The

Ceylon Law Weekly

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

with a Section in Sinhala

VOLUME LXXIII

WITH A DIGEST

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1968

Subscription payable in advance, Rs. **15/00** per Volume. Past Volumes (10-73) available Rs. **17/50** per Volume. Copies available at: 50/3, Siripa Road, Colombo 5.

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DIGEST

Bail

Bail — Courts Ordinance, section 31 — *Criminal Sessions at which the prisoner "might properly be tried" — Whether omission to serve indictment material — Ordinance No.* 9 *of* 1943, *section* 1 — *Ordinance No.* 15 *of* 1843, *section* 37 — *Charter of Justice,* 1883 — *Ordinance No.* 3 *of* 1883, *section* 281 — *Criminal Procedure Code, section* 389.

Held: (1) That the preparation and service of a copy of the indictment on a prisoner is but a step involved in bringing a prisoner to trial.

(2) That the first and second criminal sessions at which a prisoner "might properly be tried" refer to criminal sessions having territorial jurisdiction over the trial of the offence.

(3) That the omission to serve an indictment on a prisoner does not render that criminal sessions not the criminal sessions at which the prisoner could have been properly tried.

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Bills of Exchange

Promissory note — Drawer to be indicated with reasonable certainty — Is a promise to pay the plaintiff or her heirs sufficiently indicative of the drawer — Bills of Exchange Ordinance, section 6(1).

Held: (1) That when a bill or promissory note is drawn in favour of "X or his heirs", it indicates the drawer with reasonable certainty.

(2) That the heirs need not be reasonably ascertainable at the time the bill is drawn, as they would become ascertainable on the death of their predecessor, whether by last will or in the course of testamentary proceedings.

PUNCHINONA *v.* LEELAWATHIE 19

Bribery Act

Bribery Act, as amended by Act No. 40 *of* 1958 — *Charge under section* 19(*c*) — *Soliciting and accepting gratification — What the prosecution has to prove.*

Where the appellant was indicted under section 19 (c) of the Bribery Act, as amended by Act No. 40 of 1958 with (a) having solicited a gratification of Rs. 100/- none of which acts he was authorised by law or the terms of his employment.

Held: That the letter of appointment of the appellant (which does not authorise him to solicit or accept any gratification) is not sufficient to establish the charge. There must also be some evidence to show that the appellant is not authorised to solicit or accept a gratification of the kind referred to in the indictment.

PERERA, GREGORY *v.* THE QUEEN 24

Ceylon (Constitution) Order-in-Council

Section 39 — *Validity of Official Language Act.*

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Civil Procedure

Judge's order not made per incuriam — Judge cannot vary.

ABEYNAIKE *v.* WEERASINGHE 109

Civil Procedure Code

Section 18

See under—CO-OWNERS 15

Civil Procedure — Claim in reconvention — Default of appearance of defendant on date of trial — Decree nisi entered re claim — No decree nisi entered re claim in reconvention — Order thereafter made nunc pro tunc re claim in reconvention — Limits of power of Court to make such orders — Duties of opposite party — Civil Procedure Code, Sections 84, 86.

In this case the defendant had, in his answer, made a claim in reconvention. On the trial date (4/12/64) neither the defendant nor his proctor was present. On the application of Counsel for the plaintiff, judgment was entered for the plaintiff and the decree *nisi* was entered and served on the defendant. The defendant attempted to show cause for the default of appearance. At the inquiry, Counsel for the defendant pointed out that no order had been made in respect of the claim in reconvention and asked that that claim be fixed for trial.

While holding that the defendant had not satisfied him of reasonable grounds for default of appearance and making the decree *nisi* absolute in terms of section 86 of the Civil Procedure Code, the District Judge stated: "Acting under section 84 of the Civil Procedure Code, I do now what should have been done by me then on the date of trial, viz. 4.12.64. I, therefore, enter decree *nisi* dismissing the claim in reconvention for default of appearance of the defendant, who is in the position of a plaintiff.

Held: (1) That the order entering decree *nisi* dismissing the claim in reconvention was wrong. Although on rare occasions a Court may make orders *nunc pro tunc*, this is generally done when otherwise prejudice would be suffered by a party by reason of the default or delay on the part of the Court. In this case on the date of trial, the plaintiff, although it was open to him under section 84, to apply to the Court for a decree *nisi* to be entered, had failed to do so.

(2) That the decree *nisi* dismissing the claim in reconvention should, therefore, be set aside, and the claim in reconvention should now be fixed for trial inter partes.

TOWN COUNCIL OF MATUGAMA *v.* PIYASENA .. 31

Amendment of Plaint — Action for goods sold and delivered — Defendant's plea in answer that contract, if any, void and unenforceable — After trial commenced application to frame additional issues based on unjust enrichment — Objection overruled and issues allowed — Appeal — Civil Procedure Code section 146.

A plaint filed on 17/3/61 was amended on 17/6/61. This contained averments to the effect that on certain dates between 10/11/59 and 1/4/60, the plaintiff sold and delivered to the defendant certain goods at the price of Rs. 13,935/50 and that the defendant failed to make payment of the said sum.

The defendant pleaded *inter alia* in his answer that the alleged contracts were void and unenforceable in law.

Issues were framed on 11/6/62 based on the pleadings and the first witness was called. Before his evidence could be concluded, plaintiff's counsel moved to frame additional issues based on the doctrine of unjust enrichment.

The defendant objected on the grounds (1) that they did not arise on the pleadings.

(2) that it would enable the plaintiff to rely on a new cause of action which at that stage was already prescribed.

The learned Judge overruled the objections and allowed the issues. It was conceded that a separate action for relief on the basis of unjust enrichment was already prescribed.

Held: (1) That the additional issues based on unjust enrichment should not have been allowed as they do not arise on the averments in the plaint, and are not permitted by section 146 of the Civil Procedure Code.

(2) That the plea in the answer that the contract pleaded in the plaint is void and unenforceable would not entitle a Judge to frame an issue that the defendant was in some manner unjustly enriched without amending the plaint.

MUNICIPAL COUNCIL OF JAFFNA & THE SPECIAL COMMISSIONERS OF THE MUNICIPAL COUNCIL OF JAFFNA *v.* DODWELL & CO. LTD. OF COLOMBO .. 41

Civil Procedure Code, section 667 — *Interim Injunction — Application made on insufficient grounds or in the absence of probable grounds — Circumstances in which relief may be granted by Court in terms of Section* 667.

Held: That section 667 of the Civil Procedure Code is intended to punish a person who obtains an injunction on a frivolous pretext, and not to punish a person for a possible error of judgment of the District Judge who granted the said injunction.

SOMASUNDARAM *v.* NADARAJAH 64

Section 163 — *Right to lead evidence in rebuttal where burden of proving some issues on plaintiff and of proving others on defendant — Evidence in rebuttal led by plaintiff without objection — Waiver of rights by defendant — Trial Judge permitting such evidence — His inability to vary his own order thereafter.*

The plaintiff brought this action against the defendant for a declaration that the defendant held for her benefit as executrix of the estate of her late husband all rights derived or to be derived on a Mortgage Bond No. 1070 of 4th October, 1960. The Bond had been executed in the name of the defendant as mortgagee, but the plaintiff's case was that the consideration for the mortgage had been furnished by her late husband to be held in trust by the defendant for him.

After the defendant filed answer, the matter came up for trial and at the hearing certain admissions were recorded and certain issues raised by the parties.

The plaintiff then called a formal witness and produced the Bond sued upon. After the evidence of this witness was over the case for the plaintiff was closed, reserving the right to lead evidence in rebuttal in regard to the issues the burden of proving which was on the defendant. Counsel for the defendant had no objection to this course.

The defendant then called his evidence and after the close of the defendant's case, the plaintiff moved without objection from the defendant to lead evidence in rebuttal in regard to certain issues. This application was allowed by Court, and the plaintiff in fact called a witness whose evidence was concluded the same day. The case was thereafter postponed for further evidence but on the resumed date of trial Counsel for the defendant objected for the first time to the plaintiff's right to call evidence in rebuttal.

The learned District Judge refused to allow the plaintiff to lead evidence in rebuttal. In the present application in revision the plaintiff-petitioner prayed that this order be set aside and the case be set down for further trial.

Held: (1) That since the burden of proving certain issues (viz. 2 (a) and 2 (b) ,was on the plaintiff while the burden of proving the others was on the defendant and the learned District Judge had already permitted the plaintiff to lead evidence in rebuttal, he was not justified in thereafter refusing the plaintiff's application to lead evidence in rebuttal.

(2) That since the defendant had permitted the plaintiff to follow the procedure that was adopted without any objection, the defendant had waived his rights, if any, and could not now be heard to say that the plaintiff's evidence in rebuttal should be shut out.

(3) That the learned District Judge's order permitting evidence in rebuttal to be led not being made *per incuriam*, he had no jurisdiction to vary this order.

ABEYNAIKE *v.* WEERASINGHE 109

Conciliation Boards Act

Conciliation Boards Act, No. 10 *of* 1958 *as amended — Sections* 6(*a*), (*b*), (*c*), 14(1)(*a*), 18 — *Action for restoration to possession —Tenancy alleged by plaintiff — Denial by defendant — Premises in question situated in area for which Conciliation Board Panel constituted — Defendant's plea that action cannot be maintained without producing certificate from Chairman that settlement could not be effected — Such plea tried as preliminary issue — Whether decision against defendant correct.*

The plaintiff sued the 1st defendant for restoration to certain premises alleging that the 1st defendant, his brother, forcibly ejected him from the said premises of which he was in occupation as 1st defendant's tenant. The 2nd defendant was made a party alleging collusion with the 1st defendant.

The 1st defendant, while denying the allegations in the plaint pleaded in his answer —

(*a*) that the plaintiff was only his rent collector and Manager of the buildings and of the business carried on therein.

(*b*) that he was dismissed from service on account of the misappropriation of certain moneys, and that 2nd defendant was appointed in his place.

(*c*) that the plaintiff could not maintain the action as he had not produced a certificate from the Chairman of the Conciliation Board constituted for the area in which the premises in question are situated as required by section 14(1) of the Conciliation Boards Act No. 10 of 1958.

Plea (c) above was tried as a preliminary issue. The defendant produced D4, a certificate from the Chairman of the Conciliation Board Panel concerned, but is was dated 25/8/65, a date subsequent to the date of filing answer. D4, referred to a complaint against the 1st defendant by the plaintiff for having entered the premises in question and stated that settlement could not be effected.

The learned District Judge decided against the defendants holding that there was no dispute between the plaintiff and the 1st defendant such as is referred to in section 6 of the Conciliation Boards Act.

Held: (1) That the learned District Judge erred in his decision as the pleadings in the case and the certificate D4 establish that there was a dispute falling within one or more or all of the classes (a), (b) and (c) described in section 6 of the Conciliation Boards Act No. 10 of 1958.

(2) That Conciliation Boards Act does not deprive the citizen of his right of access to the established Courts. It only places a bar against the entertainment by Courts of certain civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute.

SAMARASINGHE & ANOTHER *v.* SAMARASINGHE .. 62

Constitutional Law

A Court should be reluctant to decide questions of a constitutional nature unless it is absolutely necessary to do so.

ATTORNEY-GENERAL *v.* KODESWARAM 1

Control of Prices

Control of Prices Act — Price Order made thereunder—Whether sale to a decoy is a "sale by retail" —Meaning of the term "for consumption or use."

A Price Order made under the provisions of Section 4 of the Control of Prices Act, having fixed the maximum wholesale and retail prices in respect of potatoes, proceeded to define the terms "sale by whole sale" and "sale by retail" as follows:

(a) any sale of any quantity of any article..... for the purpose of resale, or any sale of an article.....in a quantity of one hundredweight gross or more at a time, shall be deemed to be a sale by wholesale;

(b) any sale of any quantity of any article.....less than one hundredweight gross for the purpose of consumption or use shall be deemed to be a sale by retail.

Upon a charge of having acted in contravention of the Price Order, the evidence for the prosecution was that a pound of potatoes had been sold at a price in excess of the maximum price by the accused to a person employed by the police as a decoy.

It was submitted by the defence that, inasmuch as the sale was for the purpose of detection and not for the purpose of consumption, the prosecution had failed to prove an essential element of the offence, namely, that a "sale by retail" had taken place.

Held: That a sale to a decoy is a "sale by retail" within the meaning of the Price Order.

MARTIN *v.* KANDY POLICE 13

Co-owners

Co-owners — Alleged use of Distillery and warehouse by co-owners for several years for manufacturing arrack— Acquiescence by all co-owners—Years later, objection by one co-owner to the continuance of manufacturing arrack by others without his consent—Is such consent necessary?

Action to restrain licensing authority to issue license to co-owner S.G. — Allegation of collusion between licensing authority and S.G. — Interim injunction — Prayer for cancellation of license already granted to such co-owner and to restrain grant of future licenses — Right of S.G. to intervene— Civil Procedure Code, section 18.

A land, which nine minors, including the plaintiff, were entitled to, was leased for 15 years by their curator with the permission of Court, with a stipulation that a distillery and a warehouse be built thereon by the lessee with the option to remove them at the expiry of the lease. The lease expired in 1950, but the lessee did not exercise this option to remove the buildings erected by him. The co-owners, after the lessee had quit, continued for several years to use the distillery and warehouse for manufacture of arrack.

The plaintiff prayed for issue of an interim injunction restraining the Government Agent, (1st defendant) and the Excise Commissioner from issuing and/or renewing a license in favour of S.G. (a co-owner) or his nominee to manufacture arrack at the said distillery and warehouse for any period from 1st April, 1966 without the consent and approval of the plaintiff, until the determination of the present action instituted by him asking for a permanent injunction for the purpose.

Held: That in the circumstances, the plaintiff is not entitled to object to the grant of a license to S.G., a co-owner for the manufacture of arrack, an user acquiesced in over the years by him and which did not involve the conversion of the property to a new use.

Where the plaintiff claimed in the same plaint that the defendants and the said S.G. have acted in concert in obtaining a licence to manufacture arrack for 1966 without plaintiff's consent and sought, not only to restrain the issuing of a licence to S.G. from 1.4.1966 but also to revolve a licence already granted.

Held: That an application by S.G. to intervene in the action should be allowed.

GUNARATNE *v.* GOVT: AGENT, KALUTARA & ANOTHER 15

Court of Criminal Appeal Decisions

Evidence Ordinance, section 154 — *Circumstances in which a Court may permit the prosecution to cross-examine its own witness.*

Held: (1) That at a trial, if a prosecution witness voluntarily or in answer to defence counsel gives evidence clearly inconsistent with a statement made by him in his deposition, the trial judge may in the exercise of his discretion under section 154 of the Evidence Ordinance, permit the prosecution to contradict the witness by proof of the former statement.

(2) That where no such inconsistent evidence is given, but merely some testimony generally unfavourable to the prosecution, the prosecutor should not be permitted, in order to enable him to prove a former statement incriminatory of the accused, to resort to the device of tempting or provoking the witness to deny the incriminatory matter.

QUEEN *v.* ABILINU FERNANDO 21

Court of Criminal Appeal — Criminal procedure — Verdict of Jury at earlier trial — Discharge of Jury — Judge disagreeing with Jury — Second trial — No power to discharge — Only power to re-charge — Obligation to accept verdict — Object of trial by Jury — Plea of autrefois convict — Criminal Procedure Code, Sections 230, 248, 251, 330, 331.

The appellant was convicted of culpable homicide not amounting to murder on the first count, and of attempted culpable homicide not amounting to murder on the 2nd count. He had been indicted with murder and attempted murder of M and N respectively.

The appellant had been previously tried on the same indictment. At the end of that trial, the Jury found him guilty of culpable homicide on the first count and not guilty on the second count.

The trial Judge thereupon stated that to recharge the Jury might be prejudicial to the accused, and that since they had come to a conclusion on the basis of private defence, on which no evidence was led, he ordered a re-trial.

It was clear from the proceedings that the trial Judge disagreed with the unanimous verdict of the Jury at the earlier trial.

Held: (1) That section 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury.

(2) That if a Judge is reluctant to accept the verdict, section 248(2) entitles him to direct a re-consideration of the verdict, and to charge the Jury afresh for that purpose, but he is bound to accept the verdict given after re-consideration.

Per **H. N. G. Fernando, C.J.** "This provision [section 248(2)] emphasises the principle that the object of a trial by Jury is to secure a verdict which the Jury holds to be proper, and not a verdict which a Judge will find acceptable."

(3) That the appellant was in the circumstances entitled to raise the plea of *autrefois convict* and to be acquitted.

(4) That in view of section 251 of the Criminal Procedure Code, it was too late to pass sentence on him.

QUEEN *v.* ARNOLIS APPUHAMY 46

Criminal Procedure Code, section 429 — *Court of Criminal Appeal Ordinance* (*Cap.* 7) *section* 5(2) — *Attempted murder — Witness on indictment called by trial Judge after defence case closed — Refusal of defence application to call another witness — Evidence of witness used also to convict one accused by itself or as corroborative of other evidence — Not legitimate use — Legitimate, if used to assist accused— Prejudice caused to defence — How powers of Court should be exercised — Re-trial ordered on charge of grievous hurt — Penal Code, section* 317.

The appellant (first accused) and his son (second accused) were indicted for the attempted murder of M, by cutting him with a sword. The jury found the appellant guilty of voluntarily causing grievous hurt, but found the son not guilty of any offence.

There were two witnesses on the indictment, who could have testified to the identity of the assailants — M and D. The prosecution called only M, who stated that both accused had cut him, and closed his case. Both accused gave evidence, denying their presence at the scene. At the end of the day, the defence had virtually closed its case, though this was not so recorded.

On the next day, the trial Judge called D as his witness and examined him. D was then cross-examined by defence Counsel, who marked two contradictions from D's evidence in the Magistrate's Court, and proved them.

Defence Counsel then applied that the Police officer, who prepared the sketch be called by Court to enable him to prove that the place of attack as shown to the Police officer was some distance away from the place of attack as deposed to by M and D. The application was summarily refused.

In the summing-up, the trial Judge used the evidence of D for two purposes:

(*a*) That, since D did not see the second accused, it would not be safe to convict the second accused.

(*b*) That D's evidence could be used, to find the first accused guilty, either by itself or as corroboration of M's evidence.

Held: (1) That, since the rule in regard to the calling of fresh evidence under section 429 of the Criminal Procedure Code is strictly observed only when such evidence is intended to support the prosecution case, but where the defence is concerned, a certain degree of latitude is permitted:—

(*a*) the use of D's evidence to assist the second accused was legitimate;

(*b*) but, inasmuch as the Jury's verdict clearly showed that they relied either on D's evidence, or on that part of M's evidence as was corroborated by D, the use of that evidence to convict the first accused was not legitimate.

(2) That, the Crown not having attempted to rebut any evidence called by the defence, and not having been entitled to call the evidence of D in rebuttal, the action of the Court in calling that witness had the unfortunate effect of imperilling the defence of the first accused-appellant and placing him at an unfair disadvantage.

(3) That, in exercising its powers under section 429, the Court should take care not to leave room for any impression that it is using those powers to help the prosecution to discharge the burden that rests on it.

FRANCIS ALWIS *v.* THE QUEEN 81

Rape — Corroboration — Non-corroborative items treated as corroboration in summing-up — Misdirection — Court will not speculate on basis of verdict of Jury where adequate direction and incorrect direction.

Held: (1) It is a misdirection, in a case of rape, to leave to the Jury as corroborative evidence, items of evidence which are not capable in law of amounting to corroboration. The evidence so left to the Jury, while it may have tended in some slight measure to show that two of the accused were in the company of the 1st accused on the evening in question, fell short of evidence tending to show that rape was committed by the accused persons.

(2) Where the trial Judge refers to such items as "a matter you are entitled to take into consideration", and "a matter you will take in to consideration", the Court cannot speculate on the actual basis on which the Jury did act in returning the verdict, merely because there was an adequate direction as to the circumstances in which they could convict on a charge of rape, even where the woman's evidence was uncorroborated.

DHARMADASA & OTHERS *v.* THE QUEEN .. 115

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Section 5(2) — *Order for new trial.*

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Criminal Procedure

Judge disagreeing with Jury — Can jury be discharged.

QUEEN *v.* ARNOLIS APPUHAMY 46

Criminal Procedure Code

Sections 230, 248, 251, 330, 331.

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Section 429 — *Calling fresh evidence under.*

FRANCIS ALWIS *v.* THE QUEEN 81

Criminal Procedure Code of 1883 Ordinance No. 3 of 1883

Section 281.

PREMASIRI *v.* THE ATTORNEY-GENERAL 66

Crown

Liability of — To be sued by public servant for wages due for service under the Crown.

ATTORNEY-GENERAL *v.* KODESWARAM 1

Damages

Res ipsa loquitur — Collision of two lorries— Sudden defect in steering mechanism of one lorry — Onus on owner of such lorry to negative negligence.

This was an action for the recovery of damages caused by the 1st defendant's lorry driven by the 2nd defendant negligently when it collided with the plaintiff's lorry.

The evidence showed that the 1st defendant's lorry driven by the 2nd defendant, swerved to the wrong side of the road and colldied with the plaintiff's lorry which was proceeding on its correct side in the opposite direction and caused damage to the front of the lorry. The 2nd defendant promptly informed the driver of the plaintiff's lorry that the steering mechanism of his lorry had got locked and resulted in the accident.

Held: (1) That this evidence established a *prima facie* case of negligence by the operation of the principle of "*res ipsa loquitur*" and it was for the defendants, not only to give an explanation, but also to negative any want of care.

(2) That the only reasonable course for the 1st defendant is to show that he had exercised reasonable care to ensure the mechanical soundness of the lorry. Until such evidence is produced, the owner would not discharge the onus that lies on him to negative the situation created by the operation of the "*res ipsa loquitur*" doctrine.

PUNCHISINGHO *v.* BOGALA GRAPHITE LTD. .. 29

Debt Conciliation

Debt Conciliation Ordinance — Debt due on Mortgage Bond — Amicable settlement under section 30 — *Amount settled by the parties and recorded by the Board exceeding twice the amount of bond — Contravention of section* 33(b) — *Default in complying with terms of settlement — Application under section* 43 *for decree in terms of settlement — Order nisi made absolute in favour of creditor — Right of appeal — Section* 44(2), *when not applicable.*

The principle debt due on a mortgage bond dated 7/6/1954 was Rs. 90,240/69. This debt together with interest was the subject of an amicable settlement under the Debt Conciliation Ordinance between the creditor and the debtors who fixed the amount due as Rs. 192,892/45. The terms of settlement were recorded by the Board. The debtors (appellants) defaulted in complying with the terms of settlement and on an application by the creditor (respondent) under section 43 of the Ordinance, the Court, after due inquiry, made decree *nisi* absolute against the appellants who appealed.

It was contended on behalf of the respondent, that the appellant had no right of appeal in view of the proviso to sub-section 2 of section 44 of the Ordinance.

Held: (1) That as the amount agreed upon in the settlement was more than twice the amount permitted by section 33(b) of the Debt Conciliation Ordinance, the settlement was not one under the Debt Conciliation Ordinance. Therefore the learned District Judge could not have entered a decree under section 43.

(2) That as the decree *nisi* made absolute is not in terms of a settlement according to the provisions of the said Ordinance, the prohibition of appeal in the proviso to section 44 did not apply to the decree in appeal.

(3) That the submission that the settlement be treated as valid up to the amount permitted by section 33(b), cannot be upheld as the court would then enter a decree in terms of a settlement varied by it.

SALIN *v.* THE CHARTERED BANK 17

Mortgage bond — Assignment to 2nd defendant — Application by mortgagor to Debt Conciliation Board — Settlement — One of the terms of principal and interest in full before a specified date — On failure, application to stand dismissed — Default in payment — Mortgagor's interest sold in execution and purchased by plaintiff— Partition action by plaintiff — Debt Conciliation Ordinance, section 40(2).

L & S mortgaged their interests in a land in 1948, which in 1959 had been assigned to the 2nd defendant. These interests of L and S were purchased upon Fiscal's conveyance of 7/9/1959, by the plaintiff, who instituted this partition action.

The said mortgage bond was the subject of an application to the Debt Conciliation Board in 1952. The parties consented to a settlement. one of the terms of which was that the full principal and interest should be paid before 31/10/1958 and if such payment was not made "the application to the Board stands dismissed." No payment in fact was made.

The learned District Judge dismissed the plaintiff's action apparently because he had misread section 40(2) of the Debt Conciliation Ordinance.

Held: (1) That the learned District Judge was wrong in dismissing the action as the said settlement before the Board would not operate to alter the right of the parties under the mortgage bond which remained in force unaffected by the proceedings under the Debt Conciliation Ordinance.

(2) That the provisions of sub-section 2 of section 40 of the Debt Conciliation Ordinance has no application to the said settlement reached since that settlement in no way created any charge over property and the settlement did not operate to alter the rights or parties under the bond.

PERERA *v.* TISSERA & OTHERS 55

Decoy

Sale to decoy — Is it a sale by retail.

MARTIN *v.* KANDY POLICE 13

Delict

See uuder—DAMAGES

Evidence Ordinance

Section 154 — *Circumstances in which court may permit the prosecution to cross examine its own witness.*

QUEEN *v.* ABILINU FERNANDO 21

Sections 100 *and* 116.

SUMANATISSA TERUNNANSE *v.* PANGNANANDA TERUNNANSE 85

Estoppel

Estoppel — Land belonging to Buddhist temple — Defendant, a Buddhist monk and Senior pupil of Viharadhipathi, in occupation since 1942 *with permission from plaintiff — Plaintiff holding deed of adhikariship of* 1930 *given by Viharadhipathy — Death of Viharadhipathy in* 1944 *— Defendant continuing to pay paraveni share in terms of original Agreement when permission granted — Defendant refusing to pay dues since* 1953*—Action for ejectment — Whether defendant estopped from denying plaintiff's title—English law of estoppel applicable — Evidence Ordinance, sections* 100 *and* 116.

The plaintiff, claiming to be the Viharadhipathy of a Buddhist Temple by virtue of a deed of Adhikariship dated 26/12/1930 from the last Chief Incumbent G (his co-pupil) sought to eject the defendant, (also a Buddhist monk and senior pupil of G) from a land belonging to the said temple which land the defendant admitted he was permitted to possess since 1942 by the plaintiff on payment of the paraveni or landowner's share of the produce of the land to the Chief Incumbent of the temple. G died in 1944 and this action was filed in 1954 as defendant failed to hand over this share of the produce after 1953. The defendant pleaded *inter alia* that on G's death, he, as senior pupil, succeeded to the Chief Incumbency and denied plaintiff's right to maintain the action.

The District Judge held in favour of the plaintiff on the ground that G. by his deed of Adhikariship, renounced his rights as Viharadhipathy in favour of the plaintiff.

On appeal, the Supreme Court held (1) that the said deed by G was not a renunciation of his rights and even if it were, G could not lawfully appoint the plaintiff as his successor as G had pupils.

(2) that the effect of the deed was to appoint Plaintiff to act for G as the *de facto* Viharadhipathy so that he could manage the temple on G's behalf.

The defendant conceded that as G died in 1944 he was barred under the Prescription Ordinance from asserting his claim.

On an appeal to the Privy Council, Counsel for the plaintiff-appellant invited their Lordships without objection to decide the appeal in favour of the appellant on a plea of estoppel raised while the appellant was giving evidence and accepted as an additional issue ,but not decided by the District Court, nor was it suggested that it was abandoned in the Supreme Court.

The appellant relied on section 116 of the Evidence Ordinance which reads as follows:

"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy,be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and

No person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

The defendant-respondent, while admitting that he is the licensee, that he was let into possession by the appellant, that the District Court found that until 1953 he paid his dues to the appellant, says that the situation changed in 1944, when the death of G deprived the appellant of his *de facto* title and points to the words in the 2nd paragraph of section 116 "at the time when such licence was given" which correspond to the words "at the beginning of the tenancy" in the first paragraph.

Held: (1) That for the purposes of the argument on estoppel, it is not relevant to consider what the true title of the appellant was. What is relevant is the title which the respondent was apparently recognising, and this depends on the title which the appellant was apparently claiming.

(2) That although there is no satisfactory evidence that the respondent knew exactly the terms on which the paraveni shares were demanded and made before the death of G, there is no room for misunderstanding the position thereafter, as there is clear proof that the respondent acknowledged the appellant as the Viharadhipathy.

(3) That, if the license was not originally granted in 1942 by the appellant in his own right, after the death of G the grant of a new license must be implied.

(4) That the reference in the 2nd paragraph to section 116 of the Evidence Ordinance, to the licensee coming upon the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the license. When a lease or license is renewed, there is no moment at which the tenant or licensee leaves the land and re-enters it.

(5) That, therefore, the plea of estoppel succeeds, but it applies only to the respondent's interest as a licensee and does not affect his rights as a bhikku.

Per **The Judicial Committee** (*a*) "Section 116 is one of three sections that compose Chapter X of the Ordinance, which is headed Estoppel. This Chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordships consider that it must be interpreted, and, if necessary, expanded, in the light of the common law."

(*b*) "Their Lordships need not pause to consider whether the language of the first paragraph of section 116 would if literally construed in its application to a term of years, ignore an attornment and confine the estoppel to the landlord in possession at the beginning of the tenancy. If it does, the scope of the paragraph must by virtue of section 100 be expanded to give full effect to the English law of estoppel. The same considerations apply to the second paragraph which, since the present case is concerned with a license, is the one on which the appellant relies."

SUMANATISSA TERUNNANSE *v.* PANGNANANDA TERUNNANSE 85

Fideicommissum

Fideicommissum — Bequest in Last will made to child of testatrix — Does the mere presence of condition "si sine liberis decesserit" per se create a fideicommissum in favour of children — What considerations apply in determining whether a fideicommissum is to be implied in such a Will — In case of doubt, presumption against fideicommissum — Present law applicable on the subject.

After reviewing the opinions of the Roman Dutch Commentators on the question — Whether a *fideicommissum* in favour of the children would be implied from the condition "*si sine liberis decesserit*" — and after considering the modern South African and Ceylon decisions on the subject, Their Lordships —

Held: (1) That where in a will (the same would apply as regards deeds of gift *mutatis mutandis*), a bequest is made to a child of a testator, the mere presence of a clause, or condition "*si sine liberis decesserit*" does not per se create a tacit *fideicommissum* in favour of that child's childern.

(2) That whether in such a will, a *fideicommissum* is to be implied is a question of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.

(3) That such an intention must be clearly established and in case of doubt the presumption is against the implication of a *fideicommissum.*

A testatrix made a will in 1910 whereby (1) *inter alia* she directed her executor "to set apart and convey" to each of her three daughters on their respective marriages immovable property of the value of Rs. 100,000/- subject to a clearly expressed *fideicommissum* in favour of their issue;

(2) the residue and remainder of her property she devised and bequeathed equally to her three sons subject to the life interest of her husband and subject to the following conditions:—

"8b. Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

8c. If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

Subsequently in 1917 a deed of Indenture was entered into between the testatrix and her husband containing *inter alia* an agreement by the testatrix to convey the "Moragolla Group of Estates" in which was included Raglan Estate (the subject matter of this action) by way of gift to her eldest son R.L. subject to a *fideicommissary* condition.

Before any steps were taken on this agreement both the testatrix and her husband died in 1918 and the said R.L., the executor of the will of each of them instituted two testamentary cases in the District Court of Colombo. All matters in dispute in these cases including the effect of the said Indenture were referred to arbitration. The award which *inter alia* held that the Indenture was binding on the testatrix, her husband and their heirs was made a Rule of Court in 1925.

In 1951 R.L. sold Raglan Estate to S who sold it to the respondent in 1952. The appellants who are the children of R.L. who died in 1954, sued the respondent in 1959 for a declaration of title to said Raglan Estate claiming title as a fideicommissaries under the will of the testatrix, their grandmother.

The contention of the appellant was that *fideicommissum* in their favour ought to be implied from the terms of the will and/or from other indications found in the case, particularly paragraph 8c above.

Held: (1) That the clearly expressed *fideicommissum* in relation to the testator's daughter's shares and the absence of a prohibition or restriction on alienation as regards the sons' shares are two strong indications against the submission that a *fideicommissum* ought to be implied in favour of the appellants.

(2) That the indication most relied on by the appellants, viz. clause 8c. above, is open to the possible interpretation that it deals with accrued shares and not with original shares; the intention being that as regards original shares a son who dies leaving children takes absolutely, and so can make his own provision both for his widow and for his children. Hence it is sufficiently possible to negative the necessity to infer a *fideicommissum.*

PEIRIS AND OTHERS *v.* LAVIRIS APPU 101

Hiwel Andakaraya

See — PEIRIS AND ANOTHER *v.* KIRILAMAYA .. 50

Industrial Disputes Act

Industrial Disputes Act No. 43 *of* 1950 *as amended by Act No.* 62 *of* 1957, *sections* 31*B*, 31*C and* 33(2) — *Application to Labour Tribunal for relief against dismissal — Respondent described in application as "Superintendent of Deeside Estate, Maskeliya" — Order made against respondent without name of person who ordered dismissal — Is the order enforceable?*

Held: (1) That the party against whom an order under section 31C of the Industrial Disputes Act No. 43 of 1950 as amended by section 14 of Act No. 62 of 1957, can be made is the employer or in certain circumstances, a person who has ceased to be the employer. The order must, however, be made against a natural or legal person.

Where an application by a Trade Union was made for relief under section 31B of the Industrial Disputes Act naming the "Superintendent of Deeside Estate, Maskeliya" as respondent stating that M, one of its members "was summarily dismissed from work by the management" without mentioning the name of the employer who made the order of dismissal and order was made thereon by the President against the "Superintendent of Deeside Estate, Maskeliya" —

Held: (2) That the order made was unenforceable as the office of "the Superintendent" is not a legal person or is the "Superintendent of Deeside Estate" a Corporation sole. It is a fundamental principle that a court should not make an order which it cannot enforce.

SUPERINTENDENT DEESIDE ESTATE *v.* KAZHAKAM .. 90

Injunction

See under—CO-OWNERS

GUNERATNE *v.* GOVT. AGENT, KALUTARA & ANOTHER 15

See under—CIVIL PROCEDURE CODE

SOMASUNDERAM *v.* NADARAJAH 64

Interpretation Ordinance

Section 6 — *"any action, proceeding or thing"*

PREMARATNE *v.* DIAS ABEYSINGHE COMMISSIONER OF ELECTIONS AND ANOTHER.. 33

Judge

Disagreeing with jury — Can he discharge jury.

QUEEN *v.* ARNOLIS APPUHAMY 46

Jury

Jury — Accused indicted on offences under section 115 *of the Penal Code — After completion of non-summary inquiry accused electing to be tried by a Sinhala-speaking jury — Application by the Attorney-General for special jury under section* 222 *of the Criminal Procedure Code — Qualifications of Jurors set out in section* 257 *of the Criminal Procedure Code — Their applicability today — Objection by the accused — Is the application just and equitable? — Penal Code, section* 115.

The accused were indicted on counts of (a) Conspiring to wage war against the Queen and (b) Conspiring to overawe by means of criminal force, the Government of Ceylon, offences punishable under section 115 of the Penal Code.

At the completion of the non-summary proceedings, on being questioned by the Magistrate under section 165 B of the Criminal Procedure Code, the accused elected to be tried by a Sinhala speaking jury referred to in section 257(1) (b) of the Criminal Procedure Code which requires each juror to be able to speak, read and write the Sinhalese language and to possess in his own or wife's right property, immovable or movable, not less than Rs. 1,000/- in value or an income of Rs. 500/- a year.

Thereafter, the Attorney-General made an application to the Supreme Court under section 222 of the said Code for an order requiring a Special Jury to be summoned from a list (prepared under section 257(1) (d) of the said Code) of persons each of whom possessed an income of not less than Rs. 3,000/- a year, or either in his own or wife's right property movable or immovable, not less than Rs. 20,000/- in value or was in the enjoyment of a monthly salary of not less than Rs. 500/-.

Section 222 requires that the Supreme Court should be statisfied that the application is just and reasonable.

The application was supported on two grounds viz. (a) that the case is of unusual complexity in that the prosecution would be relying largely for proof of the alleged conspiracy on inferences arising from various incidents and from the conduct of the accused persons.

(b) that the prosecution will be proving confessions made by some of the accused, the contents of which will not in law be admissible as against the other accused and that a Special jury would be better able to observe this principle.

Crown Counsel argued that though there is no reference to any educational qualification in section 257, the intention of the legislature in laying down the aforesaid qualifications for a special Jury was that persons of the special panel will be better educated and more capable of dealing with complexities of facts and the law involved in the case than persons in the other panels.

Held: (1) That the said assumption by the legislature when it laid down the aforesaid qualifications though valid in 1898 (when it enacted the Criminal Procedure Code) no longer holds good having regard to the radical change of circumstances which has taken place after Independence not only in respect of educational qualifications but also of income and property qualifications.

(2) That in the circumstances it does not appear reasonable to deprive the accused of the right they have exercised under section 165(B) of the Criminal Procedure Code to be tried by a Sinhala-speaking jury.

On the argument based on section 222 of the Criminal Procedure Code that a Special jury was advisable in the interests of the defence,

Held: (3) That when the accused have through their counsel objected to a Special jury, it would be gratuitous and patronising in the supposed interests of justice to over-ride a choice freely made by the accused and their advisers.

QUEEN *v.* HENPITAGEDERA GNANASEEHA THERO & OTHERS 57

Kandyan Law

Kandyan Law—Devolution of acquired property — Illegitimate intestate — Rights of widow as against other heirs — Section 11, *Kandyan Law Declaration and Amendment Ordinance No.* 39 *of* 1938 — *Kandyan Marriage Ordinance, No.* 3 *of* 1870, *meaning of "best evidence" in section* 36.

One Sedara, who was an illegitimate child, possesed of acquired property, died in 1955 intestate and issueless and having a spouse surviving him. The said widow's claims to the deceased's property was opposed by parties who claimed to be the legitimate children of Sedara's mother, through a subsequent marriage. The parties were governed by the Kandyan Law.

Held: (1) That the devolution of property in the above circumstances is governed by the provisions of section 11 of the Kandyan Law Declaration and Amendment Ordinance of 1938.

(2) That under section 11(1)(d), the right of a widow to full dominium of her husband's property which she enjoyed under the General Kandyan Law is restricted to cases where ".....no other heir....." is in existence.

(3) That the words ".....no other heir....." in section 11(1)(d) must be taken to signify that the widow would succeed to full dominium only in the absence of any other heir to the property, however remote.

(4) That for the purposes of section 11(1)(d), the mother of an illegitimate son is his heir, and in her default, her legitimate children become heirs through her. The widow would have a life estate only.

LYDIYA *v.* KIRIUKKUWA 52

Kandyan Marriage Ordinance No. 3 of 1870

Section 36 — *Meaning of 'best evidence'*

LYDIYA *v.* KIRIUKKUWA 52

Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

See under — KANDYAN LAW

Landlord and Tenant

See also — RENT RESTRICTION

Landlord and Tenant — Notice to quit — Notice dated 27/8/64/ *to quit on or before* 1*st day of December,* 1964 — *Its Validity.*

Held: That a notice dated 27th August, 1964 given by a landlord requiring his tenant to quit the premises on or before the first day of December, 1964, is a valid notice as it must be construed as one to quit at the end of November, 1964 i.e. at midnight on 30th November/1st December — with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November.

HANIFFA & OTHERS *v.* SELLAMUTTU & OTHERS .. 27

Lease

Lease — Such lease notarially attested but unregistered — Transfer of leased premises by lessor — Whether subsequent transfer prevails over such lease — Recognition of subsisting lease by vendee — Lessee's right to plead benefit of Rent Restriction Act when lease terminates by effluxion of time — Whether vendee's right to sue in ejectment on expiry of lease barred — Rent Restriction Act (*Cap.* 274), *section* 13(1).

The plaintiff instituted this action claiming the ejectment of the defendant from certain premises purchased by him on a transfer (P1) dated 18th September 1958. At the time of the plaintiff's purchase the defendant was in occupation of the premises under a notarially attested lease from the owners (the plaintiff's vendors). The lease was for a 3 year period, from 1st January 1956 to 31st December 1958, and the owners had also acknowledged the receipt of rent for this 3 year period.

The transfer (P1) was registered while the lease was not. Two months after his purchase, the plaintiff sent the defendant a letter (D)1 giving him notice to quit the premises "on the 31st day of December 1958 on the expiry of the lease."

The trial Judge held (a) that on the date of the plaintiff's purchase the defendant became a trespasser *vis-a-vis* the plaintiff, and the plaintiff therefore was not under a legal obligation to give the defendant notice to quit before institutiing proceedings in ejectment; (b) that the letter D1 was not an indication of a recognition of the unregistered lease but merely showed that the plaintiff as indulgent enough until 31st December 1968 as sudden eviction might work hardship on the latter.

Held: (1) That the transfer (P1) prevailed over the earlier unregistered lease.

(2) That a lessee could plead the benefit of the Rent Restriction Act where the premises were occupied by him under a notarial lease which had terminated by effluxion of time.

(3) That when the plaintiff referrerd expressly to the lease in his letter D1, he was recognising the

lease granted by his vendors. It would follow therefore, that the plaintiff's action would be barred by the provisions of section 13(1) of the Rent Restriction Act, No. 29 of 1948, which protected the tenant.

ARON SINGHO *v.* SILVA 96

Local Authorities Elections Ordinance

Village Council — General Election — Extension of term of office of existing Council — Effect on elections already held — Order by the Minister declaring void all steps taken to hold the General Elections — Legality of such Order — Local Authorities Elections Ordinance, section 25, 26, 36, 84 — *Village Councils Ordinance, sections* 11, 12 — *Local Authorities (Terms of Office) Act No.* 2 *of* 1967, *section* 3 — *Interpretation Ordinance, section* 6.

On February 14, 1967, the 2nd Respondent gave notice of his intention to hold a general election for the purpose of electing members to represent the ward of the Kandupalata Village Council and fixed March 1st, 1967 as the date for receiving the nomination papers of the candidates. On nomination day, the Petitioner being the only candidate duly nominated for election to Ward 15, he was declared by the 2nd Respondent to be elected as member for the said ward.

On March 5th, 1967, the Minister of Local Government, purporting to act under Section 11 of the Village Councils Ordinance and Section 84 of the Local Authorities Elections Ordinance, by Order published in the Gazette, *inter alia*, extended by one year the life of every Village Council whose term of office was due to expire on June 20th, 1967, and declared void all steps already taken for the purpose of holding general elections in respect of the said Village Councils.

The Petitioner, by his letters dated March 19th, 1967, requested the 1st and 2nd Respondents to comply with the provisions of Section 36 of the Local Authorities Elections Ordinance which required the publication "forthwith" in the Gazette of the result of the election. The 1st Respondent replied by his letter of March 23rd, 1967 that, in view of the Minister's Order of March 5th, 1967, the Petitioner's election stood "cancelled and annulled". On the same day, the Royal Assent was placed upon the Local Authorities (Terms of Office) Act No. 2 of 1967 which, *inter alia*, extended the period of office of Village Councils from three to four years. The provisions of this Act were made applicable to existing councils as well.

On April 26th, 1967, the Petitioner applied to the Supreme Court for a mandate in the nature of a Writ of Mandamus directing the 1st and 2nd Respondents to comply with the provisions of Section 36 of the Local Authorities Elections Ordinance and cause the result of his election to be published in the Gazette.

Held: (1) That the Order of March 5th, 1967 made by the Minister of Local Government declaring void all steps taken for the holding of a general election was *ultra vires* the powers of the Minister.

(2) That the effect of the Local Authorities (Terms of Office) Act No. 2 of 1967 was:—

(*a*) That the term of office of the Kandupalata Village Council was due to expire not on June 30th, 1967, but on June 30th, 1968, and the term of office of the successor Council was to commence not on July 1st, 1967, but on July 1st, 1968;

(*b*) that there was no Council whose term of office was due to commence on July 1st 1967;

(*c*) that consequently, the general election which commenced in February 1967 to elect members to assume office on July 1st, 1967 was rendered abortive.

(3) That the principles of interpretation set out in Sections 6(3)(b) and 6(3)(v) of the Interpretation Ordinance have no application to the present case inasmuch as:—

(*a*) Act No. 2 of 1967 repealed not that provision of written law under which the petitioner was elected, but a provision of a different law, namely, section 11(2) of the Village Councils Ordinance:

(*b*) the words "any action, proceeding or thing" occurring in section 6(3)(c) must necessarily be understood to mean an action, proceeding or thing commenced under the repealed written law.

PREMARATNE *v.* DIAS ABEYSINGHE, COMMISSIONER OF ELECTIONS & ANOTHER 33

Local Authorities (Terms of Office) Act No. 2 of 1967.

Section 3 — *Effect of*

PREMARATNE *v.* DIAS ABEYSINGHE, COMMISSIONER OF ELECTIONS AND ANOTHER 33

Maintenance

Maintenance Ordinance (*Cap.* 91), *Section* 65 — *Meaning of the words "unless.....the father of such child has at any time within twelve months next after birth of such child.....paid money for its maintenance."*

Held: That the words "unless.....the father of such child has at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance" in section 6 of the Maintenance Ordinance mean that the payment must be made at some time within the period specified in the section, i.e. within one year after the birth of the child and not before its birth.

HAPIE *alias* PATHMA *v.* WIJEWARDENA 80

Meetings

For Election of Chairman of Urban Council — Can member propose his own name.

SIRISENA *v.* SIRIWARDENE & ANOTHER .. 111

Official Language Act No. 33 of 1956

Validity of — Section 29 Ceylon (Constitution) Order in Council

ATTORNEY-GENERAL *v.* KODESWARAM 1

Partition

Partition Action — Interlocutory decree — Mortgage to plaintiff by defendant of his right title, interest etc. to be declared entitled in Final decree — Hypothecary action by plaintiff — Defendant's plea that mortgage void and final decree wiped out mortgage, being an encumbrance — Partition act, Section 48 and 67.

The plaintiff instituted this hypothecary action to enforce a bond by which the Defendant had mortgaged to the plaintiff all his right title interest, claim, demand, advantages, disadvantages whatsoever that he would be declared entitled to by virtue of a Final decree in a partition action pending in respect of a certain land. The mortgage bond was executed after interlocutory decree but before the final decree.

The defendant pleaded —

(a) that the mortgage was void under section 67 of the Partition Act,

(b) that as the mortgage was not specified in the Final decree, and as the bond is an encumbrance within the meaning of section 48 of the Act, the right awarded to the defendant is free of all encumbrances.

Held: (1) That section 67 of the Partition Act has not altered the position which prevailed under the former Ordinance viz. that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing or disposing of the interest to be ultimately allotted in the pending action.

(2) That where a party deals with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the final decree is entered; therefore such an interest which vests only upon the entry of the final decree is not contemplated in the term "encumbrance" in section 48 of the Act.

JAYATILLEKE *v.* SOMADASA 25

Action for declaration, not bound by decree in partition action, and for declaration of title — Plaintiff not party to partition action — Lis pendens not duly registered — Land not described in plaint caught up in partition plan and decree — Effect of such decree — Plaintiff entitled to declaration prayed for — Partition Act (Cap. 69), section 48.

In a partition action (D.C. Panadura 8334), the plaintiff described the corpus in the plaint to include a "defined 1/3 portion of Dombagahaowita and containing in extent 8.88 perches. The northern boundary was described as the other 2/3 portion of the same land belonging to Simon Fernando. All the deeds relating to the 1/3 portion beginning from 1887 described this portion in the same way.

The plan prepared in the partition action apparently included the remaining 2/3 portion of Dombagahaowita also, and the decree in the action took in that portion also. The *lis pendens* of the partition action was registered only in the folio relating to the 1/3 portion, but not in that relating to the 2/3 portion.

The present plaintiff, claimed title to the outstanding 2/3 portion, upon deeds, executed by the heirs of Simon Fernando referred to in the deeds of the plaintiff in the partition action as the owner of the land to the north of the defined 1/3 portion.

The present plaintiff filed the present action for a declaration of her right.

Held: That the plaintiff was entitled to a declaration that she was not bound by the decree in the partition action and that she was entitled to the defined 2/3 portion of the said land.

FERNANDO *v.* PANDITHARATNE AND TWO OTHERS .. 49

Penal Code

Section 115.

QUEEN *v.* HENPITAGEDERA GNANASEEHA THERO & OTHERS 57

Plaint

Amendment of — Enabling plaintiff to rely on new cause of action which at that stage was prescribed.

MUNICIPAL COUNCIL OF JAFFNA & THE SPECIAL COMMISSIONERS OF THE MUNICIPAL COUNCIL OF JAFFNA *v.* DODWELL & CO. LTD. OF COLOMBO .. 41

Pleadings

See under — CIVIL PROCEDURE CODE.

Prescription

Negative servitude —Ne luminibus officiatur — Mere uninterrupted enjoyment of window lights for ten years deriving from neighbour's land — Does it give a right by prescription to restrain adjoining land owner from building so as to obscure them.

HASSANALLY MOOSAJIE *v.* CAROLIS SILVA ... 71

Prescription Ordinance (Cap. 68), section 9 — When "the cause of action" within the meaning of that section arises — Action for damages filed by plaintiffs by reason of having been wrongfully sued in earlier action — Does cause of action arise after decree of trial Court or after decision in appeal.?

The plaintiffs-respondents sued the defendant-appellant for damages suffered by them in consequence of an action filed against them by the defendant-appellant for declaration of title and ejectment. The said action had been decided by the learned District Judge in favour of the defendant-appellant, but in appeal the Supreme Court had set aside the decree and ordered that the action be dismissed with costs.

When the present action was instituted, a preliminary issue was raised by the defendant-appellant

as to whether the cause of action of the plaintiffs-respondents was prescribed. This issue was answered in favour of the plaintiffs-respondents.

It was argued for the defendant-appellant that the cause of action had arisen when the earlier case had been decided in the District Court, but the plaintiffs-respondents maintained that it arose when the appeal was decided.

Held: That a cause of action within the meaning of Section 9 of the Prescription Ordinance did not arise till the decision of the appeal in the earlier case.

FERNANDO *v.* WIJESEKERA & ANOTHER .. 92

Privy Council Decisions

SUMANATISSA TERUNNANSE *v.* PANGNANANDA TERUNNANSE 85

See under—ESTOPPEL.

PEIRIS & OTHERS *v.* LAVIRIS APPU 101

See under — FIDEICOMMISSUM

Promissory Note

See under — BILLS OF EXCHANGE

Public Officers

Public Officer of General Clerical Service — Promoted to Executive Clerical Class in 1959 *on certain conditions of service, salary scales etc., liable to alteration and published in Gazette of* 1955 *— New Circular No.* 560 *requiring Tamil Public Officers to pass in proficiency test in Sinhala — Failure of plaintiff as such officer to present himself for such test—Consequent suspension of increment due in pursuance of new Circular — Action for declaration that plaintiff entitled to increment and that said Circular and the Official Language Act void — Declaration granted by District Judge — Appeal.*

Right of public servant to sue Crown for wages claimed to be due for service under the Crown — Applicability of English Law — Principle governing such cases—Unaffected by provisions of Ceylon Constitution — Courts attitude when validity of enactment involved — Ceylon (Constitution) Order in Council, Section 29.

The plaintiff was appointed an officer of the General Clerical Class of the General Clerical Service in November 1952 and was duly promoted to Grade II of the Executive Clerical Class on 1st October 1959 on a salary scale of Rs. 1,670/- to Rs. 3,780/- per annum with annual increments of Rs. 120/-. An increment of Rs. 10/- per month fell due on 1.4.62, but he was informed by letter dated 28.4.62 from the Head of the Department, where he was serving, that the increment had been suspended under the provisions of a Treasury Circular (No. 560) of 4.12.61 which *inter alia* provided as follows:—

(a) that officers of the category to which plaintiff belonged must pass a proficiency test in Sinhala.

(b) that Tamil officers should pass the test in 3 stages; the 1st test within one year from 1.1.61.

(c) that in case of an officer failing the test, his increment falling due after 17.2.62 should be suspended.

The plainiff, who is a Tamil Officer, did not present himself for the requisite examination and the increment that fell due in April was suspended in pursuance of the said Circular on the ground that he had not passed the first test: thereupon the plaintiff instituted this action against the Attorney-General for a declaration (a) that the Circular is unreasonable and/or illegal and not binding on the plaintiff inasmuch as (i) the said Circular 560 was issued for the purpose of implementing the Official Language Act No. 3 of 1956 which was alleged to be *ultra vires* the Parliament as it transgressed the prohibition against discrimination contained in Section 29 of the Constitution and

(ii) that the plaintiff is entitled to payment of the said increment.

The District Judge granted this declaration and the Attorney-General appealed. The Attorney-General resisted the action *inter alia* on the ground that a public servant in Ceylon has no right to sue the Crown for recovery of wages claimed to be due for services under the Crown.

Held: (i) That the right of a public officer to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the government upon a contract of employment under the government, those laws did not, and do not now apply in Ceylon.

(ii) That, the question whether the plaintiff has the right to sue the Attorney-General must be determined under the English law as altered or modified by the law of Ceylon.

(iii) That the decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle, unaffected as it is by any provisions of the Ceylon Constitution, must apply to all such provisions and covenants including those which prescribe rates of pay and increments.

(iv) That, therefore, the plaintiff has no right to sue for the increment alleged to be due to him even if the relevant minutes and regulations had not been altered or modified by the said Treasury Circular No. 560.

(v) That as regards any pronouncement on the validity of the Official Language Act of 1956, this Court should follow the principle laid down in Cooley, Constitutional Limitations (8th Edition, p. 332); and *Burton* v. *United States* (196 U.S. Reports at p. 295), *Silver* v. *Louis Ville N R Co.* (213 U.S. Reports 191), viz. that a court should be reluctant to decide questions of a constitutional nature unless it is absolutely necessary to do so, or that when a case could be decided on one of two grounds one involving a constitutional question, and the other a question of statutory construction or general law, the Court will decide only the latter, and not venture to rule upon the former.

Per **H. N. G. Fernando, C.J.** "We did not call upon the learned Acting Attorney-General to submit his argument on the question of the validity of the Language Act. Instead, at the close of the hearing of this appeal, I indicated my intention that if our findings on the other issues arising in this case necessitate consideration of that question, I would in exercise of my powers under Section 51 of the Courts Ordinance refer the question for the decision of a Bench of five or more Judges. That course is not now necessary; but I should here express the firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arise for decision, must receive consideration by a Bench constituted under Section 51."

ATTORNEY-GENERAL *v.* KODESWARAM 1

Rei vindicatio

Rei vindicatio — Defendant's claim on prescriptive possession over long period — Mortgage of hiwel ande by co-owner in plaintiff's chain of title — Mortgagee to possess in lieu of interest—Defendant obtaining assignment of such mortgage in 1939 *— Discharge of mortgage in* 1957*—Can defendant claim prescriptive possession? — Can a defendant rely on possession of strangers to action and their predecessors in title?*

In this action instituted in 1962, the 1st and the 2nd plaintiffs-appellants claimed a declaration of title to 1/4 and 5/16 the shares respectively of a field. The defendant resisted the action by claiming that S, (one of the co-owners through whom the Ist plaintiff claimed a 1/4 share) began to possess this field long ago after an amicable division of the lands in a certain *Panguwa* and the title so acquired passed to his two daughters by deeds of 1956 and 1961 through him and another and that they had also acquired a prescriptive title thereto.

The plaintiffs — appellants rebutted this position by producing deeds P12, P13, and P 14. By P12 U., one of the proved original owners of a half-share in the plaintiff's chain of title, had, reserving to himself the *paraveni ande*, given a usufructuary mortgage of the *hiwel ande* of this field to one Sudantha who by P13 of 1911 assigned his said rights to R whose heirs in turn assigned their rights to the defendant by P14 of 1939. This bond was discharged in 1957.

The learned trial Judge held that the plaintiffs established their title but dismissed the action on two grounds; (1) that the defendant's daughters have succeeded to the rights of the aforesaid S. and (2) that these daughters and their predecessors had acquired a prescriptive title. The plaintiffs appealed.

Held: (1) That the defendant's possession prior to 1957 was referable to his rights to possess on the strength of the mortgage of the *hiwel ande* and there was not sufficient time between 1957 and to date of the plaint in this action for rights to be acquired by prescriptive possession. Also, in view of these facts the trial judge's finding that the rights of S. devolved on the defendant's daughters could not be upheld.

(2) That the rights of a *hiwel andekaraya* consist of a right to cultivate and to take a share of the cultivated crop.

(3) That the defendant, not having made any attempt to have his daughters added as parties, is not entitled to rely on their possession and of their predecessors in title.

(4) That a court can give judgment only in favour of a party to the action, and not in favour of some other person who is neither his predecessor in title nor a party to the action.

PEERIS & ANOTHER *v.* KIRILAMAYA 50

Rent Restriction

See under—LANDLORD AND TENANT

Rent Restriction Acts — Action for ejectment filed on 19.4.65 *by purchaser of premises against occupier as tenant on the ground of reasonable requirement — Later motion to amend plaint by adding sub-letting as a ground allowed — Decree entered on ground of sub-letting between September* 1964 *and April* 1965.

Rent Restriction (Amendment) Act No. 12 *of* 1966 *passed on* 10.5.67 *making its provisions effective retrospectively from* 20.7.62 *— Its effect on the decree entered and the action — Whether action declared null and void ab initio can be made valid by an amendment of pleadings.*

The plaintiff purchased the premises in question in December 1964 and in April 1965 sued the defendant, who had been in occupation thereof as tenant, for ejectment on the ground that the premises were reasonably required for his occupation.

About a year later (7.5.66) the plaintiff successfully moved to amend the plaint by alleging that the defendant had sublet (without specifying dates) the premises to certain persons. Amended plaint was filed on 23.5.66.

In the meantime the Rent Restriction (Amendment) Act No. 12 of 1966 was passed on 10.5.67, according to which "reasonable requirement' by the landlord ceased to be a ground for ejectment of a tenant.

The defence was that the persons who occupied the premises were boarders, not sub-tenants.

The learned Commissioner accepted the evidence that one of the occupants was a sub-tenant of the defendant from September, 1964 to April, 1965 and granted a decree for ejectment.

Held: (1) That according to the Commissioner's finding the sub-letting had been done before the plaintiff's purchase. Hence the plaintiff had no right of action to eject the tenant on that sub-letting.

(2) That the definition of the term "landlord" in the Rent Restriction Act is of little assistance in construing section 9(1) of the same Act.

(3) That as admittedly the standard rent of the premises is below Rs. 100/- and in view of section 4(1) of the said amending Act of 1966 making its provisions effective retrospectively from 20.7.62, this action instituted on 19.5.64 on the ground that the premises were reasonably required by the landlord, must "be deemed at all times to be null and void."

(4) That an action which is declared to be null and void *ab initio*, cannot, by an amendment be given validity, An application to amend pleadings is a step in a *valid action* pending before a Court.

WALLES *v.* SILVA 93

A lessee can plead the benefit of the Rent Restriction Acts where the premises were occupied by him under a notarial lease which had terminated by effluxion of time.

ARON SINGHO *v.* SILVA 96

Res Ipsa Loquitur

See PUNCHISINGHO *v.* BOGALA GRAPHITE LTD. .. 29

Roman-Dutch Law

Does not govern right of public officer to sue the Crown in Ceylon upon a contract.

ATTORNEY-GENERAL *v.* KODESWARAM 1

Servitude — Usus

PERERA & THREE OTHERS *v.* FERNANDO & THREE OTHERS 39

Servitude — Ne Luminibus Officiatur .. 71

Rural Courts

Rural Courts Ordinance, charge under — Acquittal of accused — Appeal from order of acquittal to District Judge by complainant — District Judge interfering with order and directing President to impose sentence — Sentence impc sed — Application by accused to Supreme Court to revise order — Rural Courts Ordinance, sections 26(1), 41(1), 41(5), 42 — *Courts Ordinance, section* 3.

On an appeal from an order of acquittal by the President of the Rural Court, the District Judge purported to convict the accused and directed the President to impose sentence. Accordingly, a fine was imposed with a default sentence, where-upon the accused applied to the Supreme Court by way of revision.

It was contended on behalf of the petitioner that under section 41(1) of the Rural Court Ordinance it was not competent to the District Judge on appeal to interfere with an order of acquittal.

It was submitted for the respondent

(*a*) that section 41(5) barred any appeal to the Supreme Court from the decision of the District Judge on an appeal under section 41, except in accordance with procedure set out in sub-section (5).

(*b*) that the Supreme Court is not empowered to revise an order of a District Judge dealing with appeals under section 42 of Rural Courts Ordinance; that his remedy, if any is by way of Certiorari.

Held: (1) That the Rural Court itself is a Court contemplated by the Courts Ordinance — vide section 3.

(2) That as what is sought to be reversed is the order of the Rural Court sentencing the petitioner, the Supreme Court will interfere.

Per **T. S. Fernando, A.C.J.**— "The point relating to this Court's jurisdiction in the instant case is not free from all difficulty, but it is clear enough that the immediate order by which the petitioner is aggrieved is not the order of the District Judge on appeal, but the sentence imposed on him by the Rural Court on the 4th August 1967.

PERERA *v.* PERERA 113

Servitude

Servitude, of washing clothes — Action for declaration that plaintiff's paddy field is free of right to wash clothes — Claim by defendants as a personal servitude — Is it available to defendants — Roman Dutch Law.

The plaintiff in this action, prayed for a declaration that his paddy field was free of any right in the defendants, who were dhobies, to wash their clothes. The defendant claimed a right to wash clothes at the water hole on the plaintiff's said paddy field basing it on a long standing practice or custom and maintaining that it falls within the ambit of a personal servitude known to the Roman Dutch Law as Usus.

The trial Judge held that the water hole in question had been used by the defendants and their forefathers to wash clothes for several years beyond the prescriptive period, and therefore the defendants were entitled to the servitude claimed by them.

Held: (1) That the learned trial Judge has erred in equating the personal servitude claimed in this case to rural praedial servitudes enumerated by Voet, such as "the right of pressing grapes or threshing corn or pulse on another's land."

(2) That the claim to the servitude of Usus is the right of using the property of others for daily needs without *detriment to the substance of the property.*

(3) That this servitude should only be recognised when there is clear evidence that the essential conditions necessary to establish the servitude have been proved.

(4) That as the plaintiff's unchallenged evidence that 'if clothes are allowed to be washed in the field he will not be able to work the fields because the fields will be polluted" shows that his fear is a legitimate one, and one that is not unlikely the defendants have failed to establish one of the essential elements necessary to claim the servitude.

PERERA & OTHERS *v.* FERNANDO & OTHERS .. 39

Servitudes — Prescription — Negative Servitude, ne luminibus officiatur — Mere uninterrupted enjoyment of window lights for ten years deriving from neighbour's land — Does it give a right by prescription to restrain adjoining land owner from building so as to obscure them— Distinction between positive and negative servitudes — Prescription Ordinance, section 3 — *Roman Dutch Law.*

Full Bench, Full Court, Collective Court meanings of — Decisions of three Judges prior to 1901 *and after, when Supreme Court consisted of four Judges, — Their binding effect on a numerically superior Bench — Courts Ordinance, sections* 7, 38 *and* 51.

The plaintiff was the owner of certain premises in Colombo and the defendant the owner of the adjoining premises on the western side. The plaintiff's building was a very old one and the wall on the western

side had for a long period a small window. The access of light through it had not been obstructed by the building which formerly stood on the defendant's premises. The defendant demolished this building and commenced to construct a new building of two floors. The plaintiff thereupon sued for an order on the defendant to remove certain alleged encroachments on the plaintiff's property and to restrain the defendant from building so as to interfere with the light and air entering through the window on the western side of the plaintiff's building.

The learned District Judge ordered the removal of the encroachments and the obstruction to the free passage of light and air through the said window. The latter part of his decision was in accord with a decision of 3 Judges of the Supreme Court viz. *Neate* v. *de Abrew* (1883) 5 S.C.C. 126. On an appeal by the defendant the matter was referred for consideration by a Bench of Five Judges in view of the conflict of previous decisions and of an argument that the said decision in *Neate* v. *Abrew* even if incorrect, is binding on the Supreme Court and must be followed.

The appeal was only pressed against the order for the removal of the obstruction to the free passage of light and air.

Held: (1) That the decision of the learned District Judge, though fully in accord with several decisions of this Court beginning with the decision of the Supreme Court in the case of *Neate* v. *de Abrew*, could not be upheld and must be set aside as under the law of Ceylon mere long enjoyment of the access of light and air through a window does not entitle an owner of land to the servitude *ne luminibus officiatur.*

(2) That the decision in *Neate* v. *de Abrew* was founded "on a manifest mistake or oversight" and should be over-ruled together with the other decisions which followed it.

(3) That the terms "Full Court", "Full Bench" or a "Collective Court" used in relation to decisions of the Supreme Court are confusing. The only proper and meaningful term is "Collective Court," that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or of the corresponding sections in earlier enactments.

(4) That a decision of any Bench of 3 Judges given in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

(5) That decisions of three Judges rendered before 1901, when they sat

(a) purely casually, because there was no other demand on the time of one of them, or

(b) in pursuance of a statutory provision, but only for the reason that two Judges could not previously agree,

could not be regarded as binding judgments of a Collective Court.

(6) That the decision of a Collective Court would be a binding Judgment only if they assembled to hear an appeal specially reserved for the consideration of the Collective Court either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights.

(7) That if the correctness of a decision of three Judges not assembled as mentioned in the proceeding paragraph is seriously doubted by a Bench of two Judges, the appropriate course is that a Bench of five or more Judges should be constituted under section 51 of the Courts Ordinance with power either to approve or to over-rule the doubtful decision.

HASANALLY MOOSAJEE *v.* CAROLIS SILVA .. 71

Urban Councils

Urban Councils Ordinance (Cap. 255), section 18 — Election to office of Chairman — Meeting convened under Urban Councils Ordinance for such purpose — Can candidate propose his own name for election as Chairman of Urban Council?

The applicant and the two respondents were members of the Urban Council of Balangoda. The 1st respondent was the Assistant Commissioner of Local Government and in terms of Sub-section 3 and 5 of Section 17 of the Urban Councils Ordinance had to preside at a meeting of the Council convened by him in order to elect a Chairman. Such a meeting was in fact convened for 3rd October 1966, and the 1st Respondent presided.

At this meeting the name of the 2nd Respondent was proposed and seconded for election as Chairman by two other members of the Council. The applicant then proposed his own name for election as Chairman. This was seconded by another member of the Council.

The 1st respondent thereupon ruled that it was not competent for the applicant to have proposed his own name for election as Chairman and held that the proposal was bad in law. The applicant's candidature for office was therefore rejected and the 2nd respondent was declared elected as Chairman without any contest.

It was submitted on behalf of the applicant that this ruling of the 1st Respondent was incorrect and that in terms of Section 18 of the Urban Councils Ordinance he was entitled to propose his own name for election to the office of Chairman.

Held: That the election of the 2nd respondent should be quashed inasmuch as the ruling given by the 1st respondent was wrong in law and the 2nd respodent should, therefore, have not been declared elected without any contest.

SIRISENA *v.* SIRIWARDENA & ANOTHER .. 111

Village Councils

Elections — See under LOCAL AUTHORITIES ELECTIONS ORDINANCE.

Words and Phrases

"Full Bench", 'Full Court', "Collective Court"

HASSANALLY MOOSAJEE *v.* CAROLIS SILVA .. 71

Writs

Mandamus.

PREMARATNE *v.* DIAS ABEYSINGHE 33

Quo Warranto.

SIRISENA *v.* SIRIWARDENA & ANOTHER .. 111

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හවුල් අයිතිකරුවෝ — හවුල් අයිතිකරුවන් විසින් අවුරුදු බොහෝ ගණනක් අරක්කු පෙරීම පිණිස භාවිතා කළ ඉස්කාගාරයක් සහ ගුදමක් —ඊට හවුල් අයිතිකරුවන්ගේ එකහත්වය — අනිත් හවුල් අයිතිකරුවන් විසින් තමාගේ අනුමැතිය නො ලබා අරක්කු පෙරීම දිගට ම කරගෙන යාම ගැන අවුරුදු ගණනකට පසු එක් හවුල් අයිති කරුවකු දැක් වූ විරෝධයක් — එබඳු අනුමැතියක් අවශ්‍ය ද යන වග.

ඇස්. ජී. නමැති හවුල් කරුවකුට බලපත්‍ර දීමෙන් බලපත්‍ර දෙන නිලධරයා වැළැක්වීමට දැමූ නඩුවක්—බලපත්‍ර නිකුත් කරන නිලධාරියා සහ ඇස්. ජී. නමැති හවුල් අයිතිකරුවා අතර ඇතැයි කියා සිටින යටිකුටටු සම්බන්ධයක්—අන්තර් තහනම් නියෝගයක්—ඇස්. ජී. නමැති හවුල්කරුවාට දැනටමත් දී ඇති බලපත්‍රය අවලංගු කිරීමට සහ අනාගතයේ ඒ තැනැත්තාට බලපත්‍ර නො දීමට කෙරෙන යාඥාවක් — මෙම නඩුවට ඇස්. ජී. නමැත්තාට මැදිහත් විය හැකි ද යන්න.

පැමිණිලිකරු ඇතුළු බාලවයස් කාරයින් නව දෙනකුට හිමිකම් ඇති ඉඩමක් ඔවුන්ගේ ආරක්ෂකයා විසින් අධිකරණයේ අවසර සහිතව එම භූමිභාගයෙහි බදු ගන්නා විසින් ඉස්කාගාරයක් සහ ගුදමක් සෑදිය යුතු ය යන කොන්දේසියක් ඇතුළත් කොට අවුරුදු 15 ක බද්ද අවසානයේ දී තමා ඉදිකර වූ ගොඩනැගිලි ඉවත් කරගත යා හැකි අන්දමට බදු දෙන ලදි. මෙම බද්ද වර්ෂ 1950 දි නිම වූ නමුත් තමා විසින් ඉදිකරන ලද ගොඩනැගිලි ඉවත් කර ගෙන යාමට ඇති අභිමතය බදු ගත් තැනැත්තා ක්‍රියාවට නො යෙදුවේ ය. බදු ගත් අය ඉඩමෙන් බැහැර වී ගිය පසු හවුල් අයිතිකරුවෝ එම ඉස්කාගාරය සහ ගුදම අරක්කු සම්පාදනය කිරීම පිණිස භාවිතා කළහ.

වර්ෂ 1966 අප්‍රෙල් මස 1 වන දිනට පසු කොයි ම කාල පරිච්ඡේදයකටවත් එක් හවුල්කරුවකු වූ ඇස් .පී. නමැත්තාගේ හෝ ඔහු විසින් නම් කරනු ලබන්නාගේ හෝ වාසියට තමාගේ අනුමැතිය සහ එකහත්වය නො ලබා අරක්කු සෑදීමට බලපත්‍රයක් නිකුත් කිරීම සහ හෝ එහි කාල සීමාව නැවත දිගු කිරීම, තමා විසින් දැනට ස්ථිර තහනම් නියෝගයක් අයැද පවරා ඇති නඩුව සමාප්ත වන තුරු, වළක්වා ගැනීම සඳහා පැමිණිලිකරු අතුරු තහනම් නියෝගයක් ලබා ගැනීමට යාඥා කළේ ය.

තීන්දුව: (1) අවුරුදු ගණනක් තමා විසින් ද එකඟ වූ පරිහරණයක් ලෙස ගැණෙන අරක්කු සම්පාදනයට එම දේපොල යෙදවීම අලුත් ප්‍රයෝජනයකට හැරවීමක් නොවන නිසා එක් හවුල්කරුවකු වූ ඇස්. ජී. නමැත්තාට අරක්කු සෑදීමට බල පත්‍රයක් දීමට මෙහි පවතින කරුණු සලකා බලන කල විරුඬ විය නො හැක.

එම පැමිණිල්ලෙහි ම පැමිණිලිකරු විසින් මෙහි විත්තිකරුවන් සමග එකී ඇස්. ජී. නමැත්තා පැමිණිලිකරුගේ අනුමැතිය නොමැතිව 1966 වර්ෂයට අරක්කු සම්පාදනය සඳහා බලපත්‍රයක් ලබා ගැනීමට අයථා සමගියකින් ක්‍රියා කළ බව තරයේ කියා පාමින් 1966.4.1 දින සිට බලපත්‍රය නිකුත් කිරීම වැළැක්වීමට පමණක් නොව එවකට දී තිබුණු බලපත්‍රයක් අවලංගුකර ගැනීමට ද ඉල්ලීමක් ද කර තිබුණි.

තීන්දුව: (2) ඇස්. ජී. නමැත්තා විසින් තමාට පාර්ශකරුවෙකු වශයෙන් නඩුවට මැදහත් වීමට ඉඩ දෙන ලෙස කළ ඉල්ලීමට ඉඩ දිය යුතු ය.

සඳහන් කළ නඩු: ගුණවර්ධනගේ නඩුව 17 න.නී.වා. 287 වන පිට.
සිල්වාගේ නඩුව 6 න.නී.වා. 225
සියදෝරිස්ගේ නඩුව 6 න.නී.වා. 275

නීතිඥවරු: රජයේ අධිනීතිඥ එච්. ඇල්. ද සිල්වා මහතා, ශ්‍රෙ.අ. 92/66 දරණ ආයාචනයේ 1 වැනි විත්තිකරු ඇපැල්කරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 15 වෙනි පිට බලනු.

ජී. පී. ජේ. කුරුකුලසූරිය මහතා, ශ්‍රෙ.අ. 93/66 දරණ ආයාචනයේ අතරින් පිලිපන් පෙත්සම්කාර ඇපැල්කරු වෙනුවෙන්.

රාජ නීතිඥ ඇන්. ඊ. වීරසූරිය මහතා, ඩබ්ලිව්. ඩී. ගුණසේකර මහතා සහ ඇන්.ඊ.වීරසූරිය (කණිෂ්ඨ) මහතා සමග අභියාචනා දෙක්හි ම පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්

මානිකටාසගර් විනිශ්චයකාරතුමා:

අංක 92/66 දරණ අභියාචනය පළමුවන විත්තිකරු වන කලුතර දිසාපති තැන විසින් එහි දිස්ත්‍රික් විනිශ්චය කාර වරයාගේ නියෝගයට විරුඬව ගන්නා ලද්දකි. මෙම නියෝගයෙන් කලුතර දිස්ත්‍රික් විනිශ්චයකාර වරයා පැමිණිල්ලේ සඳහන් පරිදි විස්තර වන සිරිලන්ද නමැති මත්පැන් පෙරන ස්ථානයෙහි අරක්කු පෙරීමට සිරිතිලක ගුණරත්න නමැත්තකුට බලපත්‍රයක් දීමෙන් සහ/හෝ එය අලුත් කිරීමෙන් දිසාපති තැන වළක්වා තිබේ. එමෙන් ම එම නියෝගයෙන් දැනට පවතින මෙම නඩුව අසා නිමාවට ගෙනයන තුරු පැමිණිලිකාර වගඋත්තරකරුගේ කැමැත්ත සහ එකඟකම නැතුව වර්ෂ 1966 අප්‍රෙල් මස 1 වැනි දින සිට කුමන කාල සීමාවක් දක්වා හෝ එම ඉස්කාගාරය සහ ගුදම ක්‍රියා කරවීමෙන් ද ගබඩාව පරිහරණය කිරීමෙන් ද දිසාපති වරයා වළක්වා තිබේ.

නඩුවේ පැමිණිලිකාර වගඋත්තරකරු හා සිරිතිලක ගුණරත්න යන අය ඉහත කී ඉස්කාගාරය සහ ගබඩාව පිහිටා ඇති ඉඩමේ හවුල් අයිතිකරුවන් නව දෙනාගෙන් දෙදෙනෙකි. මෙම ගොඩනැගිලි ජී. ආර්. පී. ගුණරත්න නමැත්තකු විසින් ඉඩම වර්ෂ 1905 දී බද්දට ගත් පසු බාල වයසෙහි වූ හවුල්කරුවන් නව දෙනාගේ ආරක්ෂකයා සහ නමා අතර ඇති වූ යම්කිසි ගිවිසුමක අනුසාරයෙන් තනන ලද බව පෙනේ. බද්ද නිම වූ පසු එම ගොඩ-නැගිලි නමා සහ බදු දුන් අය අතර ඇති වූ ගිවිසුමකට අනුව ඉවත් කරගෙන යාමට ගුණරත්න නමැත්තාට බලය තිබූ නමුත් ඔහු එම අයිතිය ක්‍රියාවට යොදවා නැත. මේ නිසා ඉස්කාගාරය සහ ගබඩාව යන දෙකම වර්ෂ 1950 සිට අරක්කු පෙරීම සඳහා හවුල් අයිති කරුවන් විසින් භාවිතා කරන ලදී. පැමිණිලිකාර වග-උත්තරකරු ද වර්ෂ 1964 වන තුරු මෙම ව්‍යාපාරයේ හවුල් කොටස් කරුවෙකි. මේ කාල සීමාවේ දී ඔවුන් අතර අර්බුද පැන නැගී තිබේ. මෙම අර්බුදවල ප්‍රතිඵල වූයේ පැමිණිලිකාර වගඋත්තරකරු විසින් නඩු එකකට වඩා පැවරීම ය. දැනට පවත්නා මෙම නඩුව ඔහු දමා ඇත්තේ ඇපැල්කරු විසින් සිරිතිලක ගුණරත්නට වර්ෂ 1966 අප්‍රෙල් මස 1 වැනි දා සිට පැමිණිලිකාර වගඋත්තරකරුගේ කැමැත්ත හා අනුමැතිය නැතුව එම ඉස්කාගාරයේ අරක්කු නිෂ්පාදනයට බලපත්‍රයක් දීම හෝ දැනට පවතින එවැන්නක් අලුත් කිරීම නො කළ යුතු යැයි උසාවියෙන් ප්‍රකාශයක් පතමිනි. එම ප්‍රකාශය ඇතුළත් වූ ස්ථාවර තහනම් නියෝගයක් ද ඔහු පතයි.

අපට නිගමනය කිරීමට මෙහි ඇති කරුණු නම් මෙම ප්‍රස්තුතයට අදාල රෝමානු-ඕලන්ද නීතිය යටතේ හවුල් කාර අයිතිකරුවන්ට ඇති අයිතිවාසිකම් හා බැඳීම් ද සලකා බැලීම හා විශේෂයෙන් අනිත් හවුල්කරුවන් ගේ අනුමැතිය නො මැතිව පොදු භූමි භාගයක එක් හවුල්කරුවකුට අනිත් අයගේ අනුමැතිය නො ලබා අරක්කු පෙරීමට බලපත්‍රයක් ලැබිය හැකි ද යන්න සලකා බැලීමත් ය. මෙම කරුණු සම්බන්ධයෙන් ඇති නීතිය ගාල්ලේ දිස්ත්‍රික් උසාවියෙන් ඉදිරිපත් වූ නඩුවක දී බොන්සර්. අග්‍ර විනිශ්චයකාරතුමා විසින් දෙන ලදුව නිරන්තරයෙන් අනුගමනය කරනු ලැබූ එහෙත් වාර්තාගත නො වූ නඩු තීන්දුවක ගැබ් වී තිබේ. පූට් ග්‍රන්ථ කර්තෘ වරයා විසින් ලියන ලද එක්තරා පරිච්ඡේදයක් (10. 3. 7) විස්තර කරමින් ඒ විනිශ්චයකාර තුමා මෙසේ පවසයි:

> ''මෙයින් මා හට තේරුම් යන්නේ එක් හවුල් කරුවකුට අනිත් හවුල්කරුවාගේ කැමැත්තට විරුඬව යම්කිසි ඉඩමක් ඒ ඉඩමෙහි හවුල් අයිතිකරුවන්ට ගත හැකි ප්‍රයෝජනය ලෙස සැලකෙන ප්‍රයෝජනය හා නො සැසඳෙන යමක් කිරීමට බලය නොමැති බවයි. නමුත් එක් හවුල් අයිතිකරුවකු යම්කිසි අවස්ථාවක පවත්නා කරුණු අනුව මතු වී ඇති ස්ව-භාවය හා අවශ්‍යතාවය අනුව හවුල් ඉඩමක් භුක්ති විඳීම නීතියෙන් වැළැකේ යැයි මෙයින් මා හට තේරුම් නොයේ.''

මෙම ක්‍රියා සම්ප්‍රදායයෙන් පිටපනින එක ම නඩුව පෙරේරා විනිශ්චයකාරතුමා විසින් දෙන ලදුව 17 න.නී.වා. 287 වන පිටේ වාර්තා වුනු ගුණවර්ධනගේ නඩුව ය. එහි දී එම උගත් විනිශ්චයකාරතුමා ''බොන්සර් අග්‍ර විනිශ්චයකාරතුමා විසින් කරන ලද කථනයට පසු තීන්දුවන ලද සිල්වාගේ නඩුව (6 න.නී.වා. 225) සහ සියදෝරිස්ගේ නඩුව (6 න.නී.වා. 275) ගැන සඳහන් කරමින් මෙසේ කියා තිබේ: ''අනිත් හවුල්කරුවන් විසින් ඉදිරිපත් කරන ලද දැඩි ලෙස ප්‍රකට විරෝධයන් නො සලකා එක් හවුල්කරුවකුට හවුල් ඉඩමක ගොඩ-නැගිල්ලක් ඉදිකිරීමට පුලුවන් යැයි මෙයින් කියැවේ යයි සලකා ගැනීම උගහට ය.'' මෙම තීන්දුව වග-උත්තරකරුගේ වාසියට ගිනිය හැකි වෙතත් එම තීන්දුවට පිළිසරණ ලෙස ගිනිය හැක්කේ එම තීන්දුව ම පමණ ය. මෙම තීන්දුව ඉතා ම දළ වශයෙන් කරුණු සළකා දෙන ලද්දක් නිසාත්, එය අඛණ්ඩව අනුගමණය කරන ලද ස්ථාපිත ප්‍රඥප්තීන්ට පටහැනිව දී තිබෙන නිසාත් එය නො සළකා සිටිය හැකි තත්ත්වයක පවතී.

සලකා බැලිය යුතු පළමු වැනි ප්‍රඥප්තිය නම් හවුල් අයිතිකරුවකුගේ යම් ක්‍රියාවක නීත්‍යානුකූලතාවය පතන්-නේ නම් එය රඳා සිටිය යුත්තේ ප්‍රකාශිත අයුරින් ගත හැකි ලෙස හෝ කරුණු වලින් හැඟීයන ලෙස හෝ සලකා ගත හැකි සෙසු හවුල්කරුවන්ගේ අනුමැතිය පිටම වේ. (2 ශ්‍රෙෂ්ඨාධිකරණ චක්‍ර ලේඛන 166 වැනි පිටුව) මෙය මෙසේ වෙතත් මෙම ප්‍රඥප්තියේ දැඩි තාවය මැකී යන එක්තරා ව්‍යතිරේකයක් ද වේ. එනම් අනිත් හවුල් අයිතිකරුවන්ගේ අනුමැතිය නො ලද කලක වුවත් එක් හවුල්කරුවකුට යම්කිසි හවුල් ඉඩමක්,

තමාට හිමි කොටසට ප්‍රමාණවත් වන අයුරින් එම ඉඩමෙහි පොදු සංවර්ධනය ගැන සලකා යම්කිසි පරමාර්ථයක් සඳහා එය පරිහරණය කිරීමට අදහස් කරන ලද්දක් නම් ඒ අනුව එසේ දියුණු කිරීමට බලය තිබීම ය. සිල්වා නමැත්තාගේ නඩුවේ (6 න.නී.වා. 225 යන රපෝර්තුවේ 229 වැනි පිටුවේ) මොන්කිරිf්ජ් විනිශ්චය කාරතුමා පහත සඳහන් පරිදි ප්‍රකාශ කොට තිබේ:

''කිසි ම අවස්ථාවක හවුල් හිමිකරුවකුට පැහැදිලිව සලකා ගත හැකි අනුමැතියක් නොමැතිව ගොඩනැගිලි ඉදිකිරීමට නො පිළිවනැයි කීමට මම නො කැමැත්තෙමි. සමහර විටක ගොඩනැගිලි ඉදිකිරීම ස්වාභාවික වුත්, අවශ්‍ය වුත් ක්‍රියාවක් වීමට ඉඩ තිබේ. හවුල් ඉඩම වී වැපිරීමට සුදුසු ඉඩමක් නම් සැලකිය යුතු හේතු නො දක්වා එක් හවුල්කරුවකුට තව එකකු විසින් එම ඉඩම අස්වැද්දවීමට ඉඩ නො දී සිටිය හැකැයි යන්න හෝ හවුල් හිමිකාරත්ත්වය පිළිබඳ ස්වාභාවික වූ හෝ අවශ්‍ය වූ හෝ අංශයක් හැටියට සැලකෙන ක්‍රියාවක් කිරීමට එකකුට අනිත් හවුල්කරුවන්ගේ අනුමැතිය අවශ්‍යයෙන් ම වුවමනා යයි යන්න මම මෙනිලා නො කියමි.''

දැන් මේ පිළිබඳව ඇති දෙවන ප්‍රඥප්තිය කෙරෙහි නිරායාසයෙන්ම යොමුවේ. යම් හවුල් දේපලක් ඒවා අරමුණු කරන ලද පරමාර්ථයන්ට මිස අනික් පරමාර්ථයන්ට වැටෙන සේ පරිහරණය කළ නො හැක. ඒවා අලුත් පරමාර්ථයන් සඳහා ද යෙදීමට නුපුලුවන. එපමණක් ද, නොව සියලු ම හවුල් හිමිකරුවන්ගේ අනුමැතිය නො ලබා ඒවායේ ස්වභාවය වෙනස් කිරීමට ද නුපුලුවන. යම් හෙයකින් මෙකී අයුරින් එක් හවුල් අයිතිකරුවකු පරිශ්‍රමයක යෙදෙන තලක් වේ නම් එම දේපල මුලින් තිබූ තත්ත්වයට පරිවර්තනය කිරීමට යයි තහනම් නියෝගයකින් ඔහුට බල කළ හැක. (පූර්ව ග්‍රන්ථ 10.3.7)

දැනට අප අතට පත් වී ඇති නඩුවේ කරුණු අපේ නීති වාර්තාවන්හි ඇතුළත් වී ඇති නඩුවල කරුණු වලට වඩා ප්‍රබල බව පෙනී යේ. මෙහි දී අපගේ කල්පනාවට භාජනය වී ඇති ඉඩම උසාවියෙන් අවසරයන් ලැබූ පසු බාල වයස්කරුවන්ගේ ආරක්ෂකයා අවුරුදු පහළොවක් ස්කාගාරයක් සහ ගුදමක් එහි ඉදිකළ යුතුය යන කොන්දේසියක් දමා බදු දෙන ලද්දකි. මෙම බද්ද ගත් තැනැත්තා නික්ම ගිය පසු අවුරුදු බොහෝ ගණනක් තුළ හවුල් අයිතිකරුවන් විසින් එම ස්කාගාරය සහ ගුදම අරක්කු සැපයීම සඳහා භාවිතා කරන ලදී. මෙම ගොඩනැගිලි සාදන ලද පරමාර්ථය අනුව හවුල් අයිතිකරුවන් විසින් ඒවා පරිහරණය කොට තිබේ. කරුණු මෙසේ තිබිය දී ''හවුල් හිමිකාරකමට අවශ්‍ය එමෙන් ම ස්වාභාවික'' පරිහරණයක් ගැන එක් හවුල්කරුවකු දක්වන විරෝධයකට සවන් දීමට නුපුළුවන. එමෙන් ම මෙය අවුරුදු ගණනක් තුළ ඔහුගේ ද එකහත්වය ලද පරිහරණයකි. අනික් අතින් මෙම හවුල් ඉඩම එහි අදහස් කරන ලද අරමුණ අනුව පරිහරණය කිරීමේ දී ඔහුගේ අනුමැතිය ඊට අවශ්‍ය මූලික අංගයක් ද නො වේ. මෙනයින් සැලකෙන විට මේ පරිසරය අනුව එක් හවුල්කරුවකුට බලපත්‍රයක් දීම සාවද්‍ය ක්‍රියාවක් නො වන අතර පැමිණිලිකාර වගඋත්තරකරුට පැමිණිලි කිරීමට එය සාධාරණ හේතුවක් ද නො වේ. මේ කරුණ පමණක් සිතා බලන කල පවා ඔහු එසේ කිරීමෙන් වළක්වා ලීමේ අටියෙන් විනිශ්චයකාරවරයා විසින් දෙන ලද නියෝගය අයෝග්‍ය ය.

93/56 දරණ අනිත් අභියාචනය තමා නඩුවේ පාර්ශ්ව කරුවකු වශයෙන් එකතු කිරීමට යැයි කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කරමින් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් දෙන ලද නියෝගයට විරුඬව සිරිතිලක ගුණරත්න නමැත්තා විසින් ඉදිරිපත් කරන ලද්දකි. මෙම ඉල්ලීම පැමිණිලිකාර වගඋත්තරකරු විසින් මූලික උසාවියේ දී දැඩි ලෙස විරෝධයට භාජනය කරන ලද්දක් නමුත් අප ඉදිරියේ දී එයට ඔහු විරෝධය නොදැක්වීමෙන් කරන ලද්දේ සනුවණකමකි.

පැමිණිලිකරු කියා සිටින්නේ විත්තිකරුවන් සහ සිරිතිලක ගුණරත්න නමැත්තා විසින් අරක්කු සම්පාදනය සඳහා 1965 වර්ෂයට අවසර පත්‍රයක් ලැබීම පිණිස තමාගේ අනුමැතිය නො ලබා එකට කථා වී කටයුතු කරන ලද හේතුවෙන් ඔවුන් විසින් සාවද්‍ය ලෙසත් නීති විරෝධී ලෙසත් කටයුතු කර ඇති බවකි. එහෙයින් සිරිතිලකට වර්ෂ 1966 අප්‍රෙල් මස 1 වැනි දා සිට බලපත්‍රයක් දීමෙන් පළමුවන විත්තිකරු වැළැක්වීමට ඔහු පරිශ්‍රමයක් දරයි. මේ තත්ත්වය අනුව උසාවියට සම්පූර්ණ ලෙසත්, ක්‍රියාත්මක ලෙසත් මෙම කරුණ පිළිබඳ විනිශ්චයක් දීමටත් නඩුවෙහි උද්ගත වී ඇති සියලු අර්බුද විසඳීමටත් ඔහු එයට ඇතුළත් කිරීම අවශ්‍ය දෙයක් ද? පැමිණිල්ලේ ද මෙම නඩුවට ඇතුළත්වීමට තැත්කරන්නාට විරුඬව එල්ලවුන යටි හවුල්කමක් පිළිබඳ දූෂමාණ සැලකිරීමක්දතිබේ. මේ කරුණ අනුවම පමණක් අපට සලකා බැලීමට සිදුවූයේ නම් මම නිගමනය කරන්නේ මෙම ඉල්ලීමට විරුඬවය. නමුත් මෙහි සහනයක් ලබා ගැනීමට ද ඉල්ලීමක් කර ඇති නිසාත්, එම සහනදායක ඉල්ලීම ඔහුගේ නීතිගත අයිතිවාසිකම් විත්දනය කිරීම කෙරෙහි බලපාන නිසාත් මෙම ඉල්ලීමට ඉඩදීම සුදුසු යැයි හැඟේ. මෙම අධිකරණයට 18 වැනි ඡෙදය යටතේ ක්‍රියා කිරීමට පුලුවන්කම ලබා දීම කෙරෙන්නේ මෙබඳු ඉල්ලීමකින් පමණක් නො වන බව ද මෙහි ලා සිතා ගතයුතු ය.

මෙම අභියාචනයට ද අප විසින් ඉඩ දෙනු ලැබේ. නඩු දෙකෙහි ම දිස්ත්‍රික් විනිශ්චයකාරතුමා විසින් දෙන ලද නියෝග අප විසින් නිෂ්ප්‍රභා කෙරේ. පළමු වැන්නෙහි දී ඇති අන්තර් නියෝගය අවලංගු වන අතර දෙවැන්නෙහි නඩුවට ඇතුළත් කිරීමට යැයි ඉල්ලා සිටින තැනැත්තා ද ඇතුළත් කළ යුතු ය.

පැමිණිලිකාර වගඋත්තරකරු විසින් ඔහුගේ අභියාචනයේ නඩු ගාස්තුවද මූලික උසාවියේ පැවැත්වුනු පරීක්ෂණයේ ගාස්තුවද ජයග්‍රාහී ඇපැල්කරුවන් එක් එක් අයකුට ම ගෙවිය යුතු ය.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු අභයසුන්දර විනිශ්චයකාරතුමා සහ සිවසුබ්‍රමනියම් විනිශ්චයකාරතුමා ඉදිරිපිට

ග්‍රෙගරි පෙරේරා එ. රැජින*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 1/67 — දිස්ත්‍රික් උසාවිය (අල්ලස්) කොළඹ අංක 20

විවාද කොට තීන්දු කළ දිනය: 15, අප්‍රෙල් 1967

අල්ලස් පණත වර්ෂ 1958 අංක 40 දරණ පණතින් සංශෝධනය වූ අයුරින් — 19(සී) ඡේදය යටතේ චෝදනාවක් —අල්ලසක් ඉල්ලීම සහ ලබා ගැනීම — පැමිණිලි පක්ෂය විසින් ඔප්පු කළ යුත්තේ මොනවා ද යන්න.

වර්ෂ 1958 අංක 40 දරණ පණතින් සංශෝධනය වූ අල්ලස් පණතේ 19(සී) ඡේදය යටතේ තමාගේ රක්ෂාවේ ප්‍රඥප්තීන්ට අනුව හෝ නීතියට අනුව ලබාගත නො හැකි රු. 100 ක මුදලක් අල්ලස් වශයෙන් (ඒ) අයැද සිටීම පිළිබඳව ද, (බී) එය ලබා ගැනීම පිළිබඳව ද ඇපැල්කරුට විරුඬව අධි-චෝදනා ඉදිරිපත්කොට නඩු පවරා තිබුණි.

තීන්දුව: ඇපැල්කරු වෘත්තියට පත්කිරීමේ ලියමන (මෙයින් කිසිම අල්ලසක් ඉල්ලීමට හෝ ලැබීමට හෝ ඔහුට බලය නො ලැබේ.) මෙම චෝදනාව ප්‍රතිෂ්ඨාපිත කිරීමට ප්‍රමාණවත් නොවේ. ඇපැල්කරුට අධි-චෝදනාවේ සඳහන් ගණයේ අල්ලසක් ඉල්ලීමට හෝ ලැබීමට බලයක් නොමැති බව පෙන්නීමට යම්කිසි සාක්ෂියක් තිබිය යුතුය.

අබේසුන්දර විනිශ්චයකාරතුමා: ''එබඳු නීතියක් නොමැති බව විනිශ්චයාත්මක ලෙස සලකා ගැනීමක් කිරීමට කිසි ම උසාවියකට නුපුළුවන.''

නීතිවේදියෝ: ඇස්. කනගරත්නම්, චෝදිත-ඇපැල්කරු වෙනුවෙන්.
කෙනත් සෙනෙවිරත්න, රජයේ අධිනීතිඥ, මහ රැජින වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

වර්ෂ 1958 අංක 40 දරණ පණතින් සංශෝධිත, අල්ලස් ආඥා පනතේ 19(සී) ඡේදය යටතේ තමාගේ රක්ෂාවේ කොන්දේසිවලට අනුව ලැබීමට අවසර නො ලද රු: 100/- ක අල්ලසක් ඉල්ලා සිටීම සහ එබඳු රු: 100/- ක අල්ලසක් තමාගේ රක්ෂාවේ කොන්දේසි වලට අනුව ලැබීමට බලයක් නොමැති කලෙක එසේ ලැබීම ගැන ඇපැල්කරුට විරුඬව අධි-යෝජනා ඉදිරිපත් කර තිබිණි. මෙම චෝදනා දෙකටම වරදකරුවූ ඔහුට එක් එක් කරුණක් සඳහා බරපතල වැඩ ඇතිව තුන් අවුරුද්දක් සිර දඬුවමක් විඳීමට සහ රු: 100/- දඩයක් එක් එක් කරුණකට ගෙවීමට යැයිද නියමවී තිබේ.

මෙහි දී පැමිණිලි පක්ෂය විසින් ඉදිරිපත් කරන ලද සාක්ෂිවල ඇපැල්කරුට ඉහත සඳහන් අල්ලස් ඉල්ලා සිටීමට හෝ එය ලැබීමට හෝ තමාගේ රක්ෂාවෙහි කොන්දේසිවලින් හෝ නීතියෙන් හෝ අවසර ලැබී නැති බවට සාක්ෂියක් නැතැයි තර්ක කරමින් ඇපැල්-කරුගේ නීතිවේදියා කරුණු සැලකරන ලදී. පී 6 දමා සලකුණු කර ඇත්තේ ඇපැල්කරු තම රක්ෂාවට පත් කරනු ලැබීමේ ලිපිය වේ. එම ලිපියෙහි යම්කිසි අල්ලසක් ලැබීමට හෝ ඉල්වා සිටීමට ඇපැල්කරුට අවසර දී තිබෙන බවක් නොපෙනේ. අල්ලස් පනතෙහි 19 වන ඡේදයෙහි කියැවෙන දඬුවම් ලැබිය හැකි වරද පිළිබඳ ඇති මූලික කරුණු තහවුරු කිරීමට එම ලිපිය ප්‍රමාණවත් නො වේ. ඇපැල්කරුට ඉහත සඳහන් ගණයේ අල්ලසක් ඉල්ලීමට හෝ ගැනීමට නීතියෙන් අවසරයක් නොමැති බව පෙන්වීමට ද යම්කිසි සාක්ෂියක් අවශ්‍ය ය.

ඇටෝර්නි-ජනරාල් තුමා වෙනුවෙන් පෙනී සිටින රජයේ අධිනීතිඥවරයා සැළකර සිටින්නේ යම්කිසි නීතියක් එසේ ඇත්නම් අධිකරණයට එය විනිශ්චයාත්මක ලෙස ඒ බව සලකා ගත හැකැයි කියමිනි. අල්ලස් පනතේ ඡේදයේ (19 පී) යටතේ පැමිණිලි පක්ෂය විසින් ඔප්පු කළ යුතු අනිත් කරුණු අතර, පහත සඳහන් දෙය ද වේ. එනම් චෝදිතයාට චෝදනා පත්‍රයේ සඳහන් අල්ලස් ලබාගැනීමට හෝ ඉල්ලා සිටීමට හෝ අවසර දෙන නීතියක් නොමැති බව ය. එබඳු නීතියක් නොමැති බව විනිශ්-චයාත්මක ලෙස සලකා ගැනීම කිසිම උසාවිය-කට නුපුළුවන. අධි-චෝදනා පත්‍රයේ සඳහන් දඬුවම් ලැබීමේ වරද තහවුරු කිරීමට අවශ්‍ය එක් මූලික කරුණක් ප්‍රතිෂ්ඨාපිත කිරීමට උවමනා සාක්ෂි පැමිණිලි පක්ෂය විසින් ඉදිරිපත් කර නොමැත යන්න ගැන අපි සෑහීමට පත්වීමු. එම නිසා ඇපැල්කරු වරදට පත් කිරීම සහ ඔහුට දී ඇති දඬුවම ද ඉවත් කරන අපි ඔහු නිදහස් කරමු.

සිවසුබ්‍රමනියම් විනිශ්චයකාරතුමා,
මම එකඟ වෙමි.

විත්තිකරු නිදහස් කරන ලදී.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 24 වෙනි පිට බලනු.

අබේසුන්දර සහ සිවසුප්‍රමනියම් විනිශ්චයකාරතුමන් ඉදිරිපිට දී ය.

සාලින් සහ තවත් අය එ. චාර්ටර්ඩ් බැංකුව, කොළඹ

ශ්‍රෙ. අ. අංක 646/64 — කුරුණෑගල දිස්ත්‍රික් උසාවි අංක 1104/විශේෂ

විවාද කොට තීන්දු කළ දිනය: 20 අප්‍රෙල්, 1967

ණය සහනදායක ආඥා පනත — උකස්කරයක හේතුවෙන් ඇති වූ ණයක් — 30 වන ඡෙදය අනුව කළ සමගි සම්පන්න බේරුමක් — බේරුම් කිරීමේ දී පාර්ශ්වකරුවන් විසින් එකඟත්වයකට බැස ගන්නා ලදුව මණ්ඩලය වාර්තා ගත කළ මුදල උකස්කරයේ මුදලේ දෙගුණයකට වැඩිවීම — මේ නිසා 33(බී) ඡෙදය උල්ලංඝණය වීම — බේරුම්කර ගැනීමේ දී ඇති කරගත් කතිකා ඉටු නොවීම — බේරුම්කර ගැනීමේ දී ඇතිකර ගත් කොන්දේසි අනුව 43 වන ඡෙදයේ පැණවීම් යටතේ තීන්දු ප්‍රකාශයක් ඉල්ලා සිටීම — ණය හිමියාගේ වාසියට නයිසයි ආඥාව ස්ථිර කිරීම — අභියාචනයක් ඉදිරිපත් කිරීමට ඇති අයිතිවාසිකම — 44(2) ඡෙදය ක්‍රියාත්මක නො වන්නේ කෙබඳු අවස්ථාවක ද යන්න.

7.6.1954 දාතමින් වූ උකස්කරයක මුල් ණය මුදල රු. 90,420/69 කි. ණය හිමියකු සහ ණයකරුවකු අතර ණය සහනදායක ආඥා පණත යටතේ පොලියත් ඇතුළු මෙම ණය මුදල සමගිසම්පන්න ලෙස බේරුමකට හේතු වූයෙන් ඒ අනුව ගෙවිය යුතු මුදල හැටියට රු. 19,2892.45 ක් එහි දී තීරණය විය. මෙම බේරුම්කරගැනීමේ කොන්දේසි ණය සහනදායක මණ්ඩලය විසින් වාර්තාගත කැරිණ. මෙම නඩුවෙහි ඇපැල්කරුවන් වූ ණයකරුවන් විසින් එකී බේරුම්කර ගැනීමේ දී ඇති වූ කොන්දේසි පැහැර හරින ලද නිසා, මෙහි වගඋත්තරකරු වූ ණය හිමියා විසින් ආඥා පනතේ 43 වන ඡෙදය යටතේ ඉල්ලීමක් ඉදිරිපත් කර සිටියෙන් උසාවිය ඇපැල්කරුවන්ට විරුඬව තීන්දු ප්‍රකාශයක් දුන් පසු ඇපැල්කරුවෝ අභියාචනයක් ඉදිරිපත් කළහ.

වගඋත්තරකරුවන් වෙනුවෙන් ඉදිරිපත් කළ තර්කය වූයේ 44 වන ඡෙදයේ 2 වන උප ඡෙදයට ඇති අතුරු විධානය අනුව අභියාචකයින්ට අභියාචනයක් ඉදිරිපත් කිරීමට අයිතිවාසිකමක් නැත යන්නයි.

තීන්දුව: (1) බේරුමක්කර ගැනීමේ දී අනුමත කරගත් මුදල ණය සහනදායක ආඥා පනතේ 33(බී) ඡෙදයෙහි අවසර දී තිබෙන මුදල මෙන් දෙගුණයකට වැඩි වූ නිසා මෙම බේරුම්කර ගැනීම ණය සහනදායක ආඥා පණතේ 43 වන ඡෙදය යටතේ සිදුවූවක් ලෙස ගිනිය නොහැක. එබැවින් උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාට 43 වෙනි ඡෙදය යටතේ තීන්දු ප්‍රකාශයක් කිරීමට නුපුළුවන

(2) මෙහි දී ස්ථිර කරනු ලබා ඇති නයිසයි ආඥාව එකී ආඥා පනතේ පැනවීම්වලට අනුකූල නොවන නිසා එහි 44 වන ඡෙදයට සම්බන්ධ අතුරු පැනවීමෙහි දැක්වෙන අභියාචන තහනම අභියාචනයට භාජන වී ඇති තීන්දු ප්‍රකාශයට බලපවත්වනු නො ලැබේ.

(3) ආඥා පනතේ 33(බී) ඡෙදයෙන් අනුමැතිය ලැබෙන ප්‍රමාණයට පමණක් මෙම බේරුම්කර ගැනීම වලංගු යැයි සලකන මෙන් ඉල්ලමින් කළ කරුණු සැලකිරීම පිළිගත නොහැක්කේ එය පසුව වෙනස් කරන ලද බේරුම්කර ගැනීමක කොන්දේසි අනුව අධිකරණය විසින් තීන්දු ප්‍රකාශයක් නිකුත් කිරීමක් වන බැවිනි.

නීතිඥවරු: රාජනීතිඥ එච්. වී. පෙරේරා මහතා හනන් ඉස්මයිල් මහතාත් සමග ඇපැල් කරුවන් වෙනුවෙන්

රාජනීතිඥ එච්. ඩබ්ලියු. ජයවර්ධන මහතා එස්. ජේ. කදිරගාමර් සහ එස්. එස්. බස්නායක මහතාත් වගඋත්තරකරු වෙනුවෙන්.

අබේසුන්දර විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි ඇපැල්කරුවන් විසින් වගඋත්තරකරුට ණය වී ඇති ණය මුදල වන රුපියල් 90,270.69 ක් සහ එහි පොලිය පිළිබඳව ඇති ගනුදෙනුවකට සහනයක් ඉල්ලමින් ණය සහනදායක මණ්ඩලයට ආයාචනයක් ඉදිරිපත් කොට තිබේ. මෙම ආයාචනය ලැබූ ණය සහනදායක මණ්ඩලය අවශ්‍ය නිවේදන මෙහි වගඋත්තරකරු වන ණයකරුට සහ ඇපැල්කරුවන් වන ණය ගත් තැනැත්තාට ද යවා දෙපක්ෂයෙන් ම කරුණු ඇසූ පසු වග උත්තරකරු විසින් ඇපැල්කරුවන් සමග මිතුරුකමින් පිළිගත් බේරුම්කර ගැනීමක් වාර්තාගත කළේ ය. නමුත් ඉන් පසු ඇපැල්කරුවන් විසින් එම තීරණයේ කොන්දේසිවලට අනුව ක්‍රියාකොට ඇත. ඉන්පසු වග උත්තරකරු ණය සහන ආඥා පනතේ 43 වන ඡෙදය යටතේ ඉහත සඳහන් බේරුම් කර ගැනීම අනුව වගඋත්තරකරුගේ වාසියට නියෝගයක් ඉල්ලා කොළඹ දිස්ත්‍රික් උසාවියට ආයාචනයක් ඉදිරිපත් කොට තිබේ. එය ලැබූ කොළඹ දිස්ත්‍රික් උසාවිය 'නයිසයි' ආඥාවක් වාර්තාගත කළේ ය. එය ස්ථිර කළ යුතු ද නැද්ද යන්න ගැන පවත්වන ලද පරීක්ෂණයකින් පසු 1964 ඔක්තෝබර් මස 21 වන දින කොළඹ දිස්ත්‍රික් උසාවිය මගින් එම නයිසයි ආඥාව ස්ථිර කරන ලදි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 17 වෙනි පිට බලනු.

ඇපැල්කරුවන් විසින් එම ස්ථිර කිරීමේ නියෝගයට විරුඬව මෙම අධිකරණයට අභියාචනයක් ඉදිරිපත්කොට තිබේ.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා වගඋත්තරකරු වෙනුවෙන් පෙනී සිටිමින් ණය සහන ආඥා පනතේ 44 වන ඡේදයේ දෙවන උප ඡේදයේ ප්‍රතිපාදනයට අනුව සලකන විට අභියාචනයක් මෙම උසාවියට ඉදිරිපත් කිරීමේ බලයක් නොමැති බව කියමින් විරෝධයක් දැක් වී ය. එම ප්‍රතිපාදනයෙහි ණය සහන ආඥා පනතේ 44 වන ඡේදයෙහි පළමුවන උප ඡේදය යටතේ කළ යම් කිසි තීරණයක දී අභියාචනයක් ඉදිරිපත් කිරීමට හෝ සංශෝධනය කිරීමට ඉල්ලීමට හෝ යම්කිසි නයිසයි ආඥාවක් නිකුත් වී එය ස්ථිර වූ විට එය නිෂ්ප්‍රභා කිරීමට අභියාචනයක් ඉදිරිපත් කිරීමට හෝ බැරි බව කියවේ. රාජනීතිඥ එච්. වී. පෙරේරා මහතා ඇපැල්කරුවන් වෙනුවෙන් පෙනී සිටිමින් එම ප්‍රතිපාදනය ක්‍රියාත්මක වන්නේ ණය සහන ආඥා පනතට අනුව බසින ලද තීරණයකට පමණක් බව සැලකර සිටියේ ය. එම ප්‍රතිපාදනයේ සඳහන් ''ණය සහන ආඥා පනත යටතේ කරන ලද බේරුමක්'' යන්නෙන් අදහස් කෙරෙන්නේ එකී පනතේ පැනවීම්වලට අනුකූලව කරන ලද එකක් පමණක් බව ඒ මතතා කීය. නමුත් මෙම නඩුවෙහි තීරණයට භාජන වී ඇති මුදල ගැන සිතන විට ණය සහන ආඥා පනතේ 33(බී) දරණ ඡේදය යටතේ ගෙවිය හැකි මුදලට වැඩි මුදලක් ණයකරුවාට තමාගේ මුදල සහ පොලිය වෙනුවෙන් ලැබෙන බව කී ඔහු ආඥා පනතේ ඡේදයෙන් කියැවෙන්නේ ඒ අනුව බේරුම කදී ණයකරුවා විසින් දෙන ලද මුදල සහ එයට ලැබිය යුතු පොලිය දුන් මුදල මෙන් දෙගුණයකට වැඩි නොවන මුදලක් විය යුතු බවකි. මෙම කරුණු බේරුම් කර ගැනීමේ දී බැසගත් තීරණය අනුව වර්ෂ 1962 ඔක්තෝබර් මස 31 වන දා දක්වා ණය හිමියාට ලැබිය යුතු මුදල රුපියල් 1,92,892.45 ක් බව පිළිගෙන තිබේ. එපමණක් නොව මෙම බේරුම් අනුව ණයකරුවන් විසින් එම මුදල ගෙවිය යුත්තේ කෙසේ ද යන්න ද එහි සඳහන් වී තිබේ. එමතු ද නොව මෙම තීරණයෙහි ණයට දුන් මුදල රුපියල් 90,420.69 ක් බවත් එය 1954 ජුනි මස 7 වන දින සහ නො. 459 දරණ උගස්කරයට අනුව ගෙවිය යුතු බව සඳහන් වේ. මේ නිසා ඇපල්කරුවන්ට වගඋත්තර කරුගෙන් ලැබිය යුතු ණය මුදල රුපියල් 90,420.69 ක්, වන අතර වග උත්තරකරු විසින් ගෙවිය යුතු ව තිබුණ වැඩිම මුදල ණය සහන ආඥා පනතේ 33(බී) දරණ ඡේදය යටතේ ගෙවේ නම් රුපියල් 1,80,841.38 ක් වන අතර බේරුම්කර ගැනීමේ තීරණයකදී ඔහු විසින් ගෙවිය යුතු මුදල හැටියට තීරණය වී ඇත්තේ රුපියල් 1,92,892.45 කි. මේ නිසා මෙසේ මෙය බේරුම් කිරීම ණය සහන ආඥා පනතේ 33(බී) දරණ ඡේදය උල්ලංඝණය කිරීමකි. එහි ප්‍රතිඵලයක් වශයෙන් මෙම බේරුම් කිරීම ණය සහන ආඥා පනතට අනුව බේරුම් කිරීමක් නොවන බව අපි ඒත්තු ගනිමු.

ණය සහන ආඥා පනතේ 43 ඡේදය යටතේ නිකුත් කෙරෙන නයිසයි ආඥාවක් නිකුත් විය යුත්තේ එම ආඥා පනතට අනුව කෙරෙන බේරුම් කර ගැනීමක දී පමණි. මෙම නඩුවෙහි දී කෙරී ඇති බේරුම් කර ගැනීම ණය සහන ආඥා පනතට අනුව කරන ලද බේරුම් කිරීමක් නොවන බව අප විසින් පිළිගනු ලැබේ. එම නිසා එහි 43 වන ඡේදය යටතේ නයිසයි ආඥාවක් නිකුත් කිරීමට දිස්ත්‍රික් විනිශ්චයකාරවරයාට බලයක් නැත. ණය සහන ආඥා පනතේ පැනවීම්වලට අනුව කෙරෙන ලද බේරුම් කර ගැනීමක කෝන්දේසිවලට එකඟව සටහන් කරන ලද නයිසයි ආඥා පනතකට විරුඬව අභියාචනයක් ඉදිරිපත් කිරීමට හෝ ඒ පිළිබඳව සංශෝධනයක් ඉල්ලා සිටීමට එම පැනවීමට අනුව බලයක් නැති බව සැබෑ ය. නමුත් මෙම නඩුවෙහි දෙන ලද නයිසයි ආඥාවේ ඇති කෝන්දේසි ස්ථිර කරමින් දෙන ලද නියෝගය දී ඇත්තේ ණය පහසු ආඥා පනතට අනුව දෙන ලද බේරුම් කර ගැනීමකට සම්බන්ධව නොවන නිසා එම ආඥා පනතේ 44 වන ඡේදයෙහි 2 වන උප ඡේදයේ සඳහන්ව ඇති පරිදි අභියාචනයක් ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කිරීමේ තහනම ක්‍රියාකාරී නොවන බව අපගේ නිගමනයයි. ශ්‍රේෂ්ඨාධිකරණයට ගතහැකි ඇපැලක් තහනම් කරමින් ලිඛිත නීතියක ඇතුළත් පැනවීමක් ඉතා ම ගරුක ලෙස කෙරෙන අර්ථ කථනයකට භාජන විය යුතු ය. මෙසේ බලන විට ඇපැල්කරුවන්ට අභියාචනයක් ඉදිරිපත් කිරීමේ අයිතියක් ඇති බව මෙහි ලා කියමු.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා කියා සිටියේ මෙම බේරුම් කර ගැනීමේ දී ණය සහන ආඥා පනතේ 33(බී) දරණ ඡේදය යටතේ ලැබිය හැකි මුදලට වඩා වැඩි මුදලක් ගෙවීමට නිගමනය කරමින් බව තීරණය වුවහොත් එම නිගමනය ආඥා පනතට අනුව ගෙවිය හැකි මුදලට වැඩි නොවන මුදලකට සීමාවන අන්දමට බල පවත්වන බවත් වැඩිපුර නියම වී ඇති මුදලට එය බලපවත්වන්නේ නැති බවත් ය. එම නිසා එම නියෝගය ආඥා පනතේ ගෙවිය හැකි වැඩි ම මුදලට පමණක් අදාල වන නියෝගයක් හැටියට පිළිගැනීමට හැකි යයි ඒ මහතා කරුණු ඉදිරිපත් කළේ ය. නමුත් යම් හෙයකින් ජයවර්ධන මහතාගේ කරුණු සැලකිරීම්වලට අනුව උගත් විනිශ්චයකාරවරයාට නැවත වාරයක් නයිසයි ආඥාවක් දීමට යයි අප විසින් උපදෙස් දෙනු ලැබේ නම් දිස්ත්‍රික් විනිශ්චයකාරවරයාට ණය හිමියා සහ ණයකරුවා අතර ඇති වූ බේරුම් කර ගැනීමේ කොන්දේසිවලට අනුකූල නොවන වෙනත් නිගමනයකට බැස නයිසයි ආඥාවක් නිකුත් කිරීමට සිදුවේ. ණය සහන ආඥා පනතේ 43 වන ඡේදයෙන් පැනවී ඇත්තේ ණයකරුවා සහ ණය හිමියා අතර ඇතිවන බේරුම්කර ගැනීමේ කොන්දේසිවලට අනුව නයිසයි ආඥාවක් නිකුත් කළ යුතු බව ය. එම නිසා ණය සහන ආඥා පනතේ 33(බී) දරණ ඡේදයෙන් අවසර ලැබී ඇති මුදලට පමණක් මෙම බේරුම් කර ගැනීම සීමා කළ යුතුය. යන සේ ජයවර්ධන මහතා විසින් දක්වන ලද සැලකිරීම පිළිගත නො හැකි සේ පෙනේ.

ඉහත සඳහන් හේතූන් නිසා උගත් විනිශ්චයකාරවරයා විසින් ස්ථිර කරන ලද නයිසයි ආඥාව අප විසින් ප්‍රතික්ෂේප කරනු ලබන අතර එම තීරණය ක්‍රියාත්මක කරන සේ දිස්ත්‍රික් උසාවියට වගඋත්තරකරු විසින් කරන ලද ඉල්ලීමට නඩු ගාස්තුවටත් යටත් කොට අප විසින් නිෂ්ප්‍රභා කරනු ලැබේ.

මෙම අභියාචනයෙහි ගාස්තුව ඇපැල්කරුවන්ට ගෙවිය යුතු ය.

ඇපැලට ඉඩ දෙන ලදී.

Present: **H. N. G. Fernando, C.J. and G. P. A. Silva, J.**

THE ATTORNEY-GENERAL *vs.* CHELLIAH KODESWARAN

S.C. No. 408/64 (*F*) — *D.C. Colombo* 1026/Z

Argued on: 4th, 7th, 9th, 10th and 11th October, 1966
23rd, 24th, 25th, 26th and 27th June and
8th, 9th, 10th and 11th July, 1967.
Decided on: 30th August, 1967

Public Officer of General Clerical service — Promoted to Executive Clerical Class in 1959 *on certain conditions of service salary, scales etc., liable to alteration and published in Gazette of* 1955 — *New Circular No.* 560 *requiring Tamil Public Officers to pass in proficiency test in Sinhala — Failure of plaintiff as such officer to present himself for such test —Consequent suspension of increment due in pursuance of new Circular—Action for declaration that plaintiff entitled to increment and that said Circular and the Official Language Act void—Declaration granted by District Judge — Appeal.*

Right of public servant to sue Crown for wages claimed to be due for service under the Crown — Applicability of English Law — Principle governing such cases — Unaffected by provisions of Ceylon Constitution — Courts attitude when validity of enactment involved—Ceylon (Constitution) Order in Council, Section 29.

The plaintiff was appointed an officer of the General Clerical Class of the General Clerical Service in November 1952 and was duly promoted to Grade II of the Executive Clerical Class on 1st October, 1959 on a salary scale of Rs. 1,670/- to Rs. 3,780/- per annum with annual increments of Rs. 120/-. An increment of Rs. 10/- per month fell due on 1.4.62, but he was informed by letter dated 28.4.62 from the Head of the Department, where he was serving, that the increment had been suspended under the provisions of a Treasury Circular (No. 560) of 4.12.61 which *inter alia* provided as follows:—

(a) that officers of the category to which plaintiff belonged must pass a proficiency test in Sinhala.
(b) that Tamil officers should pass the test in 3 stages; the 1st test within one year from 1.1.61.
(c) that in case of an officer failing the test, his increment falling due after 17.2.62 should be suspended.

The plaintiff, who is a Tamil officer, did not present himself for the requisite examination and the increment that fell due in April was suspended in pursuance of the said Circular on the ground that he had not passed the first test: thereupon the plaintiff instituted this action against the Attorney-General for a declaration (a) that the Circular is unreasonable and/or illegal and not binding on the plaintiff inasmuch as (i) the said Circular 560 was issued for the purpose of implementing the Official Language Act No. 33 of1956 which was alleged to be *ultra vires* the Parliament as it transgressed the prohibition against discrimination contained in Section 29 of the Constitution and

(ii) that the plaintiff is entitled to payment of the said increment.

The District Judge granted this declaration and the Attorney General appealed. The Attorney General resisted the action *inter alia* on the ground that a public servant in Ceylon has no right to sue the Crown for recovery of wages claimed to be due for services under the Crown.

Held: (i) That the right of a public officer to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the government upon a contract of employment under the government, those laws did not, and do not now apply in Ceylon.

Discussed: (1) *Jansz* vs. *Tranchell*, (Ram. Reports 1863-68, p. 160).
(2) *Frazer* vs. *Queen's Advocate*, (Ram. Reports 1863-68, p. 316).
(3) *Jayawardene* vs. *Ameer, Advocate*, (IV S.C. Circular, p. 77).
(4) *Siman Appu* vs. *The Queen's Advocate*, (9 App. Cases, p. 571).

Held: also (ii) That, the question whether the plaintiff has the right to sue the Attorney-General must be determined under the English law as altered or modified by the law of Ceylon.

(iii) That the decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle, unaffected as it is by any provisions of the Ceylon Constitution, must apply to all such provisions and covenants including those which prescribe rates of pay and increments.

(iv) That, therefore, the plaintiff has no right to sue for the increment alleged to be due to him even if the relevant minutes and regulations had not been altered or modified by the said Treasury Circular No. 560.

Cases referred to: *High Commissioner for India* vs. *Lall* (1948 A.I.R. Privy Council p. 121).
Malvenna vs. *The Admiralty* (1926 A.C. p. 842)
Rangachari vs. *The Secretary of State* (1937 A.I.R. P.C. 37)
Venkata Rao vs. *The Secretary of State* (1937 A.I.R. 31)
Gould vs. *Stuart*, (1896 A.C. 575)
Carey vs. *The Commonwealth* (30 Comm. L.R. 132)
William vs. *Howarth* (1905) A.C. 551.
Reilly vs. *The King* (1934 A.C. 176).
Sache vs, *Donges* (1950, 2 S.A.L.R. 265).
Robertson vs. *Minister of Pensions* (1948, 2 A.E.R. 767).
De Dohse vs. *Reg.* (1897, 66 L.J. Q.B. 423).

Distinguished: *Silva* vs. *Attorney-General* (60 N.L.R. 145).

Held also: (v) That as regards any pronouncement on the validity of the Official Language Act of 1956, this Court should follow the principle laid down in Cooley, Constitutional Limitations (8th Edition, p. 332); and *Burton* vs. *United States* (196 U.S. Reports at p. 295), *Silver* vs. *Louis Ville N R Co.* (213 U.S. Reports 191), viz. that a court should be reluctant to decide questions of a constitutional nature unless it is absolutely necessary to do so, or that when a case could be decided on one of two grounds one involving a constitutional question, and the other a question of statutory construction or general law, the Court will decide only the latter, and not venture to rule upon the former.

Per **H. N. G. Fernando, C.J.** "We did not call upon the learned Acting Attorney-General to submit his argument on the question of the validity of the Language Act. Instead, at the close of the hearing of this appeal, I indicated my intention that if our findings on the other issues arising in this case necessitate consideration of that question, I would in exercise of my powers under Section 51 of the Courts Ordinance refer the question for the decision of a Bench of five or more Judges. That course is not now necessary; but I should here express the firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arises for decision, must receive consideration by a Bench constituted under Section 51.

Walter Jayawardena, Q.C., Acting Attorney-General, with *H. Deheragoda, Senior Crown Counsel* and *H. L. de Silva, Crown Counsel,* for the defendant-appellant.

C. Ranganathan, Q.C., with *S. Sharvananda, S. C. Crossette Tambiah, D. S. Wijewardena, N. Kasirajah, K. Devarajah* and *L. A. T. Williams,* for the plaintiff-respondent.

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

The plaintiff was appointed an Officer of the General Clerical Class of the General Clerical Service on 1st November, 1952, and on 1st October 1959 he was promoted to Grade II of the Executive Clerical Class of the General Clerical Service on a salary scale of Rs. 1,620 to Rs. 3,780 per annum with annual increments of Rs. 120/-. An increment of Rs. 10/- per month fell due to the plaintiff on 1st April 1962, but on 28th April 1962 he was informed by a letter P2 from the Government Agent, Kegalle (at that time the Head of the Department in which the plaintiff was serving) that the increment had been suspended under the provisions of a Treasury Circular No. 560 of 4th December, 1961. The plaintiff sought in this action a declaration that the Circular is unreasonable and/or illegal and not binding on the plaintiff, and that the plaintiff is entitled to payment of the increment which fell due on 1st April 1962. This appeal is from the judgment of the learned District Judge granting such a declaration.

At the time when the plaintiff was promoted to the Executive Clerical Class, the Minutes applicable in relation to recruitment, conditions of service, and salary scales were those published in the Gazette of October 1, 1955. Paragraph 5 of the relevant Minute provided that appointments to the Executive Clerical Class will be made from among members of the General Clerical Class (to which the plaintiff belonged until 1959) on the results of a competitive examination. The regulations and syllabus for the examination were set out in Appendix D of the Minute which prescribed three subjects of examination, i.e. (1) Accounts (2) Regulations, procedure and office system, and (3) Sinhala *or* Tamil. The

plaintiff, who is Tamil by race, chose Tamil as his language subject for the examination.

Paragraph 7 of the Minute provided that Officers in Grade II of the Executive Clerical Class must pass an examination in National Languages prescribed in Appendix C before they proceed beyond the Efficiency Bar at the stage of Rs. 3,180/-. Appendix C required clerks of Sinhala, Tamil or Moor parentage to pass in one language. Thus under Appendix C the plaintiff could have chosen Tamil as his language subject for this examination as well.

I must note here that the Minute clearly states that the salary scales, cadre, and conditions of service are liable to alteration from time to time.

On 4th December 1961 a new Treasury Circular No. 560 provided that Officers of the category which the plaintiff belonged must pass a proficiency test in Sinhala. According to this Circular a Tamil officer (as the plaintiff is) is required to pass a test in Sinhala at 3rd standard level within one year from 1st January, 1961, a test at 5th standard level within two years, and at J.S.C. standard within three years.

The Circular provided for the suspension of an increment falling due after February 17, 1962 in a case of an officer failing the test. The plaintiff did not present himself for the requisite examination, and the suspension of his increment which fell due on April, 1, 1962 was ordered in pursuance of the Circular on the ground that he had not passed the first of the language tests prescribed in the Circular.

One of the grounds on which the plaintiff's action was resisted by the Attorney-General is that a public servant in Ceylon has no right to sue the Crown for the recovery of wages claimed to be due for service under the Crown. This defence, which was rejected by the learned trial Judge, raises questions of great importance and difficulty, and the Court is much indebted to counsel for the full and able arguments presented at the hearing of this appeal.

The first question to be decided is whether the relationship between the Crown and its servants in Ceylon is regulated by the Roman Dutch Law, or else by the English Law as altered or modified in its application in this country, The contention that the Roman Dutch Law applies is supported by two early decisions of this Court which are reported in *Ramanathan's Reports* 1863—68.

The earlier of the two decisions (*Jansz* vs. *Tranchell* Ram. p. 160) was in a case in which the question arose whether the salary of a public servant could be seized in execution of a decree against him. The Court there stated that it is certain, and that the Queen's Advocate admitted, that the salary of a public officer, when his service has been properly performed, is due to him as a debt. The Court proceeded to consider the Roman Dutch Law regarding the liability to seizure of the salary of a public servant, and held that the salary was seizable, but only if other assets of the debtor were not available to satisfy the decree, and if a Court in its discretion regarded the seizure as not being contrary to the public interest in the circumstances of a particular case. The order ultimately made was that the salary of the public servant concerned was not, in the circumstances, liable to seizure.

Thus the Roman Dutch Law was held applicable to the question whether the salary is seizable. But it is not clear from the Judgment on what basis the Court thought it certain that the salary is a debt due to a public servant. There is no statement that this is a principle of Roman Dutch Law or else of English Law. Nevertheless, it is a fair implication that the Crown did not in this case contend that no action lies for the recovery of a public servant's salary.

The later decision in *Fraser's case* (Ram. p. 316) was in a suit against the Queen's Advocate, for the recovery of balance salary due to the plaintiff as Postmaster of Galle and as a packet agent, on the ground that he had been wrongfully dismissed from those offices. The first of these offices was held under the Ceylon Government, and the second under the Imperial (British) Government. The action was dismissed by the Supreme Court on the ground that the plaintiff held his offices during pleasure, and that he had no right of action at all, so far as the (Ceylon) Postmastership was concerned, as to anything that happened after the date of his dismissal, because it had been shown that he had in fact been paid his salary up to that date.

Nevertheless, in considering the plaintiff's claim for his salary as the holder of an office under the Imperial Government, the Court drew a distinction between the respective rights of such an officer and of one employed under the Ceylon

Government. The Court was of opinion that whereas an action would not lie at all in the former case, an action for earned salary would lie against the Queen's Advocate in the latter case. The entire relevant passage in the Judgment has to be cited here:—

"We humbly consider that Her Majesty's predecessors and Her Majesty have been graciously pleased to lay aside, as to this island, part of the prerogative of the Crown as to immunity from being sued. By proclamation of the 23rd September 1799, it was amongst other things published and declared that the administration of "justice and police in the settlements and territories in the "Island of Ceylon with their dependencies, shall be henceforth and during Her Majesty's pleasure exercised by all courts of jurisdiction, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities herein before mentioned, and to such other deviations and alterations as shall by these present or by any future proclamation and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice, to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

"Afterwards, the Ordinance No. 5 of 1835, (which was allowed and confirmed by Her Majesty repealed parts of the said proclamation, but expressly reserved and retained so much of it as doth publish and declare that "the administration of justice and police within the settlements then under the British dominion and known by the designation of the maritime provinces should be exercised by all the courts of judicature, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces."

"The Ordinance of 1835, itself expressly re-enacts this, and it uses the following words, "which laws and institutions it is hereby declared are and shall henceforth continue to be binding and administered through the said maritime provinces and their dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter by lawful authority ordained."

"We humbly consider that by these declarations of the royal will, Her Majesty's subjects in this island, who had or might have any money due to them from the local Government for wages, for salary, for work, for materials, in short for anything due on an obligation arising out of contract, were permitted to retain the old right given by Roman Dutch Law to sue the advocate of the fiscal, now styled the Queen's Advocate, for recovery of their money. And if the present plaintiff could have shown that any money was due to him under his colonial appointment as Galle post-master, he might have maintained this action. He might have done so in respect of salary due for any period during which he actually served, and also in respect of the further period for which he, still holding the appointment de jure, was ready and willing to serve, but was prevented from serving by the wrongful act of this employer."

This statement of the law of Ceylon cannot be regarded as being merely *obiter*. It is clear that, if any salary earned by the plaintiff prior to the date of his dismissal had not in fact paid to the plaintiff, the Court would have given judgment for the plaintiff for the unpaid amount; this on the basis that a right to sue for salary had existed under the Roman Dutch Law.

The general question of the right of the subject in Ceylon to sue upon a contract with the Crown was considered in the case of *Jayawardena* vs. *Queen's Advocate* (IV, S.C. Circular, p. 77). The Court there stated that "the right to sue the Crown in the person of the Queen's Advocate for claims arising *ex contractu* has not only been upheld by the Courts of the Colony, but has been recognised by the Legislature in several enactments". Reference was thereafter made to Ordinance No. 9 of 1852, No. 7 of 1856 and No. 11 of 1868, all of which contemplated the possibility of suits upon contract by private parties against the Queen's Advocate. There followed the following observations:—

"Under these circumstances, we think it too late, at this day, to contest in this Court the validity of this practice. We are bound by the previous decisions of this Court, particularly by the considered decision of the Collective Court in the case of *Fraser* vs. *The Queen's Advocate*. To hold at this date, for the first time, that a practice, which has so long been sanctioned by the Court and acquiesced in by the Government, is bad in law, and cannot be sustained, would necessarily create widespread confusion and inconvenience, practically amounting in many cases to injustice. If the precedents and decisions upon which this Court acts are wrong, it must be left to the Court of appeal to set us right.

It was urged by the Queen's Advocate that the practice of suing the Crown is an attempt to impugn the royal prerogative, by virtue whereof no suit or action can be brought against the sovereign; and such, no doubt, it would be if the prerogative has not been waived in this respect. This Court in *Fraser's case* humbly expressed an opinion that it had been so waived, and we humbly venture to share that opinion. It should be observed that the question is, after all, one purely of procedure. If a judgment be obtained against the Queen's Advocate, no execution can issue either against the Queen's Advocate personally or against the Crown. See Marshall, p. 75; Thompson's Institutes, p. 12. A judgment in an action or suit *ex contractu* against the Queen's Advocate gives little, if anything, more than a successful petition of right would do in England. It is merely, as it appears to us, a mode of procedure by which a subject is able to prefer and substantiate his claim against the Crown. Compliance with the claim when substantiated must still be, as we take it, a matter of grace, Petitions of right are now in England prosecuted as ordinary actions, and as a matter of convenience, we see no objection to parties preferring their claims against the Crown here in the form of a suit against the Queen's Advocate."

The learned Acting Attorney-General in his argument before us suggested that *Fraser's case*,

while rightly deciding that the Crown could be sued upon a contract in Ceylon, was wrong in basing the decision on the Roman Dutch Law. He further argued on the authority in the concluding passage cited above from *Jayawardena's case* that the waiver of immunity from suit by the Crown in Ceylon consisted merely of the acknowledgment of a right to sue the Crown in lieu of the right under English Law to proceed by way of a petition of right. His argument, in my opinion, gains support from the observation in *Jayawardena's case* that a suit *ex contractu* against the Queen's Advocate appears to be merely a mode of procedure by which the subject is able to prefer his claim, and is thus the equivalent of the English Petition of Right.

Shortly after *Jayawardena's case*, there was decided in the Privy Council the case of *Siman Appu* vs. *The Queen's Advocate* (9 App. Cases p. 571), in which it was held that a suit upon a contract can be instituted in Ceylon against the Queen's Advocate as representing the Crown. Their Lordships considered the question whether the Roman Dutch Law entitled a subject to sue a Officer of Government on behalf of the Government. The note of the argument of Counsel in that appeal shows that *Fraser's case* (as reported in Creasy's Reports p. 10) and *Jayawardena's case* (incorrectly cited as *Fernandez* vs. *The Queen's Advocate*) were considered in the discussion of this matter. But their Lordships concluded their consideration of the question with these observations:—

> "There certainly seems no more antecedent reason why the Courts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed."
>
> "But whatever speculations may be made upon these points their Lordships cannot advise Her Majesty that such was the Roman-Dutch Law, unless it is shown to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject."

It appears to me that the true *ratio decidendi* of *Siman Appu's case* can be deduced from the following passages of the judgment:—

> "That a very extensive practice of suing the Crown has sprung up is certain. In his judgment in the case of *Fernando*, which was decided immediately before the present case came under review, Cayley, C.J., says, 'The practice has been recognised in many hundreds of decisions, and long acquiesced in by the Crown, and, so far as I am aware, has not till now been called in question. It was recognised by the judgment of the Court in *Fraser's case*, decided in the year 1868."
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> "In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English petition of right, he says that, the Ceylon Government having no Chancellor a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives little more than is given by the petition of right, for no execution can issue against the Crown or against the Queen's Advocate."
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> "It is then certain that prior to 1868 there was such an established practice of suing the Crown that the legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is defendant, and though it is the opinion of the Supreme Court, and is probable, that they refer to claims *ex contractu*, it is not clear that they do so."
>
> "Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land."

The reference in the first of the passages just cited to the judgment in *Fraser's case* shows that their Lordships relied on that case, not for the proposition that the Proclamation of 1799 (now chapter 12 of the Revised Edition 1956) and waived the Crown's immunity from suits upon contract, but instead only for the fact that this Court had often recognised the practice of suing the Crown. The judgment of Cayley, C.J. in *Jayawardena's case* (incorrectly referred to as that of Fernando) was relied on in the same way.

There is accordingly the highest judicial authority, in the decision of *Siman Appu's case* in 1884, to the effect that (as stated in the head note): "There is no authority for saying that the Roman-Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the Government. Instead the right to sue exists because there had been a very extensive practice of suing the Crown which was recognised by the Legislature and such suits are now incorporated into the law of the land."

The learned Acting Attorney-General has suggested certain other considerations which tend to support the view that the Proclamation of 1799 was not intended to make the Roman-Dutch Law applicable to the relationship between the Crown and public servants in Ceylon. The First is that the Proclamation, in referring to the Civil and Criminal Jurisdiction of the Courts, was not intended to cover matters which are the subject of Constitutional or public law, and that the relationship between the Crown and its servants is such a matter. I do not find it necessary to decide the point thus raised, and am content to observe that an argument which invokes the Proclamation must logically include the proposition that even the right of dismissal at pleasure existed in Ceylon by virtue of Roman Dutch Law, and not a principle of English Law. But I see much substance in the other suggestion that, in regard to so fundamental a matter as the relationship between the Crown and its servants (many of whom must at the time have been British by birth and race), the Proclamation could not have intended that such a matter would be regulated otherwise than by the law applicable in Britain and in other territories of the British Crown. The explanation given in Thompson's Institutes that a suit against the Government had been permitted of necessity and in lieu of the English petition of right, because the Ceylon Government had no Chancellor, is one which is in all the circumstances most acceptable.

When this Court in *Fraser's case* assumed that the wages of a public servant in Ceylon, when earned, are a debt due to him, the Court in so doing did not consider the question whether this principle was a matter of Roman Dutch Law or else of English law. But it is clear from the judgment that the Court did recognize that *the power to appoint public officers* in Ceylon was a power derived from, and exercised on behalf of, the Crown; the judgment in this connection refers to the powers of appointment granted to the Governor by his letter of appointment (presumably Letters Patent) and to Colonial Rules and Regulations (p. 321 Ram. 1863 — 68). The grant of such powers by the British Sovereign must fairly be presumed to have been an exercise of the Royal Prerogative under the law of England, and not to any authority of a Sovereign under Roman Dutch law; if this were otherwise, the Court in *Fraser's case* could not have held that the power to dismiss a public officer at pleasure existed in Ceylon without first deciding that such a power existed in Roman Dutch Law. The efficacy or validity of appointments made by the executive, in Ceylon was therefore referable to the law of England; and it follows in my opinion that the nature and legal effect of the relationship constituted by such appointments had also to be determined by reference to English law.

For these reasons I would hold, applying the judgment of their Lordships of 1884, that the right to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply in Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon.

The question whether under English law a Civil Servant has the right to sue for earned wages whether by way of a petition of right or otherwise, has been referred to by Judges and test writers as one of much doubt and difficulty. But the case of *High Commissioner for India* vs. *Lall* (1948 A.I.R. Privy Council, p. 121) is at the least a definite pronouncement on the law on this question as applicable in British India. In that case Mr. Lall, who had been a member of the Indian Civil Service was dismissed from service by the appropriate authority, and he claimed in the action a declaration that his removal was *ultra vires*, that he was still a member of the Indian Civil Service, and that as such he was entitled to all rights secured to him by the covenant rules and regulations issued from time to time by the appropriate authorities. After considering the provisions of section 240 of the Government of India Act 1935, their Lordships held that there had been a breach of a provision of section 240 which required that a civil servant shall not be dismissed unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and that the purported removal from office of Mr. Lall was void and inoperative. They accordingly granted a declaration to that effect and to the effect that Mr. Lall remained a member of the Indian Civil Service at the date of the institution of his action.

Their Lordships thereafter considered a submission for Mr. Lall that he was entitled to recover in the action his arrears of pay from the date of the purported order of dismissal up to the date of

his action. They said that "it is unnecessary to cite authority to establish that no action in tort can lie against the Crown and therefore any right of action must either be based on contract or conferred by Statute". Reliance was then placed on a judgment of Lord Blackburn in the Scottish case of *Mulvenna* vs. *The Admiralty* (1926 S.C. 842) in which the matter had been discussed as follows:—

> "These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant (see (1920) 3 K.B. 663, 25 R. 112 and other cases there referred to). It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a Civil Court of Justice, and that their only remedy under their contract lies in an appeal of an official or political kind,"

Mulvenna's case itself concerned the question whether the salary of a civil employee of the Admiralty could be arrested in the hands of the Commissioners of the Admiralty at the instance of a person holding a decree against the employee for the payment of a sum of money. Although the Court, including Lord Blackburn, did refer to earlier decisions in which there had arisen the particular question whether the salary of a civil servant is attachable, it seems clear that Lord Blackburn's own conclusion was based firmly on the primary proposition that a civil servant has no right to remuneration which can be enforced in a civil Court. After the passage I have already cited, there occur in the judgment the following observations:—

> "It further appears to me that, if this conception of the effect of public policy on the contract itself had been developed earlier, it would have led to the same conclusions in the numerous cases to which the Lord Ordinary has referred as were reached on different and, in some cases, on somewhat unsatisfying ground. It would also have avoided the necessity for several statutory provisions applicable to the pay of particular services which must now be regarded as merely declaratory of the common law."

Their Lordships in *Lall's case* referred to the provisions applicable to public servants in India prior to the Government of India Act 1935 and to the relevant provisions of the Government of India Act 1919. Section 96B of that Act had declared that a civil servant "holds office during His Majesty's pleasure,.....but no person in that service may be dismissed by any authority subordinate to that by which he was appointed". Under sub-section (2) of section 96B the Secretary of State for India in Council had been empowered to make rules for regulating *inter alia* the conditions of service, pay and allowances, and discipline and conduct, of the Civil Services of India. One such rule had provided certain conditions precedent to the dismissal of a civil servant such as; that he must be afforded an adequate opportunity of defending himself, that charges should be framed and communicated to the person charged, that a written defence must be entertained if made, and that an enquiry must be held if the person charged so desires. These provisions were the subject of consideration in the Privy Council in 1938. In the case of *Rangachari* (1937 A.I.R. P.C. 27) their Lordships held that the provision in *section* 96B(1) *itself* which prohibited the dismissal of an officer by any authority subordinate in rank to the authority that appointed him was peremptory, and that a dismissal purporting to be made in violation of that provision was void and inoperative. But in *Venkata Rao's case* (idem. p. 31) decided on the same day, their Lordships rejected the contention that a dismissal in breach of *the rules made under section* 96B could give rise to a right of action by the dismissed officer. Reference was made to an observation in *Gould's case* (1896 A.C. 575):—

> "The argument for a limited and special kind of employment during pleasure, but with the added contractual terms that the rules are to be observed, is too artificial and far-reaching".

Their Lordships regarded "the terms of the section (96B (2)) as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule ..... Their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action. To give redress is the responsibility of the Executive Government." Accepting these propositions, the Privy Council decided in *Lall's case* that a public officer had no right to

claim arrears of pay under his covenant, or in other words that he had no contractual right enforceable by action:

I must note at this stage that at least until the coming into effect of the Ceylon State Council Order in Council 1931, and perhaps even until the coming into operation of the Ceylon Constitution Order in Council 1946, the position of public servants in Ceylon was regulated in a manner similar to that which had obtained in India under the Government of India Act 1919. Their Lordships *in Venkata Rao's case* referred to the fact that section 96B, in sub-section (5), reaffirmed the supreme authority of the Secretaty of State over the Civil Service, and relied on this fact for the opinion that rules made under that section did not confer rights enforceable by action in the Courts. A similar supreme authority was formerly vested in the Secretary of State for the Colonies over the public services of Ceylon. For much the greater period of British rule in Ceylon, the right to dismiss at pleasure was implied and recognised in the case of the public service of Ceylon, and the pay and conditions of service were regulated by, or under delegated authority from, the Secretary of State. Such rules and regulations, as also the Pension Minute applicable to the public service, were not statutory enactments, nor, (unlike the Indian Rules after 1919) were they even made under empowering statutory provisions.

It is clear to me for these reasons that prior to the operation of the Ceylon Constitution Order in Council, 1946, the nature of the rights of a public servant in Ceylon was similar to that of a public servant of India, and that upon the reasoning in the Indian decisions cited above, a public servant in Ceylon had no right of redress by action in the Courts for a breach of rules and regulations prescribing the salaries and conditions of service of public officers. It would seem to follow therefore that the grounds of the decision in *Lall's case* in particular, holding that a public servant had no right to sue for his wages, were applicable also in the case of members of the public services of Ceylon.

Counsel for the plaintiff in the present appeal referred to several decisions of English and Australian Courts in support of his argument that the Scottish case of *Mulvenna* was wrongly decided, and that accordingly the decisions of the Privy Council in *Lall's case* should not be followed. Certain of the English and Australian decisions, it was urged, did acknowledge the right of a public servant to sue for his earned wages. I must refer even briefly to some of these decisions.

In the case of *Carey* vs. *The Commonwealth* (30 Comm. L.R. 132) the Court did hold that a public servant did have the right to sue for earned remuneration. But the only precedent relied upon by the Judge in *Carey's case* in support of this alleged right was the decision in *Williams* vs. *Howarth* (1905) A.C. 551. The report of this latter case, however, shows that the plea was never taken in argument that the Crown could not be sued for wages. The plea if taken would undoubtedly have succeeded, for the suit was one for wages claimed by a member of the Armed Forces of Australia who had served with the British Imperial Forces in South Africa. The only question decided was whether payments made by the Imperial Government should be taken into account in determining whether the plaintiff had received the wages payable to him by the Australian Government. The case should not, I think with respect, have been regarded as authority for the proposition that a military or civil servant of the Crown had a right to sue for earned wages.

The case of *Lucy* vs. *The Commonwealth* (33 Comm. L.R. 29) was much relied on by Counsel for the plaintiff in support of the alleged right to sue the Crown on a contract of employment. The plaintiff in that case had until March 1901 held office in the Postal Department of South Australia. At that stage the Department was taken over by the Commonwealth and the plaintiff was then transferred to the Commonwealth Public Service. In 1919 the plaintiff was notified that he would be retired from the Commonwealth Public Service upon attaining the age of 65 years, and in May 1919 he was actually so retired. The plaintiff claimed that under a South Australian Act of 1874 he had acquired a right to retain office until death or removal in terms of that Act and that he had been wrongfully retired at the age of 65 years. Section 60 of the Commonwealth Public Service Act provided that an officer transferred to that Service will retain all the existing and accruing rights which he had previously as a member of the South Australian Service, and it had been held in an earlier case that this Section (despite inconsistent provisions in section 74 of the Act) preserved to such an officer the right to remain in service after attaining the age of 65 years.

In these circumstances the plaintiff claimed (a) a declaration that he had been wrongfully removed from service on 11th March 1919 (b) a

declaration that he was entitled to retain office until his death or until his office was determined in accordance with the South Australian Act of 1874 and (c) damages for wrongful removal or dismissal. A case stated for the opinion of the High Court, after setting out the relevant facts, submitted the question "whether the damages to which the plaintiff is entitled should be measured and ascertained by anyone or more of the following considerations". and thereafter invited the Court to determine whether or not certain specified matters should be taken into account in the assessment of damages.

Despite references in the judgments to the *contract* which the plaintiff had as a member of the Public Service, it seems to me that the question whether a public servant had a right to sue the Crown for his wages was not in fact disputed in this case, for, as I have just stated, the Court was only invited to lay down the measure of damages as for a dismissal from service which was admitted to be unlawful. Indeed the note of the argument of the Counsel for the plaintiff contains this passage:— "the dismissal of the plaintiff was a breach of his statutory right and not a breach of contract; whichever it is, if the plaintiff's remedy is damages, the measure is the same". I must refer however to an observation in the judgment of Higgins, J. that "this position would be beyond question in case of ordinary contract between employer and employee; and in my opinion the relation between the Commonwealth and the officer is a relation of contract (c.f. *Williams* vs. *Howarth*)". Higgins, J. was the same Judge who had decided the earlier case of *Carey*, and I have already stated my opinion that he had wrongly relied on the decision in *Williams* vs. *Howarth*.

It seems to me that *Lucy's case* is not substantially different in principle from that of *Rangachari* decided by the Privy Council in 1937. In each case the plaintiff had a right of action because he had been dismissed in breach of statutory provision, and not because he was entitled to contractual rights.

The nature of service under the Crown in Canada was considered in the judgment of the Privy Council in the case of *Reilly* vs. *The King*, (1934, A.C. 176). The suppliant had in 1928 been appointed a member of the Federal Pension Appeal Board for a period of five years. In May 1930 the pension statutes were amended and in consequence the Pension Appeal Board was abolished, and a new Tribunal established in its place. Mr. Reilly was not appointed to the new Tribunal, and in October 1930 he was requested to vacate the premises which he had occupied in pursuance of his office. The following observations of Lord Atkin are important for present purposes:—

> "Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds, Maclean, J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract; and the foundation of the petition failed. Orde J's judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.
>
> Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould* vs. *Stuart*. That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.
>
> In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined."

The dicta of Lord Atkin in *Reilly's case* received careful examination by the Supreme Court of South Africa in the case of *Sachs* vs. *Donges* (1950 (2) S.A.L·R. 265), in which it was sought to equate the case of the revocation of a passport to the Crown's right to terminate at pleasure the employment of a public officer. Referring to Lord Atkin's statement that "if the terms of the appointment definitely prescribe a term, and expressly provide for power to determine for 'cause', it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded", two judges of the South African Court thought it clear that Lord Atkin only contemplated cases of

appointments under a statutory power, where the statute itself by implication excluded the prerogative right of dismissal at pleasure. Van den Heever J.A. said in this connection:— "Once it is established that an act is the exercise of discretionary executive power not regulated by statute *cadit quaestio*, ... the subject's redress, if any, is political, not judicial." Centlivers J. expressed his disagreement with the construction placed on Lord Atkin's dictum in the case of *Robertson* vs. *Minister of Pensions* (1948, 2 A.E.R. 767) where Lord Denning had stated that "in regard to contracts of service, the Crown is bound by its express promises as such as any subject". Let me with great respect state my own reasons for disagreeing with that construction.

In the passage cited above, Lord Atkin first referred to a judgment in which Orde, J. in the Canadian Supreme Court, seemed "to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure". Lord Atkin then expressed inability to accede to this view of the contract, *if contract there be*. His subsequent statement, that, in certain cases, "any implication of a power to dismiss at pleasure is excluded", is explained by his reference to the cases of "numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause". This reference read together with the reference to *Gould* vs. *Stuart* (1896 A.C. 575), indicate that Lord Atkin had in mind only cases in which the power to dismiss at pleasure becomes excluded by contrary provision in a statutory power of appointment. Had he intended to say that the power could be excluded *by contract*, he would surely not have failed to refer to *de Dohse* vs. *Reg* (1897, 66 L.J.Q.B. 422) and to *Dunn* vs. *Macdonald* (1897, 66 L.J.Q.B. 423), both cases in which the contrary opinion had been strongly expressed.

In *Gould* vs. *Stuart* itself, Lord Hobhouse, in delivering the judgment of the Privy Council observed that "servants of the Crown hold their offices during pleasure; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service". But the case itself concerned an office the tenure of which was regulated by the Civil Service Act of New South Wales, the provisions of which were inconsistent with the power to dismiss at pleasure. The power of dismissal being thus excluded by statute, it was not material to decide the precise base on which the power rested. Moreover, it is not easy to understand why an arbitrary power of dismissal is to be implied in a contract of employment except upon a supposition that such a power exists *aliunde*. And if such a power does exist, it is only the prerogative to which the power is fairly referable. With much respect therefore, I doubt whether the dictum of Lord Hobhouse can now be regarded as authority for the proposition that the terms of the engagement of servants of the Crown impose on the Crown contractual obligations, the breach of which may properly be the subject of dispute in Petitions of Right or (in Ceylon) in suits against the Attorney-General.

I do not consider it useful to refer to other cases cited during the argument, many of which were concerned with alleged wrongful dismissals of servants of the Crown. It suffices for me that we have not been referred to any decision holding, despite objection directly taken on behalf of the Crown, that a Petition of Right or civil suit lies against the Crown to enforce the performance of the terms of the engagement of a servant of the Crown, not being terms laid down by statute. The Ceylon decision in *Fraser's case* is thus quite exceptional.

The decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denies to this plaintiff a

right to sue for the increment alleged to be due to him under the Minutes.

There remains one possibility to which I must advert, namely whether the provisions of the Ceylon Constitution have affected the operation in Ceylon of the principle formerly applicable.

Section 57 of the Order in Council declares that (with some exceptions not here relevant) every person holding office under the Crown holds the office during Her Majesty's pleasure. Sections 58 and 60 establish a Public Services Commission, and vest in the Commission "the appointment, transfer, dismissal and disciplinary control of *public officers*", i.e. of persons holding a paid office.....as a servant of the Crown in respect of the Government of Ceylon (vide s. 3, definition). Section 61 authorises the Commission to delegate any of its powers, subject to the right of appeal to the Commission itself. Thus the powers of appointment and dismissal, which were those of the Sovereign in early English law, are now exercisable by the Commission. It is not disputed that the plaintiff in this case is a public officer within the meaning of these provisions.

Neither in Part VII of the Order in Council, under the title "The public Service", nor in any other provision of the Order, is there express statutory declaration vesting in any specified authority the power to prescribe the salaries and conditions of service of public officers. But Part V, which is entitled "The Executive", vests in Ministers the subjects and functions which may be assigned to them by the Prime Minister. The subject of "the public service" has been so assigned to the Minister of Finance, and I have no difficulty in assuming that the Minutes and Circulars referred to in this case, which were issued by the Secretary to the Treasury or his Deputy, were in fact issued under the authority of the Minister of Finance. Under s. 51, the Secretary to the Treasury who is also the Permanent Secretary to the Ministry of Finance, exercies control over the departments of Government in charge of his Minister and is thus the head of the Public Service, subject only to the special powers reserved by s. 60 to the Public Service Commission. The Minister of Finance, or his Permanent Secretary, in the exercise of their powers of control and administration of the public service, have necessarily to adhere to decisions of Parliament, particularly those decisions which are incorporated in the Appropriation Acts which appropriate funds for various public purposes; they have also to adhere to decisions of the Cabinet, which under s. 146 of the Order in Council is charged with the general direction and control of the government of the Island. There has been no suggestion during the argument of this appeal that the act of the plaintiff's head of department in withholding the plaintiff's increment, in any way infringes or usurps powers which under the Constitution are vested in Parliament, the Cabinet, the Public Service Commission, or the Minister of Finance. The head of department acted under the provisions of a Circular issued by an authority fully competent to issue it.

I find nothing in the relevant provisions of the Consitution (which have just been examined) which can in any way be construed as altering or affecting, either expressly or by implication, the principle that the terms of a public officer's engagement to serve the Crown in Ceylon do not entitle him to institute a suit to recover earned wages or to enforce the terms of his engagement. The case of *Silva* vs. *The Attorney-General* (60 N.L.R. 145) is easily distinguishable, for we are not here concerned with anything resembling the dismissal from service of a public officer by an authority not legally competent to dismiss him.

Counsel for the plaintiff argued that, although the Crown or the Executive Government in Ceylon has a power freely to alter the terms and conditions of service prescribed in the relevant minutes in force at the time of the plaintiff's promotion to the Executive Clerical Class, that power was unlawfully exercised when the Treasury Circular No. 560 was issued in December 1961. The ground of this argument was that the circular was issued for the purpose of the implementation of the Official Language Act No. 33 of 1956. Referring

to the terms of the Circular itself, and to those of a Cabinet memorandum containing directions as to the implementation of that Act, Counsel submitted that the Treasury Circular had to be issued under the compulsion of the Act; and, relying upon certain decisions in the United States, he further submitted that anything done under the compulsion of an invalid statute is itself invalid, despite the fact that what is done may be valid if done in the exercise of some ordinary contractual right or other power.

These submissions regarding the Treasury Circular depend on Counsel's other submission that the Official Language Act of 1956 was *ultra vires* on the ground that in enacting it Parliament transgressed the prohibitions against discrimination contained in Section 29 of the Constitution. Indeed the learned District Judge who heard the instant case has held the Act to be void on that ground. In considering whether this Court should now make any pronouncement as to the validity of the Act of 1956, I take note of the reluctance of the American and Indian Supreme Courts to make such pronouncements. The principle is thus expressed in Cooley, Constitutional Limitations (8th Ed. p. 332):—

> "It must be evident to anyone that the power to declare a Legislative Enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsiblity".

In *Burton* vs. *United States* (196 U.S. Reports at p. 295) it was observed that "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case". Again, in *Silver* vs. *Louisville N. R. Co.*, (213 U.S. Reports at p. 191) the Court stated that if a case could be decided on one of two grounds, one involving a constitutional question, and the other a question of statutory construction or general law, the Court will decide only the latter.

In the instant case, it is not even clear whether the question of the compulsion of a statute does arise. I have already reached the conclusion that under our Law a public servant has no right to sue for his wages. Accordingly the plaintiff is not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations had not been altered or modified by the Treasury Circular No. 560.

The position of the Crown here is not that there was an alteration in the terms and conditions of service in consequence of which the plaintiff has become disentitled to the increment. The Crown's position is that the plaintiff cannot sue for the payment of the increment, even if the minutes and regulations provide for such a payment. Since such in my opinion is the correct position in law, this Court should not now venture to rule upon the submissions as to the invalidity of the Language Act. As a note of caution I must say also that the ruling on that submission made by the learned District Judge in this case must not be regarded in any way as a binding decision.

We did not call upon the learned Acting Attorney General to submit his arguments on the question of the validity of the Language Act. Instead, at the close of the hearing of this appeal, I indicated my intention that if our findings on the other issues arising in this case necessitate consideration of that question, I would in exercise of my power under Section 51 of the Courts Ordinance refer the question for the decision of a Bench of five or more Judges. That course is not now necessary; but I should here express the firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arises for decision, must receive consideration by a Bench consituted under Section 51.

The judgment and decree of the District Court are set aside. I do not in the circumstances make any order as to the costs in the District Court, but the plaintiff must pay the costs of this appeal.

G. P. A. Silva, J.

I agree.

Set aside.

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

MARTIN *vs.* KANDY POLICE

S.C. 547/67 — *M.C. Kandy Case No.* 50042

Argued On: 20th September, 1967
Decided on: 27th October, 1967.

Control of Prices Act — Price Order made thereunder — Whether sale to a decoy is a "sale by retail — Meaning of the term "for consumption or use."

A Price Order made under the provisions of Section 4 of the Control of Prices Act, having fixed the maximum wholesale and retail prices in respect of potatoes, proceeded to define the terms "sale by wholesale" and "sale by retail" as follows:

(a) any sale of any quantity of any article.....for the purpose of resale, or any sale of an article.....in a quantity of one hundredweight gross or more at a time, shall be deemed to a sale by wholesale;

(b) any sale of any quantity of any article.....less than one hundredweight gross for the purpose of consumption or use shall be deemed to be a sale by retail.

Upon a charge of having acted in contravention of the Price Order, the evidence for the prosecution was that a pound of potatoes had been sold at a price in excess of the maximum price by the accused to a person empolyed by the police as a decoy.

It was submitted by the defence that, inasmuch as the sale was for the purpose of detection and not for the purpose of consumption, the prosecution had failed to prove an essential element of the offence, namely, that a "sale by retail" had taken place.

Held: That a sale to a decoy is a "sale by retail" within the meanig of the Price Order.

Cases referred to: *Brierly* vs. *Phillips* and *Brierly* vs. *Brear* (1947) 1 K.B. 541.
Cooke vs. *The Governor and Company of the New River*, (1889) 14 A.C. 698

Nihal Jayawickrema for the accused-appellant.

V. S. A. Pullenayagam, C.C., with *Faisz Mustapha, C.C.*, for the Attorney-General.

Silva, J.

The accused-appellant, a trader in Kandy, was charged with having on the 24th October, 1966 sold a pound of potatoes for 38 cents being a price 6 cents in excess of the maximum retail price at which the article could have been sold according to the relevant Price Order applicable to the article. The evidence on which the prosecution relied consisted of that of a Sub-Inspector of Police who made the detection with the help of a decoy who was sent by him with a marked rupee note with instructions to purchse a pound of potatoes from the boutique run by the accused. The decoy, a labourer residing at Peradeniya, testified to the fact of having gone to the boutique of the accused with the rupee note handed to him by the Sub-Inspector and having purchased a pound of potatoes for which he was charged 38 cents. The relevant Price Order showed that the maximum retail price at which a pound of potatoes could be sold was 32 cents. Although these facts were contested in the lower court counsel for the appellant in this court confined himself to the point of law that a sale to a decoy was not a sale by retail which, in his sub-mission meant a sale for consumption or use only. In other words, his submission was that, in order to succeed the prosecution has to prove, among other things, that the alleged excess price in this case was charged by the accused in respect of a sale by retail and in view of the definition of sale by retail contained in (iii) (b) of the Price Order, the prosecution had failed to prove one element of the offence, namely, that the pound of potatoes was sold by the accused for the purpose of consumption or use.

The question that arises for consideration therefore is whether the sale of a price controlled article to a decoy employed by the Police for detection of offences under the Control of Prices Act is a sale by retail for the purposes of the Act

and an Order made thereunder. In order to determine this question it is necessary to appreciate the purpose of the Control of Prices Act (Chapter 173) and to analyse the wording of the relevant sections. The words of section 4(1) which empower the Controller to make Orders fixing the maximum prices and prescribing the conditions of sale are very significant in this regard. This section provides that if it appears to the Controller that there is or is likely to arise in any part of Ceylon any shortage of any article or any unreasonable increase in the price of any article he may by Order fix the maximum price (both wholeseale and retail) above which the article shall not be sold and also prescribe the conditions of the sale of that article including conditions as to the time and place of the sale and the quantity and quality of the article to be sold. Section 8 makes it a punishable offence for any person to act in contravention of such an Order. The Price Order made by the Controller in terms of section 4 with which we are now concerned is published in Government Gazette No. 14716/7 of 12.10.1966 .Among other articles sought to be controlled by this Order are potatoes. For the purpose of the Order, any sale of any quantity of the articles ennumerated for the purpose of resale or the sale of any quantity of one hundredweight gross or more at a time is to be deemed a sale by wholesale and any sale of any quantity less than one hundredweight gross for the purpose of consumption or use is to be deemed to be a sale by retail.

It seems to me on reading of section 4 and the Order that the sole object thereof is to protect society against unscrupulous traders and to impose a price restriction on such traders who sell the article concerned in order to ensure that no sale takes place at a price above the maximum prescribed in the Order. In doing so the legislature had necessarily to lay down two prices, one a wholesale price which covered a sale by any person for resale and a sale of more than one hundredweight, and another a retail price at which the article should reach the consumer. The wholesale price would of course be slightly lower than the retail price as the retailer has necessarily to incur some further expenditure in the distribution of the article after purchasing it from the wholesaler. In making this Order, the object of the legislature was to distinguish between a sale by wholesale and a sale by retail and the former was defined as a sale for resale or a sale of more than one hundredweight which too would presumably be for resale while the latter was defined as a sale for consumption or use. The purpose of defining a sale by retail, as one for consumption or use was in my view only to draw this distinction and not to protect a seller from the penalties attaching to sales above the controlled price whenever a small quantity of the article was purchased by someone for a purpose other than consumption as food.

Secondly, it is to be noted that in both these definitions the accent is laid on the **sale** over which only the seller has control and not on the purchase over which the buyer will have control. It seems to me that the question whether an offence against the Order has been committed must be considered from the point of view of the intention of the seller at the time of the sale of the article and the question to be asked is whether or not he intended to effect a sale for the purpose of consumption or use or for some other purpose when he accepted the money from the decoy for a pound of potatoes and delivered it to him. The intention of the buyer, and the purpose for which he is purchasing the article, which the seller cannot reasonably be expected to be aware of, is not a consideration that affects the question as to the nature of the sale.

Thirdly, the word '**use**' in the phrase "for the purpose of consumption or use" is so comprehensive that it can cover almost any conceivable purpose other than consumption as food. In that view of the meaning attributable to this word, the use of the pound of potatoes by the decoy for a purpose for which the Police required it, cannot be said to fall outside the purposes contemplated by the section. Although counsel did not advance that argument another possible construction of these words is that they were used synonymously for expressing the same thing, namely, consumption or use as food. I do not however think that it was necessary for the legislature to use the second word redundantly in the context as the word consumption is quite adequate to express the meaning that is intended to be conveyed thereby. To give any other construction to the words for consumption or use in this Order would in my view defeat the clear object of this legislation.

A converse test that may be applied to determine this matter is to ask oneself the question as to what the accused was indulging in when he accepted the 38 cents and released a pound of potatoes to the decoy, if, as counsel for the appellant submitted, he did not indulge in a sale by retail. It is reasonable to think that a person who stocked

potatoes and parted with them for money could only do one of two things depending on the quantity he disposed of, namely, a sale by wholesale or a sale by retail. The sale in the present case being clearly not one by wholesale there is no other sale which can be conceived of, either according to the definition in the Order or otherwise, apart from a sale by retail. This process of reasoning too helps one to deduce that the sale by the accused was a sale by retail particularly when the word 'use' in the definition does not necessarily preclude that interpretation.

I have examined the case of *Brierly* vs. *Phillips* and *Brierly* vs. *Brear* (1947) 1 K.B. 541 but I cannot say that they are very helpful in deciding the question at issue before us. Nor do I think that the other case cited, *Cooke* vs. *The Governor and Company of the New River*, (1889) 14 A.C. 698 has any application to the immediate question involved. Further, the employment of decoys being a course resorted to in many countries for the detection of offences such as the one before us, the inability of counsel to cite in his favour a case where a similar point has been considered is also a factor that makes me feel that the point raised in this case is without substance.

For all the aforesaid reasons the appellant's contention fails and th appeal is therefore dismissed.

Appeal dismissed.

Present: **Manicavasagar, J. and Samerawickrame, J.**

KITHSIRI GUNARATNE *vs.* GOVERNMENT AGENT, KALUTARA & ANOTHER*

S.C. 92-93 (*Inty*)/1966 — *D.C. Kalutara* M/1163

Argued on: 4th March, 1967
Decided on: 19th March, 1967

Co-owners—Alleged used of Distillery and warehouse by co-owners for several years for manufacturing arrack—Acquiescence by all co-owners—Years later, objection by one co-owner to the continuance of manufacturing arrack by others without his consent — Is such consent necessary?

Action to restrain licensing authority to issue license to co-owner S.G. — Allegation of collusion between licensing authority and S. G. — Interim injunction — Prayer for cancellation of license already granted to such co-owner and to restrain grant of future licenses — Right of S.G. to intervene— Civil Procedure Code section 18.

A land, which nine minors, including the plaintiff, were entitled to, was leased for 15 year by their curator with the permission of Court, with a stipulation that a distillery and a warehouse be built thereon by the lessee with the option to remove them at the expiry of the lease .The lease expired in 1950, but the lessee did not exercise this option to remove the buildings erected by him. The co-owners, after the lessee had quit, continued for several years to use the distillery and warehouse for manufacture of arrack.

The plaintiff prayed for issue of an interim injunction restraining the Government Agent, (1st defendant) and the Excise Commissioner from issuing and/or renewing a license in favour of S.G. (a co-owner) or his nominee to manufacture arrack at the said distillery and warehouse for any period from 1st April, 1966 without the consent and approval of the plaintiff, until the determination of the present action instituted by him asking for a permanent injunction for the purpose.

Held: That in the circumstances, the plaintiff is not entitled to object to the grant of a license to S.G., a co-owner for the manufacture of arrack, an user acquiesced in over the years by him and which did not involve the conversion of the property to a new use.

Where the plaintiff claimed in the same plaint that the defendants and the said S.G. have acted in concert in obtaining a licence to manufacture arrack for 1966 without plaintiff's consent and sought, not only to restrain the issuing of a licence to S.G. from 1.4.1966, but also to revoke a license already granted,

Held: That an application by S.G. to intervene in the action should be allowed.

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* For Sinhala translation, see Sinhala section, Vol. 15, part 1, p. 1

Cases referred to: *Goonewardena* vs. *Silva* 17 N.L.R. 287
Silva vs. *Silva* 6 N.L.R. 225
Siyadoris vs. *Hendrick* 6 N.L.R. 275
De Silva Appuhami and Another vs. *Adria & Others*, (1879) 2 S.C.C. 166

H. L. de Silva, Crown Counsel, for the 1st defendant-appellant in S.C. 92/66.

G. P. J. Kurukulasuriya, for the intervenient petitioner-appellant in S.C. 93/66.

N. E. Weerasooria, Q.C., with *W. D. Gunasekara* and *N. E. Weerasooria (Jnr.)*, for the plaintiff-Respondent in both appeals.

Manicavasagar, J.

Appeal 92/66 is by the Government Agent, Kalutara (the 1st defendant) from the order of the District Judge of Kalutara restraining him from issuing and/or renewing a licence in favour of Siritilleke Gunaratna or his nominee to manufacture arrack at the Siri Landa Distillery referred to in the plaint, and to work the said distillery and warehouse for any period from 1st April, 1966 without the consent and approval of the plaintiff-respondent until the present action is heard and determined.

The plaintiff-respondent and Siritilleke Gunaratna are 2 of 9 co-owners of the land on which the distillery and warehouse stand. These buildings were erected about 1935 by G. R. P. Gunaratna, the lessee, according to an agreement of lease between him and the curator of the 9 minor co-owners. Gunaratna had the option under the agreement to remove the buildings he had constructed at the termination of the lease in 1950, but he did not exercise the option. The distillery and the warehouse has since 1950 been used by the co-owners for the manufacture of arrack, the plaintiff-respondent being a share-holder in the business, until 1964, when differences arose between him and some of the co-owners. Consequent on these disputes, the plaintiff-respondent has instituted more than one action, the instant action is one where he seeks inter alia a declaration that the appellant is not entitled to issue or renew a licence in favour of Siritilleke Gunaratne to manufacture arrack at the distillery from 1st April, 1966 without his consent and approval, and a permanent injunction embodying the aforesaid declaration.

The issue which is before us for determination involves a consideration of the rights and obligations of co-owners under the Roman-Dutch Law which applies to this topic, and in particular whether a co-owner is entitled to obtain a licence to manufacture arrack on the common land without the consent of his co-owners. The law on this subject is now well settled and has been consistently followed since the judgment of Bonser, C.J. in our unreported case from the District Court of Galle, where commenting on a passage from Voet (10.3.7) he said:

> "By this I understand that it is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted, but I do not understand the law to prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances".

The only case I recall which is out of line with this proposition is in the judgment of Pereira, J. in *Goonewardena's* case (17 N.L.R. 287) where the learned Judge referring to *Silva's* case (6 N.L.R. 225) and *Siyadoris's* case (6 N.L.R. 275) which followed the dictum of Bonser, C.J., observed

> "It hardly means that one co-owner can in defiance of an expressed objection by the others put up a building on the common property".

This decision whilst favourable to the respondent stands by its own authority; it is broadly stated and runs counter to established principles that have been consistently followed, that it can be overlooked.

The first principle is that any act of a co-owner rests for its legality on the consent of the remaining co-owners, either expressed or implied (2 S.C.C. 166): but the rigour of this rule has been mitigated by the exception that a co-owner even though he may not have the consent of his co-owners is entitled to use the common land reasonably for the common advantage, proportionate to his share for the purpose for which the land is intended. Moncrieff, J. in *Silva's* case (6 N.L.R. 225 at 229) said:

"I would not say that in no case can a co-owner build without expressed consent. Building might be a natural and necessary act. If the land were fit for paddy, I conceive that one co-owner could not forbid another to cultivate without reasons given, nor could consent be required for an act which is a natural or necessary element of their co-ownership."

This leads to the second principle; joint property cannot be converted to other purposes, other than those for which it is intended, nor can it be applied to new uses, nor its character changed without the consent of all the proprietors, and if anything of the kind is attempted by one of the proprietors, he can by interdict be compelled to restore the property to its original condition. (Voet 10.3.7).

In the present case the facts are much stronger than in the run of cases in our law reports. Here we have a land which the curator of the minors with the permission of the Court leased for a term of 13 years with the stipulation that a distillery and warehouse be built: the co-owners after the lessee had quit continued for several years to use the distillery and warehouse for the manufacture of arrack: the buildings were intended and used by the co-owners for this purpose: in this situation a co-owner cannot be heard to object to an user which is "a natural and necessary element of co-ownership", an user which he had acquiesced in over the years; nor is his consent a necessary pre-requisite for the use of the common land for the purpose for which it was intended. The grant of a licence in these circumstances to a co-owner is not a wrongful act and the plaintiff-respondent has no just cause for complaint: for this reason alone the order of the Judge restraining him by injunction is wrong.

Appeal 93/66 is by Siritilleke Gunaratna from the order of the District Judge refusing his application to be added as a party to the action. The application was resisted strongly by the plaintiff-respondents in the original Court, and sensibly not opposed before us.

The plaintiff claims that the defendants and Siritilleke Gunaratna have acted in concert in obtaining a licence for 1965 to manufacture arrack, without his consent, that they have acted wrongfully and unlawfully, and he seeks to restrain the 1st defendant from issuing a licence to Siritilleke from 1st April, 1966. Is his presence therefore necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action? We have in the plaint an allegation of collusion against the intervener; had this been the only assertion I would rule against the application: but we have also a claim for relief which would affect him in the enjoyment of his legal rights: this is a sufficient reason to grant the application, though this is not the only rule which would enable the Court to act under Section 18.

This appeal too is allowed. The orders made by the District Judge in both matters are set aside: in the first, the interim injunction is discharged, and in the second, the intervenient should be added as party—defendant.

The plaintiff-respondent will pay the costs of his appeal, and of the inquiry in the original Court to each of the successful appellants.

Samerawickrame, J.

I agree.

Both Appeals allowed.

Present: **Abeyesundere, J. and Siva Supramaniam, J.**

M. S. M. SALIN ET. AL. *vs.* THE CHARTERED BANK, COLOMBO*

S.C. 646/64 — *D.C. Colombo* 1104/*Spl.*

Argued and decided on: 8th May, 1967.

Debt Conciliation Ordinance — Debt due on Mortgage Bond — Amicable settlement under section 30 *— Amount settled by the parties and recorded by the Board exceeding twice the amount of bond— Contravention of section* 33(b) *— Default in complying with terms of settlement — Application under section* 43 *for decree in terms of settlement — Order nisi made absolute in favour of creditor — Right of appeal — Section* 44(2), *when not applicable.*

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*For Sinhala translation, see Sinhala section, Vol. 15 part 2 p. 5

The principal debt due on a mortgage bond dated 7/6/1954 was Rs. 90,420/69. This debt together with interest was the subject of an amicable settlement under the Debt Conciliation Ordinance between the creditor and the debtors who fixed the amount due as Rs. 192,892/45. The terms of settlement were recorded by the Board. The debtors (appellants) defaulted in complying with the terms of settlement and on an application by the creditor (respondent) under section 43 of the Ordinance, the Court, after due inquiry, made decree *nisi* absolute against the appellants who appealed.

It was contended on behalf of the respondent, that the appellant had no right of appeal in view of the proviso to sub-section 2 of section 44 of the Ordinance.

Held: (1) That as the amount agreed upon in the settlement was more than twice the amount permitted by section 33(b) of the Debt Conciliation Ordinance, the settlement was not one under the Debt Conciliation Ordinance. Therefore the learned District Judge could not have entered a decree under section 43.

(2) That as the decree *nisi* made absolute is not in terms of a settlement according to the provisions of the said Ordinance, the prohibition of appeal in the proviso to section 44 did not apply to the decree in appeal.

(3) That the submission that the settlement be treated as valid up to the amount permitted by section 33(b), cannot be upheld as the court would then enter a decree in terms of a settlement varied by it.

H. V. Perera, Q.C., with *Hanan Ismail*, for the appellants.

H. W. Jayewardene, Q.C., with *S. J. Kadirgamar* and *S. S. Basnayake*, for the respondent.

Abeyesundere, J.

The appellants in this case made an application to the Debt Conciliation Board under the Debt Conciliation Ordinance for a settlement of a debt of Rs. 90,270/69 and interest accrued thereon which they owed to the respondent. Upon that the respondent who was the creditor and the appellants who were the debtors were served with the requisite notice by the Debt Conciliation Board and after hearing the parties to the application the Debt Conciliation Board recorded an amicable settlement which the respondent entered into with the appellants. Thereafter the appellants defaulted in complying with the terms of the settlement. Thereupon the respondent made an application under section 43 of the Debt Conciliation Ordinance to the District Court of Colombo for a decree in favour of the respondent in terms of the settlement. The District Court entered decree nisi upon such application. After inquiring into whether or not the decree nisi should be made absolute, the District Court made order on 21st October, 1964, making the decree nisi absolute. The appellants have appealed from that order.

Mr. H. W. Jayewardene, Q.C., appearing for the respondent, raised the objection that there was no right of appeal in view of the provisions of the proviso to sub-section (2) of section 44 of the Debt Conciliation Ordinance. That proviso states that no appeal from, or application for revision of, a decree nisi made absolute under sub-section (1) of section 44 shall lie to the Supreme Court. Mr. H. V. Perera, Q.C., appearing for the appellants, submitted that the aforesaid proviso applied only to a decree absolute entered in respect of a settlement under the Debt Conciliation Ordinance and that the expression "settlement under the Debt Conciliation Ordinance" meant a settlement in accordance with the provisions of that Ordinance. He stated that the amount allowed in the settlement in the instant case to the creditor in satisfaction of both principal and interest due to him was in excess of the maximum amount permitted by section 33(b) of the Debt Conciliation Ordinance. That section provides that in any settlement under that Ordinance no creditor shall be allowed a greater amount in satisfaction of both principal and interest due to him than twice the amount of such principal. The settlement in this case states that it is agreed that sum of Rs. 192,892/45 is due to the creditor up to 31st October, 1962, and then sets out the manner in which that amount shall be paid by the debtors. It is also indicated in the settlement that the principal debt is Rs. 90,420/69 due on mortgage bond No. 459 dated 7th June, 1954. The principal that was due to the respondent from the appellants was Rs. 90,420/69 and the maximum that the respondent could heve been allowed in a settlement under the Debt Conciliation Ordinance, in accordance with the provisions of section 33(b) of that Ordinance, in satisfaction of the principal and interest due to him was Rs. 180,841/38, but in the settlement the respondent is allowed Rs. 192,892/45. The settlement is therefore in contravention of section 33(b) of the Debt Conciliation Ordinance. Consequently we hold that the settlement is not a settlement under the Debt Conciliation Ordinance.

A decree nisi under section 43 of the Debt Conciliation Ordinance must be in terms of a settlement under that Ordinance. The settlement in the instant case is held by us to be not a settlement under the Debt Conciliation Ordinance. The learned District Judge could not therefore have entered a decree nisi under section 43. An appeal from, or an application for revision of, a decree nisi entered in terms of a settlement under the Debt Conciliation Ordinance and made absolute does not lie to the Supreme Court. As the decree nisi made absolute in the instant case is in terms of a settlement which we hold is not a settlement under the Debt Conciliation Ordinance, the prohibition of appeal contained in the proviso to sub-section (2) of section 44 of that Ordinance does not apply to the decree from which the appeal before us is made. A statutory provision disallowing right of appeal must be strictly interpreted. We hold that the appellants have a right of appeal.

Mr. H. W. Jayewardena, Q.C., submitted that, if it is held that the settlement provides as the amount due to the respondent a sum which is in excess of the maximum permitted by section 33(b) of the Debt Conciliation Ordinance, the settlement may be held to be valid in so far as the amount specified therein less the impeached excess is concerned and that this Court may permit a decree to be entered in terms of the settlement treating the amount due to the respondent as being the amount stated in the settlement minus the impeached excess. If the learned District Judge is called upon to enter a decree nisi in accordance with the submission of Mr. Jayewardene, the learned District Judge will have to enter a decree nisi not in terms of the settlement between the creditor and the debtors but in terms of a settlement varied by him. Section 43 of the Debt Conciliation Ordinance requires the decree nisi to be in terms of the settlement entered into by the creditor and the debtors. We therefore hold that Mr. Jayewardene's submission that the settlement be treated as valid up to the amount permitted by section 33(b) of the Debt Conciliation Ordinance cannot be upheld.

For the aforesaid reasons we set aside the decree nisi made absolute by the learned District Judge and dismiss with costs the respondent's application to the District Court for the enforcement of the settlement.

The appellants are entitled to their costs of the appeal.

Siva Supramaniam, J.

I agree.

Set aside.

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

PUNCHINONA *vs.* LEELAWATHIE

S.C. No. 107/63 (F) — *D.C. Matara Case No.* M/1449

Argued on: May 6, 1966
Decided on: March 7, 1967

Promissory note — Drawer to be indicated with reasonable certainty — Is a promise to pay the plaintiff or her heirs sufficiently indicative of the drawer—Bills of Exchange Ordinance, section 6(1).

Held: (1) That when a bill or promissory note is drawn in favour of "X or his heirs", it indicates the drawer with reasonable certainty.

(2) That the heirs need not be reasonably ascertainable at the time the bill is drawn, as they would become ascertainable on the death of their predecessor, whether by last will or in the course of testamentary proceedings.

Not followed: *Peter* vs. *Suriapperuma* (1918) 20 N.L.R. 318.
Yates vs. *Nash* (1860) 29 L.J.C.P. 306; 2. L.T. 430.

Cases referred to: *Weerasinghe Hamine* vs. *Dias* (1935) 37 N.L.R. 27.
Silva vs. *Jayaweera* (1938) 39 N.L.R. 289.

C. Ranganathan, Q.C., with *W. S. S. Jayawardene*, for the plaintiff-appellant.

G. T. Samarawickreme, Q.C., with *E. St. N. D. Tillekaratne*, for the defendant-respondent.

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

This action for the recovery of a sum of Rs. 4,000/-, being the amount specified in an instrument proved to have been signed by the defendant was dismissed solely on the ground that, although the instrument purported to be a promissory note, the payee was not specified with certainty. The promise in the instrument was (according to the translation from Sinhala) to pay *the plaintiff or her heirs* on demand. In dismissing the action on this ground, the learned District Judge properly felt bound to follow the judgment of 2 Judges of this Court in *Peter* vs. *Suriapperuma* (20 N.L.R. 318), where the designation of the payee was in almost identical terms.

In that case, the Court relied on an English decision (*Yates* vs. *Nash*, 1860, 29. L.J.C.P. 306), in which a note had been drawn in favour of the holder of an office for the time being. That decision ceased to be good law with the enactment of the Bills of Exchange Act, 1882, which expressly declared that a bill of Exchange may be drawn in favour of the holder of an office for the time being (e.g. s. 7(2) of the Ceylon Ordinance, Cap. 82). With respect, it was in my opinion unsafe for this Court in the Ceylon case to rely on a statement in an English decision the effect of which had been expressly altered by legislation. The particular statement was that the payee must be capable of being ascertained with reasonable certainty *at the time the bill is drawn*. Soertsz, J. in *Silva* vs. *Jayaweera* (39 N.L.R. 289), impliedly criticised the statement by adding after it a mark of exclamation, but it was not necessary in the case before him to dissent from the decision in *Peter* vs. *Suriapperuma*.

A common form of promissory note contains a promise to pay X. Nevertheless, the promise is enforceable at the instance of X's legal representative, whose identity cannot be ascertained with reasonable certainty at the time when the promise is made. Nor is there such reasonable certainty where payee is "X or order." The uncertainty in both these common forms of bills is no less than the uncertainty regarding the identity of heirs when a bill is drawn in favour of "X or his heirs." So long as X is alive, there is perfect certainty that X alone can demand payment; and after the death of X, the difficulty of ascertaining who can demand payment is no different from the difficulty which can arise upon the death of the sole payee of a bill. The "heirs" of X will be either those named in a last will, whether generally or with special reference to the bill, or else the heirs upon intestacy ascertainable in the course of testamentary proceedings.

I must add that Ennis, J. (who participated in the decision of *Peter* vs. *Suriyapperuma*) held subsequently (at the report appended at 37 N.L.R. 28) that a note (as translated from the Sinhala) in favour of X or "a person who comes into possession of the document in the proper manner" did designate the payee with sufficient certainty. I am satisfied that "heirs" is a designation which is narrower and more certain than that which Ennis, J. found acceptable.

For the reasons stated I must express disagreement with the decision by which the trial Judge was bound. Sitting on a bench of 2 Judges, I am not bound to follow it.

I would allow the appeal with costs and enter judgment for the plaintiff as prayed for.

Abeyesundere, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President), Manicavasagar, J. and Siva Supramaniam, J.**

THE QUEEN *vs.* ABILINU FERNANDO

Appeal No. 17 *of* 1967 *with Application No.* 19 *of* 1967 — *S.C. No.* 271 *M.C. Avissawella* 76439

Argued on: 11th, and 12th March, 1967.
Decided on: 12th March, 1967.
Reasons delivered on: 18th April, 1967.

Evidence Ordinance, section 154 — *Circumstances in which a Court may permit the prosecution to cross-examine its own witness.*

Held: 1. That at a trial, if a prosecution witness voluntarily or in answer to defence counsel gives evidence clearly inconsistent with a statement made by him in his deposition, the trial judge may in the exercise of his discretion under section 154 of the Evidence Ordinance, permit the prosecution to contradict the witness by proof of the former statement.

2. That where no such inconsistent evidence is given, but merely some testimony generally unfavourable to the prosectuion, the prosecutor should not be permitted, in order to enable him to prove a former statement incriminatory of the accused, to resort to the device of tempting or provoking the witness to deny the incriminatory matter.

M. M. Kumarakulasingham, with *Cosme Dalpathado*, *H. W. A. Andrado* and *N. Balakrishnan* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

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

The appellant was convicted by an unanimous verdict of the jury of the murder of his brother's wife. The principal witness for the prosecution one Premaratne gave evidence which if believed clearly establishes that he had seen the appellant stab the deceased woman more than once; and this together with certain independent evidence as to motive suffice to establish the guilt of the appellant.

After leading the medical evidence, the prosecution called one Samel Fernando, the father of the appellant and the father-in-law of the deceased woman. This witness was in examination-in-chief questioned only in order to elicit from him the fact that he had identified the deceased woman at the postmortem examination.

In cross-examination, Samel Fernando in answer to certain questions gave evidence:—

(a) suggesting the possiblity that the previous witness Premaratne may not have been able to identify the assailant of the deceased woman because of trees and hedges which could have impeded his view of the scene;

(b) indicating that there had been no ill feeling between the appellant on the one hand and the deceased woman and her husband (the appellant's brother) on the other;

(c) suggesting that there had been police interference with witnesses prior to their giving evidence in the Magistrate's Court.

In view of this evidence Crown counsel moved to put to the witness questions which might have been put in cross-examination, and this application was allowed by the learned Commissioner. Thereafter Crown Counsel proceeded to examine the witness further, firstly with the object of negativing the suggestion that there had been police interference with the witness himself; secondly there was the following examination:—

"*Q.* Did your son John complain to you prior to this incident that this accused was trying to get on terms of intimacy with his wife and was harrassing them?

A. No.

Q. Did you say this in the Magistrate's court:

Court: I take it that John will be a witness.

Crown Counsel: Yes, My Lord.

Q. Did you say this in the Magistrate's Court: "Prior to this incident I received a complaint from my son John Fernando..... (Crown Counsel omits four words) that this accused was attempting to get on terms of intimacy with the deceased?"

A. No.

Q. Did you also say in the Magistrate's Court: "In consequence I advised this accused?"

A. No.

Q. Did you continue and say this: "For some time prior to this incident the accused was angry with the deceased as she rejected his advances?"

A. No.

Q. As a result of this were any complaints made to the Grama Sevaka and the police?

A. No.

Q. And did you say this continuing your evidence in the Magistrate's Court: "Several complaints had been made to the Grama Sevaka and the Police?"

A. No."

These statements in the witness's depositions were subsequently proved at the trial.

It will be seen that the matters which were thus for the subject of Crown Counsel's further examination related to that part of his testimony to which I have referred at (b) and (c) above. I can see no objection to the examination with respect to these matters.

Thereafter Crown Counsel put to the witness the first part of the following part of his deposition in the Magistrate's Court:

> "Today at about 12.30 p.m. I went to the latrine behind this house. At the time the deceased was at home and my son John had gone to work in a gem pit which is about half a mile from here. When I was in the latrine I heard the deceased crying out "අම්මේ" about four times. I rushed out of the latrine and I saw the deceased fallen on the rubber land behind her house....."

At this stage, after an intervention by Court, Crown Counsel asked the witness the following questions:

"*Q.* When you came out and saw your daughter-in-law lying fallen did you see this accused running away?

A. I did not see.

Q. Did you see this accused having a knife or some other pointed object in his hand?

A. No. I saw 2 or 3 people running along the road.

Q. Did you say this in the Magistrate's Court "I saw the accused running away?"

A. No·

Q. Did you further say: "he had a knife or some other pointed object?

A. No. (The whole passage is marked X2)."

It appears from certain remarks made by Crown Counsel during the trial that he was aware that the witness Samel would not give evidence on the lines of his deposition in so far as the evidence would implicate his son the appellant. That presumably was why the examination-in-chief did not cover the alleged incident of stabbing. It will be seen, however, that during the examination permitted under Section 154 the prosecution did refer to the contents of the deposition to the effect that the witness had seen the appellant running away with a knife in his hand from the place where the deceased woman lay fallen, and that those contents of the deposiion was ultimately proved in the extract marked "X 2".

Now the witness had not previously given at the trial any testimony to the effect either that he had not seen the appellant just after the incident, or that the appellant did not have a knife in his hand at that time. Hence the assertions in "X2" concerning those matters were not used to contradict any testiomony to the contrary which had been elicited from him by Counsel for the defence. What actually took place at the trial was that Crown counsel, knowing that the witness would deny these matters, first elicited such a denial and then proceeded to show that the witness had made different statements at a different time.

Learned Senior Crown Counsel at the argument of the appeal justified this course on the ground that there had been in the cross-examination by the defence the following evidence from the witness:—

"*Q.* Did you hear anybody crying in pain?

A. Yes. I went out to see.

Q. Did you see anybody?

A. Yes.

Q. Then what did you do?

A. My daughter-in-law was lying fallen and I raised her up."

The argument was that this evidence, because it did not contain any reference to the appellant having been seen by the witness at the time when he saw the deceased woman lying fallen, might lead the jury doubt whether the previous witness Premaratne could himself have seen the appellant stabbing the deceased. We do not agree with the factual implication of this argument. So far as the Jury was concerned, there was no real inconsistency between the evidence of the witness Premaratne, which related to a stage up to and including the fall of the deceased woman, and that of Samel, which related to a stage subsequent to a fall of the deceased woman. Had the matter been left as it remained at the end of the cross-examination, there was very little or nothing elicited by the defence from the witness Samel as to the presence or absence of the appellant at the scene.

Moreover, the prosecution case as presented to the Jury was clearly not intended to include any testimony from Samel implicating the appellant as having been present at the scene with a knife in his hand. If that had been the prosecution's intention Samel should have been questioned with respect to these matters during the examination-in-chief.

In fact what transpired at the trial was that the prosecution elicited denials on these matters from the witness with the intention of contradicting him by proof of his deposition. As learned Senior Crown Counsel has presented the point, this course was followed only in order to shake the witness's credibility by showing that he said one thing in the trial Court and another to the Magistrate. But it happens that the Jury was then informed of evidence given before the Magistrate which was clearly prejudicial to the appellant.

In the ordinary case where a prosecution witness turns adverse he does so during the course of his examination in chief. Thus a witness may have testified before a Magistrate that he was present at a certain place, that he saw A and B together, that they had an argument, and that ultimately A stabbed B. It may happen at the trial that the witness commence his evidence by stating that he was not present at the particular place and that he did not see A and B together, thus indicating that he will not give testimony in accordance with his deposition. If such a situation occurs, the prosecution should, unless it succeeds in tactfully persuading the witness to come out with his former testimony, abandon him for the purpose of the trial. If a witness persists in denying that he saw A and B together on the particular occasion, there is no need for the prosecution to proceed further and obtain a denial from the witness that he saw A stab B, and thereafter to contradict that denial by proving a deposition that he did see A stab.

If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with the statement made by him in his deposition, the discretion of the trial Judge under section 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused.

There was however ample evidence from the witness Premaratne and the witness John Fernando as to the stabbing of the deceased woman by the appellant and the strong motive for the stabbing. Under the proviso to section 5(1) of the Court of Criminal Appeal Ordinance we upheld the conviction and dismissed the appeal.

Appeal dismissed.

Present: **Abeyesundere, J. and Siva Supramaniam, J.**

GREGORY PERERA *vs.* THE QUEEN*

S.C. 1/67 — *D.C.* (*Bri.*) *Colombo No.* 20

Argued and decided on: April 15, 1967

Bribery Act, as amended by Act No. 40 *of* 1958 — *Charge under section* 19(*c*) — *Soliciting and accepting gratification — What the prosecution has to prove.*

Where the appellant was indicted under section 19(c) of the Bribery Act, as amended by Act No. 40 of 1958 with (a) having solicited a gratification of Rs. 100/- none of which acts he was authorised by law or the terms of his employment,

Held: That the letter of appointment of the appellant (which does not authorise him to solicit or accept any gratification) is not sufficient to establish the charge. There must also be some evidence to show that the appellant is not authorised to solicit or accept a gratification of the kind referred to in the indictment.

Per **Abeyesundere, J.** — "It is not possible for any Court to take judicial notice of the absence of such a law."

S. Kanagaratnam, for the accused-appellant.

Kenneth Seneviratne, Crown Counsel, for the Crown.

Abeyesundere, J.

In this case the appellant was indicted under Section 19(c) of the Bribery Act, as amended by Act No. 40 of 1958, with having solicited a gratification of Rs. 100/- which he was not authorised by law or the terms of his employment to receive and with having accepted a gratification of Rs. 100/- which he was not authorised by law or the terms of his employment to receive. He was convicted on both counts of the indictment and sentenced to a term of 3 years' rigorous imprisonment on each count and to pay a fine of Rs. 100/- on each count.

Counsel for the appellant submits that there is no evidence led by the prosecution to establish that the appellant was not authorised by law or the terms of his employment to solicit or receive the aforesaid gratification. P6 is the letter of appointment of the appellant. That letter contains the terms of the appellant's employment. In that letter the appellant is not authorised to solicit or accept any gratification. The production of P6 is not sufficient to establish the ingredients of the offence alleged under paragraphs (c) of section 19 of the Bribery Act. There must also be some evidence to show that the appellant is not authorised by law to solicit or accept a gratification of the kind referred to above.

Crown Counsel who appears for the Attorney-General submits that the Court can take judicial notice of any law. In establishing a charge under Section 19(c) of the Bribery Act what the prosecution has to prove is, *inter alia*, that there is no law authorising the accused to solicit or accept the gratification mentioned in the charge. It is not possible for any Court to take judicial notice of the absence of such a law. We are satisfied that the prosecution has failed to lead evidence necessary to establish one ingredient of the offence alleged in the indictment. Therefore we set aside the conviction of the appellant and the sentence passeed on him and acquit him.

Siva Supramaniam, J.

I agree.

Accused acquitted.

* For Sinhhla translation, see Sinhala section, Vol. 15, part 1 p, 4

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

JAYATILLAKE *vs.* SOMADASA

S.C. No. 83/65 (*F*) — *D.C. Badulla* 3304/M.B.

Argued on: 26th May, 1967
Decided on: 20th June, 1967

Partition Action—Interlocutory decree—Mortgage to plaintiff by defendant of his right title, interest etc. to be declared entitled in Final decree— Hypothecary action by plaintiff — Defendant's plea that mortgage void and final decree wiped out mortgage, being an encumbrance — Partition Act, Section 48 *and* 67.

The plaintiff instituted this hypothecary action to enforce a bond by which the Defendant had mortgaged to the plaintiff all his right title interest, claim, demand, advantages, disadvantages whatsoever that he would be declared entitled to by virtue of a Final decree in a partition action pending in respect of a certain land. The mortgage bond was executed after interlocutory decree but before the final decree.

The defendant pleaded —

(a) that the mortgage was void under section 67 of the Partition Act,

(b) that as the mortgage was not specified in the Final decree, and as the bond is an encumbrance within the meaning of section 48 of the Act, the right awarded to the defendant is free of all encumbrances.

Held: (1) That section 67 of the Partition Act has not altered the position which prevailed under the former Ordinance viz. that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing or disposing of the interest to be ultimately allotted in the pending action.

(2) That where a party deals with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the final decree is entered; therefore such an interest which vests only upon the entry of the final decree is not contemplated in the term "encumbrance" in section 48 of the Act.

Cases referred to: *Khan Bhai* v. *Perera*, 26 N.L.R. 204
Karunaratne v. *Perera* 67 N.L.R. 529

Nimal Senanayake, for the plaintiff-appellant.

Bala Nadarajah, with *N. J. Abeysekera*, for the defendant-respondent.

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

This is an action for a hypothecary decree upon a mortgage bond by which the defendant had mortgaged to the plaintiff "all my right title interest, claimed demand advantage and disadvantages whatsoever that I would be declared entitled to by virtue of the Final Partition Decree in case No. 13026 of the District Court of Badulla, in, to, from and out of all that and those the contiguous lands called and known as 'Kadewatte' ". The bond was executed after interlocutory decree for partition had been entered in the pending partition action, but before the final decree.

The defendant took two defences. One was that the mortgage was void under s. 67 of the Partition Act (Cap. 69) as having been executed during the pendency of the partition action. This defence was rightly rejected by the learned District Judge. Section 67 has not altered the position which prevailed under the former Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing or disposing of the interest to be ultimately allotted to a party in the pending action (*Khan Bhai* vs. *Perera* 26 N.L.R. 204).

The other defence taken in this case was that (in terms of s. 48 of the Partition Act) the right awarded to the defendant in the partition action is free of all encumbrances and that a mortgage executed in the interval between the entry of the

interlocutory decree and the entry of the final decree is an "encumbrance' 'within the meaning of s. 48. The learned District Judge has upheld this contention and has held that, since the mortgage was not specified in the final decree, the right of the defendant as declared in the final decree is free of this encumbrance.

In *Karunaratne* vs. *Perera* (67 N.L.R. 529) this Court rejected the argument that a donation pending partition of the interests to be allotted to the donor in a partition action will be wiped out by the final decree if the interest donated is not conserved in the final decree. Sansoni, C.J. stated succinctly his opinion:—

> "We are unable to aceept this submission, because we take the view that the interests referred to in s. 48 of the Partition Act are interests which are presently vested in the grantee, and do not include interests which have not already vested even in the grantor. We see no difference in this respect between the provisions of the old Partition Ordinance and the new Partition Act."

I agree entirely with that opinion, but the arguments of Counsel in this appeal render it desirable to state my reasons for so agreeing.

Section 5 of the Partition Act requires the plaintiff in a partition action to include in the action, as parties, all persons who to his knowledge are entitled or claim to be entitled" to any right, share, or interest to, of, or in the land to which the action relates whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, fideicommissum, life interest, or otherwise, or....." Section 12 of the Act provides for the joinder in the action (by an amended plaint) of persons disclosed upon inspection of the land register to be persons who should have been, but were not, joined as parties in the original plaint. Section 19 requires every defendant to disclose the names of every person who to his knowledge has any right share or interest in the land, but who has not been joined as a party. Section 70 permits the Court, at any time before the entry of the interlocutory decree, to join persons as parties to the action.

The provisions of the Act which I have just mentioned afford ample scope for the joinder or intervention of persons who might have interests in the corpus of a partition action, and for the determination or declaration of such interests by the Court; and the justification for the provision in s. 48, which "wipes out" certain interests unless they are specified in the decree, is that by and large those provisions give the holders of such interests adequate means to protect themselves by participation or intervention in the action.

But since intervention is not permissible *after interlocutory decree* has been entered, a person (like the plaintiff in this case) who acquires some interest after that stage cannot intervene in order to have that interest specified in the final decree. And if an interest so acquired must be regarded as an "encumbrance" within the meaning of that term in s. 48 of the Act, the holder of the interest will be quite powerless to prevent the extinction of the interest. I cannot ascribe to the Legislature an intention so harsh and unreasonable.

Where there is a dealing by a party with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the interest is in law allotted to the party, i.e. only at the stage when the final decree is entered; at that stage the lot allotted to the party becomes for the first time subject to the rights arising by virtue of the transaction. Hence I respectfully agree with Sansoni, C.J. that an interest which vests only upon entry of the final decree is not contemplated in the term "encumbrance" in s. 28.

I should add that this construction does not affect the finality of a final partition decree. The law as to the registration of interests affecting land secures that a person like the mortgagee in the present case must duly register his mortgage if it is to prevail against persons who on the faith of the final decree acquire interests from those to whom divided lots are allotted in the final decree.

The appeal is allowed with costs. The District Judge will enter hypothecary decree as prayed for in the plaint.

Sirimane, J.

I agree.

Appeal allowed.

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

HANIFFA & OTHERS *vs.* SELLAMUTHU & OTHERS

S.C. No. 387 (*Final*) of 1966 — *D.C. Kandy* 7742/*L*

Argued on: October 26, 1967.
Decided on: 27th November, 1967.

Landlord and Tenant — Notice to quit — Notice dated 27/8/64 *to quit on or before* 1*st day of December,* 1964 — *Its Validity.*

Held: That a notice dated 27th August, 1964, given by a landlord requiring his tenant to quit the premises on or before the first day of December, 1964, is a valid notice as it must be construed as one to quit at the end of November, 1964 i.e. at midnight on 30th November / 1st December — with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November.

Not Followed: *Ismail* vs. *Sheriff* (1965) 68 N.L.R. 19.
Robert vs. *Fernando* (1967) 69 N.L.R. 572.

Referred to: *Dagger* vs. *Shepherd* (1946) 1 A.E.R. 133
Crate vs. *Miller* (1947) 2 A.E.R. 45
Sibebotham vs. *Holland* (1895) 1 Q.B.D. 378.

S. Sharvananda, for the plaintiffs-appellants;

W. D. Gunasekera, for the defendants-respondents:

T. S. Fernando, A.C.J.

Many legal problems have mushroomed in the wake of the shortage of housing, not the least vexed of which is the question of the validity of the notice to quit which a landlord is required to give his tenant preparatory to the institution of a suit for ejectment. That question, like a bad coin, has the disconcerting habit of cropping up with unwelcome regularity in our courts. Court decisions, unfortunately, have not been uniform in their effect and have left landlords in no little uncertainty as to the terms in which a valid notice to quit to be served on their tenants should be framed. The appeal now before us seeks to question the correctness of a recent decision of this Court in the case of *Ismail* vs. *Sheriff* (1965) 68. N.L.R. 19.

In the case upon which the appeal has arisen, the landlord of a tenancy occupying premises on a month to month tenancy commencing on the first day and ending on the last day of a month, gave to the tenant a notice dated August 27, 1964 requiring him to quit the premises on or before the first day of December 1964. There is no dispute that this notice was received either on the date specified in the notice itself or, in any event, before the end of August 1964. The tenant, however, disputed the validity of the notice; and the issue as to its validity was by agreement of the parties tried as a preliminary issue and decided by the learned trial judge against the landlord. In so deciding, the trial judge correctly felt obliged to follow the decision of this Court in *Ismail* vs. *Sheriff* (*supra*). That case dealt with a monthly tenancy commencing on the first day of a month. where the notice to quit had been given on May 11, 1963 requiring the tenant to quit the premises on July, 1, 1963. The Court there held that the notice to quit was not valid because the requisite month's notice did not terminate at the end of a current month of the tenancy. As Alles J., who sat alone there put it, "the notice had been given before the due date from which it operates, and the notice would run from 1.6.63 until midnight of 30.6.63." He went on, however, to add that "at midnight a new tenancy on the same terms and conditions would have commenced which would expire at midnight on 31.7.63. According to the notice in the present case, a new tenancy was created from midnight on 30.6.63 to midnight on 1.7.63 (a broken period), a tenancy which is not recognised by the Roman-Dutch Law."

A monthly tenancy is a periodic tenancy; it is a tenancy which by agreement between the contracting parties runs from month to month, and

is terminated by a month's notice. The question in *Ismail* vs. *Sheriff* (*supra*) depended on a correct interpretation of so much of the expression in the notice as required the tenant to quit **on July 1, 1963.** With respect, I find myself unable to agree with the view taken by the learned judge who decided that case when he held that "a new tenancy was created from midnight on 30.6.63 to midnight on 1.7.63 — a broken period". The substantial question in all cases of this kind is the intention of the person giving the notice as expressed therein. It appears to me, again with all respect, to have been quite unreal to have attributed to the person giving the notice an intention to create a tenancy for that broken period; nor could it fairly be said that the receiver of the notice could reasonably have so understood it.

Much assistance on the interpretation of this expression, and indeed expressions of like nature is to be gained by a reference to certain authorities to which my brother drew my attention during the argument. While it is essential to the validity of a notice to quit that it should be certain, and that there should be plain unambiguous words claiming to determine the tenancy at a certain time, the Court of Appeal in *Dagger* vs. *Shepherd* (1946) 1 A.E.R. 133, held that the insertion of the words "on or before" a specified date in a notice to quit was, on a proper construction, an offer to the tenant to accept from him a determination of the tenancy on any earlier date than that named on which he would give up possession of the premises. In a later case, *Crate* vs. *Miller* (1947) 2 A.E.R. 45, the same Court quoted with approval a dictum of Lindley L.J., in *Sidebotham* vs. *Holland* (1955) 1 Q.B.D. 378 — that

> "The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

As Somervell L.J. put it (see p. 46), "in other words, a notice to quit on either day could be construed as a notice to quit when the current period in question ended. As a matter of language, a notice "terminating a tenancy" on the last day of a current period (which was the form used in the present case) may, apart from *Sidebotham* vs. *Holland*, fairly be said to mean the same thing as a notice to quit and deliver up possession on the following day, for in both cases the landlord is intimating that the last day of the current period is to be the last day of the tenancy".

I would apply the interpretation adopted in the English cases referred to above, and hold that the notice given by the landlord-appellant on the present appeal was a valid notice to quit at the end of November 1964. i.e. at midnight on 30th November/1st December — with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November. To place any other interpretation would be to defeat the clear expressed intention of the landlord.

Our attention was drawn to another and a more recent decision of this Court in *Robert* vs. *Fernando* (1967) 69 N.L.R. 572, also of a judge sitting alone, which is to the same effect as that in *Ismail* vs. *Sheriff* (*supra*). It was there held that, where a monthly tenancy commenced on the first day of January 1963, and the notice given dated 22nd February 1966 required the tenant to vacate the premises on or before 1st April 1966, the notice was invalid. The Court interpreted the notice as one in which the time of termination was in the alternative, either on 1st April 1966, or before that date. Having so interpreted the notice, the Court went on to hold that as the notice required vacation of the premises before 1st April 1966, the time of termination of the tenancy was uncertain and that the notice was therefore bad. Alternatively, it held that if the notice terminated the tenancy on 1st April 1966, the notice was bad as the termination of tenancy is not at the end of a month. The reasoning contained in the English cases I have quoted above, which I have already said I would apply, renders it necessary that I should now decline, with respect, to follow the ruling in *Robert* vs. *Fernando* (*supra*) as well.

The appeal is allowed, the judgment of 2.7.66 dismissing the plaintiff's action is set aside, and the case is remitted to the District Court for trial to be held on any remaining issues. The plaintiff is entitled to the costs of this appeal and to the costs of the trial date (22.7.66) in the District Court.

Siva Supramaniam, J.

I agree.

Appeal allowed.

Present: **G. P. A. Silva, J. and Siva Supramaniam, J.**

PUNCHI SINGHO *vs.* M/s. BOGALA GRAPHITE LTD.*

S.C. No. 57/66 (*F*) — *D.C. Avissawella No.* 11490/*M*

Argued on: 25th May, 1967.
Decided on: 20th September, 1967.

Res ipsa loquitur — Collision of two lorries — Sudden defect in steering mechanism of one lorry — Onus on owner of such lorry to negative negligence.

This is an action for the recovery of damages caused by the 1st defendant's lorry driven by the 2nd defendant negligently when it collided with the plaintiff's lorry.

The evidence showed that the 1st defendant's lorry driven by the 2nd defendant, swerved to the wrong side of the road and collided with the plaintiff's lorry which was proceeding on its correct side in the opposite direction and caused damage to the front of the lorry. The 2nd defendant promptly informed the driver of the plaintiff's lorry that the steering mechanism of his lorry had got locked and resulted in the accident.

Held: (1) That this evidence established a prima facie case of negligence by the operation of the principle of "*res ipsa loquitur*" and it was for the defendants, not only to give an explanation, but also to negative any want of care.

(2) That the only reasonable course for the 1st defendant is to show that he had exercised reasonable care to ensure the mechanical soundness of the lorry. Until such evidence is produced, the owner would not discharge the onus that lies on him to negative the situation created by the operation of the "*res ipsa loquitur*" doctrine.

Followed: *Cabraal* vs. *Albeyratne* (57 N.L.R. 368).
Not Followed: *Wije Bus Co. Ltd.* vs. *Soysa* (50 N.L.R. 350).
Referred to: *Safeeena Umma* vs. *Siddick* (37 N.L.R. 25).

Ralph de Silva, for the appellant.

K. Kanthasamy, for the respondents.

G. P. A. Silva, J.

The plaintiff respondent in this case brought this action against the 1st defendant appellant and the 2nd defendant respondent for the recovery of a certain sum being the cost of the damage caused to his lorry as a result of a collision between his lorry and a lorry belonging to the 1st defendant and driven by the 2nd defendant at the time of the impact. The allegation of the plaintiff was that the collision was due to the negligence of the 2nd defendant in that he

(*a*) drove his vehicle without a proper look out and/or

(*b*) drove his vehicle without due care or precaution and/or

(*c*) failed to keep to the left or near side of the road and/or

(*d*) failed to stop on seeing the lorry belonging to the plaintiff.

The defendants in their answer denied these allegations and further stated that the collision was due to an inevitable accident. Several issues were raised of which the material ones were:

(1) Was the said collision an inevitable accident in that the steering lock of the lorry driven by the 2nd defendant suddenly and unexpectedly, gave way,

(2) If so, is the 1st defendant liable,

(3) Was the failure of the steering mechanism due to the negligence of the 1st defendant and/or the 2nd defendant.

The learned District Judge answered issue (1) in the negative as a result of which the answer to issue (2) did not arise. He also answered issue (3) in the folowing terms. "The failure of the steering mechanism was due to the negligence of the 1st defendant" and awarded damages to the plaintiff in a sum of Rs. 1,587/05.

*For Sinhala translation, see Sinhala section, Vol. 15 part 2 p. 7

Although several grounds were set out in the petition of appeal, the only one which was seriously argued was that the learned District Judge was in error in holding that the failure of the steering mechanism was due to the negligence of the 1st defendant in not having taken the necessary precautions for the avoidance of the defect in the steering mechanism which caused the accident. The decision taken by the District Judge revolves round the question, to what extent the owner of a mechanically driven vehicle is liable for a defect in the mechanism.

The facts relevant to this question were not seriously contested and, it was shown that the 1st defendant's lorry driven by the 2nd defendant, swerved to the wrong side of the road and collided with the plaintiff's lorry which was proceeding on its correct side in the opposite direction and caused damage to the right front mud guard lights and buffer of that lorry. The 2nd defendant promptly informed the driver of the plaintiff's lorry that the steering mechanism of his lorry had got locked and resulted in the accident. The evidence for the plaintiff therefore established a *prima facie* case of negligence by the operation of the principle of '*res ipsa loquitur*' and it was for the defendants to discharge the burden attaching to them. The learned District Judge took the view that the 1st defendant had not discharged the burden placed on him and entered judgment for the plaintiff.

The question raised is one which has received consideration by courts both here and in England from time to time and several cases were cited during the argument. In *Safeena Umma* vs. *Siddick*, 37 N.L.R. 25, where it was proved that a bus, which was driven along the road at a fast speed, suddenly left the road and knocked down a boy standing on the doorstep of a house it was held by Dalton, J. that the facts proved constituted, in the absence of an explanation, a *prima facie* case of negligence. He cited with approval the following passage from a judgment of Erle, C.J. in *Scott* vs. *London & St. Katherine Docks Company* (3 H & C 593):—

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care."

The principle enunciated in this passage has generally been followed in subsequent cases.

A somewhat different view was taken by Windham, J. in the case of *Wije Bus Co., Ltd.*, vs. *Soysa*, 50 N.L.R. 350. In that case, a passenger of a motor bus, which went off the road and overturned upon impact with a culvert claimed damages for injuries caused to him by reason of negligence of the driver of the bus. The driver gave evidence that the accident was due to the steering lock giving way when he was about 20 feet from the culvert which caused the bus to overturn. The District Judge, while accepting this evidence, held following the judgment in *Safeena Umma* vs. *Siddick*, that the defendant company was liable in damages as it had not proved that the defect in the steering could not have been reasonably foreseen and remedied. In appeal however, it was held by Windham, J. with whom Dias, J. agreed that, although the maxim '*res ipsa loquitur*' applied in that case in the absence of an explanation, it was not necessary for the defendants to go so far as to prove the absence of negligence on their part, but that it was sufficient if they were able to give an explanation of the accident which would negative the presumption of negligence, which the unexplained accident had raised. Windham, J. sought support for his decision from two South African cases which are referred to in the judgment.

This judgment however was not followed by K. D. de Silva, J. in the case of *Cabraal* vs. *Alberatne*, 57 N.L.R. 368 when it was held, following the earlier case of *Safeena Umma* vs. *Siddick*, that where the doctrine of '*res ipsa loquitur*' was applicable the burden on the defendant was not only to give a reasonable explanation of the accident in question but also to show that the specific cause of the accident did not connote negligence on his part.

The facts of the *Safeena Umma case* bear some similarity to those of the instant case in that the defence in that case too was that the steering gear broke and Dalton, J. expressed the view that a bald statement of that nature by a witness for the defendants did not discharge their onus or show that there was no want of care on their part. In the instant case too all the evidence that the defendant produced was through the Works Manager of Rowlands Ltd., who stated that in his experience he had sometimes come across cases where the steering had got locked due to a latent defect and that the vehicle could not be straightened when it happened. In answer to Court however he stated further that the company did not examine the mechanism to see why the steering got locked. This evidence without more does not in my opinion discharge the onus

of the first defendant to show that he had exercised all the care or, for a matter of that, any care at all, to see that the vehicle was in good condition. If it is sufficient for a defendant merely to show that any particular accident was due to a mechanical defect, there would be hardly any scope for the application of the principle which imposes an obligation on those who have the management of a vehicle to use proper care against possible mechanical defects. This principle has endured so long because of its eminent reasonableness. Else it would hardly even be possible for a plaintiff to succeed in an action unless he had intimate knowledge of a defendant putting on the road a vehicle known to be defective in its mechanism. Nor will any user of a vehicle be obliged to have a periodical check of his vehicle for mechanical defects. When a case, in which the doctrine of *res ipsa loquitur* operates, occurs therefore I think that a defendant is obliged to satisfy the court that he did cause periodical checks and had necessary repairs attended to and did everything in his power to eliminate mechanical unsoundness. In the absence of such evidence he would not, in my view, have discharged his burden.

It seems to me that the view of Windham J., which derived support from the South African cases, is tantamount to a pronouncement that all that a defendant who has to counter the doctrine of '*res ipsa loquitur*' has to do is to point to the actual or probable reason for the accident as being a mechanical defect and that thereafter the plaintiff reverts to the original position of having to prove actual negligence. With great respect, this is a view with which I find it difficult to agree.

When one analyses the question, one is compelled as a starting point to proceed from the basis that a person who puts on the road a mechanically propelled vehicle has an initial duty to exercise sufficient care to see that such mechanical defects as would constitute a danger to other users of the road are avoided. Among such mechanical defects would be the steering gear and the braking system, the efficiency of which are of primary importance for the safety of other users of the road. As to whether sufficient care has been exercised in this regard is a matter within the peculiar knowledge of the owner of the vehicle and not of the person who has been the victim of an accident. It would therefore seem unreasonable to require from the latter the necessary evidence to prove that sufficient care was not exercised by the owner of the vehicle. The only reasonable course is for the owner of the vehicle which caused the damages to show that he had exercised reasonable care to ensure its mechanical soundness. Until such evidence is produced, the owner would not, in my judgment, discharge the onus that lies on him to negative the situation created by the operation of the '*res ipsa loquitur*' doctrine. If a defendant does not choose to adopt such course it is reasonale to presume that he does not do so as the necessary evidence of the exercise of proper care is not available to be produced.

These are the reasons which compel me to agree with the views expressed by K. D. de Silva, J. which are also in full accord with the pronouncement made by Erle, C.J. in *Scott* vs. *London & St. Katherine Docks Company* referred to in the earlier part of this judgment. I accordingly hold that the learned District Judge rightly arrived at the conclusion he did.

The appeal is dismissed with costs.

Siva Supramaniam, J.

I agree.

Appeal dismissed.

Present: **Alles, J. and Samerawickrame, J.**

THE TOWN COUNCIL OF MATUGAMA *vs.* S. PIYASENA

S.C. 5/66 (*F*) — *D.C. Kalutara* 760/*MR*

Argued on: 8th October, 1967
Decided on: 15th October, 1967

Civil Procedure — Claim in reconvention — Default of appearance of defendant on date of trial — Decree nisi entered re claim — No decree nisi entered re claim in reconvention — Order thereafter made nunc pro tunc *re claim in reconvention — Limits of power of Court to make such orders — Duties of opposite party — Civil Procedure Code, Sections* 84, 86.

In this case the defendant had, in his answer, made a claim in reconvention. On the trial date (4/12/64) neither the defendant nor his proctor was present. On the application of Counsel for the plaintiff, judgment was entered for the plaintiff

and the decree *nisi* was entered and served on the defendant. The defendant attempted to show cause for the default of appearance. At the inquiry, Counsel for the defendant pointed out that no order had been made in respect of the claim in reconvention and asked that that claim be fixed for trial.

While holding that the defendant had not satisfied him of reasonable grounds for default of appearance and making the decree *nisi* absolute in terms of section 86 of the Civil Procedure Code, the District Judge stated: "Acting under section 84 of the Civil Procedure Code, I do now what should have been done by me then on the date of trial, viz. 4.12.64. I, therefore, enter decree *nisi* dismissing the claim in reconvention for default of appearance of the defendant, who is in the position of a plaintiff.

Held: (1) That the order entering decree *nisi* dismissing the claim in reconvention was wrong. Although on rare occasions a Court may make orders *nunc pro tunc*, this is generally done when otherwise prejudice would be suffered by a party by reason of the default or delay on the part of the Court. In this case on the date of trial, the plaintiff, although it was open to him under section 84, to apply to the Court for a decree *nisi* to be entered, had failed to do so.

(2) That the decree *nisi* dismissing the claim in reconvention should, therefore, be set aside, and the claim in reconvention should now be fixed for trial inter partes.

E. R. S. R. Coomaraswany, with *Miss V. S. Lenaduwa*, for the defendant-appellant.

J. W. Subasinghe, with *Tivanka Wickremasinghe*, for the plaintiff-respondent.

Samerawickrame, J.

The plaintiff brought this action alleging that the defendant had wrongfully and without cause cancelled the lease of a rubber land granted to him and had taken over possession of the said rubber land. He claimed the recovery of a sum of Rs. 4,080/-. as the aggregate of security tendered and consideration paid at the execution of the lease and a sum of Rs. 3,000/-. as damages suffered by him by reason of a wrongful and unlawful cancellation of the lease.

The defendant filed answer denying the allegations in the plaint and further made a claim in reconvention in a sum of Rs. 5,000/- as damages sustained by the Defendant-Council, in consequence of the plaintiff committing one or more of the unlawful acts set out in paragraph 6 of the answer.

On 4.12.64, which was a trial date, neither the defendant nor his Proctor was present and on the application of Counsel for the plaintiff, the learned Judge entered judgment for a sum of Rs. 7,080/- in favour of the plaintiff and directed a decree *nisi* in terms of the judgment to be entered. After service of the decree *nisi* on the Defendant-Council, Defendant-Council showed cause and endeavoured to satisfy the Court that it had reasonable grounds for default of appearance. In the course of the argument, Counsel for the Defendant-Council pointed out that no order had been made in respect of the defendant's claim in reconvention and asked that the claim in reconvention be fixed for trial.

In his order, the learned Judge held that the defendant had not satisfied him that there had been reasonable ground for default of appearance and he made the decree absolute in terms of Section 86 of the Civil Procedure Code. In regard to the defendant's claim in reconvention, the learned Judge stated' "Acting under Section 84 of the Civil Procedure Code, I do now what should have been done by me then on the date of trial, viz. 4.12.64. I therefore enter decree *nisi* dismissing the claim in reconvention for default of appearance of the defendant, who is in the position of a plaintiff".

The defendant has appealed against the said order of the learned Judge. Mr. Subasinghe appearing for the plaintiff-respondent took a preliminary objection that an order *nisi* for default of appearance, which has been made absolute, is an order from which no appeal lies. Learned counsel for the defendant-appellant submitted that in any event, the order made by the learned District Judge in respect of his claim in reconvention was wrong and that it should be set aside and that the claim in reconvention should now be fixed for trial. The learned Judge has purported to make an order *nunc pro tunc*. It is no doubt possible on rare occasions for a Court to make such orders but it is generally done when otherwise prejudice will be suffered by a party by reason of default or delay on the part of the Court. Under Section 84 of the Civil Procedure Code, the Court could enter a decree *nisi* dismissing a claim only if the opposite party is present and does not admit the claim and does not agree to a postponement of the trial. It is always open to

such opposite party to apply to this Court for a decree *nisi* to be entered. On 4.12.64 the plaintiff was present in Court and was represented by Counsel and the only application that was made was for judgment on the claim of the plaintiff in his plaint. The last sentence of the plaintiff's evidence at the *ex parte* trial was, "I ask for judgment in a sum of Rs. 4,080/- being consideration and security tendered and Rs. 3,000/- as damages".

In these circumstances, I do not think that there was here an occasion on which a Court should enter an order *nunc pro tunc*.

I set aside that part of the order of the learned Judge which directs that a decree *nisi* should be entered dismissing the claim in reconvention and I direct that the claim in reconvention should now be set down for hearing at a trial inter-partes in due course according to law. The order of the learned District Judge making absolute under Section 86 of the Civil Procedure Code decree *nisi* entering judgment in favour of the plaintiff for a sum of Rs. 7,080/- and costs is affirmed. The plaintiff-respondent will be entitled to half costs of appeal.

Alles, J.

I agree.

Order absolute affirmed.

Decree nisi dismissing claim in reconvention set aside and sent back.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Present: **Samerawickrame, J. and Tennekoon, J.**

PREMARATNE *vs.* DIAS ABEYSINGHE, COMMISSIONER OF ELECTIONS & ANOTHER

Application No. 162/67
In the matter of an application for a Mandate in the nature of a Writ of Mandamus in terms of section 42 *of the Courts Ordinance.*

Argued on: 4th & 5th September, 1967.
Decided on: 12th October, 1967.

Village Council — General Election — Extension of term of office of existing Council — Effect on elections already held — Order by the Minister declaring void all steps taken to hold the General Elections — Legality of such Order — Local Authorities Elections Ordinance, sections, 25, 26, 36, 84 — *Village Councils Ordinance, sections* 11, 12 — *Local Authorities (Terms of Office) Act No.* 2 *of* 1967, *section* 3 — *Interpretation Ordinance, section* 6.

On February 14, 1967, the 2nd Respondent gave notice of his intention to hold a general election for the purpose of electing members to represent the wards of the Kandupalata Village Council and fixed March 1st 1967 as the date for receiving the nomination papers of the candidates. On nomination day, the Petitioner being the only candidate duly nominated for election to Ward 15, he was declared by the 2nd Respondent to be elected as member for the said ward.

On March 5th 1967, the Minister of Local Government, purporting to act under Section 11 of the Village Councils Ordinance and Section 84 of the Local Authorities Elections Ordinance, by Order published in the Gazette, *inter alia*, extended by one year the life of every Village Council whose term of office was due to expire on June 20th 1967, and declared void all steps already taken for the purpose of holding general elections in respect of the said Village Councils.

The Petitioner, by his letters dated March 19th 1967, requested the 1st and 2nd Respondents to comply with the provisions of Section 36 of the Local Authorities Elections Ordinance which required the publication "forthwith" in the Gazette of the result of the election. The 1st Respondent replied by his letter of March 23rd 1967 that, in view of the Minister's Order of March 5th 1967, the Petitioner's election stood "cancelled and annulled". On the same day, the Royal Assent was placed upon the Local Authorities (Terms of Office) Act No. No. 2 of 1967 which, *inter alia*, extended the period of office of Village Councils from three to four years. The provisions of this Act were made applicable to existing councils as well.

On April 26th 1967, the Petitioner applied to the Supreme Court for a mandate in the nature of a Writ of Mandamus directing the 1st and 2nd Respondent to comply with the provisions of Section 36 of the Local Authorities Elections Ordinance and cause the result of his election to be published in the Gazette.

Held: (1) That the Order of March 5th 1967 made by the Minister of Local Government declaring void all steps taken for the holding of a general election was *ultra vires* the powers of the Minister.

Per **Tennekoon, J.** — "Nothing unforeseen or special arose in connection with the 1967 general election for Kandupalata Village Council which rendered it necessary, by reason of the absence or inadequacy of provisions in the Ordinance, for the Minister to act under section 84. The powers given to the Minister under this section in relation to general and by-elections are for the purpose of enabling a particular general or a by-election to be carried through to a successful conclusion despite the lack of statutory provision to enable that to be done and despite the emergence of unforeseen or special circumstances which make the existing statutory provisions inadequate for that purpose. The section is not intended and cannot be construed to give the Minister power to declare any general or by-election already held or any staturoy steps already taken towards the holding of a general or by-election to be void. Delegated powers of this nature cannot in the absence of express provision to that effect, be used retroactively."

(2) That the effect of the Local Authorities (Terms of Office) Act No. 2 of 1967 was:—

(*a*) that the term of office of the Kandupalata Village Council was due to expire not on June 30th 1967, but on June 30th 1968, and the term of office of the successor Council was to commence not on July 1st 1967, but on July 1st 1968;

(*b*) that there was no Council whose term of office was due to commence on July 1st 1967;

(*c*) that consequently, the general election which commenced in Feburary 1967 to elect members to assume office on July 1st 1967 was rendered abortive.

(3) That the principles of interpretation set out in Sections 6(3) (b) and 6(3)(c) of the Interpretation Ordinance have no application to the present case inasmuch as:—

(*a*) Act No. 2 of 1967 repealed not that provision of written law under which the petitioner was elected, but a provision of a different law, namely, section 11(2) of the Village Councils Ordinance;

(*b*) the words "any action, proceeding or thing" occuring in section 6(3)(c) must necessarily be understood to mean an action, proceeding or thing commenced under the repealed written law.

Per **Tennekoon J.** — "To be 'express provision' with regard to something, it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it, so long as the applicability arises directly from the language used and not by inference therefrom."

Case referred to: *Shanmugam* v. *Commissioner for Registration of Indian and Pakistani Residents* (1964) N.L.R. at 33.

Nihal Jayawickrema, with *S. S. Wijeratne*, for the petitioner.

M. Kanagasunderam, Crown Counsel for the respondents.

Tennekoon, J.

By his petition filed in this court on the 30th of April 1967, the petitioner seeks a Mandate in the nature of a Writ of Mandamus directing the respondent to comply with the provisions of section 36 of the Local Authorities Elections Ordinance and to cause the result of an election held in respect of Ward No. 15 (Doluwa) of the Kandupalata Village Council to be published in the Government Gazette.

The circumstances in which the application is made are as follows:—

On the 14th of February 1967 the Assistant Elections Officer Kandy (the 2nd respondent) gave notice of his intention to hold a general election for the purpose of electing members to represent the wards of the Kandupalata Village Council and fixed the 1st of March 1967 as the date for the receiving of nomination papers of candidates. This step was taken by the 2nd respondent for the reason that under section 11(2) of the Village Councils Ordinance as it then stood the term of office each member of the existing council (and so also of the council itself) was due to expire on the 30th of June 1967; and section 25(1)(b) of the Local Authorities Elections Ordinance (Chapter 262) in such a situation required a general election to be held "within the period of five months preceding the date on which the term of office of the members who are to be elected is due to commence". On nomination day i.e. 1st March 1967, the petitioner being the only candidate duly nominated for election to ward No. 15 was declared by the 2nd respondent (functioning as returning officer) to be elected as

Member for the said ward. Section 36 of the Local Authorities Elections Ordinance (hereinafter to be briefly referred to as the 'Elections Ordinance') provides that in such an eventuality the returning officer, after declaring the candidate elected —

"shall report the result of the election through the Elections Officer of the District ..... to the Commissioner, and upon the receipt of the report, the Commissioner shall forthwith cause a notice of the result to be published in the Gazette and in such other manner as may appear to him to be best calculated to give publicity thereto."

Before, however, there could be compliance with this requirement of law an order was made on the 5th of March 1967 by the Minister of Local Government purporting to act under section 11 of the Village Councils Ordinance and section 84 of the Eections Ordinance. This order (marked R1) was published in the Gazette and is reproduced below:

"THE VILLAGE COUNCILS ORDINANCE AND THE LOCAL AUTHORITIES ELECTIONS ORDINANCE

ORDER made by the Minister of Local Government by virtue of the powers vested in him by section 11 of the Village Councils Ordinance (Chapter 257). and section 84 of the Local Authorities Elections Ordinance (Chapter 262).

M. Tiruchelvam
Minister of Local Government
Colombo, March 5, 1967.

1. The term of office of the members of every Village Council whose term of office is due to expire on June 30, 1967, is hereby extended up to June 30, 1968.

2. All steps heretofore taken under the Local Authorities Elections Ordinance (Chapter 262), for the purpose of holding on or before June 30, 1967, a general election of the members of any Village Council referred to in paragraph 1 shall be, and shall at all times be deemed to have been, void and of no effect whatsoever.

3. No further steps shall be taken under the Local Authorities Elections Ordinance for the purpose of holding on or before June 30, 1967, a general election of the members of any Village Council referred to in paragraph 1.
3-586/4"

The respondents thereupon abandoned the general elections that were being held in respect of all Village Councils to which the Order applied, and in particular, no steps were taken to comply with the provisions of section 36 of the Elections Ordinance in relation to the Election held for ward No. 15 of the Kandupalata Village Council. Upon the petitioner demanding compliance with those provisions he was informed by the Commissioner of Elections on the 23rd of March 1967 that the life of the existing council had been extended up to 30th June 1968 and that all steps taken to elect now Council had been cancelled and annulled by the Minister's Order and further that a fresh general election for the election of Members to take Office as from 1st July 1968 would be held in due course in 1968 i.e. presumably within the five months immediately preceding the 1st of July 1968.

At about this time there was enacted a law (assented to on the 23rd of March 1967) entitled the Local Authorities (Terms of Office) Act No. 2 of 1967. This law, in the main, amended the various provisions relating to terms of office contained in enactments relating to Municipal Councils, Urban Councils, Town Councils and Village Councils. In regard to Village Councils, subsection (2) of section 11 of the Village Councils Ordinance was amended making the period of office of a Village Council *four years* in place of the existing three years. This amendment would perhaps not have applied to existing councils unless there was express provision to that effect and accordingly we find section 3(1) of the new Act saying:

"For the removal of doubts it is hereby declared that the Ordinances amended by this Act shall, as so amended apply to all local authorities notwithstanding that the term of office of the members of any such authority has commenced but has not expired on the date of the commencement of this Act."

The effect of the new law — and there is no controversy on this aspect of the matter — was that the term of office of the Kandupalata Village Council was due to expire (even if the Minister's Order R1 did not already have that effect), not on the 30th of June 1967 but on the 30th of June 1968, and the term of office of the successor council was to commence not on 1st July 1967 but on 1st July 1968.

It was submitted by Counsel for the petitioner that the Minister had no power to extend the life of the existing council as he sought to do by his Order R1 once a general election was on foot. It is unnecessary to consider this submission in view of the fact that the term of office of the Kandupalata Village Council goes on till 30th June 1968 by virtue of the amendments of law introduced by the provisions of Act No. 2 of 1967 and the validity or otherwise of the Minister's extension of the life of the council becomes irrelevant.

The next submission made for the petitioner was that, even accepting, as indeed he must, that the term of office of the present council expires on 30th June 1968 the Minister's avoidance by P1 of all steps taken for the holding of a general election, is *ultra vires* his powers. Counsel for the respondents quite rightly did not seek to justify this part of the Minister's Order. Nothing unforeseen or special arose *in connection with the 1967 general elections for Kandupalata Village Council* which rendered it necessary, by reason of the absence or inadequacy of provisions in the Ordinance, for the Minister to act under section 84. The powers given to the Minister under this section in relation to general and by-elections are for the purpose of enabling a particular general or a by-election to be carried through to a successful conclusion despite the lack of statutory provision to enable that to be done and despite the emergence of unforseen or special circumstances which make the existing statutory provisions inadequate for the purpose. The action is not intended and cannot be construed to give the Minister power to declare any general or by-election already held or any statutory steps already taken towards the holding of a general or by-election to be void. Delegated powers of this nature cannot in the absence of express provision to that effect, be used retroactively.

It was further submitted that the resulting position is that the petitioner having been declared elected on the 1st of March there is nothing of legal force either in the Order R1 or in the Local Authorities (Terms of Office) Act No. 2 of 1967 to absolve the respondents from complying with the provisions of section 36 of the Elections Ordinance.

Section 12 of the Village Councils Ordinance Chapter 257 (as subsequently amended) requires that: "where the term of office of the members elected at the first or any subsequent general election is due to expire under section 11, a general election in accordance with the provisions of written law for the time being applicable in that behalf shall be held for the purpose of electing new members in place of such members". The written law aplicable would be the Elections Ordinance, which in section 25(1)(b). as already stated, requires such general election to be held within the period of five months preceding the date on which the term of office of the members who are to be elected is due to commence.

Prior to the enactment of Act No. 2 of 1967 (and ignoring for the purposes of this part of my judgment the Minister's Order R1 extending the life of the Council till 30th June 1968), the term of office of the members elected at the immediately preceding general election was due to expire, in terms of section 11(2) of the Village Councils Ordinance, on 30th June 1967; and if there had been a general election held and completed prior to that date in 1967, the terms of office of the new members and the new Council would have been due to commence on the 1st of July 1967 in terms of section 11(1)(b). unless there was an Order by the Minister appointing a different date. Council for the petitioner at one stage tentatively submitted that the Minister's Order R1 could be read as *impliedly* appointing the 1st of July 1968 as the date for the commencement of office of members elected at the general election in which the petitioner was declared elected for Ward 15. Having regard to the fact that even the *express provisions* of R1 in regard to the extension of the term of office of the Council have been superseded by the provisions of act No. 2 of 1967, Counsel abandoned any endeavours to give substance only to *the implications* of R1. The position after the enactment of Act No. 2 of 1967 amending as it did section 11(2) of the Village Councils Ordinance, is that the terms of office of the existing councillors were due to expire not on 30th June 1967 but on 30th June 1968, It follows as a necessary implication of law (and independently of any implication in the order of the Minister) that the term of office of the next body of councillors is due to commence on 1st July 1968. It was then submitted by Counsel for the petitioner that even so there was nothing to prevent the general election that had commenced in February 1967 being carried through to a conclusion; and that the petitioner and others elected would then assume office not on 1st July 1967 but on the new date that has resulted from the operation by section 11(2) as amended by Act No. 2 of 1967 i.e. on 1st July 1968.

Crown Counsel appearing for the respondents submits that this contention ignores the fact that in terms of section 25(1)(b) of the Elections Ordinance a general election for a body of councillors to assume office on 1st July 1968 can only be held after 1st February 1968 and consequently any members elected in 1967 cannot sit in a council whose term of office is due to commence on 1st July 1968. He also contends that if petitioner's contention is correct, the petitioner's term of office would under section 11(1)(b) of the Village Councils Ordinance commence on 1st July 1967 with the result that there would be two rival members with the right to represent the same Ward; indeed there would be two Village Councils for Kandupalata during the period 1st July 1967 and 30th June 1968. This is so much of an absurdity that one is driven to the conclusion that it is a necessary implication of the provisions of Act No. 2 of 1962 that any general elections for any local authorities in progress at the date of the enactment were to be discontinued and abandoned. Indeed Crown Counsel stated from the bar, and Counsel for the petitioner accepted the statement as correct, that all general elections to local authorities in which a new term was to commence on 1st July 1967 were in fact abandoned and none carried through to a conclusion. The legislature, in enacting the amendment to section 11(2) of the Village Councils Ordinance must, having regard to the background in which it was legislating, be taken to have intended that there would necessarily have to be general elections to elect councillors to take office on 1st July 1968 and that such general elections would, in terms of section 12 of the Village Councils Ordinance read with section 26(1)(b) of the Elections Ordinance, have to be held within the period 1st February 1968 and 30th June 1968; if it was intended that the general elections which were being held in 1967 were to be deemed in law to be due and valid general elections (notwithstanding anything in esction 25(1)(b) of the Elections Ordinance) for the election of members of Village Council whose term was due to commence on 1*st July* 1968, express provision would have been necessary.

Counsel for the petitioner however argues that the general elections which were incomplete at the time of the enactment of Act No. 2 of 1967 must, in the absence of express provision to the contrary, be carried on and completed. This submission is founded on paragraphs (b) and (c) of section 6(3) of the Interpretation Ordinance Chapter 2) which are to the following effect:

"Whenever any written law repeals either in whole or in part a former written law such repeal shall not *in the absence of any express provision to that effect* affect or be deemed to have affected —

(*a*) .....

(*b*) any offence committed, any right, liberty, or penalty acquired or incurred *under the repealed written* law;

(*c*) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

I have underlined certain portions of the section which I wish to stress.

It is settled law that "express provision" contemplated in this section, is 'provision the applicability of which does not arise by inference — *Shanmugam* vs. *Commissioner for Registration of Indian and Pakistani Residents* 64 N.L.R. at 33. It is accordingly submitted that there being no express provision, the repeal of the words "3rd year" in section 11(2)(b) of the Election Ordinance and the substitution of the words "4th year" cannot *by inference* be said to have had any effect on any rights acquired by the petitioner at the time of the enactment of Act No. 2 of 1967 and on the elections that were being held in 1967. This submission ignores the fact that the repeal is not one that has been made in those provisions of written law under which the general election was being held, but in a different law viz. section 11(2) of the Village Council's Ordinance. If there was any right acquired or rather any liability incurred under the repealed section it was the liability of Members of the existing Council to vacate office on the 30th of June 1967. As mentioned earlier there is express provision in section 3(1) of the amending Act No. 2 of 1967 making the amendment retroactive as so to make the term of office of existing councillors go on until 30th June 1968. If there was any right acquired by the

petitioner, it was a right to serve in a Council whose term of office was to commence on the 1st of July 1967; but that is the very thing with which the amending law directly deals with. As was said by Lord Radcliffe in *Shanmugam's case*: "to be 'express provision' with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference therefrom." The direct effect of the amending Act No. 2 of 1967 is to remove from contemplation of the law any new Village Council for Kandupalata with its term commencing on 1st July 1967. There is thus nothing in paragraph (b) of section 6(3) of the Interpretation Ordinance that can help the petitioner. It is then necessary to consider whether paragraph (c) helps him. It seems to me that the words "any action proceeding or thing" occurring in section 6(3)(c) must necessarily be understood as meaning any action proceeding or thing commenced under the repealed written law; the general election for the Kandupalata Village Council not having been commenced under any section or group of sections touched by the amending law, the principle of interpretation set out in section 6(3)(v) can have no application in the present case. We do not have here a case of the repeal of provisions relating to the *procedure in holding a general election*. Act No. 2 of 1967 only repeals a provision relating to the term of office of a Village Council. It is therefore, in my opinion, possible, without any transgression of the principle contained in section 6(3)(c) of the Interpretation Ordinance, to give effect to the necessary impact upon pending general elections that arises by inference from the amendment to section 11(2) of the Village Councils Ordinance.

The Elections Ordinance is one that is intimately bound up with the Village Councils Ordinance and indeed with all the Ordinances and Acts constituting various types of local authorities; but its provisions are ancillary and dependent. If Village Councils are by a repeal of the Village Councils Ordinance abolished with effect from a certain date and a new type of authority set up for the administration of such village areas as were served by Village Councils, it can hardly be contended that any pending elections, for the election of members to a Village Council to take office on a date which is after the date of the abolition of Village Councils, must in terms of section 6(1)(c) of the Interpretation Ordinance, be carried on and completed as if there were no abolition of Village Councils from the effective date. Having regard to the express provision in section 3(1) of Act No. 2 of 1967 making the amendment retroactive the position was that upon the enactment of that Act, there was no Council whose term was due to commence on 1st July 1967. It is important to observe that, but for the provision in section 3(1) an argument that the amendment would not apply to the terms of office of existing Councils and that therefore the general elections should be carried through to a conclusion would have been irresistible. Equally irresistible inferences from what has actually been done by the new law are (1) that a general election for Kandupalata Council *must be held during the period* 1*st February* 1968 *to* 30*th June* 1968 *in order to elect members whose term is due to commence on* 1*st July* 1968, and (ii) that the general election which commenced in February 1967 to elect members to assume office on 1st July 1967 is rendered abortive and need not be carried on and completed because there is no Council in the contemplation of the law due to take office on such date.

I would accordingly hold that the respondents are under no duty to comply with any of the provisions of the Elections Ordinance for the purpose of concluding the general election that commenced in February 1967 in relation to the Kandupalata Village Council; in particular they are under no legal duty to publish the petitioner's name in the Gazette as having been elected at such general election for Ward No. 15 (Doluwa) of the Kandupalata Village Council.

The application is accordingly dismissed with costs.

Samerawickrame, J.

I agree.

Application dismissed.

Present: **T. S. Fernando, A.C.J. and Alles, J.**

PERERA & THREE OTHERS *vs.* FERNANDO & THREE OTHERS

S.C. Case No. 142/1966 *(F) — D.C. Negombo Case No.* 888/*L*

Argued on: 21st November, 1967.
Decided on: 29th November, 1967.

Servitude, of washing clothes — Action for declaration that plaintiff's paddy field is free of right to wash clothes — Claim by defendants as a personal servitude — Is it available to defendants — Roman Dutch Law.

The plaintiff in this action, prayed for a declaration that his paddy field was free of any right in the defendants, who were dhobies, to wash their clothes. The defendant claimed a right to wash clothes at the water hole on the 'plaintiff's said paddy field basing it on a long standing practice or custom and maintaining that it falls within the ambit of a personal servitude known to the Roman Dutch Law as Usus.

The trial Judge held that the water hole in question had been used by the defendants and their forefathers to wash clothes for several years beyond the prescriptive period, and therefore the defendants were entitled to the servitude claimed by them.

Held: (1) That the learned trial Judge has erred in equating the personal servitude claimed in this case to rural praedial servitudes enumerated by Voet, such as 'the right of pressing grapes or threshing corn or pulse on another's land.'

(2) That the claim to the servitude of Usus is the right of using the property of others for daily needs without *detriment to the substance of the property.*

(3) That this servitude should only be recognised when there is clear evidence that the essential conditions necessary to establish the servitude have been proved.

(4) That as the plaintiff's unchallenged evidence that 'if clothes are allowed to be washed in the field he will not be able to work the fields because the fields will be polluted" shows that his fear is a legitimate one, and one that is not unlikely the defendants have failed to establish one of the essential elements necessary to claim the servitude.

H. W. Jayawardene, Q.C., with *S. D. P. Valentine* and *I. S. de Silva,* for the plaintiffs-appellants.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera,* for the defendants-respondents.

Alles, J.

In this action, the defendants, who are dhobies by occupation, successfully obtained a declaration from the District Court that they were entitled to the right to wash clothes in a portion of the paddy field belonging to the first plaintiff and depicted as Lot A in the plan attached to the plaint. In spite of the plaintiff's persistent assertions that the water hole in his paddy field was not used by the dhobies in the neighbourhood for the purpose of washing clothes, there is a finding of fact against the plaintiff and the trial Judge has held that the water hole in question had been so used by the defendants and their forefathers for several years beyond the prescriptive period. On 25.10.64, the plaintiff closed the water hole, planted paddy in the area so covered and sought a declaration from Court in this case that his paddy land was free of any right in the defendants to wash their clothes.

The question that has been argued in this appeal is whether the trial Judge came to a correct conclusion when he held that a servitude of the nature claimed by the defendants was one that was recognised in law. Counsel for the defendants-respondents sought to bring this claim within the ambit of the personal servitudes known as Usus. According to Walter Pereira, (Laws of Ceylon, p. 507), Usus "consists, in reference to land, in the occupation of the same without hindrance from the owner or his workmen, and in the right to take fruits, vegetables, flowers, hay, and wood for daily consumption" and also includes such rights as the right of grazing on common land, and also the right of fishing in another's water. On a parity of reasoning, counsel sought to claim the prescriptive right to wash clothes on another's land.

The learned trial Judge in the course of his judgment sought to equate the right to wash clothes on another's land to such servitudes recognised by Voet as 'the right of pressing grapes or threshing corn or pulse on another's land.' In doing so the Judge has fallen into error because the kind of servitudes enumerated by Voet are rural praedial servitudes, which normally attach

to land and have no analogy to the personal servitude claimed in this case. It is on the basis of a rural praedial servitude that Dalton, J. in *Tikiri Appu* vs. *Dingirala* (1934) 36 N.L.R. 267 at 268 recognised the right of a person to thresh his paddy on the threshing floor of another's land. In *Fernando* vs. *Fernando* (1911) 14 N.L.R. 166, which was a possessory action instituted by members of the dhoby community residing at Polwatte claiming a right to possess the land for the purpose of drying clothes, there was an alternative claim to a servitude of drying clothes on the land of another but Hutchinson, C.J. held that no such servitude was known to the Roman Dutch Law. The case of *Fernando* vs. *Fernando* was considered by Shaw, J. in *Kawrala* vs. *Kirihamy and another* (1917) 4 C.W.R. 187. In the latter case the plaintiff successfully claimed the right of threshing paddy on the threshing floor of a neighbouring owner as appurtenant to the plaintiff's field, and Shaw, J. held that such an easement was one that was recognised under the Roman Dutch Law. Dealing with the claim of the dhobies in *Fernando* vs. *Fernando*, Shaw, J. stated:

> "This is not a claim for a servitude such as we are dealing with in the present case. It was a claim of right such as is gained in some cases in England by custom for the inhabitants, or a particular class of inhabitants, of a district to make use of another person's property. All that *Fernando* vs. *Fernando* decides is that such an extension of the law of servitudes as has been adopted in England has not been adopted under the Roman Dutch Law."

In the present case too the right that is claimed by the defendants to wash their clothes at the water hole on the plaintiff's paddy field is based on some kind of long standing practice or custom which the defendants seek to place on a legal basis by maintaining that it falls within the ambit of the personal servitude known to the Roman Dutch law as Usus. The only recorded instance of an attempt to establish such a servitude in Ceylon was the unsuccessful effort of the dhobies of Polwatte in 1911, and here too they sought to claim the servitude as an alternative to their right to a possessory action. Percival Gane in his translation of Voet in commenting on this servitude states that there are only five decided cases in South Africa in which this subject has figured. 'That it has not been more fully used may, so far as the servitude of use is concerned, be explained by the rarity of that servitude in and since Voet's day.' (vide Translator's Note to Book VII, Tit. 8). Voet explains the reason for the rarity of this servitude in the following terms:—

> "Meantime at the present day the establishment of use is indeed rarer between private persons than is that of usufruct. That is because of the difficulties which commonly arise as to the extent to which the usuary ought to use, and because of the apprehension that fruits will be pillaged under cover of exercising use.'
>
> (Book VII, Tit. 8, Sec. 5)

Even Maasdorp (Vol. II, 7th Edn. p. 225) states that the personal servitudes of Usus and Habitatio are seldom met with in the present day. One can understand the reluctance of jurists to too readily recognise these servitudes since they are apt to seriously interfere with the right of the private individual and today they have invariably been superseded by agreement between the parties usually in legal form.

The Courts should therefore be slow to extend the application of this servitude to modern conditions particularly as it is likely to adversely affect the rights of private citizens and the servitude should only be recognised when there is clear evidence that the essential conditions necessary to establish the servitude have been proved.

In the present case, although there is a finding of fact in the defendant's favour, that for a considerable period they had washed clothes at the water hole on the plaintiff's field, the defendant's claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of Usus is the right of using the property of others for daily needs *without detriment to the substance of the property.* (Voet Book VII, Tit. 8, Sec. 1). The plaintiff's unchallenged evidence in this case is that 'if clothes are allowed to be washed in the field he will not be able to work the fields because the fields will be polluted.' This is a legitimate fear and one that is not unlikely, having regard to the nature of the work contemplated. Therefore one of the essential elements necessary to claim this servitude has not been established by the defendants.

The defendants were not entitled to a declaration that they had the right to wash their clothes on the plaintiff's field and the plaintiffs were entitled to the declaration which they prayed for in their plaint.

We set aside the judgment and decree of the District Court dismissing the plaintiffs action and allow the plaintiff's appeal with costs in both Courts.

T. S. Fernando, A.C.J.

I agree.

Appeal allowed.

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

MUNICIPAL COUNCIL OF JAFFNA & THE SPECIAL COMMISSIONERS OF THE MUNICIPAL COUNCIL OF JAFFNA *vs.* DODWELL AND COMPANY LIMITED OF COLOMBO

S.C. No. 116/1946(*F*) — *D.C. Colombo Case No.* 52431 (*M*).

Argued on: 15th and 16th September, 1966.
Decided on: 28th August, 1967

Amendment of Plaint — Action for goods sold and delivered — Defendant's plea in answer that contract, if any, void and unenforceable— After trial commenced, application to frame additional issues based on unjust enrichment — Objection overruled and issues allowed — Appeal—Civil Procedure Code section 146.

A plaint filed on 17/3/61 was amended on 17/6/61. This contained averments to the effect that on certain dates between 10/11/59 and 1/4/60, the plaintiff sold and delivered to the defendant certain goods at the price of Rs. 13,935/50 and that the defendant failed to make payment of the said sum.

The defendant pleaded *inter alia* in his answer that the alleged contracts were void and unenforceable in law.

Issues were framed on 11/6/62 based on the pleadings and the first witness was called. Before his evidence could be concluded, plaintiff's counsel moved to frame additional issues based on the doctrine of unjust enrichment.

The defendant objected on the ground (1) that they did not arise on the pleadings

(2) that it would enable the plaintiff to rely on a new cause of action which at that stage was already prescribed,

The learned Judge overruled the objections and allowed the issues. It was conceded that a separate action for relief on the basis of injustment enrichment was already prescribed.

Held: (1) That the additional issues based on unjust enrichment should not have been allowed as they do not arise on the averments in the plaint, and not permitted by section 146 of the Civil Procedure Code.

(2) That the plea in the answer that the contract pleaded in the plaint is void and unenforceable would not entitle a Judge to frame an issue that the defendant was in some manner unjustly enriched without amending the plaint.

Per **H. N. G. Fernando, C.J.** (*a*) "A statement in an answer, in denial of a contrary statement in a plaint, cannot in common sense be regarded as the plaintiff's statement for the purposes of Section 40(d). Nor can it be said that the plaint contained a demand for the relief available under the doctrine of unjust enrichment, namely restoration of the actual benefit derived, i.e. the goods, or in the alternative the value of the benefit. The plaint prayed only for the sum of Rs. 13,935/50, which represents, not the benefit derived, but the contractual purchase price of the goods."

(*b*) I am satisfied that *Jayawickreme* vs. *Amarasuriya* is in no way a precedent for the framing in the present action of the new issues accepted by the trial Judge. I must add my confident opinion that the judgment decided much less than is sometimes claimed for it.

(*c*) "I must add that I do not concur in the opinion which perhaps influenced the decision in *Peiris* vs. *Municipal Council, Galle*, namely that it would be a travesty of justice to deny some relief to a plaintiff whose claim against a Municipal Council is based on a contract not under seal. The requirement of the seal being one imposed by Statute, a person who acts on the faith of such a contract has only himself to blame for ignoring the law. It is not clear to me therefore that such a person's hands are so clean that they are fit to receive equitable relief. But in the instant case, it is not necessary for me to decide whether or not the doctrine of unjust enrichment does apply to such cases.

Distinguished: *Jayawickreme* vs. *Amarasuriya* (1918) (20 N.L.R. at 289)

Cases referred to: *Peiris* vs. *Municipal Council, Galle* (1963) (65 N.L.R. 555)
Bank of Ceylon Jaffna vs. *Chelliahpillai* (1962) (65 N.L.R. 25).
Attorney-General vs. *Smith* (1905) 8 N.L.R. 229 at 241.
Silva vs. *Obeysekera* (1922) 24 N.L.R. 97 at 107.

C. Ranganathan, Q.C., with *K. Nadarajah* for the substituted-defendants-appellants.

H. V. Perera, Q.C., with *B. J. Fernando*, for the plaintiff-respondent.

H. N. G. Fernando, S.P.J.

The plaint in this action was filed on 17th March 1961 and was amended on 17th June 1961. The plaint as amended (read with the account particulars filed therewith) averred that, on certain dates between 10th November 1959 and 1st April 1960, the plaintiff sold and delivered to the defendant certain goods at the price of Rs. 1,3935/50, and that the defendant had failed to make payment of the said sum. The plaint continued to state that a cause of action had accrued to the plaintiff to sue the defendant for the recovery of the said sum. In the prayer, the plaintiff asked "for judgment against the defendant for the sum of Rs. 13,935/50 with legal interest thereon."

The defendant, the Municipal Council of Jaffna, filed answer on 17th October 1961, and pleaded *inter alia*, that:—

"(*a*) the alleged contracts sued on by the plaintiff were for the supply of articles to the Council and involved an estimated expenditure of more than one thousand five hundred rupees;

(*b*) in the absence of any writing or writings embodying the said contracts and signed by the Mayor and the Municipal Commissioner and sealed with the Common Seal of the Council the alleged contracts are void and/or unenforceable in the law and/or do not bind the Council;

(*c*) the alleged contracts were not sanctioned by the Council nor were the provisions of *Sections* 228 and 229 of the Municipal Councils Ordinance No. 29 of 1947 complied with; and said contracts are there fore void and/or unenforceable in law and/or do not bind the Council;

Issues were framed on 11th June 1962 on the basis of the pleadings as above summarised. Thereafter the plaintiff's first witness was called, but his evidence was interrupted on 31st January 1964 by an application by plaintiff's counsel to frame the following additional issues:—

"(9) Did the plaintiff sell and deliver and/or supply to the defendant goods as set out in the account particulars marked A?

(10) If issue 9 is answered in the affirmative,

(*a*) Did the defendant council receive the benefit of the said goods?

(*b*) If so what amount is due to the plaintiff on account of unjust enrichment?

(*c*) In the alternative is the plaintiff entitled to an order to recover said goods from the defendant?

The defence objected to these additional issues on the ground that they did not arise on the pleadings, and could only be raised if the plaint was amended. It was further objected that such an amendment should not be permitted because it would enable the plaintiff to rely upon a new cause of action which at the stage of amendment was already prescribed. The learned trial Judge over-ruled these objections and entertained the new issues without first ordering an amendment of the plaint, In appeal from the Judge's order, counsel for the defendant has argued in the circumstances that the trial Judge erred in law in allowing the new issues to be framed, because they involve a cause of action not pleaded in the plaint.

It has been common ground at the stage of appeal that an action for the relief available under the doctrine of unjust enrichment in the circumstances of the present case would be prescribed upon the expiry of a period of 3 years from the time of the delivery of the goods to the defendant. It is not therefore disputed that a separate action by the plaintiff for such relief would not have been maintainable at the time when the plaintiff sought to frame the additional issues, It follows that, if an amendment of the plaint had been necessary in order to enable the plaintiff to raise the additional issues, the amendment should not have been allowed and the new issues should not have been framed. Neither at the trial, nor in appeal, was it suggested that such an amendment of the plaint could have been properly allowed.

But counsel for the plaintiff has argued that the new issues properly arise on the pleadings as they stand, and that the trial Judge rightly allowed them under Section 146 of the Code. I will attempt to set out the pith of the argument. The plaint no doubt was intended only to contain the averments necessary in an action for the enforcement of a buyer's obligation under a contract of sale: It averred a sale and delivery of goods to the defendant and a failure of the defendant to pay the sum due as the purchase price; it further claimed the relief available to a seller under a contract of sale, namely the right to a decree ordering the buyer to pay that sum, and it prayed for that relief. But when the defendant pleaded that the contract of sale was void, there was in dispute between the parties, not (or not only) the question whether the defendant was liable to perform an obligation under a contract of sale, but (or but also) the question whether the defendant, having accepted delivery of goods under a void contract, had been unjustly enriched thereby, and was accordingly liable to perform an obligation accruing under the

doctrine of unjust enrichment. It was argued that the requirements of Section 40 of the Code were satisfied: that the plaint contained a statement of the facts and circumstances constituting the cause of action, i.e. the refusal of the defendant to fulfill his obligation to compensate the plaintiff the basis of an unjust enrichment derived by the defendant; and that a demand for such compensation had been made in the plaint, when the prayer asked for a decree for the payment of the sum of Rs. 13,935/50.

In testing the validity of this argument, the prudent course for me is to first decide what would be the minimum content of a plaint designed, in the circumstances of this case, to sue the defendant upon a cause of action consisting of his failure to perform an obligation alleged to arise under the principle of law which is here invoked. (I will omit formal details). What are "the circumstances constituting the cause of action.. of which there must be a statement? (Section 40(d). These are in my opinion:—

(1) that the plaintiff delivered goods to the defendant;

(2) that the delivery and acceptance of the goods purported to be under a valid contract of sale;

(3) that there was not in law a valid contract of sale;

(4) that by accepting and retaining the goods the defendant derived a benefit which it is unjust for him to retain:

(5) that the defendant is therefore liable to restore the goods to the plaintiff or compensate the plaintiff to the extent of the value of the benefit derived.

There must further be in the plaint a demand of the relief claimed, in this context a demand for the restoration or compensation mentioned at (5) above.

The "circumstances" which I have mentioned at (1) and (2) above are also circumstances which need to be stated in a plaint in an action to enforce a buyer's liability under a contract of sale. They were perforce stated in the plaint in the instant case. But none of the other circumstances which I have listed are stated in this plaint; and these are the very circumstances, a statement of which distinguished a plaint which pleads the cause of action based on unjust enrichment. I doubt very much whether any counsel who drafts a plaint in terms of the present one, or any other counsel who reads such a plaint filed against the defendant, would imagine that its terms would entitle a Judge to frame an issue that the defendant was in some manner unjustly enriched.

Indeed, the argument of plaintiff's counsel is certainly not based upon the contents of the plaint alone. His argument depends very much on the defendant's plea that the alleged contract was void. The fact thus pleaded is said to establish the existence of a new dispute between the parties, namely a dispute as to the defendant's liabilities arising on the basis of an unjust enrichment.

There are at least two distinct grounds which compel me to reject this argument. The first is that Section 40 of the Code requires the *plaint* to state the circumstances which constitute the pleaded cause of action. If the cause of action is dependant on the nullity of a contract, then the plaint must aver the fact of nullity. The plaintiff cannot claim that he must be regarded as having duly averred that fact because the defendant has subsequently averred it. A statement in an answer, in denial of a contrary statement in a plaint, cannot in common sense be regarded as the plaintiff's statement for the purposes of Section 40(d). Nor can it be said that the plaint contained a demand for the relief available under the doctrine of unjust enrichment, namely restoration of the actual benefit derived, i.e. the goods, or in the alternative the value of the benefit. The plaint prayed only for the sum of Rs. 13,935/50, which represents, not the benefit derived, but the contractual purchase price of the goods.

The defendant's plea that the contract sued upon was void was a denial in terms of Section 75 of the Code of the essential fact upon which the plaintiff's action depended. Had the plaintiff stated to Court that he accepted the denial as correct, then his action had to be dismissed. He did not so state in this case; instead the very denial was put in issue as a matter in dispute. How then can it be said that the Judge should have framed an issue on the basis that the denial had been accepted by the plaintiff as correct? A dispute on the question whether the defendant is liable to make restitution under the doctrine of unjust enrichment could not arise unless and until the plaintiff. by amendment of his pleadings, set out new circumstances alleged to give rise to that liability.

I must reject for these reasons the plaintiff's contention that the new issues numbered (9) and (10) a, b, and c were properly framed at the trial.

Peiris vs. *Municipal Council, Galle* (65 N.L.R. 555) supports very strongly the admission by the

trial Judge of the additional issues. In that case, a firm of architects had been employed by the Municipal Council of Galle for the purpose of the construction of a Town Hall. A total sum of Rs. 84,000/- became due to the Architects as remuneration for work actually performed, and a part of this sum was paid by the Council, leaving a balance of about Rs. 30,000/-. The architects sued the Council for this amount and the trial Court held that the amount would have been due to them. But the action was dismissed on the ground that the contract was void as it was not under Seal. Nevertheless it was held in appeal that the trial Judge could and should have framed an issue of "unjust enrichment" on the part of the defendant, and the case was remitted to the trial Court for that issue to be tried.

The question whether the issue based on alleged unjust enrichment could arise on the plaint in that case was disposed of by Tambiah, J. in the following paragraph:—

> "The plaint has been drafted in such a manner that all the averments necessary to raise the issue of undue enrichment are contained therein. The duty of raising the necessary issues for a just decision of case rests on the Judge. In the instant case, it is with reluctance that the learned District Judge has dismissed the plaintiff's claim. He has held that since the plaintiffs had performed their part of the contract without any negligence and had given the defendant the benefit of a Town Hall. it would be a travesty of justice if some relief is not given to the plaintiffs.
>
> In *Jayawickreme* vs. *Amarasuriya* (20 N.L.R. at 297) Lord Atkinson, who delivered the opinion of the Privy Council posed the question 'Are they' (the parties to the case) 'to be denied justice because their pleader has chosen to over-state his client's case, and the Judge to frame an issue embodying that overstatement? 'In that case, the relevant issue was framed by their Lordships of the Privy Council in granting relief to the appellant. In the instant case too, the learned District Judge should have framed the issue and should have tried it."

In *Jayawickreme* vs. *Amarasuriya* (20 N.L.R. 289), the cause of action quite plainly stated in the plaint was the failure of the defendant to fulfil a promise made by him to make certain cash payments to the plaintiff. In setting out the circumstances which led to the making of the promise, the plaint had earlier stated:—

(1) that the defendant had held certain property under an alleged trust for the plaintiff,

(2) that the plaintiff had threatened an action against the defendant to enforce the alleged trust obligation, and

(3) that the promise sued upon was made in consideration of the plaintiff's agreement not to institute the threatened action based on trust.

The Courts in Ceylon held that:—

(*a*) there had been no trust as alleged,

(*b*) the threatened action would have been one based on an invalid claim of trust, and the compromise of such a claim was not *justa causa* for the defendant's promise,

(*c*) the promise was made out of generosity or of moral duty, and as such was not made for *justa causa*,

On these grounds the action was dismissed in Ceylon.

The Privy Council agreed with the finding at (a) above, but held that both the compromise of an invalid claim and the motive of generosity or moral duty constitute *justa causa* under Roman Dutch Law. The promise sued upon was therefore enforceable. Their Lordships stated:—

> "that the female plaintiff had long asserted a claim to the land the deceased defendant had derived from his father; that there was a dispute between them as to whether this claim was good; that she threatened to institute, proceedings to enforce it, and that the deceased defendant agreed to compromise with her by paying her Rs. 150.000/- on the instalments described in satisfaction of this claim. The validity of the claim, or the ultimate succees of a suit brought to enforce it, is entirely beside the point. On those facts the plantiffs were, in their Lordships' opinion, entitled to succeed in the present action. The question is, Are they to be denied justice because their pleader has chosen to over-state his client's case, and the Judge to frame an issue embodying that over-statement?"

Every circumstance mentioned in this statement of their Lordships' decision had been pleaded by the plaintiff in her plaint. The decision therefore gives no semblance of approval to the framing of issues on matters not involved in the plaintiff's pleadings.

Some observations were however, made concerning the issue to be decided :—

> "If the learned District Judge.....had amended the issue so as to suit the facts proved, he should, in their Lordships' opinion have given a decree in favour of the plaintiff for the sum sued for."

This was only a reference to the "over-statements" in the pleadings and in the issues framed, i.e. the superfluous averment that there had been originally a trust of property; and the superfluous addition (to the necessary averment of the compromise of a threatened action) that the threatened claim was a valid claim of trust. These superfluous averments, their Lordships held, did not alter the fact that the plaintiff had proved her case i.e. a promise to pay money in consideration of the compromise

of a claim in a threatened action, since the legal validity of the claim was a superfluous matter, the issue should have been amended in order to excise therefrom that superfluous matter. Their Lordships surely did not intend to approve the framing of *new* issues, as the plaintiff in the present case has sought to do — that is issues additional to those previously framed. They contemplated only the amendment of an issue, by retaining the relevant parts of an existing issue and deleting what was irrelevant or "over stated".

In substance, the issue which had been framed at the trial in *Jayawickreme* vs. *Amarasuriya* was:—

(*a*) Did the defendant promise to pay the plaintiff Rs. 180,000/-?

(*b*) Was the promise made in consideration of the plaintiff's refraining from instituting an action against the defendant?

(*c*) Was the threatened action one for the enforcement of an alleged trust?

(*d*) Was the alleged trust valid in law?

The decision of the Privy Council was that (a) and (b) had to be answered in the affirmative, and that the plaintiff was in law entitled to judgment on those answers. The trial Judge should therefore have deleted from the issues the "over-stated" points (c) and (d), the decision of which could have no bearing in law upon the result of the action.

I am satisfied that *Jayawickreme* vs. *Amarasuriya* is in no way a precedent for the framing in the present action of the new issues accepted by the trial Judge. I must add my confident opinion that the judgment decided much less than is sometimes claimed for it.

Counsel for the plaintiff relied also on the judgment of the Privy Council in *Bank of Ceylon* vs. *Chelliahpillai* (65 N.L.R 25). The defendant had mortgaged certain goods with the Bank by a bond of 1951 to secure future advances. In 1952, he mortgaged a land as additional security for the due payment of the amount then due to the Bank. The earlier bond contained the usual personal covenant for repayment, but the second bond did not.

The Bank sued the defendant upon the second bond only, but prayed for judgment against the defendant in the sum due and also for a hypothecary decree for the sale of the land mortgaged by this bond. In answer, the defendant pleaded that " no claim for the payment of the sum of money can be made on the second bond".

As to this plea in the answer, the Privy Council made the following observations:—

> "The Civil Procedure Code gives in Section 93 ample power to amend pleadings. Moreover, the case must be tried upon the "issues on which the right decision of the case appears to the Court to depend" and it is well settled that the framing of such issues is not restricted by the pleadings; see Section 146 of the Code, *Attorney-General* vs. *Smith* (1905) 8 N.L.R. 229 at 241) and *Silva* vs. *Obeysekera* ((1922) 24 N.L.R. 97 at 107). By either of these means a point that is interesting and difficult but far removed from the merits of the case might have been taken out of the controversy:".

As I understood it, their Lordships here suggested that the omission to plead and sue upon the personal covenant *might* have been rectified by an amendment of the plaint under Section 93; or else that the Court *might* have framed an issue based on the personal covenant in the earlier bond, despite the omission in the pleadings. I respectfully agree that the first course suggested could in all probability have been adopted without infringement of the principle that an amendment will not be permitted if it introduces a new cause of action which has become prescribed. As to the second course suggested, I note for present purposes that their Lordships did not even contemplate an amendment of the issues at the stage of appeal. They instead affirmed the decisions in Ceylon that the plaintiff Bank could not obtain a decree on the personal covenant, and was entitled only to a decree upon the hypothecation actually pleaded in the plaint. I cannot think that their Lordships intended to state, even *obiter*, that Section 146 permits a trial Court to frame issues upon an unpleaded cause of action, if that cause has then become prescribed.

To return now to the case of *Peiris* vs. *Municipal Council, Galle*, we were referred to the plaint filed in that case. Counsel for the defendant has pointed to certain features in the plaint which may have led Tambiah, J. to think that it contained a statement of circumstances appropriate to constitute a cause of action based on unjust enrichment. With great respect, I am unable to construe that plaint in the same sense. The judgment contains no explanation of the reasons in favour of that construction or of the reasons for holding that the cause of action based on unjust enrichment had not become prescribed — both of which matters are of fundamental importance in connection with the framing of new issues.

I must add that I do not concur in the opinion which perhaps influenced the decision in *Peiris* vs. *Municipal Council, Galle*, namely that it would

be a travesty of justice to deny some relief to a plaintiff whose claim against a Municipal Council is based on a contract not under seal. The requirement of the seal being one imposed by Statute, a person who acts on the faith of such a contract has only himself to blame for ignoring the law. It is not clear to me therefore that such a person's hands are so clean that they are fit to receive equitable relief. But in the instant case, it is not necessary for me to decide whether or not the doctrine of unjust enrichment does apply to such cases.

The appeal is allowed with costs, and the order allowing the new issues 9 and 10 is set aside. The trial will proceed on the other issues.

Alles, J.

I agree.

Appeal allowed and sent back.

Post Scriptum: This judgment was ready for delivery in October 1966. But delivery was delayed on application by Counsel that an order for substitution of parties may be necessary. Such an order was made on 2nd August 1967.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.** (*President*), **Tambiah, J. and Abeyesundere, J.**

THE QUEEN *vs.* ARNOLIS APPUHAMY

S.C. No. 135/1966 — *M.C. Anuradhapura Case No.* 10423

Appeal No. 76 *of* 1967 *with Application No.* 99 *of* 1967

Argued and decided on: 4th September, 1967.
Reasons delivered on: 19th October, 1967.

Court of Criminal Appeal — Criminal Procedure — Verdict of Jury at earlier trial — Discharge of Jury — Judge disagreeing with Jury — Second trial — No power to discharge — Only power to re-charge — Obligation to accept verdict — Object of trial by Jury — Plea of autrefois convict — Criminal Procedure Code, Sections 230, 248, 251, 330, 331.

The appellant was convicted of culpable homicide not amounting to murder on the first count, and of attempted culpable homicide not amounting to murder on the 2nd count. He had been indicted with murder and attempted murder. of M and N respectively.

The appellant had been previously tried on the same indictment. At the end of that trial, the Jury found him guilty of culpable homicide on the first count and not guilty on the second count.

The trial Judge thereupon stated that to recharge the Jury might be prejudicial to the accused, and that since they had come to a conclusion on the basis of private defence, on which no evidence was led, he ordered a re-trial.

It was clear from the proceedings that the trial Judge disagreed with the unanimous verdict of the Jury at the earlier trial.

Held: (1) That section 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury.

(2) That if a Judge is reluctant to accept the verdict, section 248(2) entitles him to direct a re-consideration of the verdict, and to charge the Jury afresh for that purpose, but he is bound to accept the verdict given after re-consideration.

Per **H. N. G. Fernando, C.J.** "This provision (section 248(2) emphasises the principle that the object of a trial by Jury is to secure a verdict which the Jury holds to be proper, and not a verdict which a Judge will find acceptable."

(3) That the appellant was in the circumstances entitled to raise the plea of *autrefois convict* and to be acquitted.

(4) That in view of section 251 of the Criminal Procedure Code, it was too late to pass sentence on him.

Cases referred to: *The Queen* vs. *Handy* (1959)(61 N.L.R. 265)

E. R. S. R. Coomaraswamy with *Anil Obeysekera*, *Nihal Jayawickreme* and *C. Chakradaran* with *M. Kanakaratnam* (Assigned) for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

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

The appellant in this case was indicted on two counts with the murder of one Muthu Banda, and with the attempted murder of one Nanhamy. He was after trial convicted on 2nd July 1967 of culpable homicide not amounting to murder on the first count and of attempted culpable homicide not amounting to murder on the second count, and sentenced to terms of imprisonment for 10 years and 3 years, to run concurrently. We allowed the appeal and ordered a verdict of acquittal to be entered. We now state our reasons.

The only point argued in appeal was one of *autrefois convict*, based on the following facts. The appellant had been previously tried on the same indictment and it is necessary to reproduce here the proceedings which took place at the end of the earlier trial on 28th May 1967:—

"Jury return at 4.20 p.m.

Clerk of Assize: Mr. Foreman, are you unanimously agreed upon your verdict in respect of charge No. 1?

Foreman: Yes.

Clerk of Assize: By your unanimous verdict, do you find the prisoner guilty of the charge laid against him?

Foreman: No.

Clerk of Assize: Do you find him guilty of any lesser offence?

Foreman: Yes.

Clerk of Assize: Of what offence?

Foreman: We find guilty of culpable homicide, not amounting to murder.

Clerk of Assize: By your unanimous verdict, do you find the prisoner guilty of the charge laid against him in charge No. 2?

Foreman: Not guilty.

Clerk of Assize: Of any lesser offence?

Foreman: No.

Clerk of Assize: Gentlemen, your unanimous verdict is that you find the prisoner, Jayasekera Liyana Patabendige Arnolis Appuhamy guilty of culpable homicide not amounting to murder in respect of count No. 1 and not guilty of any offence in respect of count No. 2?

Foreman: Yes.

Court: Mr. Foreman, the position is that you hold that the injuries on Nanhamy was not caused by gunshot injuries. I directed that the verdict you would have to bring in respet to that matter would be either attempted murder, grievous hurt or voluntarily causing simple hurt.

Foreman: My Lord, he exceeded the right of private defence.

Court: Your verdict was arrived at on that footing?

Foreman: My Lord, simple hurt may have been caused by a pellet not directed towards Nanhamy.

Court: In other words, you held that that was accidental?

Foreman: Yes.

Court: You said that your verdict of culpable homicide not amounting to murder was on the footing that he exceeded the right of private defence?

Foreman: Yes.

Court: I did not tell you what the law in respect of private defence. I told you to follow the law as I gave you.

Foreman: My Lord, what we say is that he used the gun before the other man used the gun.

Court to Crown Counsel: Shall I charge them again?

Crown Counsel It appears that the verdict is confused, there appears to be some grave confusion. The question of private defence never arose. If that was the basis on which the verdict was arrived at then there is no doubt that there was grave confusion.

Court: Mr. Kapukotuwa, have you anything to say?

Mr. Kapukotuwa: The position in law is that the jury are the sole judges on questions of fact. Even if a defence has not been taken, it is open to them to decide on what they can. But, if Your Lordship believes that the Jury has been confused in regard to the law, then it is open to Your Lordship to discharge the Jury and order a re-trial.

Court: In the circumstances of this particular case, I think that if I were to charge the Jury, now, it might be prejudicial to the accused. In those circumstances, since they have come to a conclusion on a matter they were not addressed on and on which there was no evidence led, I think the only fair thing to do is to discharge the Jury and order a re-trial. I accordingly order a re-trial. The accused is to be on remand."

It is perfectly clear that the learned Commissioner disagreed with the unanimous verdict at the earlier trial because in his opinion the evidence did not justify the finding of the Jury that the accused had fired his gun in self-defence — the learned Commissioner had himself not directed the Jury on the matter of self-defence. But with respect, it seems to us that the defence could properly arise. According to the evidence of Nanhamy at the second trial, Muttu Banda and Nanhamy were both Game Watchers at the Wilpattu Sanctuary. The two men were about to retire for the night when they heard a gun shot some distance away, and they proceeded in that direction, Muttu Banda carrying a gun and Nanhamy a torch. They then saw three men and gave chase to those men, whereupon two of the men ran in one direction and the third in another. They chased the third man who was running into the jungle and they stopped after chasing for a few fathoms. The third man himself apparently stopped in the jungle, for Nanhamy then recognised him as the accused. At this stage, the accused fired a gun, killing Muttu Banda and injuring Nanhamy. Although there was no eivdence that Muttu Banda had actually aimed his own gun at the accused before the latter fired his shot, the circumstances might well have led the Jury to think that such was probably the case. A man with a gun in hand who runs away when chased by another with a gun, particularly by a game watcher, is *prima facie* trying to make his escape; and if he subsequently fires when "at bay", it is not unlikely that in the words of the Foreman "he used the gun before the other man (Muttu Banda) used the gun." Had the learned Commissioner appreciated this aspect of the matter and acted according to law, the interests of justice would have been served far better than they are in the ultimate result.

It is most unfortunate that neither the learned Commissioner nor Crown Counsel appear to have been aware of a judgment of this Court which is completely in point. It was held in *The Queen* vs. *Handy* (61 N.L.R. 265) that s. 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury. The relevant provisions of the Code were fully examined in that judgment, and we are in entire agreement with the judgment. We need mention only one additional point, for the sake of completeness. In *Handy's case*, as in the present case, the presiding Judge quite clearly did not approve the Jury's verdict. If for that reason the Judge was reluctant to accept the verdict, s. 248(2) entitled him to direct a re-consideration of the verdict, and to charge the Jury afresh for that purpose. But short of having the verdict recorded and thereafter proceeding according to law, s. 248(2) provided the only permissible alternative. But even then, the Judge would have been bound to accept the verdict given after re-consideration. This provision emphasises the principle that the object of a trial by Jury is to secure a verdict which the Jury holds to be proper, and not a verdict which a Judge will find acceptable.

The only difference between the instant case and that of *Handy* is that in the latter case the rejected verdict was one of acquittal, whereas here the verdict was a conviction of culpable homicide on the first count upon which sentence should have been passed. The accused has been fortunate in escaping punishment, for in view of s. 251 of the Code it is now too late to pass sentence on him. For that, he should be thankful to the presiding Judge and the Crown Counsel who conducted the prosecution at the first trial.

Appeal allowed and accused acquitted.

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

ADELINE FERNANDO *vs.* PANDITHARATNE *nee* FERNANDO & TWO OTHERS

S.C. 88/65(*F*) — *D.C. Panadura* 9237/*L.*

Argued and decided on: 5th and 6th October, 1967.

Action for declaration, not bound by decree in partition action, and for declaration of title — Plaintiff not party to partition action — Lis pendens not duly registered — Land not described in plaint caught up in partition plan and decree — Effect of such decree — Plaintiff entitled to declaration prayed for — Partition Act (Cap. 69), section 48.

In a partition action (D.C. Panadura 8334), the plaintiff described the corpus in the plaint to include a "defined 1/3 portion of Dombagahaowita and containing in extent 8.88 perches. The northern boundary was described as the other 2/3 portion of the same land belonging to Simon Fernando. All the deeds relating to the 1/3 portion beginning from 1887 described this portion in the same way.

The plan prepared in the partition action apparently included the remaining 2/3 portion of Dombagahaowita also, and the decree in the action took in that portion also. The *lis pendens* of the partition action was registered only in the folio relating to the 1/3 portion, but not in that relating to the 2/3 portion.

The present plaintiff, claimed title to the outstanding 2/3 portion, upon deeds, executed by the heirs of Simon Fernando referred to in the deeds of the plaintiff in the partition action as the owner of the land to the north of the defined 1/3 portion.

The present plaintiff filed the present action for a declaration of her rights.

Held: that the plaintiff was entitled to a declaration that she was not bound by the decree in the partition action and that she was entitled to the defined 2/3 portion of the said land.

E. R. S. R. Coomaraswamy, with *C. Chakkradaran and V. Dharmalingam* ,for the plaintiff-appellant.

C. Ranganathan, Q.C., with *P. A. D. Samarasekera*, for the defendants-respondents.

Fernando, C.J.

The plaintiff sued in this action for a declaration that she is not bound by the decree entered in March 1963 in a partition action No. 8334 D.C. Panadura. That action had been filed by the present 1st and 2nd defendants against the present 3rd defendant for partition of property described in the schedule to the plaint filed in that action. The corpus of that action was referred to as "the contiguous allotments of lands called Delgahawatte alias Pelawatte, Pokunewatte-paula-owita, Meegahawatta paula-owita, Dombagaha-owita,, Dombagahawatta, Elabodawatta, and defined 1/3 portion of Dombagahaowita", so that the partition was sought presumably on the basis that a number of contiguous allotments had been incorporated into one entity. The last property referred to in the description quoted above, namely, "defined 1/3 portion of Dombagaha-owita" was described in paragraph 1 of Schedule B of the plaint, as a defined extent of 8.88 perches bordered on the south by an Owita and on the north by the other 2/3 parts of the same land belonging to Simon Fernando. In fact, all the deeds in which the parties to the partition action claimed title to this Dombagaha-owita described it in exactly the same way, the first of such deeds being one of 1887 registered in the folio which has been marked P33.

Despite the precise description in the plaint in the action No. 8334 of a defined 1/3 portion of Dombagahaowita, the Plan prepared for the purpose of the partition action depicted a large extent of land in such a manner that, if the Plan is correct, the remaining 2/3 portion of Dombagaha-owita either never existed at all or else was taken into the corpus which was surveyed. Some time later the decree ultimately entered in the partition action took in the same large corpus.

The lis pendens of the partition action was registered only in continuation of the folio P33, which was a folio dealing only with the deeds

affecting the defined 1/3 portion of Dombagaha-owita.

The plaintiff claims title to the outstanding 2/3 portion of Dombagahaowita upon deeds, executed by the heirs of Simon Fernando, who is referred to in the plaintiff's deeds as owner of the land to the north of the defined 1/3 portion. The learned District Judge was probably right in his view that the plaintiff's immediate predecessor in title had taken on lease the land belonging to the plaintiffs, had discovered that title to a 2/3 portion of Dombagaha-owita was outstanding and had in 1942 obtained the deeds from the persons who did have title to the 2/3 portion. But it was unreasonable for the learned District Judge to regard the fact that the plaintiff's predecessor took advantage of his discovery as being a matter which could affect the validity of the title which he thus acquired. Counsel for the plaintiff in appeal has conceded that the only registration of the lis pendens of the partition action was in the folios affecting the 1/3 portion of Dombagaha-owita and some other land with which we are not concerned in this appeal, and that the lis pendens was not registered in the folio maintained for the 2/3 portion.

In holding against the plaintiff, the learned District Judge has fallen into several errors. For instance, he refers to the deeds on which the plaintiff relies and states that those deeds refer not to a divided 2/3 portion of Dombagaha-owita but to an undivided 2/3 portion. I have perused five or six of the deeds which all specifically refer to a divided 2/3 portion.

The learned District Judge, because of oral evidence that a fence was erected in 1962 round the 2/3 portion which is now claimed by the plaintiff, has held that the land was undivided until that time. The execution of a fence in 1961 or 1962 certainly indicates that at that time there had been no fence. But considering that the southern 1/3 portion had been dealt with in numerous deeds from 1887 as a divided portion, bounded on the north by the other divided portion of the same property, there can be no doubt that the 1/3 had been indeed a divided portion, particularly because the earliest deed of 1887 specifically refers to an extent of 8.88 perches.

Counsel for the defendants in appeal has argued that the plaintiff has not identified the location of the 2/3 portion of Dombagahaowita which she now claims. It seems to me that the defendant's own deeds serve adequately to identify the land claimed by the plaintiff. The 1/3 portion is described as being bounded on the east by the Colombo-Galle Road and on the south and west by the owita. Its northern boundary is described as the remaining 2/3 portion. Similarly, the land claimed by the plaintiff is described in her deeds as being bordered on the east and the west respectively by the road and the owita. A glance at the plan shows very clearly that the entire Dombagahaowita is situated in a small pocket of land between the high road and the owita. The plan P2 which had been prepared in 1942 depicts an extent of 17. 76 perches which corresponds perfectly with the portion now marked 'X' in the preliminary plan which had been prepared for the purpose of the partition action.

The appeal is allowed with costs and the plaintiff is granted the declaration which she sought in her plaint as well as a declaration that she is entitled to the land described in the first schedule to the plaint. Plaintiff will be entitled also to costs in the District Court.

Samerawickrame, J.

I agree.

Appeal allowed with costs

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

PEERIS AND ANOTHER *vs.* KIRILAMAYA

S.C. 211 (*Final*) *of* 1965 — *D.C. Ratnapura* 4870

Argued on: October 21 and 22, 1967.
Decided on: November, 19th 1967.

Rei vindicatio — Defendant's claim on prescriptive possession over long period — Mortgage of hiwel ande *by co-owner in plaintiff's chain of title—Mortgagee to possess in lieu of interest — Defendant obtaining assignment of such mortgage in* 1939 *— Discharge of mortgage in* 1957 *— Can defendant claim prescriptive possession ? — Can a defendant rely on possession of strangers to action and their predecessors in title?*

In this action instituted in 1962, the 1st and the 2nd plaintiffs-appellants claimed a declaration of title to 1/4 and 5/16 th shares respectively of a field. The defendant resisted the action by claiming that S, (one of the co-owners through whom the 1st plaintiff claimed a 1/4 share) began to possess this field long ago after an amicable division of the lands in a certain *Panguwa* and the title so acquired passed to his two daughters by deeds of 1956 and 1961 through him and another and that they had also acquired a prescriptive title thereto.

The plaintiffs — appellants rebutted this position by producing deeds P12, P13 and P14. By P12 U., one of the proved original owners of a half-share in the plaintiff's chain of title, had, reserving to himself the *paraveni ande*, given a usufructuary mortgage of the *hiwel ande* of this field to one Sudantha who by P13 of 1911 assigned his said rights to R whose heirs in turn assigned their rights to the defendant by P14 of 1939. This bond was discharged in 1957.

The learned trial Judge held that the plaintiffs established their title but dismissed the action on two grounds; (1) that the defendant's daughters have succeeded to the rights of the aforesaid S. and (2) that these daughters and their predecessors had acquired a prescriptive title. The plaintiffs appealed.

Held: (1) That the defendant's possession prior to 1957 was referable to his rights to possess on the strength of the mortgage of the *hiwel ande* and there was not sufficient time between 1957 and to date of the plaint in this action for rights to be acquired by prescriptive possession. Also, in view of these facts the trial judges' finding that the rights of S. devolved on the defendant's daughters could not be upheld.

(2) That the rights of a *hiwel andekaraya* consist of a right to cultivate and to take a share of the cultivated crop.

(3) That the defendant, not having made any attempt to have his daughters added as parties, is not entitled to rely on their possession and of their predecessors in title.

(4) That a court can give judgment only in favour of a party to the action, and not in favour of some other person who is neither his predecessor in title nor a party to the action.

Followed: *Timothy David* vs. *Ibrahim* (1910) 13 N.L.R. 318.
Referred to: *Bandulahamy* vs. *Tikirihamy* (1943) 44 N.L.R. p. 539.

C. Ranganathan, Q.C., with *G. P. J. Kurukulasuriya*, for the plaintiffs-appellants.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne*, for the defendant-respondent.

T. S. Fernando, A.C.J.

This was an action *rei vindicatio* filed on the 29th June 1962 against the defendant-respondent by the 1st and 2nd plaintiffs-appellants claiming a declaration of title to 1/4 and 5/16ths. shares respectively of a field called Galpotte Kumbura more fully described in the schedule to their plaint. The defendant prayed for a dismissal of the action claiming that the title to this field had passed to his two daughters Premawathie and Banduwathie on a title somewhat different to that relied on by the plaintiffs as well as by prescriptive possession.

Although the learned trial judge held that the plaintiffs have established the title they pleaded, he dismissed the action on two grounds, (1) that the two children abovenamed of the defendant have succeeded to the rights of one of the original shareholders of the land, a man by the name of Sinduwa, who began to possess this field long ago after an amicable division of the lands of a certain *Panguwa*, which included this field as well, and (2) that these two children and their predecessors in title had acquired a title to this field by prescription.

The claim put forward by the defendant that title passed to Sinduwa at an amicable division of the lands of the *Panguwa* was attempted to be rebutted by the plaintiffs by showing that the defendant himself had acknowledged the validity of the title relied on by the plaintiffs. They pointed to three deeds, P12, P13, and P14, and it is necessary to examine the nature of these documents. By P12 of 1869, one Ukkulamaya, proved to be one of the original shareholders in the plaintiffs' chain of title, reciting that he had received from one Sudantha a sum of £3, and reserving to himself one half-share of the *paraveni ande*, mortgaged the *hiwel ande* of this field to the said Sudantha to be held and possessed by the latter in lieu of interest on the said amount. It may correctly be described as an instrument approximating to a usufructuary mortgage bond. Sudantha by P13 of 1911 assigned his rights under P12 to one Rankiriya and his heirs, and, Rankiriya having died, his only son Kiridinga, by P14 of 1939, in turn assigned his rights under P12 and P13 to the defendant. According to the evidence, the

bond in the defendant's favour was discharged only in 1957. The defendant himself conceded in the course of his evidence that the person who had given the usufructuary bond, viz. Ukkulamaya, had the right to cultivate, and that it was this right that was passed on to him by P14. That the rights of a *hiwel andekāraya* consist of a right to cultivate and to take a share of the cultivated crop gains some support from a reference to *hiwel ande* contained in the judgment of Keuneman, J. in *Bandulahamy* vs. *Tikirihamy* — (1943) 44. N.L.R. at p. 543 where it is stated that "undoubtedly it is a term in use. Codrington in his Glossary of Native, Foreign and Anglicized Words describes *hiwel ande* as (1) cultivator's share of the produce of a field, being half of the crop after deducting various payments called *Warawe*..... (2) paddy for hire of cattle, (3) share of the crops to which a person is entitled for the trouble of ploughing." If, therefore, the defendant's possession prior to 1957 was referable to his rights to possess on the strength of the *hiwel ande*, there was not in any event sufficient time between 1957 and the date of institution of this action for rights to be acquired by prescription. Although the learned trial judge found title as claimed by the plaintiffs established, his later finding that Sinduwa was the owner of the entirety is inconsistent with that finding. In the light of the defendant's own conduct which shows an acceptance by him of the title as claimed for the plaintiffs, the finding in favour of the plaintiffs, viz. the answers to issues (1) to (6) must now be regarded as unqualified.

In regard to the issue of prescription which has been answered in favour of the children of the defendant and their predecessors in title, it is relevant to note that, whereas title is said to have passed to the children by deeds of 1956 and 1961 respectively and this action was instituted only thereafter (June, 1962), no attempt was made at any stage of this trial to have the daughters of the defendant added as parties. It was not open to the defendant to rely on the possession of strangers to the action and their predecessors in title. A court can give judgment only in favour of a person who is a party to the action and not in favour of some other person who is neither his predecessor in title nor a party to the action. This is a view which has consistently been taken in our courts over a long period of time — vide *Timothy David* vs. *Ibrahim* — (1913) 13 N.L.R. at p. 320.

The judgment of the District Court dismissing the action instituted by the plaintiffs against the defendant cannot therefore be maintained. It is accordingly set aside, and we direct that judgment be entered declaring each of the plaintiffs entitled to the respective shares claimed by them in their plaint, for ejectment of the defendant and for damages at the agreed rate of Rs. 100/- per annum from date of action till restoration of possession. The plaintiffs are entitled to the costs of this action and of this appeal.

Siva Supramaniam, J.

I agree.

Appeal allowed.

Present: **Samerawickrame, J. and Tennekoon, J.**

LYDIYA *vs.* KIRIUKKUWA *alias* SIMON*

S.C. No. 398/65 (*F*) — *D.C. Kegalle Case No.* 1906/*T*

Argued on: 5th & 6th September, 1967.
Decided on: 1st October, 1967.

Kandyan law — Devolution of acquired property — Illegitimate intestate — Rights of widow as against other heirs— Section 11, *Kandyan Law Declaration and Amendment Ordinance No.* 39 *of* 1938 — *Kandyan Marriage Ordinance, No.* 3 *of* 1870, *meaning of "best evidence" in section* 36.

One Sedara, who was an illegitimate child,possesed of acquired property,died in 1955 intestate and issueless and having a spouse surviving him. The said widow's claims to the deceased's property was opposed by parties who claimed to be the legitimate children of Sedera's mother, through a subsequent marriage. The parties were governed by the Kandyan Law.

Held: (1) That the devolution of property in the above circumstances is governed by the provisions of section 11 of the Kandyan Law Declaration and Amendment Ordinance of 1938.

(2) That under section 11(1)d, the right of a widow to full dominium of her husband's property which she enjoyed under the General Kandyan Law is restricted to cases where ".....no other heir....." is in existence.

* For Sinhala translation, see Sinhala section, Vol. 15, part 3, p. 11

(3) That the words ".....no other heir....." in section 11(1)(d) must be taken to signify that the widow would succeed to full dominium only in the absence of any other heir to the property, however remote.

(4) That for the purposes of section 11(1)(d), the mother of an illegitimate son is his heir, and in her default, her legitimate children become heirs through her. The widow would have a life estate only.

Cases followed: *Banda* vs. *Banda* (1916) 19 N.L.R. 126
Kuma vs. *Banda* (1920) 21 N.L.R. 294

Casses referred to: *Punchirala* vs. *Punchimenika* (1879) 2 S.C.C. 44.
Tittawela *Sangi* vs. *Tittewella Mohotta* (1903) 6 N.L.R. 201.

H. W. Jayawardena, Q.C., with *B. J. Fernando*, and *L. C. Seneviratne*, for the appellant.

C. R. Guneratne, for the respondents.

Tennekoon, J.

The contest in this case is in regard to the acquired property of one Sedara who died in 1955, and whose estate is being administered in D.C. Kegalla Testamentary Case No. 1906/T.

Sedara was the illegitimate son of one Siri born of an association with one Appuwa. After Appuwa's death, Siri was either married to, or was the mistress of, one Dingiriya. The respondents are the children of that union. Siri died in 1942.

Sedara having died issueless his acquired property is now claimed on the one hand by the appellant who is the widow of Sedara, and on the other by the respondents who concede to the appellant only a right to a life interest in such property.

The learned District Judge having held, in the first place, that the respondents were the legitimate children of Siri and Dingiriya went on to hold that where an illegitimate person (being a man) dies leaving him surviving a spouse and no relation other than the legitimate children of his mother, the Kandyan Law Declaration and Amendment Ordinance contains no provision for the resolution of the question of devolution of title to his acquired property, and that the question must accordingly be resolved under the general Kandyan Law; applying that law he came to the conclusion that the wife was entitled only to a life interest and that the respondents being, as he held, legitimate children of Siri succeeded to the dominium.

Mr. H. W. Jayawardene — Queen's Counsel appearing for the appellant, while he, accepting the learned District Judge's opinion that the answer to the question of succession that arose in this case had to be resolved by reference to the general Kandyan Law, submitted that the law on the question is to be found formulated in a decision of this court made in 1903 in the case of *Tittewelle Sangi* vs. *Tittewelle Mohotta* 6 N.L.R. 201 which followed an earlier case of *Punchirale, et al* vs. *Punchi Menika* 2 S.C.C. 44. These two cases certainly are authority for the proposition that under the general Kandyan Law where a man died leaving him surviving a spouse, she would have an absolute *lat himi* right to the acquired property of her deceased husband to the exclusion of any 'relations' more distantly connected to the deceased than parents, full brothers and sisters and their children. Mr. Jayawardene's submission was that the respondents were, whether they were the legitimate or illegitimate children of Siri, excluded by this rule.

Mr. Guneratne for the respondents while submitting that the 6 N.L.R. case was not in accord with the general Kandyan Law — and in this he is supported very strongly by Hayley — Law and Customs of the Sinhalese (1923) at pages 365 — 366 — contended that the learned District Judge was wrong in holding that the Kandyan Law Declaration and Amendment Ordinance did not apply. He referred us to the provisions of section 11 thereof which, he submitted, dealt fully with the case of a man dying intestate after 1938 leaving a spouse surviving. This section

provides (*inter alia*) that the surviving spouse shall be entitled (i.e. absolutely) to the acquired property of the deceased intestate only if the deceased left him surviving *no other heirs.* I agree with Mr. Guneratne's submission that the effect of section 11 is to declare (while amending in certain respects) the law relating to the rights of a widow to the immovable property of her deceased husband; in particular having regard to the wording of section 11(1)(d) —

> "in the event of the deceased leaving him surviving no other heir, the surviving spouse shall succeed to all his property both paraveni and acquired" —

It is now no longer possible to found a right in the widow to full dominium upon the general Kandyan Law which gave her that right not in the somewhat extreme event of there being no other heirs of the deceased but in the more generous circumstances of there being no relations of a given proximity to the deceased. The words "no other heir" must, in the context in which they appear, be taken to signify that the test to be applied is; if the widow is left out of the reckoning, would there be any heir, however remote, to succeed to the property? If there is such an heir the wife would have a life estate only, and she would succeed to the full dominium only in the absence of any such heir.

The question that then remains is: are the respondents heirs of the deceased Sedera? Sedera himself is an illegitimate son of his mother. While it is accepted Kandyan Law that a father cannot succeed to the acquired property of his illegitimate child there is nothing to suggest that a mother cannot succeed to the acquired property of her illegitimate son. The difficulty however is that Siri predeceased Sedera; can any heirship be established between Siri's illegitimate son and Siri's lawful heirs *by representation.*

I am relieved of duty of searching for an answer to this question in the texts of writers on Kandyan Law because this Court has at least in two cases answered this question in the affirmative.

In the case of *Banda* vs. *Banda* 19 N.L.R. 126 the facts were: The defendant transferred certain property to his illegitimate son Kirimudiyanse who died unmarried and issueless. Kirimudiyanse's mother had predeceased him; administration having been taken to his estate, the property was sold to the plaintiff by three daughters of his mother by a different father. In deciding that the plaintiffs had good title and the defendant none, de Sampayo, J. said: "Kirimudiyanse's mother, if alive, would of course have been his heir and *in her default I think his half sisters were his heirs.*"

A similar problem arose in the case of *Kuma* vs. *Banda* 21 N.L.R. 294. One Kiri Banda died intestate in 1919. His parents were the defendant and one Kiri Menike who married each other in 1886 according to customary rites but had not registered their marriage under the then prevailing Kandyan Marriage Ordinance 3 of 1870. Kiri Menika predeceased Kiri Banda and her nearest relative was one Ranhamy a half-brother on the mother's side. The plaintiff was a daughter of Ranhamy who was dead. She claimed the property of Kiri Banda as his sole heiress, while the defendant alleged that he was the heir of his illegitimate son Kiri Banda. A Full Bench while holding that the defendant could not as father succeed to the acquired property of his illegitimate son, had no difficulty in upholding plaintiff's claim as heir of the deceased Kiri Banda *through his deceased mother* whose *illegitimate son he was.* Applying the principle adopted in these two cases I hold that the children of Siri by her husband Dingiriya are (having regard to what is said hereafter on the question of their legitimacy,) heirs of Sedera, and accordingly they succeed to his acquired property subject to a life interest in the petitioner.

In regard to the question of the legitimacy of the respondents it was urged for the first time in appeal that, although ordinarily the production of the certificates of birth of the respondents (in which Siri and Dingiriya are referred to as parents and as married) may have been relevant evidence to establish a marriage between Siri and Dingiriya by reason of the provisions of section 35 of the Evidence Ordinance, in the present

case such evidence must be excluded; it was submitted that this was the effect of the provisions of sections 8 and 36 of the Kandyan Marriage Ordinance 3 of 1870 which are substantially to the following effect:—

Section 8; No marriage contracted after 1870 is valid unless registered in manner and form as provided in the Ordinance; and

Section 36: An entry in a book kept under this Ordinance shall be the best evidence of the marriage so contracted.

It has been held that the expression "best evidence" in section 36 is used in the sense it is used in English Law and it thus excludes all evidence of an inferior character. See *Mampitiya* vs. *Wegodapola* 24 N.L.R. 130 and *Seneviratne* vs. *Halangoda* 22 N.L.R. 472.

An examination of the proceedings in the lower court indicates that the question whether the marriage between Siri and Dingiriya was only a customary marriage or was one contracted under the General Marriage Ordinance then in force or one contracted under the Kandyan Marriage Ordinance 3 of 1870 was never is issue. There were no formal issues raised at the inquiry below; there is nothing in the recorded submissions of counsel or in the judgment of the learned District Judge to indicate that the parties were at issue as to whether the marriage could be held to be valid unless it was contracted under the Kandyan Marriage Ordinance 3 of 1870 and a certified entry of such marriage produced. Mr. Jayawardene himself concedes that while there was the Kandyan Marriage Ordinance in operation at the time, there was nothing in the law to prevent Siri and Dingiriya from having contracted a valid marriage under the General Marriage Ordinance then in operation. Under that law there was no *best evidence* rule. In all the circumstances I think it would be unjust to the respondents to permit such a point to be raised for the first time in appeal. I would accordingly affirm the finding of the learned District Judge that the respondents are the legitimate children of Siri and Dingiriya.

The appeal accordingly fails and is dismissed with costs.

Samerawickrame, J.

I agree.

Dismissed

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

PERERA *vs.* TISSERA & OTHERS*

S.C. No. 135/64 (*Inty.*) & *S.C. No.* 143/64 (*Inty.*)—*D.C. Panadura No.* 8673

Argued and decided on: November 16, 1965

Mortgage bond — Assignment to 2nd defendant — Application by mortgagor to Debt Conciliation Board — Settlement — One of the terms of principal and interest in full before a specified date — On failure, application to stand dismissed — Default in payment — Mortgagor's interest sold in execution and purchased by plaintiff — Partition action by plaintiff—Debt Conciliation Ordinance, section 40(2).

L & S mortgaged their interests in a land in 1948, which in 1959 had been assigned to the 2nd defendant. These interests of L and S were purchased upon Fiscal's conveyance of 7/9/1959, by the plaintiff, who instituted this partition action.

The said mortgage bond was the subject of an application to the Debt Conciliation Board In 1952. The parties consented to a settlement, one of the terms of which was that the full principal and interest should be paid before 31/10/1958 and if such payment was not made "the application to the Board stands dismissed." No payment in fact was made.

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* For Sinhala translation, see Sinhala section, Vol. 15, part 4, p. 13

The learned District Judge dismissed the plaintiff's action apparently because he had misread section 40(2) of the Debt Conciliation Ordinance.

Held: (1) That the learned District Judge was wrong in dismissing the action as the said settlement before the Board would not operate to alter the right of the parties under the mortgage bond which remained in force unaffected by the proceedings under the Debt Conciliation Ordinance.

(2) That the provisions of sub-section 2 of section 40 of the Debt Conciliation Ordinance has no application to the said settlement reached since that settlement in no way created any charge over property and the settlement did not operate to alter the rights of parties under the bond.

Cecil de S. Wijeratna, for the plaintiff, who is the appellant in S.C. 135 and the respondent in S.C. 143.

No other appearance in either appeal.

H. N. G. Fernando, S.P.J.

This action for partition was dismissed by the learned District Judge for reasons which we find it very difficult to fathom. It seems to have been common ground between the parties that the plaintiff purchased some interests in the land upon a Fiscal's conveyance of 7th September, 1959. The interests were those of Lewis Tissera and of Siripala Tissera, the heirs of the latter having apparently been substituted in his place upon his death. The only dispute was whether the interests which the plaintiff purchased were subject to a mortgage which had been created by Siripala Tissera and Lewis Tissera in 1948 and which had by the time of the Fiscal's conveyance been assigned to the second defendant.

This mortgage bond had been the subject of an application to the Debt Conciliation Board in 1952, and the parties apparently consented to what purports to have been a settlement under that Ordinance. The only terms of this settlement were that the interest on the bond was to be reduced to 8 per cent, that the full principal and interest should be paid before 21st October, 1953, and that if such payment was not made, the application to the Board stands dismissed. No payment was, in fact, made, and, accordingly, the settlement would not operate to alter the rights of the parties under the mortgage bond.

Unfortunately, the learned District Judge has misread the provisions of sub-section 2 of section 40 of the Debt Conciliation Ordinance. That sub-section provides that where a settlement creates a charge or mortgage over property, the charge or mortgage so created will upon registration of the settlement be as effectual as a similar charge voluntarily created by a mortgagor. It has no application to the settlement reached before the Board in this case since that settlement in no way created any charge over property. Accordingly, the mortgage bond remains in force unaffected by the proceedings for debt conciliation. The learned District Judge was, therefore, wrong in dismissing the action for the reason apparently that some complication had in his opinion arisen because of the Debt Conciliation proceedings.

We think the best course in these circumstances is that the two issues which were raised at the trial should be decided afresh by another Judge. It will be open to the parties to raise any other issues which properly arise on the pleadings.

Although there was no appearance in the appeal in S.C. 143/64(Inty.) filed by the 2nd defendant, the order which is made in this appeal S.C. No. 135/64(Inty.) will enure to the benefit of the 2nd defendant because he will have a further opportunity to make his claim. In appeal No. S.C. 143/64 (Inty.), therefore, order has to be made pro forma setting aside the decree of the learned District Judge dismissing the action. We make no order as to costs.

Abeyesundere, J.

I agree.

Set aside and sent back.

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

THE QUEEN *vs.* THE REV. HENPITAGEDERA GNANASEEHA THERO & OTHERS*

Application to summon a Special Jury in M.C. Colombo Case No. 34638/*A — No.* 372/67

Argued on: 12th October, 1967.
Decided on: 12th October, 1967.
Reasons delivered on: 19th October, 1967

Jury — Accused indicted on offences under section 115 *of the Penal Code — After completion of non-summary inquiry accused electing to be tried by a Sinhala-speaking jury — Application by the Attorney-General for special jury under section* 222 *of the Criminal Procedure Code- — Qualifications of Jurors set out in section* 257 *of the Criminal Procedure Code — Their applicability today — Objection by the accused — Is the application just and equitable*? *— Penal Code, section* 115.

The accused were indicted on counts of (a) Conspiring to wage war against the Queen and (b) Conspiring to overawe by means of criminal force, the Government of Ceylon, offences punishable under section 115 of the Penal Code.

At the completion of the non-summary proceedings, on being questioned by the Magistrate under section 165 B of the Criminal Procedure Code, the accused elected to be tried by a Sinhala speaking jury referred to in section 257(1) (b) of the Criminal Procedure Code which requires each juror to be able to speak, read and write the Sinhalese language and to possess in his own or wife's right property, immovable or movable, not less than Rs. 1,000/- in value or an income of Rs. 500/- a year.

Thereafter, the Attorney-General made an application to the Supreme Court under section 222 of the said Code for an order requiring a Special Jury to be summoned from a list (prepared under section 257(1)(d) of the said Code) of persons each of whom possessed an income of not less than Rs. 3,000/- a year, or either in his own or wife's right property movable or immovable, not less than Rs. 20,000/- in value or was in the enjoyment of a monthly salary of not less than Rs. 500/-.

Section 222 requires that the Supreme Court should be satisfied that the application is just and reasonable.

The application was supported on two grounds viz. (a) that the case is of unusual complexity in that the prosecution would be relying largely for proof of the alleged conspiracy on inferences arising from various incidents and from the conduct of the accused persons.

(b) that the prosecution will be proving confessions made by some of the accused, the contents of which will not in law be admissible as against the other accused and that a Special jury would be better able to observe this principle.

Crown Counsel argued that though there is no reference to any educational qualification in section 257, the intention of the legislature in laying down the aforesaid qualifications for a special Jury was that persons of the special panel will be better educated and more capable of dealing with the complexities of facts and the law involved in the case than persons in the other panels.

Held: (1) That the said assumption by the legislature when it laid down the aforesaid qualifications though valid in 1898 (when it enacted the Criminal Procedure Code) no longer holds good having regard to the radical change of circumstances which has taken place after Independence not only in respect of educational qualifications but also of income and property qualifications;

(2) That in the circumstances it does not appear reasonable to deprive the accused of the right they have exercised under section 165 (B) of the Criminal Procedure Code to be tried by a Sinhala-speaking jury.

On the argument based on section 222 of the Criminal Procedure Code that a Special jury was advisable in the interests of the defence,

Held: (3) That when the accused have through their counsel objected to a Special jury, it would be gratuitous and patronising in the supposed interests of justice to over-ride a choice freely made by the accused and their advisers.

* For Sinhala translation, see Sinhala section, Vol. 15, part 4, p. 15

Per **H. N. G. Fernando, C·J** — (*a*) "The rejection by this Court of the accused's choice to be tried by a Sinhalese-speaking jury, at a time when Sinhala is generally the language of official business and education and often the language of the Legislature's deliberations, can confuse and perplex the mind of the public and so lead to distrust of our Courts. That is an evil which all those concerned in the administration of Justice must be watchful to avert."

(*b*) "One last observation is necessary. I must not be understood to hold the opinion that special panels of jurors are no longer necessary for criminal trials. But I do think that the qualifications presently set out in section 257 of the Code for the special panel are anachronic and merit re-consideration by the Legislature."

Referred to: *The King* vs. *Nadarajah* (1945) 46 N.L.R. 198
The King vs. *Thelenis Appuhamy* (1945) 46 N.L.R. p. 304.

V. S. A. Pullenayagam, Crown Counsel, with *Wakely Paul*, Crown Counsel, for the Attorney-General, in support.

Dr. Colvin R. de Silva, with *K. C. de Silva*, *C. D. S. Siriwardena*, and *H. L. K. Karawita*, for the 1st accused.

Dr. Colvin R. de Silva, with *Malcolm Perera* and *M. D. S. Boralessa*, for the 5th accused.

Dr. Colvin R. de Silva at their request in Court for the 7th, 8th and 9th Accused.

Dr. Colvin R. de Silva with *R. Weerakoon* for the 11th and 16th Accused.

Neville Samarakone with *Felix R. Dias Bandaranaike* and *Nihal Jayawickrema*, for the 4th Accused.

P. K. Liyanage with *H. M. Jayatissa Herath* for the 3rd and 13th accused.

U. B. Weerasekera, for the 18th Accused.

D. W. Abayakoon, with *Harischandra Mendis* and *Vernon Gooneratne* for the 14th Accused.

Prins Gunasekara, for the 20th accused.

Mohamed Nassim, for the 12th accused.

Percy Karunaratne, for the 15th accused.

D. T. P. Rajapakse, with *M. D. S. Boralessa*, for the 6th accused.

Sarath Muttetuwegama, for the 17th accused.

G. D. C. Weerasinghe, with *Harischandra Mendis*, for the 2nd Accused.

Harischandra Mendis, for the 10th accused.

Stanley Tillekeratne, with *Harischandra Mendis*, for the 19th accused.

Mangala Moonesinghe, with *G. C. Wanigasekera*, for the 22nd accused.

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

22 accused have been indicted in this case of charges:—

(i) That between the 1st day of December, 1965, and the 18th day of February, 1966, at Maharagama, Homagama, Nugegoda, Colombo and other places, in the division of Colombo, within the jurisdiction of this Court, you with others did conspire to wage war against the Queen, and that you have thereby committed an offence punishable under Section 115 of the Penal Code ; and

(ii) That within the period and at the places aforesaid and in the course of the same transaction, you with

others did conspire to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon, and that you have thereby committed an offence punishable under Section 115 of the Penal Code.

In response to the inquiry made by the committing Magistrate under section 165B of the Criminal Procedure Code, the accused elected that the Jury shall be taken for the trial from the Sinhala speaking panel, i.e. from the list referred to in section 257 of persons who can speak, read and write the Sinhalese language and possessing the requisite qualifications specified in paragraph (b) of Sub-section (1) of that section. Thereafter the Attorney-General made an application to the Supreme Court for an order requiring a special jury to be summoned to try the case against the accused. That application was refused after we had heard the arguments of learned Crown Counsel, and we now state our reasons.

It was rightly submitted that the application was one made under section 222 of the Code; accordingly the question which arose was whether the Court considers the application for a special jury to be just and reasonable. There were two main grounds urged in support of the argument that the case is one which should be tried by a special jury; *firstly*, that the case is of unusual complexity in that evidence will be led at the trial of several incidents the connection between some of which will not be easily apparent, and that the prosecution will be relying largely, for proof of the alleged conspiracy, on inferences arising from various incidents and from the conduct of the accused persons; and *secondly*, that the prosecution will be proving confessions made by some of the accused, the contents of which will not in law be admissible as against others of the accused, and that a special jury will be better able than a Sinhala-speaking jury to observe the principle that a confession by one accused is not evidence against the others.

In considering the question whether a special jury will be better qualified than a Sinhala-speaking jury to cope with these anticipated difficulties, the first point which arises is whether the distinctions made in the law between the special panel and the other panels reasonably ensure that the special panel will consist of more competent persons than those on the ordinary panels. Under section 257(1)(d) the special panel consists only of persons who can speak, read and write the English language, In addition, paragraph (d) requires *one* of the following qualifications:—

(*a*) the possession of an income of not less than Rs. 3,000/- a year;

(*b*) in one's own right or that of one's wife, the possession of movable or immovable property not less than Rs. 20,000/- in value:

(*c*) the enjoyment of a monthly salary of not less than Rs. 500/-.

Paragraph (b) of s. 257 (1) provides for a list of persons who can speak, read, and write the Sinhalese language, and requires one of the following additional qualifications:—

(i) the possession in one's own or in one's wife's right of movable or immovable property not less than Rs. 1,000/- in value;

(ii) an income of Rs. 500/- a year.

Paragraph (c) provides corresponding requirements in the case of the Tamil-speaking panel.

It will be seen that the distinctions made in section 257 refer firstly to the matter of the language which a person can speak, read, and write, and secondly, to the income or wealth which a person or his wife may possess. Thus section 257 does not directly require in either case any minimum educational qualification. Nevertheless Counsel argued that, because the Legislature in paragraph (d) laid down certain qualifications for a *special* jury, it follows that the Legislature's intention and expectation was that persons on the *special* panel will be better educated and more capable of dealing with complexities of facts and the law than persons on the other panels.

I entirely agree that the Legislature which enacted the Criminal Procedure Code in 1898 must have entertained the intention and the expectation just mentioned. But it is necessary to consider, as they appear from the Statute, the matters on which the Legislature relied for the

realisation of its intention and expectation. The matter first expressed pertains to language, and it is manifest that the Legislature in 1898 expected that persons having a knowledge of the English Language are likely to be better educated than those having only a knowledge of Sinhala or Tamil. Having regard to the known facts concerning the educational policy of the British Government of Ceylon and to its consequences, that was quite a reasonable expectation; secondary education, for instance, was in 1898 and until fairly recent times imparted exclusively through the English medium, and the language of the Administration and of Commerce was in all important respects exclusively English. The provision in paragraph (d) of section 257 requiring for a special juror the enjoyment of a monthly salary of not less than Rs. 500/- did certainly ensure the possession of a reasonably high educational qualification and/or of commercial or administrative experience, and there could have been in 1898 but few persons having a knowledge only of Sinhalese or Tamil language enjoying salaries at that level. In brief therefore section 257 was based on a perfectly valid assumption that a person on the special panel would in many respects be a more competent juror than persons of the other panels. It follows therefore that for many years after 1898 it would have been just and reasonable in a fit case to direct that it be tried by a special jury.

But I am satisfied that the assumption validly made by the Legislature in 1898 no longer holds good having regard to the radical change of circumstances which has taken place in this country particularly after Independence. It is a matter of common knowledge that the majority of those who now complete secondary education receive their education in the Sinhala medium and not in English. It is also a matter of common knowledge that even the minority which receives secondary education in the English medium no longer possesses a proficiency in the English language in any way comparable to the proficiency attained in that language prior to the 1940s.

The figures of recent University entries establish that the majority of the young people who are now competitively selected for University education have little or no knowledge of the English language, so that there has come a stage when the majority of those possessing superior educational qualifications will not on the ground of language be eligible for the panel of special jurors. Thus the principal ground for the assumption which led the Legislature in 1898 to lay down the language qualifications specified in paragraph (d) of section 257 is no longer valid.

Passing now to the income qualification, here again it may have been reasonable to suppose at the beginning of this century that the requirement of an annual income of Rs. 3,000/- or of the possession of property worth Rs. 20,000/- would secure that persons on the special panel would be better educated than others in less affluent circumstances, but having regard to the changes in the real value of money, the limits imposed in paragraph (d) are far too low to justify a similar expectation at the present time.

Counsel attempted to equate what he termed the complexity of the present case to the complexity which might arise in a case in which the evidence relates to involved accounts or matters of business practice. In a case like the present one, the function of the Jury will not be extraordinary; their task will be to decide such matters as whether a particular incident did occur, whether a person said or did something on a particular occasion, whether one accused was aware of some purpose which another may have entertained, whether an inference of guilt should be drawn from matters held to have been proved. That in no way resembles the task of the Jury in a case in which the evidence cannot be properly understood save by persons possessing some knowledge or experience of accounting, commercial or scientific matters. Even if persons having the qualifications set out in paragraph (d) of section 257(1) of the Code may be more competent than others to serve at jurors for a case of the latter type, we are not here concerned with such a case.

On the grounds discussed above, it does not appear to me reasonable to deprive the accused in this case of the right they have exercised under section 165B to be tried by a Sinhala-speaking Jury.

There is the further consideration arising under section 222 whether or not it is *just* that the case be tried by a special jury, when the accused have exercised their statutory right of election that they be tried by a Sinhalese-speaking jury. The second argument of learned Crown Counsel is relevant to this matter. He suggested that a Sinhalese-speaking jury may be less able than a special jury to keep out of consideration as against some accused confessions alleged to have been made by other accused. In other words, he

urged that a special jury was advisable in the interests of the defence. Had the accused made no objection, then perhaps it was incumbent on the Court to consider whether the interests of the defence would be better served by the empanelling of a special jury. But when the accused themselves have elected a Sinhalese-speaking jury, and when they have through their Counsel intimated their objection to a special jury, it would be gratuitous, and as my brother remarked, patronizing, for the Court, in the supposed interests of the accused, to over-ride a choice freely made by the accused and their advisers.

I presume that some of the witnesses at the impending trial will give their evidence in English; if so, it is not the practice for that evidence to be translated into Sinhalese at a trial before an English-speaking Jury. One of the advantages therefore which the accused will enjoy if tried according to their choice, is that they will be able personally to understand all the evidence, and thus to instruct their Counsel more usefully.

I do not propose to discuss the other practical advantages which the Legislature must be presumed to have intended to afford to accused persons by the exercise of their right to choose the particular language speaking panel from which juries should be drawn. But having regard to the clear right of election thus conferred, justice will not appear to be done if this Court were to over-ride such an election otherwise than on cogent grounds. I have tried to show already that no sufficient grounds have been made out in this case.

The rejection by this Court of the accuseds' choice to be tried by a Sinhalese-speaking jury, at a time when Sinhala is generally the language of official business and education and often the language of the Legislature's deliberations, can confuse and perplex the mind of the public and so lead to distrust of our Courts. That is an evil which all those concerned in the administration of Justice must be watchful to avert.

Learned Crown Counsel repeatedly stated that in previous cases a special jury has been ordered although the accused's election under section 165B had been only for an ordinary jury. The instance to which he often referred was the trial concerning the Assassination of the late Prime Minister, Mr. Bandaranaike. In that case apparently the accused had elected to be tried by an English-speaking jury, and the Court acceded to an application by the accused themselves for a special jury. In the result the accused were yet tried according to their own choice because a special jury under section 257 is always English-speaking. No question there arose of the Court over-riding the election made by the accused. For this reason that particular instance is not favourable, but is rather opposed, to the present application.

The case of *The King* vs. *Nadarajah* (46 N.L.R. 198) does not support the Crown in this case. There the prisoners had elected under section 165B to be tried by an English-speaking jury in a case expected to be heard in the Northern Circuit; the Attorney-General thereafter transferred the case to the Western Circuit at Colombo, and the prisoners then applied to be tried by a Tamil-speaking jury. That application did not fall under section 222 of the Court, but instead under section 224. The trial Judge relied upon the provision in section 165B that an accused is bound by his election under that Section; and in refusing the application for an alteration of the election, the Judge exercised his discretion under section 224. No question arose in that case, as in this one, of over-riding the election made under section 165B.

The case of *The King* vs. *Thelenis Appuhamy* (46 N.L.R. p. 304) was again one of an application not under section 222, but under section 224. That fact suffices to distinguish the case. True it was that the accuseds' election of a Tamil-speaking jury was there over-ridden by an order of Court under section 224, but it is clear that the trial Judge made his order because of the peculiar circumstance that Sinhalese accused had in that case elected to be tried by a Tamil-speaking jury upon grounds which in the opinion of the trial Judge were quite unreasonable.

The instances to which Counsel referred during his argument afford no grounds for holding that in the present case it would be *just* to order these accused to be tried by a special jury.

One last observation is necessary. I must not be understood to hold the opinion that special panels of jurors are no longer necessary for criminal trials. But I do think that the qualifications presently set out in section 257 of the Code for the special panel are anachronic and merit reconsideration by the Legislature.

T. S. Fernando, J.

I agree.

Application refused.

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

ALFRED SAMARASINGHE & ANOTHER *vs.* WILFRED SAMARASINGHE

S.C. No. 222 (*Inty*) *of* 1966 — *D.C. Galle* 7196/*L*

Argued on: December 6, 1967
Decided on: December 21, 1967

Conciliation Boards Act, No. 10 *of* 1958 *as amended—Sections* 6(*a*), (*b*), (*c*), 14(1)(*a*), 18—*Action for restoration to possession— Tenancy alleged by plaintiff —Denial by defendant — Premises in question situated in area for which Conciliation Board Panel constituted—Defendant's plea that action cannot be maintained without producing certificate from Chairman that settlement could not be effected—Such plea tried as preliminary issue — Whether decision against defendant correct.*

The plaintiff sued the 1st defendant for restoration to certain premises alleging that the 1st defendant, his brother, forcibly ejected him from the said premises of which he was in occupation as 1st defendant's tenant. The 2nd defendant was made a party alleging collusion with the 1st defendant.

The 1st defendant, while denying the allegations in the plaint pleaded in his answer —

(*a*) that the plaintiff was only his rent collector and Manager of the buildings and of the business carried on therein.

(*b*) that he was dismissed from service on account of the misappropriation of certain moneys, and that 2nd defendant was appointed in his place.

(*c*) that the plaintiff could not maintain the action as he had not produced a certificate from the Chairman of the Conciliation Board constituted for the area in which the premises in question are situated as required by section 14(1) of the Conciliation Boards Act No. 10 of 1958.

Plea (c) above was tried as a preliminary issue. The defendant produced D4, a certificate from the Chairman of the Conciliation Board Panel concerned, but it was dated 25/8/65, a date subsequent to the date of filing answer. D4, referred to a complaint against the 1st defendant by the plaintiff for having entered the premises in question and stated that a settlement could not be effected.

The learned District Judge decided against the defendants holding that there was no dispute between the plaintiff and the 1st defendant such as is referred to in section 6 of the Conciliation Boards Act.

Held: (1) That the learned District Judge erred in his decision as the pleadings in the case and the certificate D4 establish that there was a dispute falling within one or more or all of the classes (a), (b) and (c) described in section 6 of the Conciliation Boards Act No. 10 of 1958.

(2) That Conciliation Boards Act does not deprive the citizen of his right of access to the established Courts. It only places a bar against the entertainment by Courts of certain civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute.

Per **T. S. Fernando, J.** "It would appear that service of summons could not be effected on the 1st defendant so that a Conciliation Board may proceed to make an inquiry *inter partes*, but, as we apprehend the position, there is no legal *requirement* of the presence at the inquiry of the party against whom the complaint, is made. If, after reasonable effort to serve summons, the Board is satisfied that it is not possible to serve summons or otherwise secure the attendance of the party complained against, there is no legal bar to an *ex-parte* inquiry and the issue of a certificate thereafter that it is not possible to effect a settlement."

Case referred to: *Aziz* vs. *Thondaman* (1959) 61 N.L.R. 217

M. C. Abeywardene, for the defendants-appellants.

C. Ranganathan, with *S. W. L. Bandara*, for the plaintiff-respondent.

T. S. Fernando, J.

This action was instituted on 19th March 1965 in the District Court of Galle by the plaintiff who averred in his plaint that he was at all material times a monthly tenant of his elder brother, the 1st defendant, in respect of certain premises with all buildings thereon. It was further averred that his landlord, the said 1st defendant, had forcibly ejected him from a specified part of the said premises. The 2nd defendant was made a party to the case on the allegation that he had acted in concert with the 1st defendant in the said unlawful ejectment. What was prayed for in the plaint was an ejectment of the defendants and a restoration of the plaintiff to quiet possession.

The 1st defendant filed answer denying that the plaintiff was his tenant. It seems to me that there lay the real dispute between the parties. The 1st defendant further denied unlawful entry and averred that the plaintiff was only his rent collector and manager of the buildings and of the business carried on therein. He alleged that the plaintiff was dismissed from service on account of misappropriation of certain monies, and that the 2nd defendant was the person employed to succeed to the duties performed by the dismissed plaintiff.

The 1st defendant, in his answer, took up also the plea that this action could not have been instituted by the plaintiff or entertained by the court without the production of a certificate from the Chairman of the Panel of Conciliators constituted for the area in which the premises from which the plaintiff claimed he was ejected are situated. The point so pleaded was tried by way of a preliminary issue and decided by the learned District Judge against the defendants. This appeal raises solely the correctness of that decision of the District Judge.

Section 14(1)(a) of the Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963, enacted as follows:—

> "Where a Panel of Conciliators has been constituted for any Conciliation Board area —
>
> no proceedings in respect of any dispute referred to in paragraphs (a), (b) and (c) of section 6 shall be instituted in, or be entertained by, a civil court unless the person instituting such proceedings produces a certificate from the Chairman of such Panel that such dispute has been inquired into by a Conciliation Board and it has not been possible to effect a settlement of such dispute by the Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any of the parties to such settlement in accordance with the provisions of section 13;"

It did appear in the proceedings held in the District Court on the preliminary issue that a dispute between the plaintiff and the 1st defendant had been referred as contemplated in section 6 of the Act for inquiry to a Conciliation Board. D4, a certificate dated 25th August 1965, has been issued by the Chairman of the relevant Panel. By that time the answers of the defendants had been filed in the District Court. This certificate recites that a complaint was made by the plaintiff against the 1st defendant "for having entered unlawfully the service station" (which is the important part of the premises we are concerned with in this case), that it was inquired into by a Conciliation Board and that a settlement could not be effected. The learned District Judge has construed the complaint made to be one relating to a criminal offence of trespass, but we are satisfied that he was in error in so doing. He appears to have been influenced by the fact that the matter was referred to the Panel of Conciliators by the Police, but the evidence of the Police Inspector is clear enough that he treated the plaintiff's complaint to him correctly as one relating to a land dispute — a dispute of a civil nature, in respect of which the Police could necessarily make no useful decision.

It would appear that service of summons could not be effected on the 1st defendant so that a Conciliation Board may proceed to make an inquiry *inter partes*, but, as we apprehend the position, there is no legal *requirement* of the presence at the inquiry of the party against whom the complaint is made. If, after reasonable effort to serve summons, the Board is satisfied that it is not possible to serve summons or otherwise secure the attendance of the party complained against, there is no legal bar to an *ex-parte* inquiry and the issue of a certificate thereafter that it is not possible to effect a settlement. That the Chairman was aware of his power to issue a certificate in circumstances such as those I have above set out is evident from the very existence of certificate D4.

The learned District Judge, after referring to the *obiter dictum* of Basnayake, C.J., in *Aziz* vs. *Thondaman* (1959) 61 N.L.R. at p. 222 that the right of a citizen to invoke the aid of the courts is one that "is so fundamental that it cannot, in my view, be taken away by our legislature itself", has gone on to say that the plaintiff's right to sue cannot be taken away unless a statute in express and unambiguous language so states. We do not think that the Conciliation Boards

Act makes any pretensions of depriving the citizen of his right of access to the established Courts. What it seeks to do is to place a bar against the entertainment by Courts in certain stated circumstances of civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute over which the parties appear set on embarking on litigation which is often expensive to the parties as well as to the State and which almost always finishes up in bitterness. Indeed, section 18 of the Act is eloquent in regard to the mood of the legislature when it passed the law relative to conciliation, for it enacted that "the provisions of this Act shall have effect notwithstanding anything to the contrary in any written law."

I do not find it possible to agree with the learned judge in his finding that there was no dispute between the plaintiff and the 1st defendant such as is referred to in section 6 of the Act. I have already indicated above that the main dispute was that over the allegation of the existence of a tenancy. Indeed, the plaint itself, and certainly the pleadings taken together, establish that there was a dispute falling within one or more or all of the classes (a), (b) and (c) described in the said section 6. Moreover, the very conduct of the plaintiff in obtaining the certificate after the institution of the action when the pinch of the plea was being felt and the making of no effort to produce it in Court, leaving such production to be done by the 1st defendant, goes to prove that he himself realised the weakness of his position in law. The issue referred to above in this judgment had, on the facts before him, to be answered by the learned judge in the negative.

I would allow the appeal, set aside the order of 20th July 1966 appealed from, and direct that the plaintiff's action be dismissed on the ground that it could not have been instituted or entertained in view of section 14(1) (a) of Act No. 10 of 1958.

The 1st defendant is entitled to the costs in the court below and to the costs of this appeal.

Siva Supramaniam, J.

I agree.

Appeal allowed.

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

M. T. SOMASUNDERAM *vs.* M. NADARAJAH

S.C. No. 193 (*Final*) *of* 1964 — *D.C. Jaffna L*/2030

Argued on: October 16 & 20, 1967
Decided on: 2nd November, 1967.

Civil Procedure Code, section 667 — *Interim Injunction— Application made on insufficient grounds or in the absence of probable grounds — Circumstances in which relief may be granted by Court in terms of Section* 667

Held: That section 667 of the Civil Procedure Code is intended to punish a person who obtains an injunction on a frivolous pretext, and not to punish a person for a possible error of judgment of the District Judge who granted the said injunction.

Followed: *Silva* vs. *Silva* (1903) 6 N.L.R. 225.

C. Ranganathan, Q.C., with *S. Sinnathamby*, for the plaintiff-appellant.

C. Thiagalingam, Q.C., with *R. R. Nalliah*, for the defendant-respondent.

T. S. Fernando, A.C.J.

In this action instituted on 28th November 1963 the plaintiff was unsuccessful in obtaining from the District Court a permanent injunction restraining the defendant from operating certain machinery for the purpose of retreading old motor car tyres which the latter had installed on land adjoining the plaintiff's residence. The plaintiff's main allegation was that the operation complained of by him constituted a nuisance injurious to the health and comfort of the members of his family and of himself. At the hearing of the appeal before us, the plaintiff's counsel was unable to satisfy us that the learned trial judge was not justified in refusing the permanent in-

junction on the ground that the plaintiff had failed to show (1) a substantial interference in the enjoyment of his right to live on his own land or (2) a sensible discomfort caused by unreasonable interference with his personal enjoyment of his land. Before the trial began, the plaintiff, however, had obtained *ex parte* an interim injunction restraining the defendant from operating the said machinery as from 3rd December 1963; and the trial judge, at the conclusion of the trial, holding that this interim injunction had been obtained on "insufficient and false premises", has made order that the interim injunction also be dissolved and that the plaintiff do pay to the defendant damages at the rate of Rs. 200/- a day from the said 3rd December until the date of the order of dissolution viz. 17th March 1964. The inference from the quantum of damages so decreed is that the net profit to the defendant for the first year of working is assessed at something over Rs. 60,000/-, a sum which learned counsel for the defendant himself was willing to concede constituted too high an assessment of probable profit. He did, however, contend that the trial judge was right in holding that there was no probable ground for the plaintiff to have applied for the interim injunction.

Section 667 of the Civil Procedure Code enacts that if it appears to the Court that the injunction was applied for on insufficient grounds, or if, after the issue of an injunction which it has granted, the action is dismissed or judgment is given against the applicant, and it appears to the court that there was no probable ground for applying for the injunction, the court may, on the application of the party against whom the injunction issued, award against the party obtaining the same in its decree such sum as it deems a reasonable compensation for the expense or injury caused to such party by the issue of the injunction. As Layard C.J. stated in *Silva* vs. *Silva* (1903) 6 N.L.R. at p. 228, section 667 is intended to punish persons obtaining injunctions on more or less frivolous pretexts and not to punish persons for possible errors of judgement of the District Judge who grants them an injunction. The judge who granted the interim injunction in this case was the same judge who ordered its dissolution.

The plaintiff had presented an affidavit at the time of applying for the injunction and this was followed by his evidence given in court on the following day. His residence is situated in what may fairly be described as a residential area of the town of Jaffna which, unfortunately, has hitherto not been zoned into residential, commercial, industrial and other areas. In his evidence given on the day referred to above the plaintiff stated that the machine installed just 46 feet away from his house and which is worked by a steam boiler emits noxious fumes and throws out rubber dust, polluting the surrounding atmosphere and rendering it unhealthy. He complained that he has a right to draw water from a well in the land on which the factory stands, and that the drinking water in this well has been polluted by the fall of this dust. In this affidavit presented on the previous day the contents of which may also be regarded as having influenced the District Judge to order the interim injunction the plaintiff had averred that by the operation of the machinery in this factory serious personal and physical discomfort and loss of sleep have been the lot of members of his family and of himself. He had further averred therein that two of his children, both infants, had suffered nervous shock and are under medical treatment.

The plaintiff had an opportunity at the trial of substantiating this allegation in respect of the illness of his children and, as he failed to prove the truth thereof, we are unable to say that the learned judge was wrong in his finding that this particular allegation was false. Even so, the question remains whether the injunction was obtained on more or less frivolous pretexts.

There was no evidence to indicate the existence of any previous ill-feeling between the plaintiff and the defendant. This factory was opened on October 23, 1963, and it would appear that two days later the plaintiff who is a lorry driver owning a lorry himself had placed with the defendant an order for retreading two tyres. An attempt was made at the trial, somewhat half-heartedly, to suggest that the plaintiff initiated this litigation when he failed to secure appointment as a commission agent of the defendant; but no evidence was tendered in proof of the truth of the suggestion.

Before the expiry of two weeks from the date of the opening of the factory, the plaintiff addressed a petition P1 of 5.11.63 to the Medical Officer of Health complaining of poisonous smells, smoke, dust and pollution of the drinking water of the common well. This was followed up with a petition P2 of 16.11.63 to the Government Agent of Jaffna. The Medical Officer of Health inspected the factory premises and his report P10 of 16.11.63 shows that he had requested the

owner of the well to cover it to prevent any dust falling into the well. He had also requested the defendant or his servants to close up the sides of the factory which open on to the plaintiff's house. The same report indicates that the motor is being shifted to a position further away from the plaintiff's house. The Grāma Sevaka to who petition P2 had been referred visited the factory premises on 21.11.63 and made a report P4 in which he makes mention of the noise made by the motors and boilers, of the smoke and the dust and the smell of burning rubber. In his evidence he stated that he saw dust deposited on the window sill of the plaintiff's house and even on the lane adjoining the house.

It has been contended before us that certain steps had been taken after the visit of the Medical Officer of Health on 16.11.63, and that any inconvenience or irritation to the plaintiff had been removed before 18.11.63 which was the date of the filing of the plaint. The Grāma Sevaka's evidence and his report P7A show that the enclosing of the sides of the factory building with planks was going on even on 8.12.63. Report P9 of the same witness shows that dismantling of machinery was going on even as late as 12.1.64 when he visited the site on a further complaint of the plaintiff. In the state of this evidence not much assistance could have been gained on the question whether there was a lack of probable ground for seeking and obtaining an interim injunction by examining the evidence of the expert witnesses called by the two sides. It is therefore unnecessary to examine the complaint of learned counsel for the plaintiff that the trial judge has relied also on the evidence of expert witness Wijeratne whose evidence was taken at the instance of the defendant even before the trial commenced and who was not called at the trial itself and was thus not available to be cross-examined. Moreover, at the stage at which the expert witnesses saw the factory the interim injunction had already taken effect and their evidence did not relate to the state of affairs that would probably have existed when the factory was working to capacity.

Therefore, although the plaintiff has not succeeded in convincing us that the learned judge was wrong in his finding that at least one of the allegations that must have led to the granting of the interim injunction was false, there is nothing in the relevant part of the judgment appealed from that indicates that this false allegation was the main consideration that led to the grant of the injunction. At the time the court's power was invoked the circumstances which the report of the Medical Officer of Health and the evidence of the Grāma Sevaka show did exist were such as to render it difficult to say that the application was made on frivolous pretexts. The addition to these probable grounds of a false allegation in regard to the illness of children does not have the effect of erasing their existence particularly as there is nothing, as I have said above, in the judgment itself to indicate that the main or substantial ground for allowing the injunction was the allegation about the children's illness.

I would, for the reasons set out above, direct that the decree entered in the district court be amended to the extent of striking out the award of damages.

The plaintiff will be entitled to half the costs of this appeal.

Siva Supramaniam, J.

I agree.

Decree varied.

Present: **T. S. Fernando, A.C.J., Sirimane, J. and Siva Supramaniam, J.**

PREMASIRI *vs.* THE ATTORNEY-GENERAL

S.C. Application No. 401 *of* 1967

Application under Section 31 *of the Courts Ordinance for bail in M.C. Colombo No.* 37693/*C.*

Argued & decided on: 26th November, 1967.
Reasons delivered on: 5th December, 1967.

Bail—Courts Ordinance, section 31—*Criminal Sessions at which the prisoner "might properly be tried" — Whether ommission to serve indictment material — Ordinance No.* 9 *of* 1943, *section* 1 —

Ordinance No. 15 *of* 1843, *section* 37—*Charter of Justice*, 1833—*Ordinance No.* 3 *of* 1883, *section* 281—*Criminal Procedure Code, section* 389.

Held: (1) That the preparation and service of a copy of the indictment on a prisoner is but a step involved in bringing a prisoner to trial.

(2) That the first and second criminal sessions at which a prisoner "might properly be tried" refer to criminal sessions having territorial jurisdiction over the trial of the offence.

(3) That the omission to serve an indictment on a prisoner does not render that criminal sessions not the criminal sessions at which the prisoner could have been properly tried.

Cases considered: *De Mel* vs. *The Attorney-General* (1940) 47 N.L.R. 136
Leon Singho vs. *The Attorney-General* (1959) 62 N.L.R. 222
The Queen vs. *Mudiyanse* (1961) 63 N.L.R. 300
The Queen vs. *Sunderam* (1955) 60 N.L.R. 281
The Queen vs. *Jinadasa* (1958) 60 N.L.R. 125
Perera vs. *The Attorney-General* (1967) 69 N.L.R. 522

Overruled: *The King* vs. *Girigoris Appuhamy* (1946) 47 N.L.R. 499
Mendis vs. *The Queen* (1964) 66 N.L.R. 502

Per **T. S. Fernando, A.C.J.:** "The liberty of the subject is an important personal right enjoyed in democratic communities observing the Rule of Law, and custody pending trial being an infringement of that liberty, the Courts must be vigilant in ensuring that the infringement is restricted to the limits spelled out by the Legislature."

"The liberty of the subject is not a slogan as was suggested, cynically, so it appeared to us, during the argument, but is a valuable right of a citizen, and the Courts must be vigilant in ensuring that it is not unprofitably thwarted."

Nihal Jayawickrama, for the applicant.

V. S. A. Pullenayegum, Crown Counsel, with *Ranjit Abeysuriya, Crown Counsel*, for the respondent.

T. S. Fernando, A.C.J.

This matter comes before us as a result of a question of law being reserved in terms of section 48 of the Courts Ordinance for the decision of more than one judge of this Court. Alles, J., before whom the matter was first taken up, reserved the question of law in view of two recent conflicting decisions both of which will be noticed later.

Proceedings were instituted in the Magistrate's Court, Colombo, against the applicant and three others on a complaint by the Police that alleged that on or about October 8, 1966 they committed the offence of murder by causing the death of one Chandrapala, an offence punishable under section 296 read with section 32 of the Penal Code.

After a non-summary inquiry held by the Magistrate, the applicant was on February 18, 1967 committed to the Supreme Court for trial. The three other persons accused were discharged by the Magistrate.

After the date on which the applicant was so committed for trial, there was held for the Western Circuit two criminal sessions, one commencing on March 20, 1967 and the other on July 10, 1967. Yet another session (the current session) for this circuit commenced on October 12, 1967, and the applicant fears he may not be brought to trial even at this session for the reason that, although over nine months have elapsed since his commitment, he has hitherto not even had a copy of the indictment served on him. He was first remanded in custody in October 1966 and remains in custody to this day. He has thus been in custody already for over 13 months. He claims that he has a right under section 31 of the Courts Ordinance to be released on bail pending his trial.

The relevant part of the aforesaid section 31 is reproduced below:—

"If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such

prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner."

Neither counsel who appeared before us has been able to find any reported case where before the year 1960 this section has been the subject of judicial interpretation, a feature strongly indicative, in my opinion, of the absence of any serious delay up to that time in the disposal of criminal cases after date of commitment of prisoners for trial by the Supreme Court. The first reported case is one of the year 1940, two years after the introduction of the amendment of the Criminal Procedure Code by Ordinance No. 13 of 1938 whereby the system of direct committal for trial by inquiring Magistrates was substituted for the earlier system of committal on the instructions of the Attorney-General. In that case, *De Mel* vs. *The Attorney-General*, (1940) 47 N.L.R. 137, Nihill, J., dealing with an argument of Crown Counsel that the effect of the 1938 amendments would be to widen considerably the effect of section 31 of the Courts Ordinance unless the words "at which such prisoner might properly be tried" are taken to mean that time does not begin to run in a prisoner's favour until he has been served with a copy of the indictment and two weeks (required by section 165F(3) of the Criminal Procedure Code) shall have elapsed thereafter, felt he did not consider himself justified in accepting it as valid. The learned judge there went on to observe that section 31 contains an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch. He added that "it may be that the section is now more favourable to a prisoner in its application than formerly, but if that was not the intention of the Legislature the section could have been amended. Neither do I consider that the section in its application to the new procedure can be said to place a serious impediment in the path of the Crown. A period of three weeks is provided between the date of commitment and the first day of the Sessions. True if further evidence is required this may be too short a period in which to get it and to prepare and serve the indictment, but cases can and are added to the calendar after a Sessions has begun".

The liberty of the subject is an important personal right enjoyed in democratic communities observing the Rule of Law, and custody pending trial being an infringement of that liberty, the courts must be vigilant in ensuring that the infringement is restricted to the limits spelled out by the Legislature. The observations of Nihill, J. reproduced above were quoted with approval by Gunasekera, J. in a hitherto unreported decision where the learned judge dealt with the case of several prisoners whose trials could not be disposed of before the end of a particular criminal sessions of the Southern Circuit. Sansoni, J. (as he then was) himself relied in the case of *Leon Singho* vs. *Attorney-General*, (1959) 62 N.L.R. at 223, on that part of the observations of Nihill, J. which related to section 31 as embodying an important principle safeguarding the liberty of the subject. Gunasekera, J. reverted to the subject in the case of *The Queen* vs. *Mudiyanse*, (1961) 63 N.L.R. at 392, when he observed that the mischief that is aimed at by the enactment (section 31) is the imprisonment for unduly long periods of accused persons awaiting trial.

Sansoni, J. did not, however, in the case mentioned in the above paragraph refer to the other part of the observations of Nihill, J. that rejected the argument that time does not begin to run in a prisoner's favour until he has been served with a copy of the indictment, but it is to be noted that he was dealing with a case where indictment had already been served. Another case, also decided by Sansoni, J. some four years earlier, *The Queen* vs. *Sunderam*, (1955) 60 N.L.R. 281, was relied on by the Crown in its argument before us, inasmuch as the learned judge has there observed that "once the indictment had been served on all the prisoners and fourteen days had elapsed, there was no further legal impediment in the way of the Crown in bringing this case to trial." The argument before us was that the absence of an indictment was one of the legal impediments in the way of the Crown before the case can properly be tried within the meaning of section 31, but we must be careful not to read too much into the language employed by the learned judge there as that too was a case where indictment had been served long before the point that was decided there had arisen.

The earliest case which favours the view contended for by the Crown is that of *The King* vs. *Girigoris Appuhamy*, (1946) 47 N.L.R. 499, in which Nagalingam, A.J. (as he then was) held that in view of the amendment introduced to the Criminal Procedure Code in 1938 a prisoner

could not have been properly tried at any sessions unless and until a fortnight had elapsed after the service of the indictment on him. That too was a case where at the time the question of bail was decided copy of indictment had long been served. A different view was taken in the later case of *The Queen* vs. *Jinadasa*, (1958) 60 N.L.R. 502, where Gunasekera, J. granting an application for bail in the case of two prisoners committed on 17th June 1957 for trial in the Southern Circuit held that the first session at which they could properly have been tried was the session that commenced for the Circuit on 16th September, 1957, notwithstanding the fact that indictment was served on them only on 2nd April 1958.

I could now turn to the two recent cases which apparently necessitated the reference of the question to this Divisional Bench. In *Mendis* vs. *The Queen*, (1964) 66 N.L.R. 502, Manicavasagar, J., dealing expressly with a case where indictment had not been served up to the date of his decision, considered the filing of an indictment and the service of a copy thereof on the prisoner as essential and necessary requirements before the prisoner "might properly be tried". Three years later, and barely five months ago, Samerawickrame, J., in *Perera* vs. *Attorney-General*, (1967) 69 N.L.R. 522, expressly disagreed with this interpretation placed upon section 31 by Manicavasagar, J., and favoured a view which he thought was consonant with the views taken earlier by Nihill, J. in *De Mel* vs. *The Attorney-General* (*supra*) and by Gunasekara, J. in *The Queen* vs. *Jinadasa* (*supra*). In the last mentioned case Gunasekera, J. had taken the view that prisoners could "properly be tried" at a criminal session held for the proper circuit, subject, I would add, to a modification necessitated by a lawful transfer of the trial from one circuit to another.

Samerawickrame, J. stated (at page 524) that in deciding whether a prisoner should be admitted to bail under section 31, "a court must consider two questions (1) has the prisoner not been brought to trial at a sessions held after he was committed by the Magistrate, (2) was that sesssions one at which he could properly have been tried. In deciding the second question it seems to me that one must consider whether he could properly have been tried had he been brought to trial at it. It is therefore, in my view, not permissible to give as a ground for holding that a prisoner could not properly have been tried at a sessions the omission to take a step involved in bringing the prisoner to trial, viz., the preparation and service of the indictment."

We have had the advantage of a full argument by learned counsel appearing for the applicant and for the Crown and, after giving due weight to their arguments, I would respectfully agree with the opinions expressed by Samerawickrame, J. that (1) the preparation and service of copy of the indictment on the prisoner is but a step involved in bringing the prisoner to trial, and (2) that a sessions at which a prisoner could have been tried had he been brought to trial is a sessions at which he could properly have been tried. By way of an illustration, if I were to assume that a prisoner had been committed to trial on 1st February 1967, and indictment had been served on him on 25th February 1967, and the first sessions after committal commenced on 20th March 1967, that prisoner could have been brought to trial at the said sessions. If that was then the sessions contemplated in section 31, the omission to serve indictment does not render that sessions not the sessions at which the prisoner could have been properly tried.

This view first found favour with Gunasekara, J. whose familiarity with the administration of the criminal law and procedure of this Country is well known and whose contribution to the development of that law and procedure is amply borne out in our law reports. Its confirmation by Samerawickrame, J. in the recent judgment above noticed is further strengthened by a reference to an old Ordinance No. 15 of 1843, to which our attention was invited by learned counsel for the applicant. It is an Ordinance described as one providing in certain respects for the more efficient Administration of Justice in Criminal Cases and, as far as we can make out, section 37 thereof is the first legislative provision relating to the proper sessions at which a prisoner might be tried. That section is reproduced below in its entirety:— (The underlining is mine)

> 37. And it is further enacted, that if any prisoner committed for trial before the Supreme Court shall not be brought to trial at the first Criminal Sessions after the date of his commitment, *holden for the Circuit proper for the trial of such prisoner*, provided Twenty-one days have elapsed between the date of the commitment and the first day of such Criminal Sessions, he shall be admitted to bail, unless good cause be shown to the contrary. And if such prisoner is not brought to trial at the second Criminal Sessions of the Supreme Court holden for the said Circuit, after the date

of his commitment, unless, by reason of the insanity or sickness of such prisoner, the Judge of the Supreme Court presiding at such last mentioned Sessions, shall issue his order to the Fiscal for the discharge of such prisoner from his imprisonment for that offence for which he has been committed for trial.

Ordinance No. 15 of 1843 came into force on the 8th November of that year, and six days earlier, viz. on 2nd November 1843, by section 1 of Ordinance No. 9 of 1843 provision was made for the division of the Island of Ceylon into three or more Circuits in place of the provision introduced by the Charter of 1833 dividing the Island into the District of Colombo and the Three Circuits therein named. The terms of section 37 above reproduced indicate clearly enough that the first sessions and the second sessions specified therein refer to sessions having territorial jurisdiction over the trial of the offence. A close comparison of it with section 31 of the Courts Ordinance in its present form will show that it has not been subjected to any material amendment in spite of the passage of nearly 125 years.

Learned counsel for the Crown submitted, quite correctly, if I may say so, that no person can be tried at any sessions unless an indictment has in fact been presented. He referred us to the language employed in section 281 of the Criminal Procedure Code of 1883 (Ordinance No. 3 of 1883), viz. that the "indictment shall be the foundation of the trial in the Supreme Court", and contended that one cannot contemplate a session existing at which a prisoner might properly be tried until such time as the foundation can be laid for the trial. I think this was but another way of formulating the very argument which was rejected in 1940 by Nihill, J., a rejection which was endorsed in 1955 by Gunasekara, J., and in 1967 by Samerawickrame, J. Crown Counsel invited us also to consider two consequences that may arise by acceding to the argument on behalf of the applicant. He first referred us to the powers reserved to the Attorney-General by section 389 of the Criminal Procedure Code to order a supplemental inquiry at which further evidence might be recorded. Apart from observing that this point too was in the mind of Nihill, J. when he decided the case above referred to, I do not consider that any order of the Attorney-General under the said section can affect the plain interpretation of the expression "the date of his commitment" contained in section 31 of the Courts Ordinance. Samerawickrame, J. in *Perera vs. Attorney-General* (*supra*) thought that a case where the Attorney-General has exercised his powers under section 389 after commitment would be one in which the Crown could resist an application for bail in terms of section 31 of the Courts Ordinance as there would then be good cause to the contrary. I would myself endorse this observation subject to the qualification that such a situation may, but not necessarily would, constitute good cause against the granting of bail. Crown Counsel next invited us to consider what would happen where the Attorney-General, as he lawfully might do, sends an indictment to the District Court instead of to the Supreme Court to which the accused has been committed by the Magistrate. It was a little difficult to appreciate what force this second argument of Crown Counsel could carry because, apart from the fact that most offences triable by a District Court are bailable offence, section 31 can have no operation except in respect of cases of prisoners awaiting trial by the Suprme Court, Therefore, where an accused person who had been committed by a Magistrate for trial by the Supreme Court has, by the act of the Attorney-General, been called upon to face his trial in the District Court, he has ceased to be a person awaiting trial in the Supreme Court. The consequences contemplated by Crown Counsel do not, in my opinion, militate against the granting of the application for bail made in the instant case.

The applicant has, in my opinion, established that he is entitled to the right conferred on him by section 31 of the Courts Ordinance. No affidavit has been filed on behalf of the prosecution nor has any attempt been made to show other good cause. We have therefore made order that the Magistrate do admit the applicant to bail in such sum as may be fixed by the Magistrate and subject to such conditions as it may seem fit to him to impose.

I might add that we were informed by counsel that the Attorney-General is seeking in some other proceeding the intervention of this Court in an attempt to reverse the order made by the Magistrate discharging the other accused in this case. We cannot say how long the proceedings so set in motion by the Attorney-General may take before they are terminated. They cannot, however, affect the right of the applicant before us. After the date of his commitment two sessions of the Western Circuit have been commenced and terminated. He has now been in custody remanded pending trial for well over a year. Nothing catastrophic can ensue from his release on bail. A

Court has undoubted right to cancel bail where it is shown that the right to release on bail has been or is being abused. We venture to think that the granting of this application may in some measure induce a speedier disposal of the criminal proceedings against the applicant and the other accused and, indeed, act as a spur to all concerned in the disposal of cases of remand prisoners filling our goals in our common duty of eradicating the lethargy that is currently afflicting us. The liberty of the subject is not a slogan as was suggested cynically so it apeared to us, during the argument, but is a valuable right of a citizen, and the courts must be vigilant in ensuring that it is not unprofitably thwarted.

Sirimane, J.

I agree.

Siva Subramaniam, J.

I agree.

Application for bail allowed.

Present: **H. N. G. Fernando, C.J., Tambiah, J., Abeyesundere, J., Silva, J. and Samerawickrame, J.**

D. HASANALLY MOOSAJEE *vs.* Y. CAROLIS SILVA

S.C. 381/63(*F*) — *D.C. Colombo* 9457/*L*

Argued on: 12th, 13th, 14th and 15th September, 1967
Decided on: 14th November, 1967

Servitudes—Prescription—Negative Servitude, ne luminibus officiatur—Mere uninterrupted enjoyment of window lights for ten years deriving from neighbour's land—Does it give a right by prescription to restrain adjoining land owner from building so as to obscure them — Distinction between positive and negative servitudes — Prescription Ordinance, section 3 *— Roman Dutch Law.*

Full Bench, Full Court, Collective Court meanings of — Decisions of three Judges prior to 1901 *and after, when Supreme Court consisted of four Judges — Their binding effect on a numerically superior Bench — Courts Ordinance, sections* 7, 38 and 51.

The plaintiff was the owner of certain premises in Colombo and the defendant the owner of the adjoining premises on the western side. The plaintiff's building was a very old one and the wall on the western side had for a long period a small window. The access of light through it had not been obstructed by the building which formerly stood on the defendant's premises. The defendant demolished this building and commenced to construct a new building of two floors. The plaintiff thereupon sued for an order on the defendant to remove certain alleged encroachments on the plaintiff's property and to restrain the defendant from building so as to interfere with the light and air entering through the window on the western side of the plaintiff's building.

The learned District Judge ordered the removal of the encroachments and the obstruction to the free passage of light and air through the said window. The latter part of his decision was in accord with a decision of 3 Judges of the Supreme Court viz. *Neate* vs. *de Abrew* (1883) 5 S.C.C. 126. On an appeal by the defendant the matter was referred for consideration by a Bench of Five Judges in view of the conflict of previous decisions and of an argument that the said decision in *Neate* vs. *Abrew* even if incorrect, is binding on the Supreme Court and must be followed.

The appeal was only pressed against the order for the removal of the obstruction to the free passage of light and air.

Held: (1) That the decision of the learned District Judge, though fully in accord with several decisions of this Court beginning with the decision of 3 Judges of the Supreme Court in the case of *Neate* vs. *de Abrew*, could not be upheld and must be set aside as under the law of Ceylon mere long enjoyment of the access of light and air through a window does not entitle an owner of land to the servitude *ne luminibus officiatur.*

(2) That the decision in *Neate* vs. *de Abrew* was founded "on a manifest mistake or oversight" and should be over-ruled together with the other decisions which followed it.

(3) That the terms "Full Court", "Full Bench" or a "Collective Court" used in relation to decisions of the Supreme Court are confusing. The only proper and meaningful term is "Collective Court," that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or of the corresponding sections in earlier enactments.

(4) That a decision of any Bench of 3 Judges given in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

(5) That decisions of three Judges rendered before 1901, when they sat

(a) purely casually, because there was no other demand on the time of one of them, or

(b) in pursuance of a statutory provision, but only for the reason that two Judges could not previously agree,

could not be regarded as binding judgments of a Collective Court.

(6) That the decision of a Collective Court would be a binding Judgment only if they assembled to hear an appeal specially reserved for the consideration of the Collective Court either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights.

(7) That if the correctnees of a decision of three Judges not assembled as mentioned in the proceeding paragraph is seriously doubted by a Bench of two Judges, the appropriate course is that a Bench of five or more Judges should be constituted under section 51 of the Courts Ordinance with power either to approve or to over-rule the doubtful decision...

Followed: *Perera* vs. *Ratnatunga* (1964) 66 N.L.R. 337; 66 C.L.W. 97

Over-ruled: *Neate* vs. *de Abrew* (1883) 5 S.C.C. 126; Wendt's Reps. 188
Goonewardena vs. *Mohideen Koya & Co* (1910) 13 N.L.R. 264.
Pillay vs. *Fernando* (1905) 14 N.L.R. 138.

Referred to: *Rabot* vs. *de Silva* (1907) 10 N.L.R. 140.
Jane Nona vs. *Leo* (1923) 25 N.L.R. 241.
Ayankar Nager vs. *Sinatty* 1860-62 Ramanathan's Reports 75
Ellis vs. *Laubscher* (1956) 4 S.A.L.R. 692.
Bandahamy vs. *Senanayake* (1960) 62 N.L.R. 313.
Baurne vs *Keane* (1919) A.C. 815
Brownsea Haven Properties vs. *Poole Coporation* (1958) Ch. 574 C.A.
Pate vs. *Pate* (1915) A.C. 1100

Per **H. N. G. Fernando, C.J.** (*a*) "An owner of land, who erects thereon a building with windows, merely exericses his clear right to do what he pleases on his own land. His act is not referable to any intention to detract from bis neighbour's rights; such an act in no way resembles positive acts such as passage over the neighbour's land, inserting beams in his wall, or emitting rain or surface water into his premises. The erection of a window being thus referable to the lawful rights of an owner of land, is incapable of becoming subsequently an adverse act, except in the theoretical and unusual case to which reference has already been made."

(*b*) ".....We thus over-rule the previous decisions of this Court to the contrary. To do so is of great practical advantages in the public interest. In our congested cities and towns, adequate work and living space has to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by the statute sufficient powers to control development in the interest of public health and on other similar grounds."

H. W. Jayewardene, Q.C., with *S. W. Walpita, B. J. Fernando, S. S. Basnayake, B. Eliyatamby* and *T. L. D. Fernando*, for the defendant-appellant.

C. Ranganathan, Q.C., with *A. P. Ranatunga, E. B. Vannitamby* and *K. Devarajah*, for the plaintiff-respondent.

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

The plaintiff in this action is the owner of premises No. 71 Old Moor Street, Colombo, and the defendant is the owner of premises No. 69 which adjoins the plaintiff's premises on the western side. The building on No. 71 is a very old one and the wall on its western side had for a long period contained a small window, and the access of light and air through this was not obstructed by the old building which formerly stood on No. 69. Some time prior to the institution of this action, the defendant demolished the building which previously stood on No. 69 and commenced to construct a new building of two floors. The plaintiff thereupon sued for an order on the defendant to remove certain encroachments alleged to have been made on the plaintiff's property, and to restrain the defendant from building any structure which might interfere

with the light and air entering through the window on the western side of the plaintiff's building. The learned District Judge has entered decree ordering the removal of certain encroachments, and also ordering the removal or alteration of the eastern boundary wall of the defendant's building in such a manner as to remove the obstruction to the free passage of light and air through the window on the western wall of the plaintiff's building. In this appeal the defendant does not contest that part of the decree which orders the removal of certain encroachments. The appeal is only pressed against the order for the removal of the obstruction to the free passage of light and air.

Although the District Judge does not refer in his judgment to any case law governing the claim for a free passage of light and air, the decision of the learned Judge is fully in accord with the decision of this Court in the case of *Neate* vs. *de Abrew* (1883 5 S.C. C. 126) in which it was held that where a plaintiff had for ten years enjoyed an unobstructed flow of light and air through a window, he acquires a servitude *ne luminibus officiatur*. This judgment was followed in the cases of *Goonawardana* vs. *Mohideen Koya & Co.* (1910) 13 N.L.R. 264, and *Pillay* vs. *Fernando* (1905) 14 N.L.R. 138. Neverthless in the case of *Perera* vs. *Ranatunga* (1964) 66 N.L.R. 337, a Bench of two Judges of this Court decided that the servitude cannot be acquired by mere enjoyment, i.e. by the mere fact that the neighbour has not built on his land for any length of time. The present appeal was referred by my predecessor for consideration by a Bench of five Judges in view of the conflict of previous decisions and of an argument that the decision in *Neate* vs. *de Abrew*, even if incorrect, is binding on this Court and must be followed.

The case of *Neate* vs. *de Abrew* is reported both in the Fifth Volume of the S.C. Circular and in Wendt's Reports as having been decided by a Bench of three Judges, de Wet, A.C.J., Clarence and Dias, J.J.; but there is a divergence in the two Reports as to the circumstances in which the appeal came to be decided by three Judges. Both reports state that the appeal was argued on the 26th September, 1882 before Clarence and Dias, J.J. Thereafter according to one report (5 S.C.C. 127):—

> "The appeal was argued on the 26th September, 1882, before Clarence and Dias, J.J. It was afterwards arranged, with the consent of Counsel on both sides, that De Wet, A.C.J., should be furnished with a note of the authorities cited, and should take part in the decision of the appeal."

but according to the report in Wendt p. 196:—

> "The case was subsequently (on 29th November) put on for re-argument before the full Court (De Wet, A.C.J., Clarence and Dias, J.J.) when Counsel agreed to leave the case without further argument, furnishing their Lordships with copies of the above report of the argument."

The original minutes of the Supreme Court contain a purported order that the appeal be listed before the Full Court. This order creates some doubt as to the correctness of the opinion expressed by Basnayake C.J. in *Perera* vs. *Ranatunga* that "the decision cannot be regarded as a decision of the then Full Bench of three Judges ....." Subject therefore to certain observations which we will reserve for the latter part of this judgment, we propose first to regard the decision in *Neate* vs. *de Abrew* as having been *prima facie* one of a Full Court. Under the law then prevailing (1882) the Supreme Court consisted only of three Judges.

Upon the passing of Ordinance No. 24 of 1901 the Supreme Court came to consist of 4 Judges, and while that was the number of Judges the question of the binding effect of a judgment of three Judges was considered in *Rabot* vs. *de Silva* (1907) 10 N.L.R. 140. That case was heard in review by a Bench of three Judges pending an appeal to the Privy Council and it was contended for the defendant that the Court was bound by two earlier rulings, each of a Bench of three Judges (in 1903 and 1904), when the number of the Judges of the Court was four. In considering the position of a Bench thus sitting in review, Hutchinson C.J., made the following pronouncement:—

> "There is no law prescribing whether the Court so constituted is to follow the ruling of a similar Court given in review. But I think it is right that, whether it agrees with the ruling or not, it should follow it, unless perhaps it was founded on a manifest mistake or oversight, or was inconsistent with some previous decision of a similar Court which appears to be of equal or greater authority. Such a ruling ought to be regarded as the law until it is reversed by His Majesty in Council."

In the same case Wendt J. referred at some length to the binding nature of various decisions of the Court, and after considering a number of earlier cases expressed himself as follows:—

> "Having given the matter my most careful consideration, ... I suggest that this Court, whether hearing an original appeal or sitting in review, should consider itself bound by a decision upon a question of law of a three Judge Bench, whether pronounced before or after the Ordinance of 1901 became operative, and

whether upon an original appeal or in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three Judges arrived at such decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight, I should recognize that as an exception to the rule."

It will be seen that both Hutchinson, C.J. and Wendt, J., were of opinion that even after the Supreme Court came to consist of four Judges, the Court was yet bound by previous decisions of a bench of three Judges, whether the decision had been given before or after 1901. Middleton, J. however, agreed with Wendt, J., only to the extent that a Court of **three Judges** would thus be bound:—

"Whether a Court of four Judges should be deemed to have power to over-ride the decision of three is a matter that I would leave to be decided by that Court if necessary when it is first called into operation."

The occasion thus contemplated by Middleton, J. apparently never arose; we have not been referred to any case decided by the full complement of four Judges in the period between 1901 and 1921, in which latter year the number of Judges was increased to five. In the first case decided by the full complement of five Judges, Bertram, C.J. observed that although the former section 54A of the Courts Ordinance empowered the Chief Justice to reserve any case for the consideration of all four Judges, there was a series of cases reserved, not for four Judges, but for only three Judges out of the four, and that the decisions in those cases have been consistently referred to in the law reports as decisions of a Full Bench. In this first decision of a Bench of five Judges (*Jane Nona* vs. *Leo* (1923) 25 N.L.R. 241), the question which precisely arose was whether after 1921 a Bench of five Judges was bound by a judgment of a Court of three Judges. The majority of the Court held that they were not so bound, but only on the ground that a decision given by three Judges at a time when the Bench consisted of four Judges, must not be regarded as a judgment of a Collective Court and is therefore not binding on a Collective Court of five Judges. Accordingly, the judgment in *Jane Nona* vs. *Leo* has no direct bearing on that part of Wendt J's proposition in which he referred to the binding nature of a decision given by three Judges at a time when the Court consisted of only three Judges. For the purposes of the point under discussion in the present appeal, it suffices to state that the Court in *Jane Nona* vs. *Leo* did not disagree in any way with the qualifications stated by Hutchinson, C.J. and Wendt, J., as to the binding nature of previous decisions. It is interesting that the House of Lords in 1962 (*Scruttons, Ltd.* vs. *Midland Silicones, Ltd.* (1962) 1 A.E.R. 12) referred to similar qualifications:—

"I would certainly not lightly disregard or depart from any ratio decidendi of this House. But there are at least three classes of cases where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision. The first two of these grounds appear to me to apply to the present case."

There must of course have been numerous occasions during the past 60 years when Judges of this Court have stated themselves to be bound by decisions of three Judges of the Court whether sitting as the proper "Full Bench" before 1901, or as the mis-named Full Bench after 1901, but such statements cannot be fairly understood to have constituted an abandonment of the qualifications as to the binding effect which were expressed in *Rabot* vs. *de Silva*.

Let me now consider the arguments for the appellant in the present case in support of his submission that in reaching the decision in *Neate* vs. *de Abrew*, the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur*, and that the *ratio decidendi* of the decision is obscure.

De Wet, A.C.J., referred in his judgment to certain general statements of Van Leeuwen as to the character of servitudes. None of these statements contains any reference whatsoever to the mode of acquisition of servitudes; and the only references in any of the statements to the servitude under consideration in the case are explanations of the nature of the right. Finally the learned Judge cites the following statement from Huber, Book 2, p. 294 (5 S.C.C. 129):—

"The right that my neighbour shall not build so as to obstruct my light I do not lose even though he should not so build for 50 years, but only if he has built and obstructed my light and I have acquiesced in the same for 10 years."

This last statement, in the opinion of the learned Judge, supported the proposition "that any man is of right entitled to the enjoyment of light and air." It is clear, however, that the passage from Huber refers, not to the acquisition of the servitude, but to the loss of the right of servitude by the sufferance of an obstruction for the period of

prescription. Although therefore the learned Judge thought that he was applying the Roman Dutch Law to the question before him, he did not in fact refer to any text applicable to that question. Thus Voet VIII, 4, section 5 (Gane's Translation Vol. 2 p. 484) states:—

> "No prescription results from failure to use a right. Meantime it seems that we should by no means omit to notice that prescription of servitude is not brought on by the mere fact that perchance one of the neighbours has not used his right upon his property for a long term, and that the other neighbour has reaped an advantage thereby. What if he has not planted trees on his ground, had not made a pleasure-garden or has not built higher on his ground, and it has thus happened that his neighbour's lights have for a very long time remained undarkened and his freer outlook in no way obstructed? Wrong would it surely be for his neighbour on the strength of that to claim for himself a servitude of not building higher or of not having his outlook or lights blocked. To build up higher on one's own ground and to do things like that are matters of sheer capacity, in respect of which prescription has not been proved, but freedom has all the time been retained. Ulpian therefore lays down that no action lies against one who by building up darkens the house of a neighbour to whom he owes no servitude, nor can any notice in regard to the new work be given."

Indeed the judgment of Clarence, J. in the same case indicates emphatic dissent from the opinion of de Wet, A.C.J.:—

> "There can be no question but that, under the Roman-Dutch Law, a negative servitude such as this could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case."

> "But in the negative kind, such as window-light, the enjoyment is not attended necessarily by any invasion of the neighbour's dominium. Voet (VIII., 4, 5), is as distinct as possibly can be in laying it down that bare enjoyment will not create the negative servitude by prescription; and he cites from Neostadt (Decis. No. 98), a decided case which is precisely on all fours with the present, in which the owner of the windows failed to establish his right although until the neighbour began to obstruct them they had remained unobstructed from beyond the memory of man."

Clarence J. himself in *Neate* vs. *de Abrew* held that upon a construction of section 3 of the Prescription Ordinance of 1871 (now Chapter 68), the mere uninterrupted enjoyment for ten years of window lights, deriving light from a neighbour's land, entitles the owner of the windows to have the adjoining landowner restrained from building so as to obscure them. This conclusion was reached by Clarence J. upon the basis of a decision of this Court in *Ayankar Nager* vs. *Sinatty* (Ramanathan's Reports 1860 — 62 p. 75). But unfortunately Clarence J. appears to have formed the opinion that the principle of *juris quasi possessio*, which was applied in that case in regard to a right of way, was equally applicable in regard to a negative servitude. This opinion, presumably based upon a passage from Savigny cited in that case, turns out to have been quite erroneous. The passage cited in *Ayankar Nager* vs. *Sinatty* is from page 131 of Perry's Translation of Savigny. But Savigny deals elsewhere with the specific case of the acquisition of negative easement, and the following statements appear in the courses of his discussion:—

> "If my neighbour has built his house to a certain height only, I enjoy the benefit of it merely casually and as a matter of fact, and I have therefore no possession." (p. 385)

> "It follows from the above that the possession of negative easements may be acquired in two ways — by adverse user, and by legal title; i.e. 1st, by resistance to the attempt to obstruct the user; 2nd, by any juridical proceeding....." (p. 386)

Savigny further states that the same principle which applies in regard to the acquisition of a positive servitude must apply also in this case:— "In general the acquisition of this *juris quasi possessio* may be stated thus:—

> "the act which constitutes the subject of the right must be exercised in fact, and be exercised as of right."

The note of the argument in *Neate* vs. *de Abrew* (5 S.S.C. p. 128 and Wendt at p. 194) shows that these statements of Savigny were relied on by Counsel appearing for the defendant. The failure of Clarence J. to refer to these statements in his judgment can only indicate that Clarence J. failed to consider adequately the law applicable to the question for determination. Indeed he himself expressed in strong terms his own opinion that user of passage is not ordinarily to be regarded as possession, but he felt compelled to disregard his own opinion because he held himself bound by decision in *Ayankar Nagar* vs. *Sinatty*. Yet in considering himself bound by that decision, he fell into the error of regarding the decision as being applicable in the case of a negative servitude.

The third judgment in the case of *Neate* vs. *de Abrew* was that of Dias J. He too held that the servitude had been acquired under our Statute Law governing prescription. But in this judgment also there is no reference whatsoever to the argument most strongly relied on by Counsel, by reference to Voet and Savigny, that the servitude *ne luminibus officiatur* cannot be acquired by the mere long enjoyment of light and air.

The statement in the judgment "admittedly the plaintiff possessed the right which he claimed for more than 10 years" begs the question. For a right can only be possessed after a person acquires the right.

Having examined the three judgments, it is now certain that the opinion of the three Judges was not unanimous. The ground relied on by de Wet, A.C.J., was emphatically rejected by Clarence, J. The ground relied on by Clarence J. and Dias J. was not accepted by de Wet, A.C.J., and it was a ground which could not have been accepted if the authorities cited to the Court had received examination. De Wet, A.C.J. himself made no single reference to the only law which could have applied viz. the Prescription Ordinance of 1871.

In these circumstances this Court is fully justified in reaching the conclusion that the law was not "duly considered" before the three Judges who decided *Neate* vs. *de Abrew*, and accordingly that the decision is not binding in the sense explained by Wendt, J. in *Rabot* vs. *de Silva*, and that it was founded "on a manifest mistake or oversight" in terms of the dicta of Hutchinson, C.J.

What section 3 of the Prescription Ordinance (Chap. 68) requires is undisturbed and uninterrupted possession of lands or immovable property for 10 years, and "immovable property" includes a servitude. Once a person has acquired a servitude, i.e. a positive or negative right affecting his neighbour's property (whether by grant, judicial decree or prescription) he may properly be said to possess the right. But until the right has come into existence, there can be no possession of it. The case is different with land, for a person can actually possess a land while he has no right to possess it. That is why the doctrine of *juris quasi possessio* was necessary. If an act in relation to a neighbour's property is exercised by a person, he is said to possess the right of which the act is the subject. In the case of a positive servitude, e.g. a right of way, a person does exercise the subject of the right when he walks over his neighbour's property; and if he does so "undisturbed and uninterrupted" and "adversely" he has the *juris quasi possessio* for the purposes of the law of prescription. But in the case of a negative servitude, the subject of the right is that one's neighbour must desist from doing an act on his own land. Many systems of Law — Roman Law, Roman-Dutch Law, Scots Law, Spanish Law, the Code Napoleon — recognize that, subject only to one exception, there can be no exercise of the subject of such a right. (c.f. Burge, Colonial and Foreign Laws, Vol. III, pp. 441, 442). The exception itself is perhaps purely theoretical and cannot actually lead to an acquisition of a servitude by prescription save in extra ordinary circumstances. This exception was first stated in the Code of Justinian (lib. 7.33.12), and is recognized in some of the systems of law mentioned above. If my neighbour attempts to obstruct the flow of light and air, and I oppose that attempt, the neighbour's long acquiescence in my opposition, presumably by his desisting from the obstruction, can give me a right to the servitude. But it would appear that the South African Courts do not recognize even this exception (*Ellis* vs. *Laubscher* 1956, 4 S.A.L.R. 692).

Burge (Vol. III p. 440) states that in English Law a servitude can only be created by deed. But in early English Law, long enjoyment of free access of light and air, was held to establish a presumption of a grant of the servitude. (English Law appears to have been exceptional in favouring claims for "ancient lights"). Such long enjoyment now, by statute, creates the right that there should be no sensible diminution of the light and air thus enjoyed. But the terms of our Prescription Ordinance do not bring into operation the principle which is expressly stated in the English statute.

The conclusion of Clarence J. in *Neate* vs. *de Abrew*, when considered in the light of all systems of law other than English Law, has the consequence that section 3 of our Prescription Ordinance is unique in that it permits the acquisition of a negative servitude by prescription, on the ground of the mere long enjoyment of the access of light and air. We have shown already that the assumption of Clarence J. that there can be *possession* of the subject of this servitude conflicts with all earlier opinion, particularly that of Savigny. But a further consideration is that for purposes of prescription, possession must be *adverse*. Savigny contrasts casual or accidental or factual enjoyment with enjoyment as of right; where there is enjoyment as of right, the element of adversity can be established. We find assistance in this connection from the principle often recognized in our Courts that a person's possession of property is referable to his lawful title. An owner of land, who erects thereon a building with windows, merely exercises his clear right to do what he pleases on his own land. His act is not referable to any intention to detract from his neighbour's rights; such an act in no

way resembles positive acts such as passage over the neighbour's land, inserting beams in his wall, or emitting rain or surface water into his premises. The erection of a window thus being referable to the lawful rights of an owner of land, is incapable of becoming subsequently an adverse act, except in the theoretical and unusual case to which reference has already been made.

In construing the meaning of section 3 of our Prescription Ordinance and the concepts of "possession" and "adversity" our Courts have for long understood those concepts in the same sense as they were fairly recently explained in the American Re-statement of the Law (Property: Servitudes: section 458 p. 2928):—

> "Use must be wrongful or capable of being made wrongful. To be adverse a use must be wrongful as to the owner of the interest affected or must be capable of being made by him wrongful as to him. If a possessor of land builds on his land in such a way that his building receives support from neighboring land, or receives light coming from neighboring land, he is using the neighboring land, but since these uses are not wrongful as to those having interests in such land, nor capable of being made wrongful by them, they are not adverse to them. The use or enjoyment authorized by a negative easement is neither wrongful as to the owner of the interests affected nor capable of being made by him wrongful as to him. Hence such an easement can-not be created by prescription.'

For these reasons, we hold that under the law of Ceylon mere long enjoyment of the access of light and air through a window does not entitle an owner of land to the servitude *ne luminibus officiatur*. We over-rule the previous decisions of this Court to the contrary. To do so is of great practical advantage in the public interest. In our congested cities and towns, adequate work and living space has to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by statute sufficient powers to control development in the interest of public health and on other similar grounds.

We return now to the matter of decisions of a "Full Court", a "Full Bench", or a "Collective Court", as such decisions have been differently termed. The difference in terminology is confusing, particularly if each term was intended to convey the same meaning. It appears from the judgments in *Bandahamy* vs. *Senanayaka* (62 N.L.R. 313) that the only proper and meaningful term is "Collective Court", that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or of the coresponding sections in earlier enactments. We use the term hereafter in the sense just explained. *Jane Nona* vs. *Leo* has already decided that a Collective Court is not bound except by a judgment of a previous "Collective Court". Thus a decision of any Bench of 3 Judges given in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

There remains the question whether every decision of a Bench of 3 Judges prior to 1901 must be regarded as a decision of a Collective Court. Wendt J. himself, while strongly favouring the opinion that decisions of 3 Judges prior to 1901 are binding, mentions the fact that sittings of 3 Judges were sometimes merely casual, and not deliberate (*Rabot* vs. *de Silva* 10 N.L.R. at p. 147):—

> "In practice, besides these hearings in review, and besides cases specially reserved, many cases (especially in the earlier years, even up to the seventies, when the number of appeals was small) came before the Full Bench of three Judges, who, not having other demands upon their time, sat togther to hear mixed list composed of two-Judge cases and one-Judge cases. There were thus decisions of the Full Court which dealt with appeals not involving any "doubt or difficulty," and which sprang out of a two-Judge Bench reserving for the opinion of the Full Bench cases involving points upon which conflicting decisions existed with the view of obtaining a definitive ruling thereon."

The last sentence in the passage cited refers, not to instances where 3 Judges sat only casually, but to cases where because a Bench of 2 Judges was unable to agree on the decision of an appeal, the decison of the Court was suspended until 3 Judges were present. A similar suspension is still necessary under section 38 of the Courts Ordinance in its present form.

There were thus decisions of Benches of 3 Judges rendered before 1901 where the Benches assembled for 3 different reasons:—

1. 3 Judges sat purely casually, because there was no other demand on the time of one of them.

2. 3 Judges sat in pursuance of statutory provision, but only for the reason that 2 Judges could not previously agree as to the decision of an appeal.

3. 3 Judges assembled to hear an appeal which had been specially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights.

We are agreed that decisions of 3 Judges rendered before 1901 in the circumstances stated at 1 and 2 above cannot be regarded as binding judgments of a Collective Court and that before 1901, 3 Judges constituted a Collective Court whose decision would be a binding judgment only if their sitting was in the circumstances stated at 3 above. Hence a Bench of 2 Judges sitting at the present time is not strictly bound to follow a decision rendered by 3 Judges not assembled in the circumstances lastly mentioned. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e. of 5 or more Judges, should be constituted under section 51 of the Courts Ordinance, with power either to approve or to over-rule the doubtful decision. Many of the judgments in *Bandahamy* v. *Senanayake* (62 N.L.R. 313) recognize the principle that the decision of such a Bench will, on the ground of numerical superiority, and because of the special reservation under section 51, be followed by any Bench ordinarily constituted under section 38 of the Courts Ordinance.

The "facts" mentioned earlier in this judgment as to the hearing and decision of *Neate* v. *de Abrew* do not clearly establish that the case was decided by the Collective Court properly so called. That is a second reason why the present Bench may properly review and over-rule the decision.

The appeal is allowed, and the decree of the District Court is varied by the deletion therefrom of the order for "the removal or alteration of the eastern boundary wall of the defendant's premises in such a manner as to remove the obstruction for the free passage of light and air through the window on the western wall of the premises of the plaintiff."

In the unusual circumstances of this case, we make no order as to the costs of this appeal.

Abeyesundere, J.
I agree.

Silva, J.
I agree.

Samerawickrema, J.
I agree.

Tambiah, J.

I agree with the reason set out by My Lord, the Chief Justice for allowing this appeal. In the early reports, particularly the Supreme Court Circulars, there are a number of judgments in which all the three judges who constituted the Supreme Court at that time had taken part. How far these judgments could be considered judgments of a Full Court or Collective Court has been discussed in *Rabot* v. *de Silva* (1907) 10 N.L.R. 140).

As stated in that case it is only when the Supreme Court assembles under statutory provisions to sit as a Collective Court, it's decisions will have the effect of a Collective Court. Under the statutory provisions which existed when *Neate* v. *Abrew* (1883) 5 S.C.C. 126) was decided, a Full Court could only be constituted if a case was referred to it either by a single judge or by the Chief Justice. Applying this test the case of *Neate* v. *Abrew* should be regarded as a Full Court decision.

The three judges who decided the case of *Neate* v. *Abrew* had given three different reasons. With respect to the learned judges who decided that case, the reasons given by them are demonstrably erroneous. Are the hands of future generations of judges hamstrung and are they to follow this erroneous decision? The answer to this question is found in the dictum of Denning L.J. who said: (vide the dictum of Denning, L.J. in *Ostime* vs. *Australian* Provident Society, (1959) 2 A.E.R. 245 at 256) "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."

The English principle of *stare decisis* had been adopted by us. As the dictum of Lord Denning shows, in the United Kingdom a liberal view is now being taken permitting judges to depart from wrong decisions of a binding nature. In the Dominion jurisdiction, even a more liberal view is being now taken. In Ceylon, it would be sufficient to state that we should be content to follow the English principles on this matter which has been succinctly set out by the House of Lords in *Scrutton Ltd.* vs. *Midland Silicones Ltd.* ((1962) 1 A.E.R. p. 12). One of the principles enunciated in this case is that if a *ratio* decidendi of a case

is obscure, the decision has no binding effect, The *ratio decidendi* of *Neate* vs. *Abrew* is obscure and we are not bound to follow it.

In Roman Dutch Law, the better view is that servitude cannot be acquired by prescription. The Prescription Ordinance (Cap. 68) makes specific provisions governing the acquisition of servitudes by prescription. In interpreting the provisions of section 3 of this Ordinance, a real servitude has been equated to immovable property and it could only be acquired by adverse possession for a period of ten years. There must be something in the nature of an invasion of another's right and adverse possession of such a right for the period of ten years, to entitle a person to claim the acquisition of a real servitude by prescription.

In the instant case, the plaintiff has failed to prove any adverse use. A person is entitled to build as high as possible on his land, under the common law as an incident of his ownership. As stated by the Privy Council in *Corea* vs. *Appuhamy* (1911) 15 N.L.R. 65, possession could never be adverse if it is referable to a lawful title. If a person builds on the land to whatever height he may desire, he does so as the owner of the land and his right is therefore based on lawful title. In the absence of proof of other facts, he cannot acquire a negative servitude of this nature.

It was urged by Mr. Ranganathan that even if the case of *Neate* vs. *Abrew* was wrongly decided, it has been regarded as good law for well over eighty years and therefore should not be departed from by this Court. The principle of *communis error facit jus* was stated by Lord Buckmaster as follows: "Firstly, the construction of a statute of doubtful meaning once laid down and accepted for a long period of time ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience. Secondly, that the decisions upon which title to property depends or which by establishing principle of construction otherwise form the basis of contracts ought to receive the same protection. Thirdly, decisions affecting the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made or the position of the public materially affected, ought in the same way to continue." (vide *Bourne* vs. *Keane* (1919) A.C. 815 at 874). Lord Evershed M.R. said: ',There is well established authority for the view that a decision of long standing, on the basis of which many persons will in the course of time have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision'.' (vide *Brownsea Haven Properties* vs. *Poole Coporation* (1958) Ch. 574 C.A.) The decision in *Neate* vs. *Abrew* however does not affect title and does not come within the principles set out in perpetuating inveterate error. In *Pate* vs. *Pate* (1915) A.C. 1100, 1108) Lord Sumner in declining to follow earlier cases on the construction of section 18 of the Prevention of Frauds Ordinance (Cap. 70) which had stood for forty-four years said: "This is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which would be unjust to disturb..... nor is it in any case sound to misconstrue a statute for fear that in particular instances hardship may result. That is a matter for the legislature, not for the Courts." Mr. Ranganathan was only able to cite a few cases (vide *Goonewardena* vs. *Mohideen Koya and Co.* (1910) 13 N.L.R. 264 and *Pillai* vs. *Fernando* (1905) 14 N.L.R. 138) where *Neate* vs. *Abrew* was followed, but on the other hand, recently it has not been followed. (vide *Perera* vs. *Ranatunga* (1964) 66 N.L.R. 337).

If negative servitude could be acquired by prescription by the mere act of building in one's own land. it would follow as a logical consequence that the right of servitude for prospect could also be acquired in this way. Such a result would be unthinkable in modern society. The recognition of this principle would act as a clog on building activity, prevent town expansion and act as a deterrent to town expansion, since a person who had put up a building ten years earlier could always say that he enjoyed the right of prospect to view either the sea or the range of undulating hills, and bring an action asking for an injunction preventing persons from building.

For these reasons I agree with the order proposed to be made by My Lord the Chief Justice.

Appeal allowed.

Present: **Sirimane, J.**

HAPIE *alias* PATHMA *vs.* WIJAYAWARDENA

S.C. 789/67 — *M.C. Kandy* 47925

Argued on: January 16, 1968
Decided on: 20th January 1968

Maintenance Ordinance (Cap. 91), Section 65 — Meaning of the words "unless.....the father of such child has at any time within twelve months next after birth of such child.....paid money for its maintenance."

Held: That the words "unless.....the father of such child has at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance" in section 6 of the Maintenance Ordinance mean that the payment must be made at some time within the period specified in the section, i.e. within one year after the birth of the child and not before its birth.

P. Somatillakam, for the appellant.

S. Kanagaratnam, for the respondent.

Sirimane, J.

This was an action brought by the applicant against the respondent claiming maintenance for her illegitimate child. The child was born on 13.9.63, and the action filed nearly 2 1/2 years later.

The Magistrate has found, and the evidence amply supports the finding, that the respondent is the father of the child. He, however, dismissed the application as, in his opinion, the applicant had failed to satisfy the requirements of section 6 of the Maintenance Ordinance, Chapter 91.

The relevant part of that section reads as follows:

"In the case of an application for an order under section 2 in respect of an illegitimate child, such application shall not be entertained unless made within twelve months from the birth of such child, or unless it be proved that the man alleged to be the father of such child has at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance....."

According to the evidence the respondent visited the applicant till about 9.1.63 when he was told that she was pregnant. Thereafter, he disappeared, and was not seen till about January 1966, according to the applicant and according to her sister-in-law till he came to Court in this case. It is clear, therefore, that he had not maintained the child within a year of its birth.

There was evidence, however, that the respondent had on 9.1.63, i.e. some 8 months *before* the birth of the child paid a sum of Rs. 800/- which, according to the applicant, was for her expenses. But even assuming that some part of this money had been spent on the child after its birth, as stated by the applicant's mother, yet I think the Magistrate reached a correct conclusion.

In my opinion, the words "unless ..... the father of such child has at any time within twelve months next after the birth of such child maintained it or paid money for its maintenance" mean that the payment must be made at some time within the period specified in the section, i.e. within one year *after* the birth of the child.

The appeal is dismissed.

Dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **T. S. Fernando, A.C.J. (President), Abeyesundere, J. and Alles, J.**

M. K. FRANCIS ALWIS *vs.* THE QUEEN

Appeal No. 109 *of* 1967 — *with Application* 143 *of* 1967
S.C. No. 198 *of* 1966 — *M.C. Gampaha* 5799/*A*

Argued and decided on: November 17, 1967.
Reasons delivered on: December 2, 1967.

Criminal Procedure Code, section 429 — *Court of Criminal Appeal Ordinance* (*Cap.* 7) *section* 5(2) —*Attempted murder — Two accused — Witness on indictment called by trial Judge after defence case closed — Refusal of defence application to call another witness — Evidence of witness used also to convict one accused by itself or as corroborative of other evidence — Not legitimate use — Legitimate if used to assist accused— Prejudice caused to defence—How powers of Court should be exercised—Re-trial ordered on charge of grievous hurt—Penal Code, section* 317.

The appellant (first accused) and his son (second accused) were indicted for the attempted murder of M, by cutting him with a sword. The Jury found the appellant guilty of voluntarily causing grievous hurt, but found the son not guilty of any offence.

There were two witnesses on the indictment, who could have testified to the identity of the assailants — M and D. The prosecution called only M, who stated that both accused had cut him, and closed his case. Both accused gave evidence, denying their presence at the scene. At the end of the day, the defence had virtually closed its case, though this was not so recorded.

On the next day, the trial Judge called D as his witness and examined him. D was then cross-examined by defence Counsel, who marked two contradictions from D's evidence in the Magistrate's Court, and proved them.

Defence Counsel then applied that the Police officer, who prepared the sketch be called by Court to enable him to prove that the place of attack as shown to the Police officer was some distance away from the place of attack as deposed to by M and Z. The application was summarily refused.

In the summing-up, the trial Judge used the evidence of D for two purposes:

(*a*) That, since D did not see the second accused, it would not be safe to convict the second accused.

(*b*) That D's evidence could be used, to find the first accused guilty, either by itself or as corroboration of M's evidence.

Held: (1) That, since the rule in regard to the calling of fresh evidence under section 429 of the Criminal Procedure Code is strictly observed only when such evidence is intended to support the prosecution case, but where the defence is concerned, a certain degree of latitude is permitted:—

(*a*) the use of D's evidence to assist the second accused was legitimate;

(*b*) but, inasmuch as the Jury's verdict clearly showed that they relied either on D's evidence, or on that part of M's evidence as was corroborated by D, the use of that evidence to convict the first accused was not legitimate.

(2) That, the Crown not having attempted to rebut any evidence called by the defence, and not having been entitled to call the evidence of D in rebuttal, the action of the Court in calling that witness had the unfortunate effect of imperilling the defence of the first accused-appellant and placing him at an unfair disadvantage.

(3) That, in exercising its powers under section 429, the Court should take care not to leave room for any impression that it is using those powers to help the prosecution to discharge the burden that rests on it.

Cases referred to: *The King* vs. *Aiyadurai* (1942) 43 N.L.R. 289; XXIII C.L.W. 61.
The Queen vs. *Don Wilbert* (1962) 64 N.L.R. 83.
Reg. vs. *John Owen* (1952) 2 Q.B. 362; (1952) 1 A.E.R. 1040
R. vs. *Browne* (1943) 29 Cr.A.R. 106
The Queen vs. *Mendis Appu* (1960) LX C.L.W. 11.

E. R. S. R. Coomaraswamy, with *E. St. N. D. Tillekeratne*, *G. Seneviratne* and *L. F. Ekanayake* (*assigned*), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

T. S. Fernando, A.C.J.

The appellant (the 1st accused) and his son (the 2nd accused) stood their trial before a judge and jury on a charge of attempt to commit the offence of murder by cutting a man named Marshal with a sword. The jury returned a unanimous verdict of guilty of voluntarily causing grievous hurt as against the appellant, but by a similar verdict found his son not guilty of any offence. The son was accordingly acquitted, and the appellant was sentenced to 10 years' rigorous imprisonment.

Learned Counsel for the appellant has contended before us that, by a violation of the rules governing the calling of fresh evidence after the cases for the prosecution and the defence had been closed, the appellant has been deprived of a fair trial.

The names of two witnesses who could have testified as to the identity of the person or persons who made an attempt upon the injured man Marshal appeared on the list of witnesses contained in the indictment. These two witnesses were Marshal himself and another man bearing the name of Dharmadasa. Counsel for the Crown who must ordinarily be presumed to be aware of the strength and the weakness of the Crown case decided, as he was undoubtedly entitled to do, to call only one of these two witnesses, viz. Marshal. That witness stated that the appellant and his son both cut him shortly after midnight on the evening in question. At the close of the case for the Crown both the appellant and his son gave evidence on their own behalf denying their presence anywhere near the place where Marshal was alleged to have been attacked. At the end of the day there was no other evidence which the defence wished to call, and although there is no record made that the defence case had then been closed, the nature of the recorded proceedings thereafter makes it fairly clear that the defence had indeed closed its case. What remained for the next day was for counsel to address and for the judge to charge the jurors summing-up the evidence and laying down the law by which they were to be guided.

The next day's proceedings commenced with the learned judge addressing Crown Counsel and informing him that he wished to call Dharmadasa "as my witness". Crown Counsel stated "Very well, my Lord". I make mention of this proceeding in Court because the record does not indicate that the learned judge addressed defence counsel on the matter at all. Although it was an assigned junior counsel who was conducting the defence of both accused, there was no enquiry made from him as to whether he had any objection to the course of action proposed. Dharmadasa was then called, and his entire examination-in-chief (which ran into four typed pages) was conducted by the learned judge. Crown Counsel was asked whether he wished to cross-examine Dharmadasa, and, on his replying to the judge that he did not, Dharmadasa was cross-examined at some length by defence counsel. During that cross-examination, counsel marked two passages from Dharmadasa's evidence as recorded in the Magistrate's Court, probably with the object of discrediting his evidence on certain matters which do not appear to have been of any real importance. Defence counsel was next allowed to prove these two contradictions by calling the Clerk of Assize to produce the record of the Magistrate's Court proceedings. When that had been done, defence counsel made an application that the police officer who prepared the sketch be called by the Court. The Crown, it may be mentioned, had not called this police officer, but his name was on the list of witnesses and, it may be assumed, he was present and available to be called. Defence Counsel's object was to prove that the place of attack as shown to the police officer was some distance away from the place of attack as deposed to by Marshal and Dharmadasa. That part of the record of the trial as relates to the unsuccessful attempt of the defence counsel to have this evidence placed before the jury in order at least to discredit Dharmadasa in respect of the place which he said was the place of attack is reproduced below—

Defence Counsel: My Lord, I would like to make an application that Your Lordships be pleased to call the officer who made the sketch.

Court: I refuse that.

Defence Counsel: May I make my submissions why I want that evidence?

Court: Why should I call? You had your opportunity of calling any witnesses you wanted, and if you did not want them why should I call them?

Defence Counsel: In the light of this witness's evidence whom we did not anticipate would be called.....

Court: What is your complaint? Is it your complaint that I have no right to call witnesses? How does that arise?

Defence Counsel: No, My Lord, with respect I submit that it would be in the interests of justice to have the officer who made the sketch called because the injured person pointed out to him a place where he said he was cut by the 1st accused which is entirely different from the place where it had happened.

Court: You have no right to make such a submission in the presence of the jury — that anything incorrect was pointed out. If you wanted to make any such submission you should have first asked the jury to retire. You must not lead inadmissible evidence in that fashion.

Defence Counsel: I am sorry, My Lord. May I make that application?

Court: I refuse the application to call the sketch officer.

The scope of the court's power under section 429 of the Criminal Procedure Code to call a witness at any stage of a trial has been examined in many cases by this Court. In *The King* vs. *Aiyadurai*, (1942) 45 N.L.R. 289, it was observed that the power is not incompatible with the relevant English rule, and this Court formulated the principle accepted in the English Court of Criminal Appeal to be that fresh evidence called by a judge *ex proprio motu*, unless *ex improviso*, is irregular and will vitiate the trial, unless it can be said that such evidence was not calculated to do injustice to the accused.

The Crown in the instant case decided to rest its proof with the evidence of the single witness Marshal. The learned Commissioner who presided at the trial, having called Dharmadasa as a witness in pursuance of the power vested in a court by section 429, expressed himself thus in the course of his charge to the jury:—

"Now, the reason why I called Dharmadasa today was because I wanted you to know that Dharmadasa who was there and who claims to have come there straightway and seen the assault did not see the 2nd accused there. That, gentlemen, would be of some importance to you, because while it is just possible that witness Marshal is possibly true in the story that he says, it is curious that Ruban and this 2nd accused have disappeared not to be seen at the time Dharmadasa comes to see Puran (the 1st accused) still cutting the man. So that, in those circumstances, in view of the fact that the injured man himself in the first instance to the Police is recorded as having said "Puran cut", coupled with the fact that Dharmadasa did not see the other accused, I think, in my opinion, would make you doubt, apart from anything else, as to whether it is safe to find the 2nd accused guilty in a case like this."

If the sole effect of Dharmadasa being called by the Court after the close of the evidence for the defence was to assist the jury to decide whether the 2nd accused was a participant in the attack, the course adopted by the learned Commissioner could not be the subject of legitimate criticism. As was pointed out by this Court in *The Queen* vs. *Don Wilbert*, (1962) 64 N.L.R, at 89, the rule in regard to the calling of fresh evidence is strictly observed only when such evidence is intended to support the prosecution case, but where the defence is concerned a certain degree of latitude is permitted.

The actual shape the charge to the jury took thereafter was, however, unfortunate. Said the learned Commissioner in respect of the evidence against the appellant:—

"In regard to the first accused there is the evidence of Dharmadasa who says I saw the 1st accused cut Marshal as he lay fallen..... So that it is for you to decide whether you can act on the evidence of Marshal as against both accused. If you doubt his evidence, first of all, in regard to the 2nd accused, then there is

no evidence against the 2nd accused and he must be acquitted. Then, can you act on his evidence against the 1st accused? For the moment consider that he had not given evidence and that the only witness was Dharmadasa who gave evidence and said "I saw this 1st accused cutting Marshal". Would you act on the evidence of Dharmadasa? Because, if you feel that it is safe to act on the evidence of Dharmadasa, then Dharmadasa corroborates Marshall in regard to the cutting. Then, even if you do not believe Marshal by himself, it is open to you to say "Well, we believe him because he is corroborated by Dharmadasa" or "We act on the evidence of Dharmadasa alone". These are entirely matters for you."

The jury's verdict clearly shows that they relied either on Dharmadasa's evidence or on that part of Marshal's evidence as was corroborated by Dharmadasa. It is therefore relevant to remind ourselves of what was stated in *John Owen's case* (1952) 2 Q.B. 362 that —

"The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that where it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex* vs. *Browne*, (1943) 29 Cr. A.R. 106, the calling of a fresh witness."

The prosecution had an opportunity of calling Dharmadasa, but deliberately refrained from doing so. Probably the prosecutor correctly felt that the calling of Dharmadasa would weaken his case against the 2nd accused. Each of the accused then gave evidence in support of his respective alibi. Thereafter any application by the Crown to call Dharmadasa, which could only have been done by way of evidence in rebuttal, could not possibly have been entertained, and Crown Counsel did not attempt to make any such application. Was it, then, open to the Court to call Dharmadasa? It is sufficient if I were to quote from the decision of *John Owen* (supra):

"Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed, where it becomes necessary to rebut matters which have been raised for the first time by the defence."

The Crown not having attempted to rebut any evidence called by the defence, the action of the Court in calling the evidence of Dharmadasa, although it may not of course have been so intended, had the unfortunate effect of imperilling the defence of the appellant and placing him at an unfair disadvantage. This Court, in *The Queen* vs. *Mendis Appu* (1960) 60 C.L.W. 11, stated that "the powers conferred by section 429 should be used with caution. In a trial by jury the functions of the prosecution, the defence and the judge are laid down in the Code, and the Court should take care not to leave room for any impression that it is using its powers under section 429 to help the prosecution to discharge the burden that rests on it." The ground of appeal advanced is, in our opinion, sound.

For the reasons indicated above, we quashed the conviction and sentence of the appellant; but, being of opinion that this is a case in which we should act under the power conferred by the proviso to section 5(2) of the Court of Criminal Appeal Ordinance, we ordered a new trial of the appellant on a charge of voluntarily causing grievous hurt with an instrument of cutting, an offence punishable under section 317 of the Penal Code.

Appeal allowed and re-trial ordered.

Privy Council Appeal No. 8 *of* 1967

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

MEERUPPE SUMANATISSA TERUNNANSE

vs.

WARAKAPITIYE PANGNANANDA TERUNNANSE

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

From

THE SUPREME COURT OF CEYLON

Delivered on: 23rd January, 1968

Estoppel—Land belonging to Buddhist temple— Defendant, a Buddhist monk and Senior pupil of Viharadhipathi, in occupation since 1942 *with permission from plaintiff—Plaintiff holding deed of adhikariship of* 1930 *given by Viharadhipathy — Death of Viharadhipathy in* 1944 *— Defendant continuing to pay paraveni share in terms of original agreement when permission granted — Defendant refusing to pay dues since* 1953 *— Action for ejectment — Whether defendant estopped from denying plaintiff's title— English law of estoppel applicable—Evidence Ordinance, sections* 100 *and* 116.

The plaintiff, claiming to be the Viharadhipathy of a Buddhist Temple by virtue of a deed of Adhikariship dated 26/12/1930 from the last Chief Incumbent G (his co-pupil) sought to eject the defendant, (also a Buddhist monk and senior pupil of G) from a land belonging to the said temple which land the defendant admitted he was permitted to posses since 1942 by the plaintiff on payment of the paraveni or landowner's share of the produce of the land to the Chief Incumbent of the temple. G died in 1944 and this action was filed in 1954 as defendant failed to hand over this share of the produce after 1953. The defendant pleaded *inter alia* that on G's death, he, as senior pupil, succeeded to the Chief Incumbency and denied plaintiff's right to maintain the action.

The District Judge held in favour of the plaintiff on the ground that G. by his deed of adhikariship, renounced his rights as Viharadhipathy in favour of the plaintiff.

On appeal, the Supreme Court held (1) that the said deed by G was not a renunciation of his rights and even if it were, G could not lawfully appoint the plaintiff as his successor as G had pupils;

(2) that the effect of the deed was to appoint plaintiff to act for G as the *de facto* Viharadhipathy so that he could manage the temple on G's behalf.

The defendant conceded that as G died in 1944 he was barred under the Prescription Ordinance from asserting his claim.

On an appeal to the Privy Council, Counsel for the plaintiff-appellant invited their Lordships without objection to decide the appeal in favour of the appellant on a plea of estoppel raised while the appellant was giving evidence and accepted as an additional issue, but not decided by the District Court, nor was it suggested that it was abandoned in the Supreme Court.

The appellant relied on section 116 of the Evidence Ordinance which reads as follows:

> "No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and
>
> no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

The defendant-respondent, while admitting that he is the licensee, that he was let into possession by the appellant, that the District Court found that until 1953 he paid his dues to the appellant, says that the situation changed in 1944, when the death of G deprived the appellant of his *de facto* title and points to the words in the 2nd paragraph of section 116 "at the time when such licence was given" which correspond to the words "at the beginning of the tenancy" in the first paragraph.

Held: (1) That for the purposes of the argument on estoppel, it is not relevant to consider what the true title of the appellant was. What is relevant is the title which the respondent was apparently recognising, and this depends on the title which the appellant was apparently claiming.

(2) That although there is no satisfactory evidence that the respondent knew exactly the terms on which the paraveni shares were demanded and made before the death of G, there is no room for misunderstanding the position thereafter, as there is clear proof that the respondent acknowledged the appellant as the Viharadhipathy.

(3) That, if the license was not originally granted in 1942 by the appellant in his own right, after the death of G the grant of a new license must be implied.

(4) That the reference in the 2nd paragraph to section 116 of the Evidence Ordinance, to the licensee coming upon the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the license. When a lease or license is renewed, there is no moment at which the tenant or licensee leaves the land and re-enters it.

(5) That, therefore, the plea of estoppel succeeds, but it applies only to the respondent's interest as a licensee and does not affect his rights as a bhikku.

Per **The Judicial Committee** (*a*) "Section 116 is one of three sections that compose Chapter X of the Ordinance, which is headed Estoppel. This Chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordhsip consider that it must be interpreted, and, if necessary, expanded, in the light of the common law."

(*b*) "Their Lordships need not pause to consider whether the language of the first paragraph of section 116 would if literally construed in its application to a term of years. ignore an attornment and confine the estoppel to the landlord in possession at the beginning of the tenancy. If it does, the scope of the paragraph must by virtue of section 100 be expanded to give full effect to the English law of estoppel. The same considerations apply to the second paragraph which, since the present case is concerned with a license, is the one on which the appellant relies."

Cases referred to: *Doe* vs. *Baytup* (1835) 3 Ad. and El. 188; 4 L.J.K.B. 263
Cornish vs. *Searell* (1828) 8 B. and C. 471; 6 L.J.O.S.K.B. 254
Harvey vs. *Francis* (1837) 2 M. and Rob. 57.
Jones vs. *Stone* (1894) A.C. 122; 70 L.T. 174
Foster vs. *Robinson* (1950) 2 All E.R. 342; (1951) 1 K.B. 149
Oastler vs. *Henderson* (1877) 2 Q.B.D. 575; 37 L.T. 22; 46 L.J.Q.B. 607
Collins vs. *Claughton* (1959) 1 All E.R. 95; (1959) 1 W.L.R. 145

E. F. N. Gratiaen, Q.C., with *H. Wanigatunge* and *Mark Fernando*, for the plaintiff-appellant.

H. A. Koattegoda, with *M. L. S. Jayasekera*, for the defendant-respondent.

Lord Devlin

The respondent, who was the defendant in the original proceedings in the District Court of Matara, is a bikku, that is, a monk or priest, belonging to a temple in Welihinda. In 1942 he was permitted by the appellant, who was or who claimed to be the Viharadhipathi, that is, the Chief Priest or Chief Incumbent of the Temple, to live on a piece of land of about 18 acres in extent situated at Warakapitiya, about a mile away from the Temple but part of its property. The land had previously been leased for cultivation. Shortly after 1942 the respondent built on this land an avasa or residence in which he lived with dayakas attached to him. It was the respondent's obligation to hand over to the Chief Incumbent the paraveni share, that is, the landowner's share of the produce of the land. This the respondent did until 1953. It is his refusal or failure to do so after that year that has led to the present dispute, the claim with which the Board is concerned being a claim by the appellant to eject the respondent from the land.

In the courts below the principal matter in issue was whether the appellant was the rightful Viharadhipathi of the Welihinda Temple. It is common ground that, if he was, he was entitled to possession of the land and to eject the respondent. Proceedings were begun on 20th September 1954, the appellant in his amended plaint asking for a declaration that he was entitled to the land and for an order of ejectment. The respondent in his amended answer denied that the appellant was the rightful Chief Incumbent and entitled to the land. The respondent claimed also that, if he was ejected, he ought to be compensated for the cost of the avasa and other improvements made to the land. He claimed further that in any event he was as a bikku entitled

to reside in the Temple or on land belonging to it and to be maintained out of the revenues of the Temple. It is not disputed that this is his right as a bikku unless he has forfeited it by his contumacy.

The trial began in September 1957 and after a number of adjournments was concluded in December 1960. The District Judge by a judgment delivered on 21st December 1960 decided that the appellant was the lawful Viharadhipathi and so declared. The learned judge made an order for the ejectment of the respondent. He refused him any compensation, finding that the buildings had been paid for out of the income from the land; and this claim for compensation has not been further pursued. The learned judge also held that the respondent had by his contumacy forfeited his right to residence. On 15th May 1963 the whole of this judgment was reversed in the Supreme Court which held that the appellant's action failed because he could not establish his title as Viharadhipathi.

The course which the argument has taken before the Board makes it unnecessary for their Lordships to do more than indicate the nature of the dispute as to title. It is agreed that in 1928 the Reverend Gunananda became the lawful Viharadhipathi of the Welihinda Temple and of three other temples as well. On 26th December 1930 Gunananda, who was residing in one of his other temples and found it difficult to manage the Welihinda Temple, executed an Adhikari Deed which conferred certain rights and duties on the appellant. In the opinion of the District Judge the Reverend Gunananda by this Deed renounced his rights as Viharadhipathi of the Welihinda Temple in favour of the appellant. The Supreme Court on the contrary held that the Deed was not a renunciation and that even if it were, the Reverend Gunananda could not lawfully appoint the appellant as his successor. The Court said that under the rule of sisyanu sisya paramparawa, which governed the succession, the Viharadhipathi must choose his successor from among his pupils. The appellant was not one of Gunananda's pupils; the two men were in fact co-pupils of the previous Chief Incumbent. The respondent is Gunananda's senior pupil. The Court held that the true effect of the Deed was to appoint the appellant to act for Gunananda as the *de facto* Viharadhipathi of the Welihinda Temple so that he could manage that Temple on Gunananda's behalf.

The Reverend Gunananda died in 1944 and therefore any authority to act merely as his deputy would have come to an end in that year. Indeed, the respondent contends that on Gunananda's death, he as the senior pupil and in default of any valid appointment succeeded him as Viharadhipathi; but he concedes that he is now barred under the Prescription Ordinance from asserting his claim.

In the argument before the Board Mr. Gratiaen for the appellant invited their Lordships to decide the appeal in his favour on the simple ground that, whether or not the appellant was the lawful Viharadhipathi, the respondent was estopped from challenging his title to possession of the land in dispute. This contention was not considered in either of the judgments in the courts below. The plea was introduced while the appellant was giving evidence. It was then accepted as an additional issue and the point was put in argument by the appellant's counsel but the District Judge did not decide it. There is no note of the argument before the Supreme Court but it has not been suggested that the point was there abandoned. It was clearly raised in the appellant's case in this appeal and has not been objected to before the Board. Their Lordships are obviously at a disadvantage in considering a point which was left undecided by the courts of Ceylon. The disadvantage is to some extent diminished by the fact that, as will appear, the point is goverened by English law.

The appellant relies on section 116 of the Evidence Ordinance which reads as follows:

> "No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and
>
> no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

The respondent concedes that he was a licensee of the land in dispute. His argument against the estoppel rests, as will appear, upon a narrow interpretation of the Ordinance. Section 116 is one of three sections that compose Chapter X of the Ordinance, which is headed Estoppel. This Chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordships consider that it must be interpreted, and if necessary expanded, in the light of the common law. The

Ordinance is one of a number which follow the Indian Evidence Act 1872. This Act, as is well known ,was drawn up by Sir James Stephen. In 1876 he reproduced it in substance for English lawyers in his Digest of the Law of Evidence. The object of the Digest was to supply a concise code and not an elaborate treatise and so principles are briefly stated: but in his introduction to the first edition Stephen said that it was "intended to represent the existing law exactly as it stands". Section 116 of the Ordinance corresponds with Article 112 of the Digest. It is therefore in their Lordships' opinion legitimate, when applying section 116, to consult and give effect to the English cases, even if they appear to go further than the language of the section; and specific authority for so doing is given by section 100 of the Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

The authorities which settle the English law are conveniently collected in Spencer Bower & Turner on "Estoppel by Representation", 2nd Edition, p. 170. This form of estoppel, although it has since the decision in *Doe* vs. *Baytup* (1835) 3 Ad. and El. 188 been extended to licensor and licensee and other similar relationships, originated out of the relationship of landlord and tenant. The basis for it is the acknowledgment or recognition of the landlord's title. The acknowledgment may be formal as by the execution of a lease or of a deed of attornment; an attornment has been defined by Holroyd J. in *Cornish* vs. *Searell* (1828) 8 B. and C. 471 at 476 as "the act of the tenant's putting one person in the place of another as his landlord". Estoppel can also arise informally from any act of recognition, the most common being the payment of rent after entry or after attornment. But then it is always open to the tenant to explain that the act relied upon was not intended or understood as a recognition. In *Harvey* vs. *Francis* (1837) 2 M. and Rob. 57 Patteson J. held "that where a tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received." See also *Jones* vs. *Stone* (1894) A.C. 122.

It will be observed that section 116 does not in terms embrace the situation in which there has been a change of landlords during the tenancy nor does it deal with the effect of payment of rent. It is on this sparseness of language that the respondent relies. He concedes, as their Lordships have said, that he is the licensee of the land in dispute he admits also that he was let into possession of it by the appellant as licensor and it was found against him that until 1953 he paid his dues to the appellant in the form of crops or cash. But he points to the words in the second paragraph of section 116 "at the time when such license was given", which correspond to the words "at the begining of the tenancy" in the first paragraph. He says that he does not deny that the appellant had as *de facto* Viharadhipathi at the time when the license was given in 1942 the title to possesion of the land. But, he says, the situation changed in 1944 when the death of the Reverend Gunananda deprived the appellant of his *de facto* title; and he contends that there is nothing in the Ordinance to prevent him from challenging the *de jure* title which after 1944 the appellant assumed.

For the purposes of the argument on estoppel it is unnecessary, and indeed irrelevant, to consider what the appellant's title truly was. The question is what was the title which the respondent was apparently recognising, and this depends on the title which the appellant was apparently claiming. There is clear evidence to show that the appellant and the Reverend Gunananda both considered that the Deed of 26th December 1930 was effective to pass the full title of Viharadhipathi to the appellant and not merely the power of management. In 1933 the appellant's title was challenged by another bikku of the Welihinda Temple. On 16th July 1933 the appellant filed a plaint in the District Court of Matara seeking against this bikku a declaration that he, the appellant, was the Chief Incumbent of the Welihinda Temple. The issue was fought and went to the Supreme Court which on 7th June 1937 granted the appellant the declaration for which he asked. The meaning and effect of the Deed of 26th December 1930 was not directly in issue, since the defendant based his claim on a title which he sought to derive from an earlier Chief Incumbent. But the Reverend Gunananda gave evidence in support of the appellant's claim to be Viharadhipathi; and, referring to the Deed, said he gave it "not temporarily".

If the appellant was to the knowledge of the respondent claiming his dues as Viharadhipathi *de jure* and they were paid to him as such, it would

be no answer to an estoppel to say that he could have claimed them in some other capacity or as agent for the Reverend Gunananda, when undoubtedly they would have been payable. The question is whether acknowledgemnt or recognition of title is to be inferred from the transactions between the parties and the inference depends on what the nature of the transactions was and not what it might have been. In a case where the bare fact to payment is consistent with an inference either way, the transactions would have to be closely investigated before the correct inference could be drawn. The payments of the paraveni share made before the death of the Reverend Gunananda covered only a short period and occurred a long time before the trial took place. There is no satisfactory evidence of the terms on which they were demanded and made and, though there may be suspicion, there is no proof that the respondent then knew exactly what the plaintiff was claiming his position to be. Their Lordships will therefore assume in favour of the respondent that he intended to pay his dues to the appellant only as agent for the Reverend Gunananda and will treat the case as if it was not until after the Reverend Gunananda's death that the appellant claimed the dues in his own right.

After this there was no room for misunderstanding. The respondent knew himself to be the senior pupil of the Reverend Gunananda and knew therefore that, if the appointment of the appellant was invalid, it was he himself who was the lawful Viharadhipathi. Yet the payment of dues continued as before. From 1948 onwards there is documentary evidence of accounts rendered and payments made. In 1953 when payment was first with held by the respondent, the appellant prosecuted him for criminal misappropriation and on the complaint form the appellant was styled as Viharadhipathi of the Welihinda Temple. The record shows that the value of the produce appropriated was thereafter paid to the complainant and the accused was discharged. Neither formally then nor later in a letter which he wrote to the appellant in September 1953 did the respondent challenge his title. The envelope in which this letter was sent was addressed to the appellant under his title of Viharadhipathi in the respondent's own handwriting and it expresses only distress at the bringing of criminal proceedings.

The construction which the respondent puts on section 116 is that under it the estoppel operates only in favour of the first landlord of a tenancy or the original grantor of the license; and that it cannot operate in favour of their successors in title. This truncates the English doctrine. Until attornments were virtually abolished by the Law of Property Act 1925 section 151, it was customary, if not necessary, when a reversion was assigned, for the tenant to attorn to the new assignee. Many of the cases of estoppel in the books relate to tenants who are prevented by their attornment from denying the title of the assignee. Their Lordships need not pause to consider whether the language of the first paragraph of section 116 would, if literally construed in its application to a term of years, ignore an attornment and confine the estoppel to the landlord in possession at the beginning of the tenancy. If it does, the scope of the paragraph must by virtue of section 100 be expanded to give full effect to the Enlgish law of estoppel. The same considerations apply to the second paragraph which, since the present case is concerned with a license, is the one on which the appellant relies.

Their Lordships must however add that in their opinion not even the most limited construction of the second paragraph would on the facts of the present case avail the respondent. The license which was granted to him in 1942 was clearly a revocable one. A revocable license is automatically determined by the death of the licensor or by the assignment of the land over which the license is exercised. Thus if the license was not originally granted in 1942 by the appellant in his own right, after the death of the Reverend Gunananda the grant of a new license must be implied. The respondent argues nevertheless that he did not "come upon" the land by virtue of the new license but by virtue of that which had expired. In their Lordships' opinion the reference in the para-

graph to the licensee coming upon the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the license. When a lease or license is renewed, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law. In *Foster* vs. *Robinson* (1950) 2 All E.R. 342, Evershed M. R. said at p. 348: "The determination of the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. I think, to use the language of Cockburn C.J. in *Oastler* vs. *Henderson* (1877) 2 Q.B.D. 575 at 578, there was a virtual taking of possession." The principle was applied again by the Court of Appeal in *Collins* vs. *Claughton* (1959) 1 All E.R. 95 where Lord Evershed's dictum was cited at 98.

Their Lordships conclude that the plea of estoppel succeeds. It applies only to the respondent's interest as a licensee and does not affect his rights as a bikku. Mr. Gratiaen said that he would not contest these rights. Their Lordships will therefore humbly advise Her Majesty to allow the appeal and to restore the order and decree of ejectment made in the District Court, subject to the right of the respondent to continue to reside in the avasa on the land in suit and to be maintained out of the income of that land or of other temporalities belonging to the Welihinda Temple. The respondent must pay the costs of this appeal. As to the costs in the courts below their Lordships consider that a large part of them must have been incurred on the issue of title on which the respondent succeeded in the Supreme Court and which the appellant has not asked the Board to resolve. Moreover the final result of the proceedings is to restore to the respondent his rights of residence and maintenance of which he was deprived by the judgment of the District Court. Their Lordships consider that in these circumstances each party should pay its own costs of the proceedings in the courts below and they will humbly advise Her Majesty to vary accordingly the order of the Supreme Court.

Appeal allowed.

Present: **Siva Supramaniam, J.**

THE SUPERINTENDENT, DEESIDE ESTATE, MASKELIYA

vs.

ILANKAI THOZHILAR KAZHAKAM

S.C. 63/67 — *Labour Tribunal Case No. K.* 3876

Argued on: 4th October, 1967
Decided on: 31st January, 1968

Industrial Disputes Act No. 43 *of* 1950 *as amended by Act No.* 62 *of* 1957, *sections* 31*B*, 31*C and* 33(2)—*Application to Labour Tribunal for relief against dismissal—Respondent described in application as "Superintendent of Deeside Estate, Maskeliya" — Order made against respondent without name of person who ordered dismissal — Is the order enforceable?*

Held: (1) That the party against whom an order under section 31C of the Industrial Disputes Act No. 43 of 1950 as amended by section 14 of Act No. 62 of 1957, can be made is the employer or in certain circumstances, a person who has ceased to be the employer. The order must, however, be made against a natural or legal person.

Where an application by a Trade Union was made for relief under section 31B of the Industrial Disputes Act naming the "Superintendent of Deeside Estate, Maskeliya" as respondent stating that M, one of its members "was summarily dismissed from work by the management" without mentioning the name of the employer who made the order of dismissal and order was made thereon by the President against the "Superintendent of Deeside Estate, Maskeliya"—

Held: (2) That the order made was unenforceable as the office of "the Superintendent" is not a legal person nor is the "Superintendent of Deeside Estate" a Corporation sole. It is a fundamental principle that a court should not make an order which it cannot enforce.

Referred to: *The Land Commissioner vs. Ladamuttu Pillai* (1960) 62 N.L.R. 169

Siva Rajaratnam, for the appellant.

No appearance for the respondent.

Siva Supramaniam, J.

This is an appeal from an order made by the President of the Labour Tribunal of Nuwara Eliya under section 31C of the Industrial Disputes Act No. 43 of 1950 as amended by section 14 of No. 62/1957 (hereinafter referred to as the Act) directing that one Meiappen, a labourer on Deeside Estate, Maskeliya, whose services had been summarily terminated on 22nd January 1965 be re-instated and be paid "one and a half year's back" wages, amounting to Rs. 1,080/-.

The application for relief was made by the respondent Trade Union of which Meiappen was a member. "The Superintendent, Deeside Estate, Maskeliya" was named as the Employer against whom the application was made. In the written application that was filed it was stated that Meiappen "was summarily dismissed from work by the Management with effect from 22nd January 1965" and that the applicant-Union considered the dismissal "unlawful" and "unreasonable". The name of the employer who made the order of dismissal was not mentioned.

The person who held the office of Superintendent of the said estate filed a statement that Meiappen was lawfully dismissed on the ground that on the night of 24th December 1964 he, along with three young female labourers of the estate, had entered the bungalaw of A. Wijesundera, the Assistant Supreintendent of the estate, in the latter's absence and had danced and made merry in the sitting room of the bungalow and consumed beer and arrack belonging to the Assistant Superintendent. After enquiry, the President of the Tribunal held that he found it difficult to accept the evidence of the Assistant Superintendent and his witnesses and made the order referred to earlier.

At the hearing of this appeal which was filed by the person who held the office of Superintendent, Counsel for the appellant strongly attacked the finding of the President on the facts as unreasonable. Under section 31D of the Act, however, no appeal lies on questions of fact.

The appeal was also pressed on a question of law which, in my opinion, is entitled to succeed. Under the Act, the Tribunal is empowered to make any order as may appear to it to be just and equittable. The party against whom the order can be made is the employer or, under certain circumstances, a person who has ceased to be the employer. The order, therefore, has to be made against a natural or legal person for it is only against such a person that the order can be enforced.

In the instant case, the party against whom the application was made by the respondent and against whom the order has been made by the President is "The Superintendent, Deeside Estate, Maskeliya". The office of "The Superintendent" is not a legal person. Under our law, a Corporation Sole must be expressly created by legislative enactment — Vide the Judgment of the Privy Council in The *Land Commissioner* vs. *Ladamuttu Pillai* 62 N.L.R. 169 at page 182. The order made by the President is, therefore, unenforceable.

Under section 33(2) of the Act, where an order is made for payment of money by any employer to any workman, the amount of such money, if unpaid, can be recovered by a Magistrate's Court in like manner as a fine imposed by the Court. In the instant case, since "The Superintendent of Deeside Estate" is not a Corporation Sole, there is no one from whom the amount ordered can be recovered. It is a fundamental principle that a Court should not make an order which it cannot enforce.

I set aside the order made by the President of the Labour Tribunal and dimiss the applicant-respondent's application. I make no order in regard to costs.

Set aside.

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

LAMBERT FERNANDO *vs.* BEATRICE WIJESEKERA & ANOTHER

S.C. No. 84 — *D.C. Colombo No.* 43274/M

Argued on: January, 20 & 23, 1961
Decided on: January, 23 1961

Prescription Ordinance (Cap. 68), section 9 — When "the cause of action" within the meaning of that section arises — Action for damages filed by plaintiffs by reason of having been wrongfully sued in earlier action — Does cause of action arise after decree of trial Court or after decision in appeal.

The plaintiffs-respondents sued the defendant-appellant for damages suffered by them in consequence of an action filed against them by the defendant-appellant for declaration of title and ejectment. The said action had been decided by the learned District Judge in favour of the defendant-appellant, but in appeal the Supreme Court had set aside the decree and ordered that the action be dismissed with costs.

When the present action was instituted, a preliminary issue was raised by the defendant-appellant as to whether the cause of action of the plaintiffs-respondents was prescribed. This issue was answered in favour of the plaintiffs-respondents.

It was argued for the defendant-appellant that the cause of action had arisen when the earlier case had been decided in the District Court, but the plaintiffs-respondents maintained that it arose when the appeal was decided.

Held: That a cause of action within the meaning of Section 9 of the Prescription Ordinance did not arise till the decision of the appeal in the earlier case.

Izzadeen Mohamed, with *M. T. M. Sivardeen*, for the defendant-appellant.

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

Basnayake, C.J.

The question for decision on this appeal is whether the present action of the plaintiffs-respondents for damages suffered by them in consequence of certain legal proceedings unsuccessfully taken against them by the defendant-appellant is barred by the provisions of section 9 of the Prescription Ordinance.

The defendant-appellant had sued the plaintiffs-respondents for a declaration of title to two contiguous lands depicted as lots A and B in plan No. 527 of 14th December 1953 made by William C. de Zilva, Licensed Surveyor. The action was decided by the learned District Judge in favour of the defendant-appellant. He entered judgment for him declaring him entitled to an undivided 5/8 share of the premises described in schedule B to the plaint, and also granting him an order ejecting the plaintiffs-respondents from that portion of the premises described in schedule B to the plaint. The plaintiffs-respondents successfully appealed from that judgment. This Court set aside the decree in favour of the defendant-appellant and ordered that his action be dismissed with costs. Thereafter the present action was instituted on 25th February 1958 by the plaintiffs-respondents. A preliminary issue whether the cause of action was prescribed was raised and decided by the learned District Judge in their favour.

Section 9 of the Prescription Ordinance provides:

> "No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen."

It was contended for the defendant-appellant that the cause of action arose when the case against the plaintiffs-respondents was decided in the District Court while the plaintiffs-respondents maintained that a cause of action did not arise till their appeal was decided. The learned District Judge upheld the latter view. In our opinion he is right. The present appeal is from that order. In our opinion the respondents were not entitled to institute the present action until this Court had decided the appeal on the question whether the land in dispute belonged to the plaintiffs-respondents or not. A cause of action did not arise till the decision of the appeal in that case.

The appeal is therefore dismissed with costs.

Sinnetamby, J.

I agree.

Appeal dismissed.

Present: **Sirimane J.**

MRS. BERTHA WALLES *vs.* DR. D. V. H. SILVA

S.C. 7/67 — C.R. Colombo 90549

Argued on: December, 19 & 20, 1967
Decided on: January, 17, 1968.

Rent Restriction Acts — Action for ejectment filed on 19.4.65 *by purchaser of premises against occupier as tenant on the ground of reasonable requirement — Later motion to amend plaint by adding sub-letting as a ground allowed — Decree entered on ground of sub-letting between September* 1964 *and April* 1965.

Rent Restriction (Amendment) Act No. 12 *of* 1966 *passed on* 10.5.67 *making its provisions effective retrospectively from* 20.7.62 *— Its effect on the decree entered and the action — Whether action declared null and void ab initio can be made valid by an amendment of pleadings.*

The plaintiff purchased the premises in question in December 1964 and in April 1965 sued the defendant, who had been in occupation thereof as tenant, for ejectment on the ground that the premises were reasonably required for his occupation.

About a year later (7.5.66) the plaintiff successfully moved to amend the plaint by alleging that the defendant had sublet (without specifying dates) the premises to certain persons. Amended plaint was filed on 23.5.66.

In the meantime the Rent Restriction (Amendment) Act No. 12 of 1966 was passed on 10.5.67, according to which "reasonable requirement" by the landlord ceased to be a ground for ejectment of a tenant.

The defence was that the persons who occupied the premises were boarders, not sub-tenants.

The learned Commissioner accepted the evidence that one of the occupants was a sub-tenant of the defendant from September, 1964 to April, 1965 and granted a decree for ejectment.

Held: (1) That according to the Commissioner's finding the sub-letting had been done before the plaintiff's purchase. Hence the plaintiff had no right of action to eject the tenant on that sub-letting.

(2) That the definition of the term "landlord" in the Rent Restriction Act is of little assistance in construing section 9(1) of the same Act.

(3) That as admittedly the standard rent of the premises is below Rs. 100/- and in view of section 4(1) of the said amending Act of 1966 making its provisions effective retrospectively from 20.7.62, this action instituted on 19.5.64 on the ground that the premises were reasonably required by the landlord, must "be deemed at all times to be null and void."

(4) That an action which is declared to be null and void ab initio, cannot, by an amendment be given validity. An application to amend pleadings is a step in a *valid action* pending before a Court.

Not followed : *Ratnasingham* vs. *Cathirasasamy*, (1956) 58 N.L.R. 476.

H. V. Perera, Q.C., with *M. L. de Silva*, for the defendant-appellant.

C. Ranganathan, Q.C., with *B. Bodinagoda*, for the plaintiff-respondent.

Sirimane, J.

The plaintiff purchased the premises in question in December 1964. At the time of his purchase the defendant was the tenant of these premises, and in fact had been in occupation as a tenant for about twenty four years before the plaintiff's purchase. On 19.4.65 the plaintiff filed action for ejectment on the ground that the premises were reasonably required by him for his occupation.

About a year later (on 7.5.66) the plaintiff moved to amend the plaint alleging that the defendant had sublet the premises to one "Kulendran and/or Shanmugam and/or Mrs. Madawela and/or Miss Rasiah" without specifying the dates of the alleged subletting. This amendment had been allowed, and an amended plaint was filed on 23.5.66.

In the meantime the Rent Restriction (Amendment) Act No. 12 of 1966 (hereinafter referred to as the Amending Act) was passed on 10.5.67. according to the provisions of which "reasonable requirement" by the landlord was no longer a ground for ejectment of the tenant. The defendant's position was that certain other people who occupied the premises with her were her boarders and not sub-tenants.

The Commissioner accepted the evidence that Miss Rasiah had been a sub-tenant of the defendant from September 1964, to April 1965, and granted the plaintiff a decree for ejectment on that ground. This finding of fact was strongly assailed and it was urged that Miss Rasiah (a Pharmacist) was a convenient witness found by the plaintiff (a Doctor) to supply a deficiency at a later stage in the case.

Assuming, however, that the finding of fact is correct, one sees that the sub-letting had been done *before* the plaintiff's purchase. Section 9(1) of the Rent Restriction Act, Chapter 274, provides that the tenant of any premises to which the Act applies shall not sublet without the prior consent in writing of the landlord. Sub-section 2 of that section then goes on to say, "where any premises or any part thereof *is sublet* in contravention of the provisions of sub-section (1) *the landlord* shall .....be entitled ..... to a decree for ejectment .....of his tenant, and ..... of the persons to whom the premises or any part thereof has been so sublet."

When does the right to a decree for ejectment under this section arise? It arises on the subletting. A sub-tenancy continues from month to month; but the subletting is done on a particular day, and it is this act of subletting that gives rise to the right.

To whom does the right accrue? In my opinion it accrues to *the landlord* at the time of the subletting.

When a sale takes place the purchaser no doubt steps into the shoes of the seller as a singular successor to title, and, on the principle that hire goes before sale, a tenancy or a sub-tenancy will continue with the purchaser as the new landlord.

But, rights of action which have accrued for *breaches* of the contract of tenancy do not pass to the purchaser unless there is an assignment of those rights. If, for example, a tenant has defaulted in payment of rent when A was his landlord; and A thereafter sells the premises to B, then the purchaser B cannot sue the tenant for ejectment on the ground that he has been in arrears of rent. Voet says (book 19, title 2, section 19, Gane's translation, page 428):

> "On the other hand also whenever by statute or custom sale gives place to lease a particular successor is only bound to bear up to the end with a resident in occupation or a tenant in enjoyment if the lessee is ready to pay the rents to him *for the ensuing period.*"

Similarly, if a tenant has sublet premises without the permission of the landlord a purchaser cannot eject the tenant on that subletting, particularly so, if the sub-tenancy has terminated at the time he comes into Court.

I am unable to accept the argument of learned Counsel for the respondent that once a tenant sublets in contravention of section 9 of the Rent Restriction Act he renders himself liable for ejectment not only by the landlord at that time, but by any of his successors in title. According to this argument if a tenant sublets premises without permission from his landlord even for a month, then a subsequent purchaser can sue the tenant for his past act of subletting even though there are no sub-tenants at the time he brings his action. Section 9(1) of the Rent Restriction Act is not a punitive section and the right to a decree for ejectment does not in the context of that section accrue to a person other than the landlord at the time of the subletting.

My attention was drawn to the case of *Ratnasingham* vs. *Cathirasasamy*, 58 N.L.R. 476 where a contrary view has been expressed. The learned

Judges who decided that case were of the view that the definition of the word "landlord" in the Rent Restriction Act as "the person for the time being entitled to receive the rent", enabled any landlord of the premises at any time after the subletting to sue for a decree for ejectment. With great respect, I am unable to share this view. The definition of the word "landlord" is of little assistance in construing the true meaning of the section. The real question is whether a person for the time being entitled to collect rent, is entitled to sue for a decree for ejectment on the ground of a subletting which had been done when he was not the person entitled to collect rent.

The appeal must succeed on this ground even assuming that Miss Rasiah's evidence that there was a subletting is correct.

I pass on to the second ground urged in the appeal.

It is admitted that the standard rent of the premises is below Rs. 100/- per month. In the case of such premises section 2 of the Amending Act provides that no action or proceeding for the ejectment of the tenant shall be instituted or entertained by any Court except on four grounds, viz.

(*a*) Rent being in arrears for three months or more
(*b*) Subletting without the landlord's written consent
(*c*) The premises being used for an immoral or an illegal purpose, and
(*d*) Wanton destruction or wilful damage being caused to the premises.

Section 4(1) makes these provisions effective retrospectively from 20.7.62 and proceeds to enact that

"accordingly any action which was instituted on or after that date and before the date of commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies shall if such action, is pending on the date of commencement of this Act, deemed at all times to have been and to be null and void."

For the purpose of giving it retrospective effect one has to assume that this section was in operation on 19.4.65 when this action was instituted on the ground that the premises were reasonably required by the landlord. So that the action must "be deemed at all times to have been and to be null and void." No doubt, an amendment, for certain purposes (e.g. for purposes of prescription) relate back to the date of the plaint. But an application to amend pleadings is a step (under section 93 of the Civil Procedure Code) in a valid action pending before a Court. An action which is declared to be null and void *ab initio* cannot, by an amendment be given validity.

The appeal must succeed on this ground too. Lastly, there is the question of fact.

Miss Rasiah's evidence has to be viewed with the utmost care and circumspection. She did say that she paid Rs. 75 per month and occupied a certain part of the house. This evidence was flatly contradicted by the defendant who said that Miss Rasiah was a boarder brought in by her mother whom the defendant had known earlier. The mere fact that a door leading to the rooms they occupied had been closed does not necessarily negative the fact that they could have been boarders; nor even the fact that they had been seen doing some cooking — (assuming that this evidence is true). It would be an unsafe inference to draw from Miss Rasiah's evidence that she had exclusive occupation of an identifiable entity to the exclusion of the tenant.

The plaintiff then called one Mr. Oliver Wijesinghe, an Assistant Registrar-General, whose evidence apparently impressed the Commissioner. He had been a neighbour of the defendant for about four years and would surely have known whether the plaintiff had sublet any part of the premises. In the course of his evidence he said that for the first time the plaintiff asked him in 1966 as to who was staying in the premises in question in 1965, and went on to say "then I gave him a list of names. As to whether they were living as boarders or as sub-tenants I do not know."

The learned Commissioner has failed to consider this evidence, which is certainly not inconsistent with the version of the defendant. When one considers all the circumstances in this case it seems to me that the defendant's version was the more probable one.

The appeal is allowed, and the plaintiff's action is dismissed with costs in both Courts.

Appeal allowed.

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

H. K. ARON SINGHO *vs.* K. A. SAMUEL SILVA

S.C. No. 167 *of* 1959 — *C.R. Colombo No.* 72682

Argued on: 7th December, 1960
Decided on: 29th March, 1961

Lease — Such lease notarially attested but unregistered — Transfer of leased premises by lessor — Whether subsequent transfer prevails over such lease — Recognition of subsisting lease by vendee — Lessee's right to plead benefit of Rent Restriction Act when lease terminates by effluxion of time — Whether vendee's right to sue in ejectment on expiry of lease barred — Rent Restriction Act (*Cap.* 274), *section* 13(1).

The plaintiff instituted this action claiming the ejectment of the defendant from certain premises purchased by him on a transfer (P1) dated 18th September 1958. At the time of the plaintiff's purchase the defendant was in occupation of the premises under a notarially attested lease from the owners (the plaintiff's vendors) .The lease was for a 3 year period, from 1st January 1956 to 31st December 1958, and the owners had also acknowledged the receipt of rent for this 3 year period.

The transfer (P1) was registered while the lease was not. Two months after his purchase, the plaintiff sent the defendant a letter (D1) giving him notice to quit the premises "on the 31st day of December 1958 on the expiry of the lease."

The trial Judge held (a) that on the date of the plaintiff's purchase the defendant became a trespasser *vis-a-vis* the plaintiff, and the plaintiff therefore was not under a legal obligation to give the defendant notice to quit before instituting proceedings in ejectment; (*b*) that the letter D1 was not an indication of a recognition of the unregistered lease but merely showed that the plaintiff as indulgent enough until 31st December 1968 as sudden eviction might hardship on the letter.

Held: (1) That the transfer (P1) prevailed over the earlier unregistered lease.

(2) That a lesseee could plead the benefit of the Rent Restriction Act where the premises were occupied by him under a notarial lease which had terminated by effluxion of time.

(3) That when the plaintiff referred expressly to the lease in his letter D1, he was recognising the lease granted by his vendors. It would follow therefore, that the plaintiff's action would be barred by the provisions of section 13(1) of the Rent Restriction Act, No. 29 of 1948, which protected the tenant.

Followed: *Sennaiya Chetty* vs. *Rupesinghe Appuhamy*, (1885) 7 S.C.C. 111
Singho Appuhamy vs. *Amaratunga*, (1922) 1 Times of Cey. Reps. 110
Gunaratne vs. *Thelenis*, (1946) 47 N.L.R. 433

Cases referred to: *Hinniappuhamy* vs. *Kumarasinghe*, (1957) 59 N.L.R. 566
Britto vs. *Heenatigala*, (1956) 57 N.L.R. 329; LIII C.L.W. 52
Wijesinghe vs. *Charles*, (1915) 18 N.L.R. 169
Bandara vs. *Appuhamy*, (1923) 25 N.L.R. 176
Ukkuwa vs. *Fernando*, (1936) 38 N.L.R. 125

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

H. W. Jayewardene, Q.C., with *B. J. Fernando*, for the plaintiff-respondent.

T. S. Fernando, J.

This action was instituted by the plaintiff claiming the ejectment of the defendant from certain premises which have been purchased by him from the owners on transfer P. 1 executed on 18th September 1958. At the time of such purchase by the plaintiff the premises were occupied by the defendant and there is no dispute between the parties that the defendant had been placed in occupation by the owners who had executed a notarially attested lease for three years commencing from 1st January 1956 to 31st December 1958 and acknowledging the receipt by them of rent for the premises for the full period of three years in advance. This lease had at no time been registered, and on the authority of *Sennaiya Chetty* vs. *Rupesinghe Appuhamy* (1885) 7 S.C.C. at 111 and *Singho Appuhamy* vs. *Amaratunge* (1922) 1 Times at 110 the transfer

P.1 prevails over the unregistered lease. The plaintiff, however, through his proctor, about two months after his purchase, viz. on 14th November 1958, addressed letter D.1 to the defendant giving him "notice to quit and deliver quiet and peaceful possession of premises No. 98 occupied by you on the 31st day of December 1958 on the expiry of the lease." The defendant failed to quit the premises by the 31st of December 1958 and the present suit resulted.

The learned Commissioner of Requests, purporting to apply the decision of this Court in *Hinniappuhamy* vs. *Kumarasingha* (1957) 59 N.L.R. at 566 reached the conclusion that on the date of purchase by the plaintiff, viz. on 18th September 1958, the defendant became a trespasser *vis-a-vis* the plaintiff. In regard to the letter D.1 the Commissioner took the view that it was not an indication of a recognition of the unregistered lease but went to show that the plaintiff was indulgent enough to allow the defendant to remain until 31st December 1958 as sudden eviction might work hardship on the latter. If the defendant had in law become a trespasser *vis-a-vis* the plaintiff, the latter was under no legal obligation to give the defendant any notice to quit before instituting proceedings in ejectment. De Sampayo, J. in the course of his judgment in *Wijesinghe* vs. *Charles* (1915) 18 N.L.R. 169 observes:— "It is clear that a purchaser in this connection has two courses open to him when a third party is in possession of the property at the time of the sale: he may either stand on the strength of the title and sue the third party in ejectment, or he may at once bring the action *ex empto* against his vendor for faliure to implement the sale by delivery of possession." In the case before me it is obvious that the plaintiff had not elected to proceed against his vendor. In that situation how did the plaintiff come to refer to the lease at all in the letter D1? It was contended on his behalf in the lower Court that he was unaware of any lease by the vendor and that it was unlikely that he would ever have made the purchase had he known of this lease. As against this contention it must be observed that any reasonable purchaser of residential property could be expected to have addressed his mind to the question of vacant possession of the premises and the implications arising from the operation of the Rent Restriction Act. An interpretation of the letter D1 must have regard to the probability I have referred to above, and I am of opinion that when the plaintiff referred in letter D 1 expressly to the lease and indicated that possession may be retained till 31st December 1958 he was recognising the lease granted by his vendor. A lessee can plead the benefit of the Rent Restriction Act where the premises are occupied by him under a notarial lease which has terminated by effluxion of time — *Guneratne* vs. *Thelenis* (1946) 47 N.L.R. at 433. In view of the opinion which I have reached in regard to the interpretation of the letter D1, the plaintiff's action is barred by reason of Section 13(1) of the Rent Restriction Act, No. 29 of 1948. In this situation it does not appear to me to be necessary, sitting alone, to discuss arguments raised by counsel for both parties as to the conflict between the decisions in *Hinniappuhamy* vs. *Kumarasingha* (*supra*) on the one hand and *Bandara* vs. *Appuhamy* (1936) 25 N.L.R. at 176 and *Ukkuwa* vs. *Fernando* (1936) 38. N.L.R. at 125 on the other.

It is important to realise, said Gratiaen, J. in *Britto* vs. *Heenatigala* (1956) 57 N.L.R. at 329, that Section 13 of the Act (No. 29 of 1948) operates "notwithstanding anything in any other law". This means that the "tenant" is protected even though his contractual rights may have been terminated (e.g. by due notice or by effluxion of time) or extinguished by operation of law. Giving effect to Section 13 of the Rent Restriction Act, I hold that the present action was not competent and should have been dismissed with costs. The appeal is, therefore, allowed, and the plaintiff's action is dismissed with costs in both courts.

I am unable to agree with Mr. Jayawardene that a decision in this case adverse to the plaintiff causes him undue hardship. His position would have been the same if the defendant had been an ordinary monthly tenant. The fact that the defendant was the holder of a notarial lease — albeit unregistered — which was due to expire only some three and a half months after the date of the purchase cannot surely make the defendant's claim to retain occupation any less deserving than that of a tenant from month to month.

Appeal allowed.

SUPPLEMENT

WELCOME TO THE HONOURABLE CHRISTOPHER GREGORY WEERAMANTRY PUISNE JUSTICE IN THE CEREMONIAL COURT AT HULTSDORF ON DECEMBER 17, 1967 AT 11 O'CLOCK IN THE FORENOON *

PRESENT

The Hon. Hugh Norman Gregory Fernando, Chief Justice.
The Hon. Dr. Henry Wijayakone Tambiah, Q.C., Puisne Justice.
The Hon. Asoka Windra Hemantha Abeyesundere, Q.C., Puisne Justice.
The Hon. Gardiye Punchihewage Amaraseela Silva, Puisne Justice.
The Hon. Albert Lionel Stanley Sirimane, Puisne Justice.
The Hon. Anthony Christopher Augustus Alles, Puisne Justice.
The Hon. Veeravagu Siva Supramaniam, Puisne Justice.
The Hon. George Terrance Samerawickrame, Q.C., Puisne Justice.
The Hon. Victor Tennekoon, Q.C., Puisne Justice.
The Hon. Christopher Gregory Weeramantry, Puisne Justice.

N. Navaratnam Esquire, Registrar, Supreme Court.
B. F. Perera Esquire, 1st Deputy Tegistrar, Supreme Court.
L. Wickramasinha Esquire, 2nd Deputy Registrar, Supreme Court.
D. Meynert Esquire, 3rd Deputy Registrar, Supreme Court.
C. E. W. de Alwis Esquire, 4th Deputy Registrar, Supreme Court.

The Hon. A. C. M. Ameer, Q.C., Attorney-General.
E. W. P. S. Jayawardena Esquire, Q.C., Solicitor-General.
H. V. Perera Esquire, Q.C.
E. B. Wikramanayaka Esquire, Q.C.
G. G. Ponnambalam Esquire, Q.C.
C. Thiagalingam Esquire, Q.C.
E. G. Wikramanayaka Esquire, Q.C.
S. Nadesan Esquire, Q.C.
H. W. Jayewardena Esquire, Q.C.
A. H. C. de Silva Esquire, Q.C.
G. E. Chitty Esquire, Q.C.
P. Navaratnarajah Esquire, Q.C.

AND a representative gathering of both branches of the profession.

The Hon. A. C. M. Ameer, Q.C., Attorney-General

My Lords,

It was just over a year ago that I had expressed the hope that the worthy example set by Mr. Justice Samerawickrame, in sacrificing a lucrative practice at the Bar in order to be of service to the country on the Bench, would be emulated by other members of the Bar as well. Today, that hope has been fulfilled and we are assembled here to offer our felicitations to Mr. Justice Weeramantry who, in the annals of the judicial history of this country, is perhaps the youngest to be appointed to the Supreme Court Bench. No more is it true, therefore, to say as an old lawyer once said,

* For Sinhala translation, see Sinhala section, Vol. 15, part 6, p. 21

that the Bench was very like Heaven, a place we all like to go to, some day, but not today.

Mr. Justice Weeramantry, we are only too well aware of the sacrifice you made when you decided to accept appointment as Commissioner of Assize two years ago, at a time when the glittering prospect at the Bar was yours. At the Bar you were, in many respects, considered a model advocate when you were beginning to demonstrate that advocacy need be none the less effective for moderation, fairness and courtesy not only to opponents but even to hostile witnesses. By your experience at the Bar, your wide knowledge and learning and by your experience on the Assize Court Bench you have not only equipped yourself for the responsibilities of the office you have today assumed, but also demonstrated that the duties of this high office will sit lightly upon you.

The oath of office you have taken imposes on you a lofty duty of impartiality which may appear to be as impossible as it is for a man to jump off his own shadow, but which you, as a Judge, must try your best to do; it calls upon you to purge your mind not only of partiality to persons but even partiality to arguments; and your duty requires you not merely to select one or other of the two conflicting views submitted but to make your own contribution from the stores of your own knowledge, experience and research. For your part, these are essential if the parties to litigation or the wider public are to be convinced that justice is done, and the courts are to enjoy public confidence. In this context it is well for you also to remember the celebrated words of Lord Birkenhead, uttered when he assumed office as Lord Chancellor — "To none will we deny, to none will we delay justice."

Justice, however, cannot be done by the Bench alone; justice cannot be meted out or a case decided without each party to the dispute being afforded the fullest opportunity of presenting his side of it to the court. In the law courts history never repeats itself; no two cases are ever the same; no law-giver can be so prescient as to anticipate all the contingencies of human life; administration of justice which concern human affairs and is the every-day concern of ordinary citizens cannot be based on scientific axiom and scientific formulae. They relate to the struggles and rivalries, the desires and emotions to which human relationships give rise. There can be no question, therefore, that the most effectual and only practicable method of arriving at the rights of a dispute is by a critical debate in the presence of an impartial third party, where every statement and argument on either side is submitted to the keenest scrutiny and attack; where every step on the way to judgment has been tested and contested to ensure that the chance of error in the ultimate decision is reduced to a minimum. The better the case is presented on each side and the keener and more skilful the debate before him, the more likely is it that the judge will reach a just and sound judgment. That is why it has been said that a strong Bar makes a strong Bench; that is also why we cherish the independence of the Bar as well as offer every new Judge our co-operation.

It is for the reason that the Bar is also an essential element in the process of the administration of justice that we keep asking for patience, understanding and courtesy from the Bench, in order that we may ourselves perform our duties but, as I said the other day, not to the extent of suffering fools gladly, or even at all. We have no reason to doubt but every reason to hope that Your Lordship, with your qualities as a man and your own experience at the Bar, will hold out to us the virtues of patience, understanding and courtesy, however difficult it may be to practise them on the Bench, without which justice may not even appear to be done. For our part, Your Lordship need have no fears of the fullest co-operation you will receive from us.

You have a long innings on the Bench; when many of us are no more you may still be. We have every reason to hope that in the years ahead of you, you will not only enrich our Law Reports and legal literature, but also ensure for yourself a due place in the legal annals of this country. In offering you the congratulations of the Bar and wishing you a long and distinguished tenure of office, may I conclude on a personal note — to say that it has given me particular pleasure to perform this duty to a son of my late revered teacher, for whom and for whose memory I continue to have the highest regard and respect.

The Honourable C. G. Weeramantry, Puisne Justice:

I thank you, Mr. Attorney, for your kind words of welcome.

We who practise and administer the law in Ceylon are heirs to a proud tradition, for through

many generations our people have sought from our courts the highest ideals of justice and not sought in vain; and even as the courts have fostered and cherished these ideals, so have the courts in their turn been honoured and cherished in the hearts of our people. Thus have they become the repositories of the people's trust and the palladium of a people's rights, reflecting both in their ancient traditions and in their present endeavours so much that is richest and noblest in the life of our country.

The thought, therefore, that I have been called to a seat on this bench fills me with profound humility and weighs me down with a burden which lies very heavily on each one of us on this bench — the burden of being in a special sense a trustee of those traditions of which I have spoken — traditions which have retained their lustre undimmed through the passing generations.

This thought compels me to dedicate myself to the responsiblities of this office in this spirit — that it is my high duty to bend my energies towards keeping inviolate this splendid inheritance, so that when the time comes for us to pass on our trust, we can hand down this inheritance in all its pristine purity to the generations that are to come.

This occasion is tinged for me with some measure of sadness at the thought that I today leave behind a phase of my life—a long phase and a happy phase, spent in the enjoyment of the comradeship, the kindness, and the warmth which only the Bar can give. I will carry to my new duties treasured memories of the wonderful kindness I have received from all sections of the Bar, alike from both its branches, alike from senior and junior, alike from that day I first entered the Library to this. That friendship I have noticed also in the past two and a half years in which I have assisted in the administration of justice from this side of the bar table; and now that it has fallen to my lot to continue here, I shall look forward to a long and happy association in which we shall in that same spirit of comradeship continue to serve the cause of justice to which we all, Bench and Bar alike, are dedicated.

I look upon it as a great privilege to come to this Bench having known and savoured so happily and so long what life at the Bar can give, and having also learnt so much that life at the Bar can teach.

Well do I know the problems, the difficulties, the stresses and the strains of professional practice, well do I know also the loyalty, the qualities of head and heart and the high sense of dedication which have ever characterised our Bar. I know too the respect it has always commanded for its courage and independence and I know the high regard and loyalty it has always shown to the judiciary of this country. Though, therefore, it is customary on these occasions to ask for the co-operation of the Bar, I am strongly conscious of the superfluousness of this request. I know that your co-operation and your guidance, your help and your goodwill, will always be available to me unstintingly and in ample measure. Of these I shall stand greatly in need, and these I shall confidently expect.

Even as I am confident I shall have these from you, so also may the Bar feel assured that it will ever have from me the courtesy, the friendship and the understanding of one who has spent so many long and happy years in its fold.

The future holds a challenge for all members of our profession, for though the law must be stable it cannot stand still. The process of growth and development is unceasing. Changing times throw down fresh challenges and changing situations pose new problems. These must be met and faced, for so only may a legal system develop to that fuller maturity towards which the law must ever strive.

In the words of the great Justice Cardozo, "existing rules and principles can give us our location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow". When, therefore, we — you and I — devote our energies to the cause of justice, I invite you to look upon ourselves not as administrators of a set body of inflexible rules but rather as privileged participants in the process of development, for we would fail in our trust should the law in our hands stand still. In this task and in all those problems associated with maintaining our law and our traditions at their purest and at their best, I look forward to your guidance, your assistance and your goodwill.

Mr. Attorney and friends, I thank you once again for the warmth of your welcome.

Privy Council Appeal No. 23 *of* 1967

Present : **Viscount Dilhorne, Lord Guest, Lord Wilberforce, Lord Pearson & Sir Alan Taylor**

DERWENT PEIRIS & OTHERS *vs.* ABEYSIRI MUNASINGHE LAVIRIS APPU

From
THE SUPREME COURT OF CEYLON

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

DELIVERED THE 23RD JANUARY, 1968

Fideicommissum — Bequest in Last Will made to child of testatrix — Does the mere presence of condition "si sine liberis decesserit" per se create a fideicommissium in favour of children—What considerations apply in determining whether a fideicommissum is to be implied in such a Will—In case of doubt, presumption against fideicommissum — Present law applicable on the subject.

After reviewing the opinions of the Roman Dutch Commentators on the question — Whether a *fideicommissum* in favour of the children would be implied from the condition "*si sine liberis decesserit*"—and after considering the modern South African and Ceylon decisions on the subject, Their Lordships—

Held: (1) That where in a will (the same would apply as regards deeds of gift *mutatis mutandis*), a bequest is made to a child of a testator, the mere presence of a clause, or condition "*si sine liberis decesserit*" does not per se create a tacit *fideicommissum* in favour of that child's children.

(2) That whether in such a will, a *fideicommissum* is to be implied is a question of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.

(3) That such an intention must be clearly established and in case of doubt the presumption is against the implication of a *fideicommissum.*

A testatrix made a will in 1910 whereby (1) *inter alia* she directed her executor "to set apart and convey" to each of her three daughters on their respective marriages immovable property of the value of Rs. 100,000/- subject to a clearly expressed *fideicommissum* in favour of their issue;

(2) the residue and remainder of her property she devised and bequeathed equally to her three sons subject to the life interest of her husband and subject to the following conditions:—

"8b. Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

8c. If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

Subsequently in 1917 a deed of Indenture was entered into between the testatrix and her husband containing *inter alia* an agreement by the testatrix to convey the "Moragolla Group of Estates" in which was included Raglan Estate (the subject matter of this action) by way of gift to her eldest son R.L. subject to a *fideicommissary* condition.

Before any steps were taken on this agreement both the testatrix and her husband died in 1918 and the said R.L., the executor of the will of each of them instituted two testamentary cases in the District Court of Colombo. All matters in dispute in these cases including the effect of the said Indenture were referred to arbitration. The award which *inter alia* held that the Indenture was binding on the testatrix, her huband and their heirs was made a Rule of Court in 1925.

In 1951 R.L. sold Raglan Estate to S who sold it to the respondent in 1952. The appellants who are the children of R.L. who died in 1954, sued the respondent in 1959 for a declaration of title to said Raglan Estate claiming title as fideicommissaries under the will of the testatrix, their grandmother.

The contention of the appellant was that a fideicommissum in their favour ought to be implied from the terms of the will and/or from other indications found in the case, particularly paragraph 8c above.

Held: (1) That the clearly expressed *fideicommissum* in relation to the testators daughter's shares and the absence of a prohibition or restriction on alienation as regards the sons' shares are two strong indications against the submission that a *fideicommissum* ought to be implied in favour of the appellants.

(2) That the indication most relied on by the appellants, viz. clause 8c. above, is open to the possible interpretation that it deals with accrued shares and not with original shares; the intention being that as regards original shares a son who dies leaving children takes absolutely, and so can make his own provision both for his widow and for his children. Hence it is sufficiently possible to negative the necessity to infer a *fideicommissum*.

Cases referred to: *Galliers* vs. *Rycroft* (1901) A.C. 130.
Abeyawardene vs. *West* (1957) 58 N.L.R. 313; LIV C.L.W. 33 (P.C.)
Steenkamp vs. *Marais and Others* (1908) 25 S.C.R. 483.
Ex parte Swanepoel and others 1948 (1) SA 1141 (0)
Engelbrecht vs. *Engelbrecht en Andere* 1958 (3) SA 571 (0).
Asiathumma vs. *Alimanchy* (1905) 1 A.C.R. 53.
Sandenam vs. *Iyamperumal* (1916) 3 C.W.R· 58.
Deu vs. *Jayewardene* (1927) 5 T.C.L.R. 107.
Carolis vs. *Simon* (1929) 30 N.L.R. 266
Appuhamy vs. *Holloway* (1943) 44 N.L.R. 276; XXV C.L.W. 52.
Thinoris de Silva vs. *Weerasiri et al* (1949) 51 N.L.R. 467; XLI C.L.W. 74
De Silva vs. *Rangohamy* (1961) 62 N.L.R. 553.
Rasammah vs. *Manar* (1963) 65 N.L.R. 467

L. Kadirgamar, with *D. C. Amerasinghe*, for the appellants.

E. F. N. Gratiaen, Q.C., with *H. W. Jayawardene Q.C.* and *R. K. Handoo*, for the respondents.

Lord Wilberforce

The action in which this appeal is brought is a *rei vindicatio* relating to some 200 acres of land in the Kurunegala District known as the Raglan Estate. The appellants claim this land as *fideicommissaries* under the will of their grandmother Adeline Winifred Peiris ("the testatrix"). The respondent's title rests upon a conveyance for value from the father of the appellants Richard Louis Peiris. The appellants' claim was upheld by the District Judge but his decision was reversed by the Supreme Court on the ground that the appellants failed to establish the existence of a *fideicommissum*.

The main question for determination is whether, under the terms of the will and in accordance with certain rules of Roman Dutch Law, a *fideicommissum* affecting the Raglan Estate in favour of the appellants ought to be implied; but before consideration is given to this question, it is convenient to state some matters of fact which gave rise to certain issues in the Courts below.

The will of the testatrix was made on 3rd June 1910 before a well known and experienced notary public A. W. Alwis. It appears that some dispute arose between the testatrix and her husband Richard Steuart Peiris as to the title to various properties, and on 31st May 1917 a Deed of Indenture was entered into between them, the occasion for which was the impending marriage of one of their daughters. This Deed, amongst other provisions, contained an agreement by the testatrix to convey the Moragolla Group of estates (which included the Raglan Estate) by way of gift to her eldest son Richard Louis Peiris (the appellants' father) subject to a *fideicommissum* condition, and further agreements for the gift of other pieces of land to others of her chlidren. Before any steps were taken to implement these provisions, Richard Steuart Peiris died on 23rd October 1918. The testatrix herself died shortly after on 20th December 1918.

Richard Louis Peiris, the eldest son of the testatrix and her husband, was executor of the will of each of them and he initiated two testamentary cases (Nos. 6569 and 6571) in the District Court of Colombo, seeking a decision on certain questions of doubt as to which differences had arisen between the heirs. All matters in dispute, which appear to have included the effect of the Indenture of 31st May 1917, were referred to arbitration, and in due course an Award was made. It is sufficient to state that the arbitrator found that

the Indenture of 1917 was binding on the testatrix, her husband and their heirs, and that therefore the two testaments did not deal with the properties dealt with by the Indenture. He also found that the Indenture was binding on the children of the testatrix and her husband.

On 17th December 1925 the Award was made a Rule of Court by the District Court of Colombo.

None of the present appellants was a party to the testamentary cases or to the Award. The eldest of them was in fact not born until 1930.

The title of the respondent arises from a sale of the Raglan Estate in 1951 by Richard Louis Peiris to one U. B. Senanayake, whose title, if any the respondent acquired on 9th August 1952. Richard Louis Peiris died in December 1954 and the present action was instituted on 18th March 1959.

The relevant portions of the will of the testatrix, of 3rd June 1910, are as follows:

"I hereby will and direct that on the marriage of each of my daughters (with the sanction and approval of my said husband) my executor shall set apart and convey to her immovable property of the value of one hundred thousand rupees subject to the conditions following: viz.

That such daughter shall not sell, mortgage or otherwise alienate such property or properties but shall be entitled during the term of her natural life only to take enjoy and receive the rents income and produce thereof. She shall not be at liberty also to lease or demise such property or properties for any term exceeding four years at any one time or to receive in advance the whole of the rents for such period and subject to the further condition that on the death of such daughter such property or properties so given to her shall go to and devolve on her children in equal shares. Should such daughter die without leaving issue then I will and direct that the properties so given to her shall devolve on her surviving sisters and the issue of such sister as shall then be dead. Such issue taking only amongst themselves the share to which another could have been entitled to or have taken if alive.

So long as my daughters or any of them shall remain unmarried and shall prove dutiful and obedient to my husband my executor shall pay to each of them monthly a sum of two hundred and fifty rupees for her sole absolute use and benefit.

8a. I give devise and bequeath all the rest residue and remainder of my property and estate immovable and movable unto my sons in equal shares subject to the express condition that my said husband Richard Steuart Peiris shall be entitled during the term of his life to take receive enjoy and appropriate to himself for his own absolute use and benefit all rents income produce and profits of all the said property and estate with full liberty to expend for the management cultivation and upkeep thereof all such sums of money as he on his absolute discretion shall think fit and with full power and authority to my said husband should be deem it necessary to mortgage the said properties or any of them for the purpose of raising and borrowing money for any purpose whatsoever and upon such terms and conditions as he shall deem fit and proper and also subject to such conditions and restrictions as my said husband shall according to his absolute discretion and wish think fit to impose when conveying such property or properties to my sons.

8b. Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

8c. If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

The numbering placed before the three paragraphs dealing with the residue does not appear in the original will but has been added for convenience of reference.

It will be seen that while the will contains, in paragraph 8b, a gift, of a clearly *fideicommissary*, character, in the event of any of the testatrix's sons dying without leaving issue (in the terminology of Roman Dutch Law a clause "*si sine liberis decesserit*"), there is no corresponding provisions, in relation to the son's original shares, which deals expressly with the event of a son dying but leaving issue, and in particular no gift in that event to the son's children.

The appellants' submission was that a *fideicommissum* in their favour ought to be implied. They advanced the following propositions:

I. That a "*si sine liberis decesserit*" clause, under Roman Dutch Law automatically gives rise to a *fideicommissum* in favour of the children mentioned in the "*conditio*" if the *de cujus* was a descendant of the testator.

II. That, if I is not correct, only slight indications from surrounding circumstances, or from other provisions in the will are required in order that such a *fideicommissum* should be inferred.

III. That if (contrary to II) very clear indications *aliunde* are needed to support the inference of a *fideicommissum*, indications of this quality are to be found in the present case.

Their Lordships commence their examination of these propositions by reference to the commentators. There is no doubt that support can be found in them for the appellants' submissions. *Grotius* endorses proposition I, though he does so in a negative rather than a positive form; answering the question whether, where the *conditio* exists, the heir is burdened with a *fideicommissum* in favour of his children he says:

> "However, the generally accepted view is that this is not so unless the children were descendants of the testator .....or unless the last will contained some other indications from which a contrary intention might be inferred". (The Jurisprudence of Holland: Tr. Lee (1926) p. 153.)

Voet discusses the question at greater length. In a section headed "Person burdened by condition may alienate property left unless it appears that those given place under condition were called as heirs" he states that this (alienation) is not permitted "should the children or others who have been given place under condition appear by that very fact to have been summoned by the testator to those properties in respect of which they have been so given place" and continues by stating four sets of circumstances from which such calling may be inferred — as to which "watchfulness is certainly needed.....for cases are not lacking in which those who have been given place under a condition ought on account of various circumstances to be deemed to have been summoned under the last will."

The fourth of these is expressed as follows:

> "Finally Neostadius is authority for saying that with collaterals indeed....who have been given place under a condition, the view of the Roman law demonstrated above (*sc.* that those who are '*positi in conditione*' are not deemed '*positi in dispositione*') ought....to be approved ; but that actual descendants of the testator who have been given place by him under a condition appear by our customs to have been summoned by the last will apart from any combination of reasonable inference such as has been already described." (Voet; Commentary Tr. Gane (1956) Vol. IV Bk. XXVIII Tit 2 s. 10.)

The cautious statement of this fourth proposition is to be noted: it is placed under the authority of *Neostadius* without direct endorsement by the author. That *Voet* himself considered the point a doubtful one is shown by a footnote to the passage last cited in which he refers to *Grotius* and *Van Leeuwen* on one side and to *Sande's* disagreement on the other. His own view appears to go no further than acceptance of the relevance of "various circumstances". It may also be noted that the learned translator, in an introductory note to the title, says that (*inter alia*) section 10 has been "in modern times a veritable battleground on two most momentous questions" of which he states the present as one.

It is not necessary to refer at length to the writings of *Van Leeuwen*. In his Commentaries on Roman Dutch Law dealing with the special case of descendants of the testator he says "under the testator's children, grandchildren are held to be so included (*i.e.* called to the inheritance) *if from the circumstances it appears that such was the intention*" (Commentaries Tr. Kotze (1921) 2nd Ed. Vol. I Bk. III Ch. VIII s. 12 p. 383). To what extent this reference to "the circumstances" introduces an additional requirement, and if it does what the strength of it must be, does not appear. In his earlier work the Censura Forensis he appears to approve the opinion expressed "by others" that even children and grandchildren are not to be considered as summoned to the inheritance by virtue of the condition "unless unmistakable and very evident inferences and necessary deductions from the testator's intentions require this, since.. ....if the testator wish to summon the latter to the inheritance by means of a *fideicommissum* he ought expressly to say so, since in cases of doubt the presumption is always in favour of the heir and against the *fideicommissum*" (Censura Forensis Bk. III Ch. 7 section 18).

Finally reference may be made to Professor Lee. After stating that the question (*sc.* whether a *fideicommissum* in favour of the children would be implied from the condition "*si sine liberis decesserit*") was disputed, he states positively "If however the testator was an ancestor, not only does the above-mentioned clause create a *fideicommissum* in favour of the children, but even if the clause had been omitted it will be read into the will with the same result." (Lee, Introduction to Roman Dutch Law 5th Ed. (1953) p. 379). For authority he refers to *Voet* and *Huber* and mentions *Galliers* vs. *Rycroft* (1901) A.C. 130 a case concerned with the question whether the *conditio* ought to be implied.

Thus it can be said that the commentators, while in some passages supporting the implication of a *fideicommissum* in favour of descendants of the testator, are not entirely agreed on the question whether this implication may or should be drawn from the mere existence of the *conditio* or whether additional circumstances indicating the testator's intentions are required or whether, if so, slight,

or strong indications are needed. It becomes therefore necessary to enquire to what extent and in what form the views so expressed have been received into the law of Ceylon. The correct approach to a question of this kind is not now in doubt, since this Board has given its approval to the formulation of it by Professor Lee:

> "The works of the older writers....have a weight comparable to that of the decisions of the Courts, or of the limited number of 'books of authority' in English Law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course, the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason; or, will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life; or again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience." (Lee op. cit p. 14 approved *Abeyawardene* vs. *West* (58 N.L.R. 313, 320 (J.C.)).

In the present case, it is not only the difference of emphasis of the commentators, which leaves scope for clarification of the law by the courts. There is also the fact that the principles on which testamentary instruments are to be construed must differ widely from those applicable in 17th century Holland. In modern Ceylon, they are or may be made (as in the present case) in the English language, against the background of a mixed legal system, by notaries familiar with that system, for well-educated testators, themselves capable of understanding legal techniques. The courts at the present time are accustomed, rightly, to regard their primary task as being to ascertain the real intention of testators, from a fair consideration of the language of the instrument as a whole, account being taken no doubt of well known and accepted rules but with liberty to mould them so as to give effect to rather than to defeat that intention. It appears in fact that this is the process which has been adopted in Ceylon. The modern law on the question now under consideration may be said to have its origin not in a Ceylon decision but in a case decided in 1908 by the Supreme Court of Good Hope. This case (*Steenkamp* vs. *Marais and others* 25 S.C.R. 483) was concerned with a joint will by a testator and his wife containing a gift in favour of their son Carel with (as was assumed) a *si sine liberis decesserit* clause in favour of another son. The question was whether Carel had power to mortgage the property subject to the bequest without regard to any interest of his minor children. On behalf of the latter it was claimed that the clause gave rise to an implied or tacit *fideicommissum*. Maasdorp, J., after an examination of the relevant passages of the commentators, decided against the implied *fideicommissum:* the decision of the case, he held, depended wholly on the clause in question, there being nothing in any other portion of the will to indicate any other intention. In other words he decided that, even in a case concerned with descendants of the testator, the mere presence of the *conditio*, without other indication, was not sufficient to give rise to the implication.

This decision has been followed in other South African cases. Their effect has recently been stated as follows:

> "This question" (*i.e.*, whether children placed in the condition should be deemed to be called to the succession) has frequently been discussed in decided cases (compare *Steenkamp* vs. *Marais* u.s., *Ex parte Richter* 1945 OPD 297, *Ex parte Kops and others* 1947(1) SA 155 (0)) and the conclusion to which the Courts have come is that such a provision creates no *fideicommissum* in favour of the children. Such an intention can also not be deduced from the wording of the will (*sc*, *this will*) since in the analysis and interpretation of a will the most important indeed the only object is to establish the intention of the testator and then to give it effect; to this all so-called rules of interpretation are subordinate. All the different indications must be taken into account without laying too much emphasis on them. When there is a reasonable doubt in regard to the actual intentions of the testator the Court will decide against a *fideicommissum* (*Ex parte Swanepoel and others* 1948 (1) SA 1141 at p. 1143 (0). *Engelbrecht* vs. *Engelbrecht en Andere* 1958 (3) SA 571 (0) per Klopper A.J.) (Transl. Honore).

It remains to consider the extent to which the principle, now so firmly established, in South Africa has been accepted in Ceylon. The first of the modern cases in which the Courts of Ceylon had to consider the effect of a *si sine liberis decesserit* clause, was *Asiathumma* vs. *Alimanchy* (1905) 1 A.C.R. 53. The gift was in favour of the donor's wife with a gift over, in the event of her dying without issue to the donor's brother in law. It was held that this did not create a *fideicommissum* in favour of any children his wife might have and that she was free to deal with the property. This was not a case involving a gift to descendants of the donor and the only relevance of it is that it shows that the Court was prepared to consider the terms of the will and the circums-

tances of the family before deciding that a *fideicommissum* ought not to be implied.

Learned counsel for the appellants in an argument to which their Lordships are indebted, referred to a number of later Ceylon cases, prior to 1962, which he submitted have not sufficiently been taken into account by the Supreme Court in their recent decisions.

In two of these, an implication has been drawn of a *fideicommissum* from the presence of the condition (*Sandenam* vs. *Iyamperumal* (1916) 3 C.W.R. 58, *Deu* vs. *Jayewardene* (1927) 5 T.C.L.R. 107), but neither of these cases contains an examination of the authorities and in the latter at least reliance was placed on other expressions found in the will. *Carolis* vs. *Simon* (1929) 30 N.L.R. 266 requires somewhat fuller mention, for there a *fideicommissum* was implied and the case of *Steenkamp* vs. *Marais* considered. The Supreme Court did not differ from the latter decision: it distinguished it upon the ground that the terms of the will showed that the testators had in contemplation not merely children or grandchildren but remoter descendants; the argument (invoked in *Steenkamp* vs. *Marais*) that the testator's intention might have been, in the event of the birth of issue, to liberate their father from the bond of *fideicommissum* so that he could confer upon them benefits by will or on intestacy was insufficient to meet the case: there was moreover an express prohibition against alienation which would serve no purpose unless to ensure devolution of the property upon the descendants. There was a sufficient manifestation of intention that the property should remain with the testator's descendants. In *Appuhamy* vs. *Holloway* (1943) 44 N.L.R. 276, 280, Wijeyewardene, J. said that even where there is an express "*si sine liberis*" clause in a will the better opinion of the jurists appears to be that a *fideiciommissum* cannot be implied in favour of the children in the absence of special circumstances.

In *Thinoris de Silva* vs. *Weerasiri et al* (1949) 51 N.L.R. 467 there was a clear and sufficient indication showing an intention to create a *fideicommissum* but Wijeyewardene J. again referred to the conflicting opinions of learned writers as to the effect of a *si sine liberis* clause taken alone.

These cases can hardly be taken as establishing a line of authority which commits the Courts of Ceylon to a different principle from that established in South Africa, or as preventing them from making a full examination of the relevant law for themselves.

This the Supreme Court undertook in *De Silva* vs. *Rangohamy* (1961) 62 N.L.R. 553. It decided in terms that the presence in a will of a *si sine liberis decesserit* does clause not *per se* create a tacit *fideicommissum* in favour of grandchildren of the testator — even though the children referred to in the clause are descendants of the testator. In this judgment H. N. G. Fernando J. mentioned the opinion, to the contrary, expressed by Professor Nadaraja in his work "The Roman Dutch Law of *Fideicommissa*", and referred to the conflicting views of the text-writers. He said that the view that a tacit *fideicommissum* arises by implication from the clause alone was reasonable and might have been accepted by Ceylon and South Africa, but the law in both countries had developed otherwise. So far as the rationale of the presumption was concerned, he was not convinced that a demonstration of *pietas* (*sc.* in favour of descendants) by the clause, raised the necessary inference of an intention to call the descendants to the succession: the testator might have contemplated that they should take their benefits in another way, *e.g.*, by transfer or devise from the ascendant legatee. He accepted, and indeed held, that a *fideicommissum* in favour of descendants might be implied if there was an intention to include them in the succession. This case was followed by the Supreme Court in *Rasammah* vs. *Manar* (1963) 65 N.L.R. 467, a case of a deed of gift. Herat J. referred to the division of opinion among the commentators but reaffirmed the proposition that the trend of decisions in both Ceylon and South Africa was against implication of a *fideicommissum* from the clause alone: the intention to create a *fideicommissum* might be construed out of the language used and from the circumstances of the case. Both of the two latter decisions were followed by the Supreme Court in the present case.

Learned counsel for the appellants submitted that the law in Ceylon has not been settled by the two decisions of 1961-1963 and that it is still an open question whether, the clause, *per se*, in the case of a gift to descendants, gives rise to a tacit *fideicommissum*. If the question is still open, then, it was argued, the weight of opinion among the commentators is in favour of he implication.

Their Lordships cannot accept this argument. In the first place they consider that the decisions of

the Court in Ceylon show a definite trend, following or parallel to those of the Courts of South Africa against the implication of a *fideicommissum* from the clause alone. In cases where the implication has been drawn, this has been upon the basis (perhaps sometimes insufficiently founded) that there was shown to be an intention to create a *fideicommissum*. Secondly their Lordships consider that this trend is in accordance with the requirement that effect should be given to the intentions of testators which the Court ascertains from a fair reading of his testamentary dispositions in the light of the circumstances in which he was placed, rather than from the rigid application of rules of law.

As regards the law applicable in 1910 when the will was made, or in 1917 immediately before the testatrix's death, their Lordships are of opinion that, while not so decisively settled as at the present time, the tendency referred to above was sufficiently shown to form the basis of assumption upon which the draftsman would act. The decision in *Steenkamp* vs. *Marias* (u.s.) was given in 1908 and at the least must have stood as a warning that if *fideicommissa* in favour of those mentioned in the condition were to be established, they should be established expressly.

In their Lordships' opinion the present law to be applied may be summarised in these propositions:

1. Where in a will (and *mutatis mutandis* the same would apply as regards deeds of gift), a bequest is made to a child of a testator, the mere presence of a clause, or condition, "*si sine liberis decesserit*" does not *per se* create a tacit *fideicommissum* in favour of that child's children.

2. Whether, in such a will, a *fideicommissum* is to be implied is a matter of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.

3. Such an intention must be clearly established: in case of doubt the presumption is against the implication of a *fideicommissum*.

Their Lordships now turn to the will. It is first relevant to consider the circumstances in which it was made. The testatrix then had three sons and three daughters, none of the latter being married. She had a considerable estate and was in a position to make generous provision for her children. The scheme of the will was that each daughter should on marrige receive property worth Rs. 100,000, and that the portion of her estate allocated to the daughters should be preserved for the daughters and their issue. The residue, subject to a life interest given to her husband, was to go to the sons. The dispositions of this portion of the estate were to be such as to prevent an intestacy and to exclude collateral relatives from benefit. Consequently there was to be imposed on the share of each son an express *fideicommissum* which, in the event of his dying without leaving issue, would carry the share over to those of his brothers or their children. Provision was to be made for the sons' widows.

In considering, whether, in the event of a son's death leaving children a *fideicommissum* over his original share was to be implied in favour of those children, one is met, at once, by two strong indications pointing to a negative answer:

(1) There is, in relation to the daughter's shares, an express and clearly expressed *fideicommissum* in precisely this event.

(2) No prohibition, or restriction on alienation is imposed as regards the sons' shares, though again an express restriction is imposed as regards the shares of the daughters.

The appellants attempted to explain this distinction by saying that the gifts were different: the daughters, severally, took a fixed sum; the sons on the other hand took the residue jointly. This may be so; but the residuary bequest continues to provide for the devolution of each son's share — by means (in the event of his not leaving issue) of an express *fideicommissum*. The absence of a further express *fideicommissum* (corresponding to that affecting the daughters' bequests), should a son die leaving issue, remains striking.

The argument based on this distinction is a very strong one: in face of it an implication of a *fideicommissum* can only be drawn from some very clear indication indeed. The indication most relied on (indeed the only indication of any weight) is derived from the clause numbered 8c. It is

one which requires consideration. It appears to deal with the very case now in question ("if any of my said sons shall die leaving children") and it terminates with the words "the property to which her children would be entitled under this my will". These words it is said show, and show with sufficient clarity, that it is supposed, or contemplated, that a son's children do take an interest under the will: this supposition would be falsified unless a *fideicommissum* were implied in their favour.

This argument has considerable *prima facie* force: it convinced the learned District Judge; it had some appeal to their Lordships. If no sense or meaning could be given to this clause but one which rests upon the inference of a *fideicommissum* in favour of the son's children, then, even in the face of the contrary indications, such inference might have to be drawn. If on the other hand a meaning can be given to it, which does not rest upon this inference, or require it to be drawn, then such meaning should be attributed; if it is a case of doubt which meaning it bears, that must be resolved against the *fideicommissum*.

Their Lordships consider that the clause can be interpreted in a manner which does not require the inference. For it may be read as an appendix to the clause numbered 8b. That clause may be analysed as follows:

(1) If a son dies (*a*) unmarried or (*b*) married but without issue then

(2) his share goes to (*a*) his surviving brothers or (*b*) the children of any deceased brother: provided that (as regards case 1(*b*)) if there is a widow, she is entitled to one-quarter of the income during her widowhood.

The clause numbered 8c. would then deal further with case 2(*b*), in the additional event of there being a widow (this gives a meaning to the words "leaving children *and also* a widow"). In other words the clause is dealing with accrued shares and not with original shares: the intention being that as regards original shares a son who dies leaving children takes absolutely and so can make his own provision both for his widow and for his children.

This interpretation of the clause no doubt has its difficulties, both of construction and in its application: it is not the only possible interpretation· But it is a possible interpretation, sufficiently possible to negative the necessity to infer a *fideicommissum* against which such strong indications exist elsewhere in the will.

Their Lordships are therefore of opinion that no *fideicommissum* ought to be inferred and that, in consequence, the appellants' case must fail.

There remains the second issue on which the appellants would also have to succeed if they were to make good their claim against the respondent. They would have to show that the Raglan Estate specifically formed part of the share of their father Richard Louis Peiris in the residuary estate, so as to be affected by the *fideicommissum*. As was pointed out in the Supreme Court this involves their making good the unusual claim that the Indenture and Award took effect so far as to confer upon Richard Louis Peiris a specific interest in the Raglan Estate; but failed to take effect (as against the appellants) so as to withdraw the Raglan Estate from the will and subject it to the terms of the Award. In making good their contentions the appellants would be in some difficulty from the form of their pleading and from the lack of positive evidence as to what precisely was done, as regards the various properties, following upon the Award. The Judgment of H. N. G. Fernando J. in the Supreme Court set out, very fully and fairly, the manner in which the appellants sought to overcome these difficulties: without coming to a conclusion upon them, the Court evidently considered that the appellants' contentions were not without weight. In these circumstances, and because decision upon the first issue determines the appeal, their Lordships do not think it right to express a concluded view on this issue.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

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

BABY ENJEE ABEYNAIKE *vs.* KANKANAMGE COLLIN WEERASINGHE

S.C. Application No. 310 *of* 1965

Argued on: November 5, 1965
Decided on: November 12, 1965

Civil Procedure Code, section 163 — *Right to lead evidence in rebuttal where burden of proving some issues on plaintiff and of proving others on defendant — Evidence in rebuttal led by plaintiff without objection — Waiver of rights by defendant — Trial Judge permitting such evidence — His inability to vary his own order thereafter.*

The plaintiff brought this action against the defendant for a declaration that the defendant held for her benefit as executrix of the estate of her late husband all rights derived or to be derived on a Mortgage Bond No. 1070 of 4th October, 1960. The Bond had been executed in the name of the defendant as mortgagee, but the plaintiff's case was that the consideration for the mortgage had been furnished by her late husband to be held in trust by the defendant for him.

After the defendant filed answer, the matter came up for trial and at the hearing certain admissions were recorded and certain issues raised by the parties.

The plaintiff then called a formal witness and produced the Bond sued upon. After the evidence of this witness was over the case for the plaintiff was closed, reserving the right to lead evidence in rebuttal in regard to the issues the burden of proving which was on the defendant. Counsel for the defendant had no objection to this course.

The defendant then called his evidence and after the close of the defendant's case, the plaintiff moved without objection from the defendant to lead evidence in rebuttal in regard to certain issues. This application was allowed by Court, and the plaintiff in fact called a witness whose evidence was concluded the same day. The case was thereafter postponed for further evidence but on the resumed date of trial Counsel for the defendant objected for the first time to the plaintiff's right to call evidence in rebuttal.

The learned District Judge refused to allow the plaintiff to lead evidence in rebuttal. In the present application in revision the plaintiff-petitioner prayed that this order be set aside and the case be set down for further trial.

Held: (1) That since the burden of proving certain issues (viz: 2 (a) and 2 (b)), was on the plaintiff while the burden of proving the others was on the defendant and the learned District Judge had already permitted the plaintiff to lead evidence in rebuttal, he was not justified in thereafter refusing the plaintiff's application to lead evidence in rebuttal.

(2) That since the defendant had permitted the plaintiff to follow the procedure that was adopted without any objection, the defendant had waived his rights, if any, and could not now be heard to say that that the plaintiff's evidence in rebuttal should be shut out.

(3) That the learned District Judge's order permitting evidence in rebuttal to be led not being made *per incuriam*, he had no jurisdiction to vary this order.

C. Ranganathan, Q.C., with *N. S. A. Goonetilleke*, for the petitioner.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne*, for the respondent.

Tambiah, J.

The plaintiff-petitioner brought this action against the defendant-respondent for a declaration that the defendant holds for the benefit of the plaintiff, as executrix of the estate of her late husband, one K.G. John Weerasinghe, all benefits, rights and interests derived or to be derived by the defendant under Mortgage Bond No. 1070 of 4th October 1960.

This bond was executed in the name of the defendant respondent as mortgagee and the plaintiff's case is that the consideration for the mortgage was furnished by her late husband, the said K. G. John Weerasinghe, to be held by the defendant in trust for Mr. K. G. John Weerasinghe. The defendant filed answer and took up the position that the consideration of the said bond was lent on advance by him and that it consisted of monies given by way of gift to him by the late K. G. John

Weerasinghe and interest accruing to him on Mortgage Bonds No. 14299 of 18th June 1958, No. 929 of 23rd March 1960 and 989 of 7th June 1960.

At the hearing of the action the following admissions were recorded:—

1. That K. G. John Weerasinghe died on 18.12.1960;
2. that the plaintiff is the widow and executrix of the estate of John Weerasinghe;
3. that Mortgage Bond No. 1070 of 4.10.1960 was duly executed;
4. that the consideration of the said bond was a sum of Rs. 15,000/-;
5. that the sum of Rs. 15,000/- consisted, *inter alia* of the capital and interest in respect of Mortgage Bonds Nos. 929 and No. 989 which are referred to in paragraph of the answer;
6. that such part of the consideration of Rs. 15,000/- as did not consist of interest accruing on Bonds No. 14299; No. 29; and No. 989 consisted of monies furnished by the late John Weerasinghe.

At the trial the following issues were raised:

1. (*a*) Did the said John Weerasinghe intend to pay or provide the consideration for Bond No. 1070 for the benefit of the defendant.

   (*b*) Was such part of the consideration as did not consist of interest on Bonds Nos. 14299, 929 and 989 given to the defendent by the said John Weerasinghe by way of gift.
2. (*a*) what is the amount, if any, of interest accruing on the bonds Nos. 14299, 929 and 989 up to 4.10.60.

   (*b*) Does the sum belong to the defendant.
3. If issues 1(a) and/or 1(b) and issue 2(b) are answered in favour of the plaintiff:

   (*a*) Does the defendant hold in trust for the benefit of the plaintiff as executrix of the said estate, all the benefits, right, title and interest derived or to be derived under the said Bond.

   (*b*) Is the defendant entitled to retain the said interest under the bond as against the plaintiff or to enrich himself in respect thereof.

   (*c*) If issues 3(a) and/or 3(b) be answered in the affirmative, is the plaintiff entitled to the relief prayed for in the plaint.
4. Did the sum of Rs. 15,000/- appearing on the Bond in question consist of monies gifted by John Weerasinghe to the defendant and interest accruing on Mortgage Bonds Nos. 14299, 929 and 989.
5. Is the plaintiff estopped by her conduct in Mortgage Bond action No. 1360 of this Court from maintaining this action in asmuch as:—

   (*a*) She is a party-defendant in the said case where this identical bond was sued upon;

   (*b*) that she is a encumbrancer of the property mortgaged by the Bond in question.

The plaintiff called a formal witness A. G. Weerasinghe and produced through him the mortgage bond sued upon. After cross examination the plaintiff closed his case reserving the right to lead evidence in rebuttal of the issues the burden of which was on the defendant. Counsel for the defendant had no objection to this course.

Thereafter the defendant called his evidence and upon the conclusion of the defendant's case the plaintiff moved without objection from the defendant to lead evidence in rebuttal of issues 1, 3, 4 and 5. The Court allowed this application and the plaintiff called a witness whose evidence was concluded on same day and the case was postponed for another date of trial. On the resumed date of trial the plaintiff called further evidence in rebuttal, when the counsel for the defendant objected for the first time, to the plaintiff's right to call evidence in rebuttal.

The Learned District Judge after hearing evidence, by his order dated 15.7.1965 refused to allow the plaintiff to lead evidence in rebuttal. The plaintiff petitioner prayed in this application that the order of the Learned Judge refusing to allow him to lead evidence be set aside and that the case be set for trial. It was contended by Counsel for the respondent that since the burden of proving all the issues was on the defendant, evidence in rebuttal cannot be permitted.

From the issues raised in this case it is clear that at least the burden of proving issues 2(a) and 2(b)

was on the plaintiff and the burden of proving certain other issues was on the defendant. Plaintiff had the right to begin to prove issues 2(a) and 2(b) and he was allowed to lead his evidence without objection. Relying on section 163 of the Civil Procedure Code the plaintiff reserved the right to lead evidence in rebuttal. It seems to me that the learned District Judge mis-directed himself in disallowing the plaintiff to lead evidence in rebuttal. The relevent portion of section 163 may be cited in this context.

It enacts:

".....But where there are several issues, the burden of proving some of which lies on the other party or parties, the party beginning may at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the opposing party or parties; and in the latter case the party beginning may produce evidence on those issues after the other party or parties has or have produced all his or their evidence, and such other party or parties may then reply specially on the evidence so produced by the party beginning, but the party beginning will in that case be entitled to reply generally on the whole case."

Since the burden of proving issues 2(a) and 2(b) was on the plaintiff and the learned District Judge has permitted the plaintiff to lead evidence in rebuttal he was not justified in refusing the plaintiff's application to lead evidence in rebuttal.

Further it seems to me that the defendant having allowed the plaintiff to follow the procedure that he has adopted without objection has waived his rights, if any, and cannot now he heard to say that the plaintiff's evidence in rebuttal should be shut out. Further the learned District Judge's order allowing evidence in rebuttal was not made per incuriam and he had no jurisdiction to alter his order.

For these reasons I set aside the order of the learned District Judge refusing the plaintiff to lead evidence in rebuttal and direct the learned Judge to hear the evidence of the plaintiff and make his order. The plaintiff-petitioner is entitled to the costs of this application.

H. N. G. Fernando, S.P.J.

I agree.

Application allowed.

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

S. DON SIRISENA *vs.* L. G. SIRIWARDENA & ANOTHER

S.C. Application No. 428 *of* 1966

In the matter of an application for mandates in the nature of Writs of Quo Warranto and Mandamus under section 42 *of the Courts Ordinance.*

Argued & Decided on: December 5, 1967
Reasons delivered on: December 10, 1967

Urban Councils Ordinance (Cap. 255), *section* 18 — *Election to office of Chairman — Meeting convened under Urban Councils Ordinance for such purpose — Can candidate propose his own name for election as Chairman of Urban Council?*

The applicant and the two respondents were members of the Urban Council of Balangoda. The 1st respondent was the Assistant Commissioner of Local Government and in terms of Sub-section 3 and 5 of Section 17 of the Urban Councils Ordinance had to preside at a meeting of the Council convened by him in order to elect a Chairman. Such a meeting was in fact convened for 3rd October 1966, and the 1st Respondent presided.

At this meeting the name of the 2nd Respondent was proposed and seconded for election as Chairman by two other members of the Council. The applicant then proposed his own name for election as Chairman. This was seconded by another member of the Council.

The 1st respondent thereupon ruled that it was not competent for the applicant to have proposed his own name for election as Chairman and held that the proposal was bad in law. The applicant's candidature for office was therefore rejected and the 2nd respondent was declared elected as Chairman without any contest.

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* For Sinhala translation, see Sinhala section, Vol. 15, part 7, p. 26

It was submitted on behalf of the applicant that this ruling of the 1st Respondent was incorrect and that in terms of Section 18 of the Urban Councils Ordinance he was entitled to propose his own name for election to the office of Chairman.

Held: That the election of the 2nd respondent should be quashed inasmuch as the ruling given by the 1st respondent was wrong in law and the 2nd respondent should, therefore, have not been declared elected without any contest.

Nimal Senanayake, with *Bala Nadarajah*, *Adela P. Abeyratne* and *D. Senanayake*, for the applicant.

Mervyn Fernando, Crown Counsel, for the 1st respondent.

N. R. M. Daluwatte, for the 2nd respondent.

T. S. Fernando, A.C.J.

This application raises an interesting point relating to the election of a Chairman of an Urban Council.

The applicant and the 2nd respondent are members of the Urban Council of Balangoda. The 1st respondent is the Assistant Commissioner of Local Government who is required by sub-sections (3) and (5) of section 17 of the Urban Councils Ordinance (Cap. 255) to preside at a meeting of the Council convened by him for the purpose of electing a Chairman. It is common ground that such a meeting was convened for the 3rd October 1966, and that the 1st respondent did preside thereat.

So much of the proceedings at this meeting of the 3rd October 1966 as is relevant for the purpose of deciding the present application may now be noted. The name of the 2nd respondent for election as Chairman was proposed and seconded respectively by two other members of the Council. The applicant then proposed his own name for election to the same office whereupon the 1st respondent indicated to him that there may be no one to second the proposal. Why the 1st respondent should have made a remark to that effect is not apparent, and the remark itself, I am free to observe, was an imprudent one. However that may be, another member of the Council did second the applicant's name that had been proposed by the latter himself. The 1st respondent then ruled that it was not competent to the applicant to have proposed his own name for election as Chairman and held that the proposal was bad in law. The applicant's candidature for office was therefore rejected. In the result the 2nd respondent was declared elected without any contest on the basis that there was only one candidate proposed and seconded for election — vide section 18(1)(a).

The question for determination by us upon the present proceeding is whether the ruling referred to above made by the 1st respondent is correct in law. Section 18 of the Urban Councils Ordinance in its present form was the result of an amendment of the relevant law introduced by the Local Authorities (Election of Officials) Act, No. 39 of 1951. It was an Act passed for the purpose, *inter alia*, of amending the law relating to Local Authorities in order to make new provisions regarding the mode of election of the Mayors or Chairmen and the Deputy Mayors or Vice-Chairmen of such Authorities. Even before amendments were effected by Act No. 39 of 1951, the relevant law so far as it affected the election of a Mayor or a Deputy Mayor of a Municipal Council — (vide section 14(4) of the Municipal Councils Ordinance, No. 29 of 1947) — required the proposing and seconding of names of candidates for these two offices to be done "by any other Councillor". The 1951 Act did not seek to change that part of the law. Indeed in the case of an election of a Chairman for Village Committee, the law is analogous to that governing the election of a Mayor of a Municipal Council. Section 19 of the Village Communities Ordinance, No. 9 of 1924, as amended by Act No. 39 of 1951, (Cap. 257) requires the proposing and seconding of a name of a member for election as Chairman to be done "by any other member". The Legislature, however, at the same time, although it had in contemplation before it the corresponding provisions obtaining in the cases of a Municipal Council and a Village Committee, appears to have departed from those provisions when it legislated for the cases of Chairmen and Vice-Chairmen of Urban Councils and Town Councils which are the other local authorities established by law in this Country. In the case of these two local authorities, the provision relating to the proposing and seconding being done "by any other Councillor" or "by another member" was not included. We cannot think that the distinction which the amending Act No. 39 of 1951 introduced was anything

but studied or deliberate, coming as it did at a time when the Legislature was making new provisions regarding the mode of election of officials of all the local authorities of this Country. We have therefore to give effect to the apparently deliberate intention of the legislature. In that situation we need not attempt to ascertain any reason for the distinction; but we would like to observe that one reason may well be that membership of an Urban Council or a Town Council can often be very small. Whereas the minimum number of councillors for the composition of an Urban Council and a Town Council is four and three respectively, a Municipal Council or a Village Committee is composed of a larger number of members. Learned Crown Counsel, who had made some investigation in the relevant archives, did in fact bring to our notice that this was the very reason that the draftsman of the legislation had in mind, but ,of course, we cannot make use of that knowledge in reaching our own interpretation of the written law.

Crown Counsel, appearing for the 1st respondent, was frank enough to state that he could not support the ruling of the respondent at the meeting in question. Counsel for the applicant invited our attention to a passage in Crew's standard work on the conduct of *Public Company and Local Government Meetings* (1956, 19th ed.) at p. 28 which I would like to quote below:—

> "There is usually nothing to prevent a person proposing or seconding himself as Chairman, though this course is undesirable; in any event, he is entitled to vote for himself."

Any argument which could have been advanced on behalf of the 2nd respondent based on the use by the legislature of the passive voice in the language employed in section 18(1) — "any member may with his consent be proposed" — is defeated by the action of that very legislature in observing a distinction between the cases of a Municipal Council and a Village Committee on the one hand and an Urban Council and a Town Council on the other. For the reason I have thus indicated, we did at the conclusion of the argument make *absolute* the order *nisi* which had already issued from this Court so far as the application related to a mandate in the nature of a writ of *quo-warranto*. and we quashed the election of the 2nd respondent on 3rd October 1966 as Chairman of the Urban Council of Balangoda.

Mandamus has also been sought on this *application*, but we do not think it necessary for us to issue any mandate of that nature at this stage. Now that the election of the 2nd respondent has been quashed, we do not doubt that the 1st respondent or, if that be the case, his successor in office, will proceed without delay to convene the necessary meeting and proceed to election of a Chairman. Learned Crown Counsel indicated to us that that would indeed be the advice that will be tendered to the Assistant Commissioner of Local Government.

The applicant is entitled to the costs of this application to be paid in equal shares by the 1st and 2nd respondents.

Siva Supramaniam, J.

I agree.

Application for writ of Quo Warranto allowed.

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

L. ABRAHAM PERERA *vs.* W. J. B. PERERA*

S.C. Application No. 377 *of* 1967

Application seeking a revision of an order made in Case No. 11036 *of the Rural Court of Pinwatte.*

Argued on: November 25, 1967.
Decided on: December 7, 1967.

Rural Courts Ordinance, charge under — Acquittal of accused — Appeal from order of acquittal to District Judge by complainant—District Judge interfering with order and directing President to impose sentence — Sentence imposed—Application by accused to Supreme Court to revise order — Rural Courts Ordinance, sections 26(1), 41(1), 41(5), 42 — *Courts Ordinance, section* 3.

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* For Sinhala translation, see Sinhala section Vol. 15 part, 7, p. 25.

On an appeal from an order of acquittal by the President of the Rural Court, the District Judge purported to convict the accused and directed the President to impose sentence. Accordingly, a fine was imposed with a default sentence, whereupon the accused applied to the Supreme Court by way of revision.

It was contended on behalf of the petitioner that under section 41(1) of the Rural Courts Ordinance it was not competent to the District Judge on appeal to interfere with an order of acquittal.

It was submitted for the respondent

(*a*) that section 41(5) barred any appeal to the Supreme Court from the decision of the District Judge on an appeal under section 41, except in accordance with procedure set out in sub-section (5).

(*b*) that the Supreme Court is not empowered to revise an order of a District Judge dealing with appeals under section 42 of Rural Courts Ordinance; that his remedy, if any is by way of Certiorari.

Held: (1) That the Rural Court itself is a Court contemplated by the Courts Ordinance — vide section 3.

(2) That as what is sought to be reversed is the order of the Rural Court sentencing the petitioner, the Supreme Court will interfere.

Per **T. S. Fernando, A.C.J.** — "The point relating to this Court's jurisdiction in the instant case is not free from all difficulty, but it is clear enough that the immediate order by which the petitioner is aggrieved is not the order of the District Judge on appeal, but the sentence imposed on him by the Rural Court on the 4th August 1967."

F. N. D. Jayasuriya, for the petitioner.

Desmond Fernando, for the respondent.

T. S. Fernando, A.C.J.

The petitioner was charged in the Rural Court of Pinwatte with the commission of an offence punishable under section 26(1) of the Rural-Courts Ordinance, No. 12 of 1945 (Cap. 8). The offence was alleged to have been committed by the petitioner inasmuch as he did carry on a dangerous or offensive trade, to wit, the smoking and manufacturing of rubber sheets without a permit from the Chairman of the village Committee.

The learned President of the Rural Court, after trial, made order on the 19th May 1967 acquitting the petitioner. The complainant (who is the respondent on the proceedings in revision before me) appealed to the District Judge in terms of section 41 of the Rural Courts Ordinance, and that judge by his order of the 11th July 1967 set aside the verdict of acquittal entered in the Rural Court and purported to convict the petitioner on the ground that the President had misdirected himself on a material question of law. He returned the record of the case to the Rural Court with a direction to the President to impose a lawful sentence. Accordingly, on receipt of the record, the learned President, on the 4th August 1967, in the presence of the petitioner, imposed on the latter a fine of Rs. 25/-, in default of payment of which the petitioner is to undergo rigorous imprisonment for two weeks.

On behalf of the petitioner it is claimed, and this claim is not disputed by counsel for the respondent, that upon on appeal from an order of a Rural Court it is not competent for the District Judge on appeal to interfere with on order of acquittal. The proviso to section 41(1) of the Ordinance is too clear to permit a contrary contention to be advanced.

Section 41(5) bars any appeal to this Court from the decision of a District Judge on any appeal preferred to the latter under section 41, except in accordance with the procedure indicated in sub-section (5). The petitioner therefore seeks the intervention of this Court by an exercise of the powers of revision vested therein. Counsel for the respondent has contended that this Court is not empowered to revise an order of a District Judge acting in the appellate jurisdiction conferred on hm by section 42 of the Rural Courts Ordinance and that the petitioner's remedy, if any, may be by way of an application for interference by this Court by way of a mandate in the nature of *certiorari*. The point relating to this Court's jurisdiction in the instant case is not free from all difficulty, but it is clear enough that the immediate order by which the petitioner is aggrieved is not the order of the District Judge on appeal, but the sentence imposed on him by the Rural Court on the 4th August 1967. Even though that sentence resulted directly from the order of the District Judge on appeal, it is claimed that what is sought to be revised is the order of the Rural Court sentencing the petitioner. A Rural

Court is itself a court contemplated by the Courts Ordinance (Cap. 6) — vide section 3 —, and I think this claim of the petitioner should be upheld.

For the reason so briefly indicated I would quash the sentence imposed on the petitioner by the Rural Court.

Application allowed.

Present: **T. S. Fernando, A.C.J. (President), Abeysundere, J. and Manicavasagar, J.**

M. DHARMADASA AND OTHERS *vs.* THE QUEEN

C.C.A. Appeals 125 *to* 127 *of* 1967 (*with Applications Nos.* 167 — 169 *of* 1967)
S.C. 174/1966 — *M.C. Horana* 41988

Argued & Decided on: December 2, 1967.
Reasons delivered on: December 7, 1967.

Court of Criminal Appeal — Rape — Corroboration — Non-corroborative items treated as corroboration in summing-up — Misdirection— Court will not speculate on basis of verdict of Jury where adequate direction and incorrect direction.

Held: (1) It is a misdirection, in a case of rape, to leave to the Jury as corroborative evidence, items of evidence which are not capable in law of amounting to corroboration. The evidence so left to the Jury, while it may have tended in some slight measure to show that two of the accused were in the company of the 1st accused on the evening in question, fell short of evidence tending to show that rape was committed by the accused persons.

(2) Where the trial Judge refers to such items as "a matter you are entitled to take into consideration", and "a matter you will take into consideration", the Court cannot speculate on the actual basis on which the Jury did act in returning the verdict, merely because there was an adequate direction as to the circumstances in which they could convict on a charge of rape, even where the woman's evidence was uncorroborated.

Referred to: *Goddard vs. Goddard* (1962) 46 Cr. A.R. 461.
Zielinski's Case (1950) 34 Cr.A.R. 193.

E. R. S. R. Coomaraswamy, with *Anil Obeyesekere*, *Kumar Amerasekere*, *U. De Z. Gunawardene*, *N. Wijenathan*, *C. Chakradaran*, *P. P. S. Fernando* and *P. A. de Z. Karunaratne* (assigned), for the accused-appellants.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

T. S. Fernando, A.C.J.

The three appellants as the 1st, 2nd and 4th accused and another man, Karunatilleke, as the 3rd accused, stood their trial before a judge and jury on an indictment containing three charges which alleged that all four of them committed the offence of (1) house-breaking by night (sec. 443), (2) theft (sec. 369) and (3) rape on one Karunawathie (sec. 364) of the Penal Code. At the conclusion of a lengthy trial the jury by a unanimous verdict found the 1st, 2nd and 4th accused (the appellants) guilty on all three charges in the indictment and the 3rd accused not guilty of any offence.

In regard to the appeal of the 1st accused, who was well-known to the woman Karunawathie, the jury had before them the evidence of the woman herself who claimed to have identified him as a person who broke into her house on the night in question as well as the evidence of certain injuries found on the person of the 1st accused which could have tended to corroborate the woman's evidence that he was one of the persons who had forcible sexual intercourse with her. We found no reason for interfering in any way with the convictions of the 1st accused or the sentences imposed upon him. We accordingly dismissed his appeal.

A difficulty, however, arose in the case against the other appellants. As the 3rd accused was found not guilty of any offence, in spite of the woman's evidence that she identified not only the 1st accused but all three other accused as

well, it was contended that it was unreasonable for the jury to have accepted her evidence implicating the 2nd and 4th accused while refusing to accept her evidence implicating the 3rd accused. There appears, however, to be some ground for the jury to have differentiated between the cases of the 2nd and 4th accused on the one hand and that of the 3rd on the other. While the woman's evidence in so far as it tended to implicate all the accused on the house-breaking and theft charges did not require corroboration, the learned judge, correctly in our opinion, directed the jury to look for corroboration of her evidence before returning a verdict against the accused on the charge of rape.

While the judge in marshalling the evidence in the case pointed to some evidence as being capable of providing the necessary corroboration in so far as it tended to incriminate the 2nd and 4th accused, that evidence did not affect the 3rd accused. It is therefore probable that the jury, seeking corroboration so far as the charge of rape was concerned, and not finding any tending to criminate the 3rd accused found him not guilty on the charge, and then somewhat illogically went on to find him not guilty on the other two charges as well. No appeal is competent against an acquittal at a trial by jury, and we need not, therefore, consider any further upon the present appeals the correctness of the verdict in respect of the 3rd accused.

Learned counsel for the appellants has, however, pointed to the nature of the directions given by the learned Commissioner who presided at the trial in respect of the alleged corroboration, and contended that he has here left to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration. The evidence so left to the jury, while it may have tended in some slight measure to show that the 2nd and 4th accused were in the company of the 1st accused on the evening in question, fell short of evidence tending to show that rape was committed by these two accused persons. In the case of *Goddard and Goddard* (1962) 46 Cr. A.R. at p. 462, Chief Justice Lord Parker, after referring to the well-known observations of Byrne J. in *Zielinski's case* (1950) 34 Cr.A.R. 193 stated as follows:—

"It is only right to say that in the experience of this Court that principle is seldom followed; indeed, if it is to be treated as a general principle applicable to all cases of corroboration, this court feels that it goes too far. Quite clearly, it is idle to give that direction *simpliciter* in a case where in fact there is no evidence capable of amounting to corroboration because the very fact that the direction is given would leave the jury to infer that there was some evidence capable of amounting to corroboration if they looked for it. Equally, if you get a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration, as, for example a complaint made by the complainant. In the general run of cases, where there is evidence capable of amounting to corroboration, the duty of the judge must depend on the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this court he should give a broad indication of the evidence which, the jury, if they accept it, may treat as corroboration."

In respect of the two bits of evidence which we are satisfied could not be treated as corroborative of the woman's complaint of rape in so far as they tended to criminate the 2nd and 4th accused, the trial judge referred to them respectively as (1) "a matter you are entitled to take into consideration" and (2) "a matter you will take into consideration". Pointing to an adequate direction given by the learned judge to the jury as to the circumstances in which they could convict on a charge of rape even where the woman's evidence was uncorroborated, Crown Counsel invited us to affirm the convictions. We did not, however, find it possible to agree to this course of action as this Court cannot now speculate on the actual basis on which the jury did act in returning the verdict on the charge of rape. The jury may well have, in the light of the judge's directions, considered as corroborative, evidence which we are satisfied could not be deemed to be such. For that reason, while affirming the convictions and sentences imposed on the 2nd and 4th accused on the first two charges, we have quashed their convictions and the sentences imposed upon them in the 3rd charge.

Conviction and sentences on 2nd & 4th accused on charges 1 and 2 affirmed.

Convictions on 3rd charge quashed.

END OF VOLUME LXXIII

SUPPLEMENT

THE FREEDOM OF MOVEMENT

The first major event in the International Human Rights Year 1968 was the conference on "Freedom of Movement" which was held in January, in Bangalore, India. It was organised by the International Commission of Jurists and was attended by over a hundred Judges, lawyers and teachers of law from the Asian and Pacific Countries. The Chairman of the Conference was Mr. M. C. Setalvad, former Attorney-General of India.

THE CONCLUSIONS OF BANGALORE ON FREEDOM OF MOVEMENT

Bangalore, January 10-14, 1968.

1. The United Nations has designated 1968 as International Year for Human Rights. This Conference of Jurists called by the Mysore State Commission of Jurists, in co-operation with the Indian Commission of Jurists and the International Commission of Jurists, offers its contribution to that year in the detailed study which it has made, and in the Conclusions which it has reached concerning the Right to Freedom of Movement, recognised in Article 13 of the Universal Declaration of Human Rights (1948) in the following terms:

"13 (1) Everyone has the right to Freedom of Movement and residence within the border of each State,

(2) Everyone has the right to leave any country, including his own, and to return to his country."

and also recognised in article 12 of the International Covenant on Civil and Political Rights (1966).

2. Freedom of Movement of the individual within or in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, educaton, trade, or employment or to escape from an environment in which his other liberties are suppressed or threatened. Moreover, in an independent world requiring for its future peace and progress an ever growing measure of international understanding, it is desirable to facilitate individual contacts between peoples and to remove all unjustifiable restraint on their movement which may hamper such contacts.

3. To the extent that Freedom of Movement is formulated as a legal right, it has to be recognised that this right may be subject to certain limitations. But it is important to assert that there is in the first place a right of freedom of movement; it is for those who would challenge it to show that in a particular instance the right can be justifiably withdrawn or restricted.

CHAPTER 1

FREEDOM OF MOVEMENT WITHIN A COUNTRY

4. The right to freedom of movement and residence within the borders of a State must be made available to every person lawfully upon the territory of a State irrespective of his citizenship race, colour, religion or political affiliation. Incorporation of the right in substantive law as well as procedural safeguards for its enjoyment must be ensured.

5. Considering the need to maintain a balance between the freedom of the individual and the general welfare of the community, reasonable restrictions may be imposed by or under the authority of law on the enjoyment of the right. Such restrictions may, however, be imposed *only* if the following conditions are satisfied:

(*a*) The provisions relating to the imposition of restrictions, appeals from such restrictions and their review by the courts and independent administrative bodies contained in Chapter III of these Conclusions are observed.

(*b*) The law permitting the imposition of the restrictions fixes the maximum limit of the period of restriction and requires the making of periodical public reports to the appropriate constitutional authority giving adequate particulars of all executive action in pursuance of such law.

CHAPTER II

FREEDOM OF MOVEMENT OUTSIDE ONE'S COUNTRY.

Scope and contents of the right:

6. Freedom of movement outside one's country may involve three elements:

(*a*) departure from one's country;
(*b*) entry into, travel within and exit from a foreign country;
(*c*) return to one's country.

Somewhat different considerations apply to each of these elements. Nevertheless, if freedom of movement is to be enjoyed to the full, they should each receive the widest possible protection.

Right to leave a country

7. Every State should recognise that its Citizens have a right to leave their country, and to proceed to the countries of their choice. This right should be protected by legis-

lation. Any restrictions should be imposed only in accordance with the rules set out in Chapter — III hereof, both as to the imposition of restrictions and as to the appeals from such restrictions and their review by administrative bodies and the Courts.

Right to enter a country

8. (*a*) The right of a citizen to enter his own country should be recognised without limitation. The re-entry of long-term residents, including stateless persons may be refused only in the most exceptional circumstances.

(*b*) Deprivation of citizenship should not be used for the purpose of circumventing this right.

(*c*) Where citizenship of a person extends to both metropolitan and non-metropolitan territories, it is recognized that this right may be limited to entry into the territory to which he belongs.

9. (*a*) As a first step towards removing all barriers to freedom of movement, foreigners should be accorded a right, subject to clearly defined grounds on which it could be refused in specific cases, to visit a State for a limited period as tourists, for business or professional purposes or for study.

(*b*) Recognition should be given to the right of refugees, stateless persons and persons seeking political asylum to seek to enter a country in accordance with the terms of article 14 of the Universal Declaration of Human Rights and of the United Nations Declaration on Territorial Asylum of November 30, 1967. Where a State finds difficulty in granting or continuing to grant asylum, it should grant to the person concerned an opportunity, either by way of provisional asylum or otherwise, of going to another State of his choice.

(*c*) An effective procedure for appeal from and the administrative review of, refusal of entry ,should be provided.

(*d*) States should be encouraged to adopt treatises such as those existing between the members of the European Economic Community, between the Nordic countries and between certain States of Latin-America, under which citizens of each of the States parties to the treaty are accorded full freedom of movement throughout the territories of all those States.

Inclusion of family

10. No restriction on exit from one's country, or on entry into a foreign country, should be inconsistent with the right to protection of family life accorded by article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant on Civil and Political Rights.

Limitation on right to leave

11. The right of a person to leave a foreign country should be guaranteed subject to three limitations only. He may be refused permission to leave (a) for such period as is necessary for reasons of public health; (b) if there are reasonable grounds for suspecting that he has committed a criminal offence within the jurisdiction of the foreign country concerned, until he has been tried and acquitted or found guilty and served any sentence of imprisonment or paid any fine imposed on him; the investigation and trial should take place within a reasonable time; (c) until he has paid or made provision for the payment of any taxes payable by him.

Passports and Visas:

12. (a) Since a passport is in practice necessary to proceed to other countries, the right of the individual to a passport should be recognised. The procedure for obtaining a passport should be simple, speedy and inexpensive. The grounds on which a passport may be refused, issued subject to limitations, cancelled or withdrawn should conform to the principles laid down in paragraph 7 of these Conclusions in relation to the right to leave one's country.

(b) The principles relating to appeal and review contained in Chapter — III apply equally to the refusal, the issue subject to limitations, the cancellation and the withdrawl of passports.

(c) The need to have a passport renewed when abroad should not be used by a Government as a means of bringing pressure to bear on its citizens in foreign countries to compel their return.

Refugees and Stateless Persons

13. Refugees, stateless persons, and those unable to obtain a passport from the country of which they are citizens should have a right to a travel document acceptable to states in lieu of a passport. Such a document is at present obtainable by those who fall within the provisions of the Convention relating to the Status of Refugees, 1951. the protocol relating to the Status of Refugees, 1966 and the Convention relating to the Status of Stateless Persons, 1954. In so far as these instruments do not make comprehensive provision for the granting of universally acceptable travel documents to such persons, they should be completed by further international agreements, the full and effective application of which should be subject to the supervision of the United Nations.

Free Movement Treaties:

14. States should be encouraged to adopt treaties, such as those existing between the members of the European Economic Community, between the Nordic countries, and between certain States of Latin-America, under which citizens of the States parties thereto may travel freely between the territories of those States without a passport.

Elimination and Simplification of Formalities:

15. (a) States should be encouraged to examine their visa requirements with a view to their eventual abolition in so far as they are not strictly necessary. Such abolition should extend to refugees, stateless persons and any other persons travelling on a travel document other than a passport.

(b) In so far as visas are retained, the procedure for obtaining them should be simple, speedy and inexpensive, and the refusal of a visa should be subject to appeal and review.

(c) Once a visa has been granted refusal of entry should, in view of the hardship which may be involved, be limited to those cases in which it is strictly necessary in view of facts or circumstances which have arisen or been discovered since the issue of the visa.

Frontier Formalities

16. The procedure and formalities applied at frontier for entry to and departure from countries should be simplified.

Security of Movement and Residence Abroad

17. It is vital that the freedom of movement of those travelling outside their country should be secure and should not be unlawfully interfered with either by their own State or by the State in which they are present.

18. This principle applies both to those who are with consent of their country and to those who have received political asylum. Sush persons must be able to live and travel free from the danger of being returned against thier will to the State from which they sought asylum.

Abductions from Territory or Aircrafts.

19. The Abduction of persons from the territory of a foreign State by the agents of any State, and the removal of passengers from on board foreign ships or aircraft which have made unscheduled stops, whether by the authorities of the State on whose territory the stop has been made or by any other persons, seriously contravene the individual's right to freedom of movement.

20. The individual whose freedom of movement has been infringed by his unlawful abduction from foreign territory or removal from a ship or aircraft should enjoy the right to have recourse to the Courts of the State which abducted him to secure his release and return to the State from which he was abducted, and to obtain compensation for any loss or damage sustained as a result of his unlawful abduction. Where he does not have such recourse, he should be able to have recourse to an international tribunal for the protection of his rights. These principles apply whether the abduction was effected by agents of the State to which the person concerned was abducted or by private individuals.

CHAPTER III

RULES APPLICABLE TO RESTRICTIONS ON FREEDOM OF MOVEMENT

General:

21. Save in so far as is otherwise provided Conclusions the Rules set out in this Chapter shall apply to all restrictions on the right to Freedom of Movement dealt with in the preceding Chapters.

22. The right of a citizen to re-enter his own country is absolute and not subject to any limitation.

Limitations on Rights

23. In respect of other aspects of the right of freedom of movement, only such limitations as are consonant with Rule of Law and as are reasonably necessary in a democratic society may be imposed.

Furthermore, Article 12(3) of the International Covenant on Civil and Political Rights recognises that the Right of Freedom of movement

"shall not be subject to any restrictions except those which are provided for by law, are necessary to protect national security, public order (*order public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights and duties recognized in the present Covenant."

It should, however, be recognized that these heads of restriction may by the very generality of their expression encourage excessive limitations on freedom of movement. Therefore, to the extent that any of them is adopted by a legislature, their scope should be strictly construed so that any question of doubt is resolved in favour of freedom of movement.

24. Such restrictions as are imposed must be reasonable in their operation and application, and should not be arbitrary, excessive or greater in respect of time or area of application than is required in the interest of the general public and necessary in the particular situation nor constitute an abuse of authority.

25. The exercise of the right to freedom of movement being a vital human right, any limitation on the right to Freedom of Movement should be imposed only by or under the authority of law enacted by the legislature and such measure should set out the precise grounds on which it is sought to justify the limitation.

War or emergency situations:

26. In so far as it may become necessary to impose special restrictions on the right to Freedom of Movment owing to an emergency situation such special restrictions should only be permitted in time of war or other public emergency threatening the life of the nation and should be limited to the extent strictly required by the exigencies of the situation. In such situations the safeguards for the protection of fundamental rights during such period recommended by previous congresses and conferences of the International Commission of Jurists and by the United Nations Seminar on Civil and Political Rights (Jamaica 1967) should be respected.

Family:

27. No restriction should be imposed which is inconsistent with the right to protection of family life accorded by Article 12 of the Universal Declaration of Human Rights and by Article 17 of the Covenant on Civil and Political Rights.

Administrative Procedures and Judicial Review:

28. Any limitation of freedom of movement or refusal to grant a travel permit or passport in a particular case should be communicated to the individual concerned without unreasonable delay and should state in writing the reasons for such limitation or refusal.

29. The validity of any restriction imposed on a person's right to freedom of movement should in all cases be subject to ultimate review by the Courts to ensure that such restriction complies with the criteria adopted in these conclusions.

30. An effective procedure for the independent administrative review of and appeal from administrative decisions restricting the right to Freedom of Movement with ultimate recourse to the courts should be provided.

31. In all cases the onus of justifying any restriction on a person's right to freedom of movement should rest on the authority seeking to impose such restriction.

32. The several safeguards relating to administrative orders (notice to interested parties, right to be heard and represented, judicial review ,etc.) recommended by previous congresses and conferences of the International Commission of Jurists and by the United Nations Seminar on Civil and Political Rights held in Jamaica 1967 should be complied with. (Extracts from the relevant recommendations are appended to the present conclusions.)

CHAPTER IV

INTERNATIONAL PROMOTION OF THE RIGHT TO FREEDOM OF MOVEMENT

33. Jurists the world over and all persons and bodies interested in the promotion and protection of Human Rights should build up public opinion which will impel States to recognise the importance of this freedom and to act conformably to the letter and spirit of the Universal Declaration of Human Rights and the International Covenant in Civil and Political Rights.

34. It is recommended that the United Nations should promote the preparation and adoption of an International Convention relating to Freedom of Movement. While such an International Convention should be as comprehensive as possible and should ensure the maximum degree of freedom of movement making provision in particular for all the matters set forth in these conclusions, it could by means of optional clauses allow for reservations on the part of States which are unable or unwilling to grant full freedom of movement in existing circumstances.

35. Having regard to the increasing frequency of the abduction or kidnapping of passengers in the course of travel it would be desirable to consider the adoption of an international convention for the protection of passengers in transit by ship or aircraft.

36. This Conference requests the International Commission of Jurists to transmit these Conclusions to the United Nationa International Conference on Human Rights to be held in Teheran on April 22 — May 13, 1968.

The following is the text of a special resolution adopted by the Bangalore Conference

PROPOSAL FOR A COUNCIL OF ASIA AND THE PACIFIC.

"The Conference of Jurists from sixteen nations, assembled at Bangalore in January 1968, at the invitation of the Mysore State Commission of Jurists, the Indian Commission of Jurists and the International Commission of Jurists, having considered and noted the Resolution adopted by the Conference of Lawyers from the Asian and Pacific Region assembled at Colombo in January 1966:

BELIEVES:

1. That on the Asian Continent and in the Pacific Region there are many countries which have achieved their independence in recent years; and these and other countries in the Region have numerous problems of common interest and urgency relating to human rights and fundamental freedoms and social, economic and cultural matters in their bearing on the Rule of Law; and

2. That the sharing of experience by these countries would be of great value to them all;

And therefore **RECOMMENDS:**

A. That consideration be given to the establishment, by, the Governments and Parliaments of such Region, of an organisation analogous to the Council of Europe for the purpose of realising their common aspirations and fulfilling the Rule of Law, by discussion of questions of common concern, and by agreement and common action upon economic, social and cultural matters for the furtherance of the Rule of Law and fuller realisation of human rights and fundamental freedoms:

B. That such Organisation be representative of the Governments and Parliaments of such Region:

C. That participation in such Organisation be upon such a basis that it shall not affect the collaboration of its Members in the work of the United Nations Organisation or of any other organisation or association to which they are parties;

D. That the matters which should be within the scope of such Organisation should not include matters relating to national defence;

E. That membership of such Organisation should be open to all States in such Region which adhere to the Rule of Law and the maintenance of human rights and fundamental freedoms;

F. That a copy of these Recommendations be forwarded by the International Commission of Jurists to the Governments of all States in such Region;

G. And that the National Sections of the International Commission of Jurists take appropriate steps to further the establishment of such Organisation."

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යූ. ඒ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)
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එම්. එච්. එම්. නයිනමරික්කාර් බී.ඒ.,එල්.එල්.බී,(කැන්ටැබ්)
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වරුන බස්නායක

වී. ඇස්. ලේනදුව මෙනෙවිය

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සහකාර කර්තෘවරු

1968

දයකමිල – කාණ්ඩයකට (ඉංග්‍රීසි වාර්තාත් සමග) රු. 15/– පසුගිය කාණ්ඩයක මිල රු. 17/50.
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වර්ෂ 1958 අංක 40 දරණ පණතින් සංශෝධනය වූ අල්ලස් පණතේ 19(සී) ඡෙදය යටතේ තමාගේ රක්ෂාවේ ප්‍රඥප්තීන්ට අනුව හෝ නීතියට අනුව ලබාගත නොහැකි රු. 100 ක මුදලක් අල්ලස් වශයෙන් (ඒ) අයැද සිටීම පිළිබඳව ද, (බී) එය ලබා ගැනීම පිළිබඳව ද ඇපැල්කරුට විරුද්ධව අධි-චෝදනා ඉදිරිපත්කොට නඩු පවරා තිබුණි.

තීන්දුව: ඇපැල්කරු වෘත්තියට පත්කිරීමේ ලියමන (මෙයින් කිසිම අල්ලසක් ඉල්ලීමට හෝ ලැබීමට හෝ ඔහුට බලය නො ලැබේ.) මෙම චෝදනාව ප්‍රතිෂ්ඨාපිත කිරීමට ප්‍රමාණවත් නොවේ. ඇපැල්කරුට අධි-චෝදනාවේ සඳහන් ගණයේ අල්ලසක් ඉල්ලීමට හෝ ලැබීමට බලයක් නොමැති බව පෙන්නීමට යම්කිසි සාක්ෂියක් තිබිය යුතුය.

අබේසුන්දර විනිශ්චයකාරතුමා: ''එබඳු නීතියක් නොමැති බව විනිශ්චයාත්මක ලෙස සලකා ගැනීමක් කිරීමට කිසි ම උසාවියකට නුපුළුවන.''

ග්‍රෙගරි පෙරේරා එ. රැජින 4

උඩරට නීතිය

අත්කරගන්නා ලද දේපල වල උරුමය අයිතිවීම — අවජාතක දරුවන්ගේ දේපල උරුමය — අනෙක් උරුමක්කාරයින්ට විරුඬව වැන්දඹුවන්ට ඇති අයිතිවාසිකම් — උඩරට නීතිය ප්‍රකාශයට පත් කිරීමේ සහ සංශෝධනය කිරීමේ පණත — අංක 39/1938 එකොළොස් වැනි වගන්තිය.

අත්කරගන්නා ලද දේපල භුක්ති විඳිමින් සිටි අවජාතක දරුවකු වූ සේදරා දරුවන් නොමැතිව නමුත් තම වැන්දඹු භාර්‍යාව පමණක් ඉතිරිකොට 1955 දී තම දේපල කිසිවකුට අන්තිම කැමැති පත්‍රයකින් අයිති නොකොට මියගියේය. වැන්දඹුව විසින් දේපල පිළිබඳ සම්පූර්ණ අයිතිය ඉල්ලා සිටි නමුදු සේදරාගේ මව්ගේ නීත්‍යානුකූල දරුවන් යයි කියා ගන්නා අනෙක් උරුමක්කාරයින් විසින් එයට විරුඬත්ත්වය පල කරන ලදී. මෙම නඩුවේ පක්ෂ කෙරෙහි බලපවත්වනුයේ උඩරට නීතියයි.

තීන්දුව (1) ඉහත සඳහන් කරුණු අනුව දේපල උරුමවීම කෙරෙහි බලපවත්වන්නේ 1938 අවුරුද්දේ උඩරට නීතිය ප්‍රකාශ කිරීමේ හා සංශෝධනය කිරීමේ පනතේ එකොළොස් වැනි වගන්තියයි.

(ii) සාමාන්‍ය උඩරට නීතිය යටතේ තම සැමියාගේ දේපල සම්පූර්ණයෙන් භුක්ති විඳීමට තිබූ අයිතිය දැනට ඉහත කී පනතේ 11(1)(ඩී) වැනි වගන්තිය අනුව තවත් උරුමක්කාරයකු නොමැති අවස්ථාවලට පමණක් සීමා වී ඇත.

(iii) ''තවත් උරුමක්කාරයකු නොමැත'' යන වචනවල තේරුම නම් භාර්‍යාවට දේපලවල සම්පූර්ණ උරුමය ලැබිය හැක්කේ තවත් කොතරම් ඇත් වුවත් උරුමක්කාරයකු නොමැති අවස්ථාවක පමණක් බවය.

(iv) ඉහත කී 11(1)(ඩී) ඡෙදය අනුව අවජාතක පුතකුගේ උරුමක්කාරයා ඔහුගේ මවය. ඇය මියගොස් නම් ඇගේ නීත්‍යානුකූල දරුවන් ඇගේ මාර්ගයෙන් උරුමක්කාරයන් බවට පත් වේ.

ලිඩියා එ. කිරිඋක්කුවා නොහොත් සයිමන් ... 11

උකස්කරයක්

එය දෙවන විත්තිකරුට පවරා තිබීම — උකස් තැබූ තැනැත්තා විසින් ණය සහන මණ්ඩලයට ඉදිරිපත් කළ ඉල්ලීමක් — බේරුමකට බැස ගැනීම — මුලු මුදල සහ පොලිය නියමිත දිනයකට පෙර ගෙවිය යුතු බව එහි එක් කොන්දේසියක් වීම — එසේ කිරීම පැහැර හැරියොත් ඉල්ලීම ව්‍යර්ථවූ ලෙස සලකා ගත යුතුවීම — ගෙවීම පැහැර හැරීම — උකස්කරු ගේ අයිතිවාසිකම් ඇස්කීසි මගින් විකිණීම සහ ඒවා

පැමිණිලිකරු විසින් මිලට ගැනීම — පැමිණිලිකරු විසින් දමන ලද බෙදුම් නඩුවක් — එය නිෂ්ප්‍රභා වීම — ණය සහන ආඥා පනතේ 40(2) වන ඡේදය.

'ඇල් සහ ඇස්' නමැත්තන් විසින් වර්ෂ 1948 දී යම් ඉඩමක තමන්ට තිබුණු අයිතිවාසිකම් උකස් තබා ඒවා වර්ෂ 1959 දී දෙවන විත්තිකරුට ඔවුන් විසින් පවරන ලදහ. 'ඇල් සහ ඇස්' නමැත්තන්ට තිබුණු මෙම අයිතිවාසිකම් පිස්කල් නිලධාරියාගේ පැවැරීමකින් 7/9/1959 දරන දින මිලදී ගත් පැමි - ණිලිකරු මෙම බෙදුම් නඩුව දැම්මේය.

යථෝක්ත උකස්කරය වර්ෂ 1952 ණය සහන මණ්ඩලයට යවන ලද ඉල්ලීමකට පාත්‍රවූ දෙයක්ව තිබුනි. පාර්ශ්වකරුවෝ එය බේරුමකට පත්කර ගැනීමට කැමැති වූහ. එහි එක් කොන්දේසියක් වූයේ මුල් මුදල සහ පොලිය සම්පූර්ණයෙන්ම 31/10/1953 වන දිනට පෙර ගෙවියයුතු බව සහ එය පැහැර හැරියොත් ණය සහන මණ්ඩලයට කළ ඉල්ලීම ව්‍යර්ථ වූ ලෙස සැලකිය යුතු බවත්ය. ඇත්ත වශයෙන්ම මේ අනුව කිසිම ගෙවීමක් සිදු වී නැත.

පෙනී යන හැටියට උගත් දිස්ත්‍රික් විනිශ්චය කාරවරයා මෙම නඩුව නිෂ්ප්‍රභා කරන ලද්දේ ඔහු විසින් ණය සහන ආඥා පනතේ 40(2) වැනි ඡේදය වරදවා තේරුම් ගෙන ඇති බැවිනි.

තීන්දුව: (1) ණය සහන මණ්ඩලය ඉදිරියේ කරගත් බේරුමේ හේතුවෙන් ණය සහන ආඥා පනතේ පැනවීම්වලට අනුකූලව කෙරුනු එම පරීක්ෂණයේ දී එකී උකස්කරයට අනුව පාර්ශ්ව කරුවන්ට තිබුණු අයිතිවාසිකම් වෙනස් වීමකට බල පවත්වන්නේ නැති නිසාත් ඒවා නොකෙලෙසී පවතින නිසාත් මෙම උගත් දිස්ත්‍රික් විනිශ්චයකාර වරයා විසින් නිෂ්ප්‍රභා කිරීම නිවැරදි ය.

(2) කර ගන්නා ලද බේරුමට ණය සහන ආඥා පනතේ 40(2) දරන ඡේදයේ පැනවීම අදාල වන්නේ නැත. ඊට හේතුව එම බේරුම්කර ගැනීම නිසා ඉඩම පිළිබඳ වගකීමේ භාරයක් කොයි ලෙස-කින් වත් නො පැවරීම සහ බේරුම්කර ගැනීමේ කොන්දේසිවලින් දෙපාර්ශ්වයේ මුලින් තිබූ අයිතිවාසිකම් වෙනස් නොවීමත් ය.

පෙරේරා එ. තිසේරා සහ තවත් අය ... 13

ණය සහනදයක ආඥා පණත—යටතේද බලනු. 5

අලාභ හානි

''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය (Res ipsa loquitur) — ලොරි දෙකක් අතර ඝට්ටනයක්— එක් ලොරියක සුක්කානම් යාන්ත්‍රිය අංශයේ හදිසි ඌනතාවයක් — තමා වෙත නොසැළකිලිමත් බවක් නොමැති බැව් ඔප්පු කිරීම එම ලොරි හිමියා පිට ඇති කාර්‍ය භාරයක් බව.

මෙය පළමුවෙනි විත්තිකරුට අයත් ලොරියක් දෙවන විත්තිකරු විසින් නොසැළකිල්ලෙන් පැදවීම නිසා එය පැමිණිලිකරුගේ ලොරිය සමඟ ගැටීමෙන් සිදු වූ අලාභය අයකර ගැනීමේ පර-මාර්ථයෙන් පැවරූ නඩුවකි.

දෙවන විත්තිකරු විසින් පදවන ලද පළමු වැනි විත්තිකරුට අයිති ලොරිය පාරේ වැරැදි පැත්තට කැපී ගොස් එම පාරේ නිවැරැදි පැත්තේ ඉදිරි පසින් ගමන් කළ පැමිලිකරුගේ ලොරියෙහි හැපී එහි ඉදිරි කොටසට අලාභ හානි සිදු වී ඇති බව සාක්ෂි වලින් අනාවරණය විය. දෙවන විත්තිකරු විසින් පැමිණිලිකරුගේ ලොරිය පැද වූ තැනැත්තාට තමාගේ ලොරිය සුක්කානම් යාන්ත්‍රිය අංශයේ හිර වීමක් නිසා මෙම හදිසි අනතුර සිදු වූ බව නොපමාව කියන ලදී.

තීන්දුව: (1) මෙම සාක්ෂියෙන් ''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය අනුව බැලූ බැල්මට ම නොසැළකිලිමත් බවක් පෙනී යේ. එබැවින් විත්තිකරුවන් විසින් සිඩිය වූ අයුරු පහදා දීම පමණක් නොව තමන් විසින් පරෙස්ස මින් තොරව කටයුතු නොකළ බවද පෙන්වා දිය යුතු ය.

(2) මෙහි දී පළමුවන විත්තිකරු ගත යුතුව තිබුණු එක ම යුක්තිසහගත මාර්ගය වූයේ තමා ගේ ලොරියේ යාන්ත්‍රිය යෝග්‍යතාවය ආරක්ෂාවට අවශ්‍යවන පියවර ගත් බව පෙන්වීමට එබඳු සාක්ෂි ඉදිරිපත් කිරීමයි. එසේ සාක්ෂි ඉදිරිපත් කරන තුරු ''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය ක්‍රියාත්මක වීමෙන් තමා පිට පැවරෙන තත්ත්වයෙන් මිදීමට උවමනා බරින් නිදහස් නොවේ.

පුංචිසිඤ්ඤෝ එ. සීමාසහිත බෝගල ග්‍රැපයිට් සමාගම 7

හවුල් අයිතිකරුවෝ

හවුල් අයිතිකරුවන් විසින් අවුරුදු බොහෝ ගණනක් අරක්කු පෙරීම පිණිස භාවිතා කළ ඉස්කාගාරයක් සහ ගුදමක් — ඊට හවුල් අයිතිකරුගේ එකඟත්වය — අනිත් හවුල් අයිතිකරුවන් විසින් තමාගේ අනුමැතිය නො ලබා අරක්කු පෙරීම දිගට ම කරගෙන යාම ගැන අවුරුදු ගණනකට පසු එක් හවුල් අයිතිකරු වකු දැක් වූ විරෝධයක් — එබඳු අනුමැතියක් අවශ්‍ය ද යන වග.

ඇස්. ජී. නමැති හවුල්කරුවකුට බලපත්‍ර දීමෙන් බලපත්‍ර දෙන නිලධරයා වැළැක්වීමට දැමූ නඩුවක් — බලපත්‍ර නිකුත් කරන නිලධාරියා සහ ඇස්.ජී. නමැති හවුල් අයිතිකරුවා අතර ඇතැයි කියා සිටින යටිකුට්ටු සම්බන්ධයක් — අන්තර් තහනම් නියෝ ගයක් — ඇස්. ජී. නමැති හවුල්කරුවාට දැනටමත් දී ඇති බලපත්‍රය අවලංගු කිරීමට සහ අනාගතයේ ඒ තැනැත්තාට බලපත්‍ර නො දීමට කෙරෙන යාඥාවක් — මෙම නඩුවට ඇස්.ජී. නමැත්තාට මැදිහත් විය හැකි ද යන්න.

පැමිණිලිකරු ඇතුළු බාලවයස්කාරයින් නව දෙනකුට හිමිකම් ඇති ඉඩමක් ඔවුන්ගේ ආරක්ෂ-කයා විසින් අධිකරණයේ අවසර සහිතව එම භූමිභාගයෙහි බදු ගන්නා විසින් ඉස්කාගාරයක් සහ ගුදමක් සෑදිය යුතුය යන කොන්දේසියක් ඇතුළත් කොට අවුරුදු 15 ක බද්දක් අවසානයේ දී තමා ඉදිකර වූ ගොඩනැගිලි ඉවත් කරගෙන යා හැකි අන්දමට බදු දෙන ලදී. මෙම බද්ද වර්ෂ 1950 දී නිම වූ නමුත් තමා විසින් ඉදිකරන ලද ගොඩ නැගිලි ඉවත්කර ගෙන යාමට ඇති අභිමතය බදු ගත් තැනැත්තා ක්‍රියාවට නො යෙදුවේ ය. බදු ගත් අය ඉඩමෙන් බැහැර වී ගිය පසු හවුල් අයිතිකරු වෝ එම ඉස්කාගාරය සහ ගුදම අරක්කු සම්පාදනය කිරීම පිණිස භාවිතා කළහ.

වර්ෂ 1966 අප්‍රේල් මස 1 දිනට පසු කොයි ම කාලපරිච්ඡේදයකටවත් එක් හවුල්කරුවකු වූ ඇස්. ජී. නමැත්තාගේ හෝ ඔහු විසින් නම් කරනු ලබන්නාගේ හෝ වාසියට තමාගේ අනුමැතිය සහ එකඟත්වය නො ලබා අරක්කු සෑදීමට බලපත්‍ර-යක් නිකුත් කිරීම සහ හෝ එහි කාල සීමාව නැවත දිගු කිරීම, තමා විසින් දැනට ස්ථිර තහනම් නියෝ-ගයක් අයැද පවරා ඇති නඩුව සමාප්ත වන තුරු, වළක්වා ගැනීම සඳහා පැමිණිලිකරු අතුරු තහනම් නියෝගයක් ලබා ගැනීමට යාඥා කළේ ය.

තීන්දුව: (1) අවුරුදු ගණනක් තමා විසින් ද එකඟ වූ පරිහරණයක් ලෙස ගැණෙන අරක්කු සම්පාදනයට එම දේපොල යෙදවීම අලුත් හැරවීමක් නොවන නිසා එක් හවුල්කරුවකු වූ ඇස්. ජී. නමැත්තාට අරක්කු සෑදීමට බල පත්‍රයක් දීමට මෙහි පවතින කරුණු සලකා බලන කල විරුඬ විය නො හැක.

එම පැමිණිල්ලෙහි ම පැමිණිලිකරු විසින් මෙහි විත්තිකරුවන් සමග එකී ඇස්. ජී. නමැත්තා පැමි-ණිලිකරුගේ අනුමැතිය නොමැතිව 1966 වර්ෂයට අරක්කු සම්පාදනය සඳහා බලපත්‍රයක් ලබා ගැනී-මට අයථා සමගියකින් ක්‍රියා කළ බව තරයේ කියා පාමින් 1966.4.1. දින සිට බලපත්‍රය නිකුත් කිරීම වැළැක්වීමට පමණක් නොව එවකට දී තිබුණු බලපත්‍රයක් අවලංගුකර ගැනීමට ද ඉල්ලීමක් ද කර තිබුණි.

තීන්දුව: (2) ඇස්. ජී. නමැත්තා විසින් තමාට පාර්ශ්වකරුවකු වශයෙන් නඩුවට මැදහත් වීමට ඉඩ දෙන ලෙස කළ ඉල්ලීමට ඉඩ දිය යුතු ය.

කිත්සිරි ගුණරත්න එ. කළුතර දිසාපති සහ තවත් කෙනෙක් 1

ණය සහනදායක ආඥා පණත

උකස්කරයක හේතුවෙන් ඇති වූ ණයක් — 30 වන ඡෙදය අනුව කළ සමගි සම්පන්න බේරුමක් — බේරුම් කිරීමේ දී පාර්ශ්ව-කරුවන් විසින් එකඟත්වයකට බැස ගන්නා ලදුව මණ්ඩලය වාර්තා ගත කළ මුදල උකස්-කරයේ මුදලේ දෙගුණයකට වැඩිවීම — මේ නිසා 33(බී) ඡෙදය උල්ලංඝණය වීම — බේරුම් කර ගැනීමේ දී ඇති කරගත් කතිකා ඉටු නොවීම — බේරුම්කර ගැනීමේ දී ඇති කරගත් කොන්දේසි අනුව 43 වන ඡෙදයේ පැණවීම් යටතේ තීන්දු ප්‍රකාශයක් ඉල්ලා සිටීම — ණය හිමියාගේ වාසියට නයිසයි ආඥාව ස්ථිර කිරීම — අභියාචනයක් ඉදිරි-පත් කිරීමට ඇති අයිතිවාසිකම — 44(2) ඡෙදය ක්‍රියාත්මක නො වන්නේ කෙබඳු අවස්ථාවක ද යන්න.

7.6.1954 දාතමින් වූ උකස්කරයක මුල් ණය මුදල රු. 90,420/69 කි. ණය හිමියකු සහ ණය කරුවකු අතර ණය සහනදායක ආඥා පණත යට-තේ පොලියත් ඇතුළු මෙම ණය මුදල සමගි සම්පන්න ලෙස බේරුමකට හේතු වූයෙන් ඒ අනුව

ගෙවිය යුතු මුදල හැටියට රු. 19,2,892.45 ක් එහි දී තීරණය විය. මෙම බේරුම්කර ගැනීමේ කොන්දේසි ණය සහනදායක මණ්ඩලය විසින් වාර්තා ගත කැරිණ. මෙම නඩුවෙහි ඇපැල්කරුවන් වූ ණය හිමියා විසින් ආඥා පනතේ 43 වන ඡේදය යටතේ ඉල්ලීමක් ඉදිරිපත් කර සිටියෙන් උසාවිය ඇපැල්කරුවන්ට විරුද්ධව තීන්දු ප්‍රකාශයක් දුන් පසු ඇපැල්කරුවෝ අභියාචනයක් ඉදිරිපත් කළහ.

වගඋත්තරකරුවන් වෙනුවෙන් ඉදිරිපත් කළ තර්කය වූයේ 44 වන ඡේදයේ 2 වන උප ඡේදයට ඇති අතුරු විධානය අනුව අභියාචකයින්ට අභියාචනයක් ඉදිරිපත් කිරීමට අයිතිවාසිකමක් නැත යන්නයි.

තීන්දුව: (1) බේරුම්කර ගැනීමේ දී අනුමත කරගත් මුදල ණය සහනදායක ආඥා පනතේ 33(බී) ඡේදයෙහි අවසර දී තිබෙන මුදල මෙන් දෙගුණයකට වැඩි වූ නිසා මෙම බේරුම්කර ගැනීම ණය සහනදායක ආඥා පණතේ 43 වන ඡේදය යටතේ සිදුවූවක් ලෙස ගිනිය නොහැක. එබැවින් උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාට 43 වෙනි ඡේදය යටතේ තීන්දු ප්‍රකාශයක් කිරීමට නුපුළුවන.

(2) මෙහි ස්ථිර කරනු ලබා ඇති නයිසයි ආඥාව එකී ආඥා පනතේ පැනවීම්වලට අනුකූල නොවන නිසා එහි 44 වන ඡේදයට සම්බන්ධ අතුරු පැනවීමෙහි දැක්වෙන අභියාචන තහනම අභියාචනයට භාජන වී ඇති තීන්දු ප්‍රකාශයට බලපවත් වනු නො ලැබේ.

(3) ආඥා පනතේ 33(බී) ඡේදයෙන් අනුමැතිය ලැබෙන ප්‍රමාණයට පමණක් මෙම බේරුම්කර ගැනීම වලංගු යැයි සලකන මෙන් ඉල්ලමින් කළ කරුණු සැලකිරීම පිළිගත නොහැක්කේ එය පසුව වෙනස් කරන ලද බේරුම්කර ගැනීමක කොන්දේසි අනුව අධිකරණය විසින් තීන්දු ප්‍රකාශයක් නිකුත් කිරීමක් වන බැවිනි.

සාලින් සහ තවත් අය එ. චාර්ටඩ් බැංකුව, කොළඹ 5

උකස්කරයක්—යටතේද බලනු 13

ගම් සභා උසාවි පණත

ගම්සභා උසාවි පනත යටතේ චෝදනාවක් — විත්තිකරු නිදහස් වීම — එම තීන්දුවෙන් පැමිණිලිකරු දිස්ත්‍රික් විනිශ්චයකාරතුමාට ඇපැල් ගැනීම — ඇපැලේ දී එම තීන්දුව ඉවත්කර දඬුවම් නියම කිරීමට ගම් සභා උසාවියට නඩුව ආපසු යැවීම — විත්තිකරුට දඬුවම් නියම කිරීම — එම තීන්දුවට විරුඬව ශ්‍රේෂ්ඨාධිකරණයට සංශෝධන ඉල්ලීමක් කිරීම — ගම්සභා පනත, 26(1), 41(1), 41(5), 42 යන ඡේද — උසාවි ආඥා පනත 3 වැනි ඡේදය.

ගම්සභා උසාවියක විනිශ්චයකාරතුමකු විසින් විත්තිකාරයකු නිදහස් කරමින් දී ඇති තීන්දුවකට විරුඬව දිස්ත්‍රික් විනිශ්චයකාරතුමකු වෙත ගන්නා ලද ඇපැලක දී එම දිස්ත්‍රික් විනිශ්චයකාරතුමා විසින් එම තීන්දුව වෙනස් කොට විත්තිකරු වරද කරු ලෙස තීන්දුකරමින්, දඬුවම් නියම කිරීම සඳහා ගම්සභා උසාවියට එම නඩුව ආපසු යවන ලදී. ඒ අනුව ගම්සභා උසාවියේ විනිශ්චයකාරතුමා විසින් රු: 25/- දඩයක් නියම කොට එය නොගෙවිවොත් සිර දඬුවම් විඳීමට ද නියම කරන ලදී.

මේ තීන්දුව සංශෝධනය කිරීමට ඉල්ලුම් පත්‍රයක් විත්තිකරු විසින් ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරනු ලැබී ය.

විත්තිකාර පෙත්සම්කරු වෙනුවෙන් පහත සඳහන් තර්ක ඉදිරිපත් කරන ලදී.

ගම්සභා උසාවි පනතේ 41(1) උප වගන්තිය අනුව දිස්ත්‍රික් නඩුකාරවරයකුට, නිදහස් කළ විත්තිකරුවකු නැවත වරදකරුවකු ලෙස තීන්දු කිරීමට බලයක් නැත.

මීට පිළිතුරු වශයෙන් වගඋත්තරකරු විසින් (ඒ) ගම්සභා උසාවි පනතේ 41(5) උප වගන්තිය අනුව, ගම්සභා උසාවියකින් දිස්ත්‍රික් නඩුකාරවරයකු ඉදිරියට ගනු ලබන ඇපැලකට විරුඬව 41(5) වගන්තියේ සඳහන් පරිදි මිස ඇපැල් ගැනීමට එම වගන්තිවලින් අවසරයක් නොමැත.

(බී) ගම්සභා උසාවි පනතේ 42 වැනි වගන්තිය අනුව ගම්සභා, උසාවියක තීරණයකට විරුඬව කරන ඇපැලක දී දිස්ත්‍රික් නඩුකාරවරයකු දී ඇති තීරණයකට විරුඬව ශ්‍රේෂ්ඨාධිකරණයට සංශෝධන ඉල්ලුම් පතක් ඉදිරිපත් කිරීමට ද බලයක් නොමැත. එසේ වෙනස් කිරීමක් කළ හැකි වනුයේ 'සර්ටියරාරායි' ආඥාවකින් පමණකි.

තීන්දුව (1) උසාවි ආඥා පනතේ 3 වැනි වගන්තිය අනුව, සලකා බලන කල ගම්සභා උසාවියක් ද එම වගන්තිය යටතේ ගැනෙන උසාවි සංඛ්‍යාවෙහි ඇතුලත් වේ.

(2) සංශෝධන ඉල්ලුම් පත්‍රය, ගම්සභා උසාවියක තීරණයක් පමණක් පිළිබඳ හෙයින් එය වෙනස් කිරීමේ බලය ශ්‍රේෂ්ඨාධිකරණයට ඇත.

ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍රවිනිශ්චයකාර තුමා විසිනි — "මෙම සිඩියේ දී ශ්‍රේෂ්ඨාධිකරණයෙහි බලය පිළිබඳ ප්‍රකාශය සියලු දුෂ්කරතාවලින් මිදී නැති නමුදු, පෙත්සම්කරුට පීඩා කර වූ කිට්ටුම නියෝගය ඇපෑලේ දී දිස්ත්‍රික් විනිශ්චයකරු කළ නියෝගය අනුව, 1967 අගෝස්තු 4 වැනි දින ඔහුට ග්‍රාමීය උසාවියෙන් දුන් දඬුවම් බැව් පැහැදිලිව පෙනී යන්නේ ය."

ඇල්. ඒබ්‍රහම් පෙරේරා එ. ඩබ්ලිව්. ජේ. බී. පෙරේරා 25

නගර සභා ආඥා පණත

නගර සභා ආඥා පනත ,17(3), (5) ඡෙද සහ 18(2) වැනි ඡෙදය — සභාපතිවරයෙක් තේරීමේ රැස්වීම — සාමාජිකයකුට තමාගේ ම නම සභාපති ධුරයට යෝජනා කළ හැකි ද යන්න?

මෙහි ඉල්ලුම්කරු සහ වග-උත්තරකාර දෙදෙන බලන්ගොඩ නගර සභාවේ සාමාජිකයෝ ය. පළමු වන වග-උත්තරකරු වූකලි සභාපතිවරයකු තෝරා පත්කර ගැනීම සඳහා නගර සභා ආඥා පනත අනුව පත් කරනු ලැබූ සහකාර කොමසාරිස්වරයා ය. ඔහු සභාපතිවරයෙක් තෝරා ගැනීමට කැඳ වූ නගර සභාවේ රැස්වීමක 3.10.66 වැනි දින මුලසුන ඉසිලී ය.

රැස්වීමේ දී දෙවැනි වග-උත්තරකරුගේ නම සභාපති ධුරයට තෝරා ගැනීමට ඒ සභාවේ සාමාජිකයන් දෙදෙනකු විසින් යෝජනා ස්ථිර කරන ලදී. ඉක්බිති ඉල්ලුම්කරුගේ නම සභාපති ධුරයට ඔහු විසින් ම යෝජනා කරනු ලදුව, වෙන සාමාජිකයකු විසින් ස්ථිර කරන ලදී.

එවිට පළමුවැනි වග-උත්තරකරු, ඉල්ලුම්කරුට තමාගේ ම නම නීත්‍යානුකූලව සභාපති ධුරයට යෝජනා කළ නොහැකි යයි තීරණයකර, ඉල්ලුම්කරුගේ ඉදිරිපත්වීම ප්‍රතික්ෂේප කොට දෙවැනි වග-උත්තරකරු නිතරහයෙන් සභාපති ධුරයට පත්වූයේ යැයි ප්‍රකාශ කරන ලදී.

ඉල්ලුම්කරු වෙනුවෙන් අප ඉදිරියේ තර්ක කළේ නගර සභා ආඥා පනතේ 18 වැනි වගන්තිය අනුව ඉල්ලුම්කරුට තමාගේ නම යෝජනා කිරීමට ඉඩ තිබුන බව කියමිනි.

තීන්දුව: පළමුවැනි වග-උත්තරකරු විසින් දුන් යට කී තීරණය නීත්‍යානුකූල නො වන නිසා දෙවැනි වග-උත්තරකරු සභාපති වශයෙන් පත් වීම අවලංගු කළ යුතුය.

ඇස්. දොන් සිරිසේන එ. ඇල්. ජී. සිරිවර්ධන සහ තව කෙනෙක් 26

ජූරි සභාව

ජූරි සභාව — දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ විත්තිකරුවන්ට අධිචෝදනා කරනු ලැබීම — ප්‍රාථමික නඩු විභාගය පැවැත්වීමෙන් පසු විත්තිකරුවන් සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව ඇසීමට කැමතිවීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 222 වගන්තිය යටතේ විශේෂ ජූරි සභාවක් සඳහා ඇටෝර්නිජනරාල් විසින් ඉල්ලීමක් කිරීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 257 වැනි වගන්තියේ ජූරි සභිකයන්ගේ සුදුසුකම් දක්වා තිබීම — ඒවා අදට අදාළ නොවීම — විත්තිකරුවන්ගේ විරෝධය — සාධාරණ වූ ද යුක්ති සහගත වූ ද ඉල්ලීමක් ද?

දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ දඬුවම් කළ හැකි වැරැදි ක්‍රියාවලට පහත දැක්වෙන චෝදනා යටතේ විත්තිකරුවෝ අධිචෝදනා ලැබූහ. (ඒ) රැජිනට විරුඬව යුඬ කිරීමට කුමන්ත්‍රණය කිරීම, (බී) සාපරාධී බලහත්කාරයෙන් ලංකාණ්ඩුව බියපත් කිරීමට කුමන්ත්‍රණය කිරීම.

ප්‍රාථමික නඩු විභාගය අවසානයේ දී මහේස්ත්‍රාත්වරයා විසින් ප්‍රශ්න කළ විට අපරාධ නඩු සංවිධාන සංග්‍රහයේ 257(1) (බී) වගන්තියේ සඳහන් කෙරෙන පරිදි සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව විභාග කිරීමට විත්තිකරුවෝ කැමති වූහ. ඒ වගන්තියේ සඳහන් සුදුසුකම් නම් සිංහල භාෂාව කථා කිරීමට, කියැවීමට හා ලිවීමට හැකි වීමත්, වටිනාකමින් රු: 1,000 කට නො අඩු චංචල හෝ නිශ්චල දේපළ තමාගේ අයිතියෙන් හෝ තම භාර්‍යාවගේ අයිතියෙන් හෝ තිබීම; හෝ වර්ෂයකට රු: 500 ක ආදායමක් තිබීමයි. ඉන්පසු (එම සංග්‍රහයේ 257(1) (බී) වගන්තිය යටතේ සැකසුණු) ලැයිස්තුවකින් විශේෂ ජූරි සභාවක් කැඳවීමට නියෝගයක් කරන ලෙස, 222 වැනි වගන්තිය යටතේ ඇටෝර්නි ජනරාල්වරයා විසින් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලීමක් කරන ලදී. එම ලැයිස්තු

වට අයත් පුද්ගලයන්ට රු: 3,000 කට නොඅඩු වාර්ෂික ආදායමක් තිබීම හෝ වටිනාකමින් රු: 20,000 කට නො අඩු චංචල හෝ නිශ්චල හෝ දේපොළ තමාගේ අයිතියෙන් හෝ තම භාර්‍යාව ගේ අයිතියෙන් හෝ තිබීම හෝ රුපියල් 500 ක මාසික වේතනයක් ලැබීම හෝ අපේක්ෂිත ය.

ඉල්ලීම සාධාරණ වූ ද යුක්ති සහගත වූ ද ඉල්ලීමක් බවට ශ්‍රෙෂ්ඨාධිකරණය සෑහීමකට පත් වීම 222 වැනි වගන්තියෙන් අපේක්ෂිත ය.

ඉල්ලීමට පක්ෂව කරුණු දෙකක් දක්වන ලදී. එනම්: (ඒ) කුමන්ත්‍රණය ඔප්පු කිරීමට, විවිධ සිද්ධීන්ගෙන් හා විත්තිකරුවන්ගේ හැසිරීමෙන් පැන නැගෙන අනුමාන මත පැමිණිලි පක්ෂය බොහෝ දුරට රැඳී සිටින හෙයින් නඩුව අසාමාන්‍ය සංකීර්ණත්වයෙන් යුත් එකකි; (බී) සමහර විත්ති කරුවන් විසින් කරන ලද අපරාධෝච්චාරණ පැමිණිලි පක්ෂයෙන් ඔප්පු කරනු ලබන අතර ඒවා යේ අඩංගු කරුණු නීතිය අනුව අනිත් විත්තිකරු වන්ට විරුඬව පිළිගත නොහැක යන ප්‍රතිපත්තිය පිළිගැනීමට, සිංහල කථා කරන ජූරි සභාවකට වඩා හොඳින් විශේෂ ජූරි සභාවකට හැකි වනු ඇත.

257 වැනි වගන්තියේ කවර අධ්‍යාපනික සුදුසු කමක්වත් සඳහන් නැති නමුදු විශේෂ ජූරි සභාවකට යථෝක්ත සුදුසුකම් නියම කිරීමේ දී ව්‍යවස්ථා දායකයේ චේතනාව වූයේ, විශේෂ ජූරි සභික නාම ලේඛනයේ සඳහන් පුද්ගලයන් අනිත් නාම ලේඛනවල සඳහන් පුද්ගලයන්ට වඩා හොඳ අධ්‍යාපනයක් ලබා තිබෙන අතර, කරුණු හා නීතිය පිළිබඳ සංකීර්ණතාවන්ට මුහුණ දීමට වඩා හොඳින් ඔවුන්ට හැකි වීමය යි රජයේ අධිනීතිඥවරයා තර්ක කෙළේ ය.

තීන්දුව: (1) යථෝක්ත සුදුසුකම් නියම කළ ව්‍යවස්ථාදායකය විසින් කරන ලද එකී පිළිගැනීම, අපරාධ නඩු සංවිධාන සංග්‍රහයේ සම්මත කළ කාලය වන 1898 දී වලංගු වුව ද අධ්‍යාපනික සුදුසුකම් සම්බන්ධයෙන් පමණක් නොව ආදායම් හා දේපළ සුදුසුකම් සම්බන්ධයෙන් ද නිදහස ලැබීමෙන් පසු ඇති වී තිබෙන මූලික වෙනස්කම් සලකා බලන විට, එය තව දුරටත් වලංගු නැත.

(2) මේ තත්වය යටතේ සිංහල කථා කරන ජූරි සභාවක් මගින් විභාග කිරීමට, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 165(බී) වගන්තිය යටතේ විත්තිකරුවන් විසින් පාවිච්චිකර තිබෙන අයිතිය ඔවුන්ට අහිමි කිරීම, සාධාරණ සේ නො පෙනේ.

විශේෂ ජූරි සභාවක් පත්කිරීම විත්තිකරුවන් ගේ යහපත පිණිස වෙතියි අපරාධ නඩු සංවිධාන සංග්‍රහයේ 222 වගන්තිය පදනම් කර කරන ලද තර්කය ගැන —

(3) විත්තිකරුවන් ඔවුන්ගේ උපදේශකයන් මාර්ගයෙන් විශේෂ ජූරි සභාවක් පත් කිරීමට විරුඬත්ත්වය ප්‍රකාශ කර සිටිය දී, විත්තිකරුවන් හා ඔවුන්ගේ උපදේශකයන් නිදහසේ කර තිබෙන තේරීමක් යුක්තිය ඉටුකිරීමේ ප්‍රයෝජනය පිණිස යයි කියා යටපත් කිරීම, අරුම පුදුම ත්‍යාගශීලීත්ත්වයක් හා අනුග්‍රහයක් දැක්වීමකි.

රැජින එ. හේන්පිටගෙදර ඤාණසීහ හිමි සහ තවත් අය 15

ගරු ජී. පී. ඒ. සිල්වා සහ සිව සුබ්‍රමනියම් විනිශ්චයකාරතුමන් ඉදිරිපිට

පුංචි සිකෙදිකු එ. සීමාසහිත බෝගල ග්‍රැපයිට් සමාගම*

ශ්‍රෙ.අ. අංකය 57/66 (එfප්) — දි.උ. අවිස්සාවේල්ල අංකය 11490/එම්

විවාද කළේ 1967 මැයි, 25 වැනි දා
තීන්දු කළේ: 1967 සැප්තැම්බර්, 20 වැනි දා

''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය (Res ipsa loquitur) — ලොරි දෙකක් අතර සට්ටනයක් — එක් ලොරියක සුක්කානම් යාන්ත්‍රිය අංශයේ හදිසි ඌනතාවයක් — තමා වෙත නොසැළකිලිමත් බවක් නොමැති බැව් ඔප්පු කිරීම එම ලොරි හිමියා පිට ඇති කාර්‍යභාරයක් බව.

මෙය පළමුවන විත්තිකරු අයත් ලොරියක් දෙවන විත්තිකරු විසින් නොසැළකිල්ලෙන් පැදවීම නිසා එය පැමිණිලිකරුගේ ලොරිය සමඟ ගැටීමෙන් සිදු වූ අලාභය අයකර ගැනීමේ පරමාර්ථයෙන් පැවරූ නඩුවකි.

දෙවන විත්තිකරු විසින් පදවන ලද පළමු වැනි විත්තිකරුට අයිති ලොරිය පාරේ වැරැදි පැත්තට කැපී ගොස් එම පාරේ නිවැරැදි පැත්තේ ඉදිරි පසින් පමන් කළ පැමිණිලිකරුගේ ලොරියෙහි හැපී එහි ඉදිරි කොටසට අලාභ හානි සිදුවී ඇති බව සාක්ෂිවලින් අනාවරණය විය. දෙවන විත්තිකරු විසින් පැමිණිලිකරුගේ ලොරිය පැද වූ තැනැත්තාට තමාගේ ලොරිය සුක්කානම් යාන්ත්‍රිය අංශයේ හිරවීමක් නිසා මෙම හදිසි අනතුර සිදු වූ බව නොපමාව කියන ලදි.

තීන්දුව: (1) මෙම සාක්ෂියෙන් ''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය අනුව බැලූ බැල්මට ම නොසැළකිලිමත් බවක් පෙනී යේ. එබැවින් විත්තිකරුවන් විසින් සිඩිය වූ අයුරු පහදා දීම පමණක් නොව තමන් විසින් පරෙස්සමින් තොරව කටයුතු නොකළ බව ද පෙන්වා දිය යුතු ය.

(2) මෙහි දී පළමුවන විත්තිකරු ගත යුතුව තිබුණු එක ම යුක්තිසහගත මාර්ගය වූයේ තමාගේ ලොරියේ යාන්ත්‍රිය යෝග්‍යතාවය ආරක්ෂාවට අවශ්‍යවන පියවර ගත් බව පෙන්වීමට එබඳු සාක්ෂි ඉදිරිපත් කිරීමයි. එසේ සාක්ෂි ඉදිරිපත් කරන තුරු ''සිඩිය තමාම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය ක්‍රියාත්මක වීමෙන් තමා පිට පැවරෙන තත්ත්වයෙන් මිදීමට උවමනා බරින් නිදහස් නොවේ.

අනුගමනය කළ නඩුව: කබ්‍රාල් එ. ඇල්බෙරත්න (57 න. නී. ව. 368)

අනුගමනය නොකළ නඩුව: සීමාසහිත විජේ බස් සමාගම එ. සොයිසා (50 න.නී.වා. 350)

සඳහන් කළ නඩුව: සෆිනා උම්මා එ. සිද්දික් (37 න.නී.වා. 25)

රැල්ප් ද සිල්වා මහතා, ඇපැල්කරු වෙනුවෙන්

කේ. කන්දසාමි මහතා, වගඋත්තරකරුවන් වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 29 වෙනි පිට බලනු.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා

පැමිණිලිකාර වගඋත්තරකරු විසින් මෙම නඩුව ගෙනෙන ලද්දේ පළමුවන විත්තිකාර ඇපැල්කරුට සහ දෙවන විත්තිකාර වගඋත්තරකරුට විරුඬව ය. එහි අරමුණ වූයේ පළමුවන විත්තිකරු සතු එක් ලොරියක් එය දෙවන විත්තිකරු අත තිබිය දී තමාගේ ලොරිය හා ගැටීමෙන් එහි ප්‍රතිඵලයක් වශයෙන් එයට සිදු වූ අලාභය අය කරගැනීම ය. පැමිණිලිකරු කියා සිටියේ මෙම ගැටීම සිදු වූයේ දෙවන විත්තිකරු පහත සඳහන් කරුණු නොකිරීමෙන් ඔහු නොසැළකිලි ලෙස කටයුතු කළ නිසාය යන්නයි. එම කරුණ නම්:

(ඒ) ඔහු තම ලොරිය නිසි සේ ඉදිරිපස නොබලමින් පැදවීම නිසා සහ/හෝ

(බී) ඔහුගේ වාහනය යථා පරිදි ආරක්ෂාව හෝ පරිස්සම නොමැතිව පැදවීම නිසා සහ/හෝ

(සී) තමාගේ ලොරිය තමාගේ වම්පසට නොකර පැදවීම හෝ පාරේ වම්පසට කිට්ටුව නොපැදවීම නිසා සහ/හෝ

(ඩී) පැමිණිලිකරුට අයිති ලොරිය දකිනු ලැබූ කල ඔහු තමාගේ වාහනය නතර කිරීම නොකළ නිසා ය.

මෙම පැමිණිල්ලට පිළිතුරු බඳින ලද විත්තිකරුවෝ ඉහත කී ලෙස චෝදනා මුබයෙන් කියා සිටි කරුණු නොපිළිගත්හ. එපමණක් නොව මෙම ගැටීම නොවැළක්විය හැකි හදිසියකින් සිදු වූ බව ඔහු වැඩිදුරටත් කියා සිටියේ ය. මේ සඳහා විසඳිය යුතු ප්‍රශ්න රාශියක් මතු කරන ලද නමුත් කරුණට ඉතා ම සම්බන්ධ ලෙස සැළකිය හැකි ප්‍රශ්න පහත දැක්වේ.

(1) දෙවන විත්තිකරු විසින් පදවන ලද ලොරියේ සුක්කානමින් ක්‍රියා කෙරෙන යාන්ත්‍රික කොටස බලාපොරොත්තු නො වූ ලෙස බිඳීයාම නිසා මෙම ගැටීම නොවැළැක්විය හැකි හදිසි අනතුරක් ලෙස සැළකිය හැකි ද?

(2) එසේ නම් පළමු වන විත්තිකරු ඒ සඳහා බැඳී සිටී ද?

(3) සුක්කානමේ මෙම යාන්ත්‍රිය මෙවලම් අක්‍රියාකාරීවීම පළමුවන විත්තිකාර සහ දෙවන විත්තිකාරයන්ගේ නොසැළකිල්ල නිසා සිදු වී ද?

උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා ඉහත සඳහන් ප්‍රශ්න අතුරෙන් පළමුවෙනි නිශේධයෙන් පිළිතුරුදීම නිසා එහි ප්‍රතිඵලයන් වශයෙන් දෙවන ප්‍රශ්නයට දිය යුතු පිළිතුර මෙහි දී මතු නො වී ය. ඔහු විසඳිය යුතු තුන්වන ප්‍රශ්නයට පිළිතුරු දී ඇත්තේ

''සුක්කානම් යාන්ත්‍රිය කොටස අබලන් වූයේ පළමු වන විත්තිකරුගේ නොසැළකිල්ල නිසා'' යි මෙසේ කී විනිශ්චයකාරතුමා පැමිණිලිකරුට රු: 10,587/05 ක අලාභය වශයෙන් අයකර ගැනීමට ද තීන්දු කළේ ය.

ඇපැල් පෙත්සමේ බොහෝ කරුණු සඳහන් කොට ඇති නමුදු උග්‍ර ලෙස විවාදයට භාජනය කළ එක ම කරුණ නම් මෙසේ හදිසි අනතුර සිදුවීමට හේතු වූ සුක්කානම් යාන්ත්‍රිය අංශයේ ඇති දුබලකම වැළැක්වීමට අවශ්‍ය ආරක්ෂක විධානය නොයෙදීම නිසා එය පළමුවන විත්තිකරුගේ නොසැළකිල්ලෙන් සිදු වූයේ යැයි තීන්දු කළ උගත් විනිශ්චයකාරතුමා කරුණු වරදවා ගෙන තීරණය කොට තිබේය යන්න ය. යාන්ත්‍රිය බලයකින් පැදවෙන වාහනයක යන්ත්‍ර-සූත්‍ර කොටස් වල ඇති අඩුලුහුඬු කම පිළිබඳ එම වාහනයේ අයිතිකරු කොතරම් දුරට බැඳී සිටී ද යන ප්‍රශ්නය වටේ දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් ගන්නා ලද තීරණය රැඳී පවතින ලෙස පෙනේ.

මෙම ප්‍රශ්නයට අදාල කරුණ ගැන සැලකිල්ලෙන් හා උනන්දුවෙන් විවාද නොකරන ලද නමුත් දෙවන විත්තිකරු විසින් පදවන ලද පළමුවන විත්තිකරුට අයිති ලොරිය පාරේ නිවැරැදි ලෙස පෙරමුණට ගමන් කළ පැමිණිලිකරුගේ ලොරිය වෙත වැරැදි පැත්තට හැර වී ඇවිත් ගැටුන බව නඩුවේ දී පෙන්වන ලදී. මේ නිසා දකුණු පැත්තේ ඉදිරිපසේ වූ මඩවැළැක්වීමේ ආවරණයේ ඇති ලාම්පුවලට සහ ලොරියේ ආරක්ෂක දණ්ඩට ද අලාභ සිදුවූ බව ද වැඩිදුරටත් පෙන්වන ලදී. දෙවන විත්තිකරු තමාගේ ලොරියේ සුක්කානමේ යාන්ත්‍රිය අංශය බිඳීයාමේ ප්‍රතිඵලයන් ලෙස මෙම හදිසි අනතුර සිදු වූ බව දෙවන විත්තිකරු පැමිණිලිකරුගේ ලොරිය පදවන්නාට නොපමාව දැනුම් දී තිබේ. මේ නිසා පැමිණිලිකරු වෙනුවෙන් දෙන ලද සාක්ෂිවලින් ''සිඬිය තමා ම කරුණු පහදා කථා කරයි'' (Res ipsa loquitur) යන නීතිගත ප්‍රඥප්තිය ක්‍රියාත්මක වීමේ හේතුවෙන් බැලු බැල්මට නොසැළකිල්ලක් පෙනෙන නිසා ඒ නයින් තමන් වෙත පැවැරී තිබෙන සාක්ෂි

භාරයෙන් මිදීමෙන් බේරීමේ වගකීම විත්තිකරුවන් පිට පැවරේ. මෙහි පළමුවන විත්තිකරු එහි කාර්‍ය්‍ය භාරය ඉටු නොකළේ ය යන මතයට උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා බැසගත් නිසා පැමිණිලිකරුට වාසියට තීන්දුව දුන්නේ ය.

මෙහි දී මතුවුන ප්‍රශ්නය මෙරට මෙන් ම ඉංග්‍රීසි නීතියෙහි දී අධිකරණයන්හි කල්පනාවට වරින් වර භාජනය වී ඇති නිසා මෙම නඩුව විභාග කිරීමේ දී නොයෙක් නඩු අප ඉදිරියේ උපුටා දක්වන ලදී. සෆිපිනා උම්මා එ. සිද්දික් (37 න.නී.වා. 25) යන නඩුවේ වේගයෙන් මහ පාරේ පදවන ලද බස් රියක් හදිසියේ පාරෙන් පැන ගෙයක පඩිය උඩ සිටගෙන උන් පිරිමි ළමයකු යට කළ බව ඔප්පු විය. එම නඩුවේ ඔප්පු වූ කරුණු අනුව විත්තියෙන් කරුණු පැහැදිලි වීමත් නොසිදුවූයේ නම් එය බැලූ බැල්මට නොසැළකිල්ලෙන් වූ සිඩියක් යැයි ඩෝල්ටන් විනිශ්චයකාරතුමා පිළිගන්නා ලදී. ස්කොට් එ. ලන්ඩන් නගරය සහ සාන්ත කැතරින් පෙදෙසේ ඩොක්ස් සමාගම (3 H and C 596) නමැති නඩුවේ අර්ල් නායක විනිශ්චයකාරතුමා විසින් කරන ලද පහත සඳහන් ප්‍රකාශය ද ඩෝල්ටන් විනිශ්චයකාරතුමා සඳහන් කළේ ය.

''නොසැළකිල්ල පිළිබඳ සෑහෙන ලෙස තර්කානුකූල සාක්ෂි තිබිය යුතුයි. නමුත් අනතුර සිදුවූ හේතුව ලෙස ගැනෙන ද්‍රව්‍ය විත්තිකරුගේ හෝ ඔහුගේ සේවකයන්ගේ පාලනය යටතේ පවතින්නක් බව පෙන් වූ කලක, සිදු වූ හදිසි අනතුර වාහනය පාලනය කරන්නන්ගේ මනා පරිස්සමක් තිබුනු කලක සිදුවිය නොහැකි හදිසි අනතුරක් නම් එම අනතුර සිදු වූ ආකාරය විත්තිකරුවන් විසින් තෝරා නොදෙන්නේ නම් එය ඔවුන්ගේ පරිස්සම නොමැති කමින් සිදු වූවක් ලෙස ගැනීමට යුක්තියුක්ත තර්කානුකූල සාක්ෂි එයින් සැපයේ.''

මෙම පාඨයෙහි දැක්වෙන ප්‍රඥප්තිය ඊට පසු විසඳන ලද නඩුවල දී අනුගමනය කරන ලදී.

වින්ඩ්හැම් විනිශ්චයකාරතුමා විසින් විජය බස් රථ සමාගම සහ සොයිසා අතර විවාද වී 50 න.නී.වා. 350 වැනි පිටුවේ වාර්තා වී ඇති නඩුවේ දී එයට තරමක් විරුඬව මතයක් පහළ කළේ ය. මෙම නඩුවේ බස් රියක ගමන් කළ මගියෙක් එම බස්රිය පාරෙන් ඉවත පැන ගොස් බෝක්කුවක හැපීමෙන් තමාට සිදු වූ තුවාල වලට අලාභය ඉල්ලමින් ඒවා සිදුවූයේ බස්රියැදුරුගේ නොසැළකිල්ල නිසා යැයි කියා සිටියේ ය. මෙහි දී සාක්ෂි දුන් බස් රියැදුරු තමා බෝක්කුවට අඩි 20 ක් පමණ ඈතින් සිටිය දී සුක්කානම් යාන්ත්‍රිය කොටස බිඳී යාමෙන් එම හදිසි අනතුර සිදුවී බස්රිය උඩපැත්ත පහළට පෙරලුන බව කීවේ ය. දිස්ත්‍රික් විනිශ්චයකාරවරයා මෙම සාක්ෂිය පිළිගත් නමුත් මෙහි කලින් සඳහන් කළ සෆිපිනා උම්මා එ. සිද්දික් යන නඩුවේ තීන්දුව අනුව යමින් ප්‍රකාශ කළේ මෙම යාන්ත්‍රිය අඩුලුහුඬුව කලින් දැකීමට නොහැකියැයි ද එය එසේ දැක පිළියම් නොකළ හැක්ක කැයි ද යන කරුණ විත්තිකාර සමාගම විසින් ඔප්පු කළ නිසා ඔවුන් අලාභය ගෙවිය යුතුයැයි තීරණය කරන ලදී. කෙසේ වෙතත් එහි අභියාචනයේ දී ඩයස් විනිශ්චයකාරතුමාගේ ද එකඟත්වය ඇතිව වින්ඩ්හැම් විනිශ්චයකාරතුමා තීරණය කළේ විත්තිකරුවන් විසින් කරුණු පැහැදිලි කිරීමක් නොකළ අවස්ථාවේ දී ''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' යන ප්‍රඥප්තිය ගැලපෙන නමුත් විත්තිකරුවන් විසින් තමා අත නොසැළකිල්ලක් නොමැති බව ඔප්පු කිරීමට තරම් දුරට යෑම අවශ්‍ය නැති බවත් හදිසි අනතුර පිළිබඳ කරුණු නොපහදන කලක තමාගේ නොසැළකිල්ලෙන් එය සිදුවිය හැකැයි සළකා ගැනීමට ඇති අවකාශය මග හැරී යන ලෙස යම්කිසි කරුණු පහදදීමක් කළොත් එය ප්‍රමාණවත් බව කියමින් තීන්දුව දුන්නේ ය. එතුමාගේ මෙම තීන්දුවට එම නඩු තීන්දුවේ සඳහන් කොට ඇති දකුණු අප්‍රිකානු නඩු දෙකකින් පිළිසරණ ලැබී තිබේ.

ඒ කෙසේ වෙතත් සෆිපිනා උම්මා එ. සිද්දික් නමැති නඩුව අනුව යමින් කේ. ඩී. ද සිල්වා විනිශ්චයකාරතුමා 57 න.නී.වා. 368 වන පිටේ වාර්තා කොට ඇති කබ්රාල් එ. ඇල්බේරත්න නමැති නඩුවෙහි සිඩිය තමා ම කරුණු පහදා දෙයි'' යන ප්‍රඥප්තිය ගැලපෙන නඩුවක දී හදිසි අනතුර පිළිබඳ විත්තිකරු පිට පැවරෙන භාරය හදිසි අනතුර පිළිබඳ යුක්ති යුක්ත කරුණු පහදා දීමක් පමණක් නොව එම අනතුර සිදුවීමට හේතු වූ විශේෂ සිඩියෙන් තමා පිට නොසැළකීමක් නො පැවරෙන බව පෙන්නා දීම ද වේය යන නිගමනය කරමින් ඉහත සඳහන් නඩු තීන්දුව අනුගමනය නොකෙළේ ය.

සෆිපිනා උම්මා නඩුවෙහි කරුණු ගැන සළකා බලන කල ඒවා දැනට අප ඉදිරිපිට ඇති නඩුවට යම්කිසි සමානකමක් තිබේ. එම නඩුවෙහි ද කරුණු දැක්වූයේ සුක්කානම් යාන්ත්‍රිය අංශය බිඳීයාම නිසා අනතුර සිදු වූ බව ය. එහි දී ඩෝල්ටන් විනිශ්චයකාරතුමා විත්තිකරුවකු විසින් එබඳු ප්‍රකාශයක් කිරීමෙන් ම තමා අතේ තිබිය යුතු ආරක්ෂාවෙහි අඩු ලුහුඬුවක් නොපෙනේය යන්න ඔප්පු කිරීමේ කාර්‍ය්‍ය භාරයෙන් ඔහු නිදහස් නොවේය යන නිගමනයට බැස ගත්තේ ය. දැනට අප ඉදිරිපිට ඇති මෙම නඩුවෙහි දී විත්තිකරු විසින් ගෙන හැර දැක් වූ සියලු ම සාක්ෂි ඉදිරිපත් වූයේ සීමාසහිත රෝලන්ඩ්ස් සමාගමේ වැඩකටයුතු පිළිබඳ

කළමනාකාර මහතාගෙනි. ඔහු කීයේ තමාගේ අත්දැකීම් අනුව සමහර විට සුක්කානම් යාන්ත්‍රිය කොටස හිරවීම අනාවරණය නොවුනු අඩුපාඩුවක් නිසා සිදුවිය හැකි බවත් එසේ සිදු වූ විට වාහනය නියම මාගීයෙහි යන ලෙස හසුරුවා ගැනීමට නොහැකි බවත් කියා සිටියේ ය. අධිකරණයෙන් අසන ලද ප්‍රශ්නයකට පිළිතුරු දුන් ඔහු කීයේ එසේ සුක්කානම් යාන්ත්‍රිය අංශය හිරවූයේ මක්නිසා ද යන්න සමාගම විසින් සොයා ගැනීමට සමාගම විසින් යාන්ත්‍රික පරීක්ෂණයක් නොකළ බව ය. මා සිතන හැටියට වෙන කිසිවක් නොමැතිව ම මෙම සාක්ෂිය පමණක් සළකන විට මෙම වාහනය යථා තත්ත්වයක තිබේදැයි බැලීමට තමා විසින් ක්‍රියාත්මක කළ යුතු තරමේ පරීක්ෂාවක් හෝ ඇත්ත වශයෙන් ම කිනම් පරීක්ෂාවක් හෝ කළ යුතු යැයි පැවරෙන කාර්‍ය්‍ය භාරයෙන් පළමුවන විත්තිකරු මිදී නැති ලෙස පෙනීයේ. විත්තිකරුවකුට නියම වශයෙන් යම්කිසි හදිසි අනතුරක් වූ කල එය යාන්ත්‍රිය දෝෂයකින් සිදුවූවක් යැයි පමණක් පෙන්වීම ප්‍රමාණවත් නම් වාහනයක පාලන භාරය දරණ කෙනෙකු විසින් එහි සිදුවිය හැකි යාන්ත්‍රිය අඩු ලුහුඬුකම් පිළිබඳව ඔහු විසින් නියම පරෙස්සමකින් ක්‍රියා කළ යුතුය යන්නෙන් ඔහු පිට පැවරී ඇති බැඳීම ක්‍රියාත්මක කිරීමට කොයි ලෙසකින්වත් ඉඩකඩ ඇති බව සිතාගත හැකි ය. මෙම ප්‍රතිපත්තිය මෙතෙක් කල් පැවතී ආයේ එහි ඇති විශිෂ්ට යුක්ති සහගතකම හේතු කොට ගෙන ය. එසේ නොවුනි නම් දැනුවත්ව ම යාන්ත්‍රිය ඌනතා ඇති වාහනයක් මහ පාරෙහි පරිහරණය කරන බව දැනගත් විටක මිස නඩුවකින් පැමිණිලිකරුට ජයගත නො හැක. එපමණක් නොව වාහනයක් භාවිතා කරන කිසි ම පුද්ගලයකු කෙරෙහි තමාගේ වාහනයෙහි යාන්ත්‍රිය ඌනතා පවතීදැයි වරින්වර පරීක්ෂා කිරීමට ඇති යුතුකම නිසා ඔහු විසින් වරින් වර කරන පරීක්ෂා කර බැලීම ද නොකෙරෙනු ඇත. එම නිසා ''සිඩිය තමාම කරුණු පැහැදිළි කරයි'' යන ප්‍රඥප්තියට ගැළපෙන නඩුවක දී විත්තිකරුවකු විසින් තමාගේ වාහනයට වරින් වර කළ යුතු පරීක්ෂණ කළ බවත් එයට කළ යුතු ප්‍රතිකර්ම සඳහා අවධානය යෙදූ බවත් යාන්ත්‍රිය අයෝග්‍යතා මග හැරීමට ගතයුතු තම වසඟයේ ඇති සෑම පියවරක් ම ගත් බවත් සම්බන්ධයෙන් උසාවිය තෘප්තියට පත් කිරීම ඔහු පිට ඇති බැඳීමකැයි මම සිතමි. මාගේ මතය අනුව මෙබඳු සාක්ෂි නොමැති අවස්ථාවක ඔහු තමා පිට පැවරී ඇති කාර්‍ය්‍ය භාරයෙන් නොමිදේ.

දකුණු අප්‍රිකානු රටවල පිටුවහල ලැබූ වින්ඩ්හැම් විනිශ්චයකාරතුමාගේ මතයෙන් යම්කිසි විත්තිකරුවකුට ''සිඩිය තමා ම කරුණු පැහැදිලි කරයි'' (Res ipsa loquitur) යන ප්‍රඥප්තිය බිඳ දැමීමට උවමනා අවස්ථාවක හදිසි අනතුරට ඇති වූ නියම හේතුව හෝ සිතාගත හැකි හේතුව හෝ ලෙසට යාන්ත්‍රිය ඌනතාවයක් ඔහු විසින් පෙන්වීමෙන් පසු පැමිණිලිකරුවා යළිත් කලින් තිබුනු තත්වයට ම — එනම් ඔහු විසින් විත්තිකරුගේ නියම නොසැළකිල්ල පෙන්විය යුතුය යන තත්වයට ම වැටෙන අයුරක් පෙනී යයි. මෙය මට එකඟ වීමට අමාරු මතයක් බව ගෞරව පෙරටුව කියයුතුය.

ප්‍රශ්නය විග්‍රහකර බලන්නකුට යම්කිසි පුද්ගලයකු විසින් යාන්ත්‍රිය ක්‍රමයකින් පැදවෙන වාහනයක් මහ පාරේ ගමනාගමනයට යොදවන කල එම මාගීය යෑම් ඊම්වලට භාවිතා කරන මහජනයාට අන්තරායකාරී වන තරමේ යාන්ත්‍රිය ඌනතාවයන් එම වාහනයෙහි තිබේදැයි නිගමනය කිරීමට ප්‍රමාණවත් වන ආරක්ෂා සහිත බවකින් ඔහු විසින් ක්‍රියා කළ යුතුවේය යන ප්‍රතිපත්තිය මූලික පදනම හැටියට සළකා එතැන සිට එම විග්‍රහය ඇරඹිය නො හැකි දෙයක් හැටියට පෙනේ. මහ පාර ගමනාගමනය පිණිස භාවිතා කරන අනිත් අයවලුන්ගේ පක්ෂයෙන් සළකා බලන කල ඔවුන්ට ඉතා ම වැදගත් හැටියට පෙනෙන සුක්කානම් ගියරය (Steering) සහ රිය නැවැත්වීමේ තිරිංග මෙවලම් කොටස මෙවැනි ඌනතාවයන් අතරට ගැනෙන දේවල් ය. මේ අංශය ගැන ප්‍රමාණවත් ප්‍රවේශමක් යොදා ඇද්ද යන්න වාහනය හිමිකරු සතු විශේෂ දැනීමක් විනා හදිසි අනතුරට ගොදුරු වූ තැනැත්තා දත් දෙයක් නොවේ. එබැවින් මෙවැනි කරුණක දී සෑහෙන පරෙස්සමකින් ක්‍රියා කොට නොමැති බව ඔප්පු වන සාක්ෂි පැමිණිලිකරුගෙන් බලාපොරොත්තු වීම යුක්ති සහගත බැවින් තොර ලෙස පෙනෙන සේ ය. මෙවැනි අවස්ථාවක ඇති එක ම යුක්තියුක්ත තත්ත්වය අලාභ හානිය සිදු කළ වාහනය අයිතිකරු විසින් එහි යාන්ත්‍රිය අනූනතාවය පිළිබඳව ඔහු විසින් සෑහෙන ප්‍රමාණයක ආරක්ෂා විධාන යොදන ලද පෙන්වීම මැනවි යයි සිතා ගැනීම ය. එසේ නිගමනයේ හැටියට ඔහු විසින් එබඳු සාක්ෂි ඉදිරිපත් කරන තුරු ඔහු පිට පැවරී ඇති ''සිඩිය තමාම කරුණු පැහැදිළි කරයි'' (Res ipsa loquitur) යන මතය බිඳ හෙළීමේ කාර්‍ය්‍ය භාරයෙන් ඔහු මිදී නොයේ. එබඳු ක්‍රියා මාගීයක් විත්තිකරුවකු විසින් අනුගමනය කිරීමට තෝරා නොගන්නා ලද කලක ඔහු එසේ නො කරන ලද්දේ එබඳු ආරක්ෂා විධානයක් ඔහු විසින් ක්‍රියාත්මක කළ බවට අවශ්‍ය සාක්ෂි ඔහුට සැපයීමට බැරි නිසා යයි පිළිගැනීම යුක්ති යුක්ත ය.

මෙම නඩු තීන්දුවේ මුල් කොටසේ සඳහන් කළ ස්කොට් එ. ලන්ඩන් සහ සාන්ත කැතරින් පෙදෙසේ ඩොක් සමාගමේ නඩුවේ දී අර්ල් නායක විනිශ්චයකාරතුමා විසින් කරන ලද ප්‍රකාශනය හා සම්පූර්ණ එකඟත්වයක් ඇති කේ. ඩී. ද සිල්වා විනිශ්චයකාරතුමා ප්‍රකාශ කළ මත වලට එකඟ වීමට බව බලකෙරෙන්නේ මේ හේතු සාධක නිසා ය. මෙම නියාමයෙන් බලන කල උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා බැසගෙන ඇති අවසාන නිගමනය නිවැරදිය යන්න මම පිළිගනිමි.

නඩු ගාස්තුවට ද යටත් කර මෙම අභියාචනය නිෂ්ප්‍රභා කෙරේ.

සිව සුබ්‍රමනියම් විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

ඇපැල නිෂ්ප්‍රභා විය.

සමරවික්‍රම සහ තෙන්නකෝන් විනිශ්චයකාරවරු ඉදිරිපිට දී ය

ලිඩිසා එ. කිරිඋක්කුවා නොහොත් සයිමන්*

සු. උ. අංකය: 398/65 (එෆ්ජ්). දි. උ. කෑගල්ල අංකය: 1906/T

විවාද කළ දින: 1967 සැප්තැම්බර් 5 සහ 6
තීන්දුව දුන් දිනය: 1967 ඔක්තෝබර් 1

උඩරට නීතිය — අත්කරගන්නා ලද දේපලවල උරුමය අයිතිවීම — අවජාතක දරුවන්ගේ දේපල උරුමය — අනෙක් උරුමක්කාරයින්ට විරුඬව වැන්දඹුවන්ට ඇති අයිතිවාසිකම් — උඩරට නීතිය ප්‍රකාශයට පත්කිරීමේ සහ සංශෝධනය කිරීමේ පනත—අංක 39/1938 එකොලොස් වැනි වගන්තිය.

අත්කර ගන්නා ලද දේපල බුක්තිවිඳිමින් සිටි අවජාතක දරුවකු වූ සේදරා දරුවන් නොමැතිව නමුත් තම වැන්දඹු භාර්‍යාව පමණක් ඉතිරිකොට 1955 දී තම දේපල කිසිවකුට අන්තිම කැමති පත්‍රයකින් අයිති නොකොට මිය ගියේ ය. වැන්දඹුව විසින් දේපල පිළිබඳව සම්පූර්ණ අයිතිය ඉල්ලා සිටි නමුදු සේදරාගේ මව්ගේ නීත්‍යානුකූල දරුවන් යැයි කියා ගන්නා අනෙක් උරුමක්කාරයින් විසින් එයට විරුඬත්ත්වය පල කරන ලදී. මෙම නඩුවේ පක්ෂ කෙරෙහි බලපවත්වනුයේ උඩරට නීතියයි.

තීන්දුව: (i) ඉහත සඳහන් කරුණු අනුව දේපල උරුමවීම කෙරෙහි බලපවත් වන්නේ 1938 අවුරුද්දේ උඩරට නීතිය ප්‍රකාශ කිරීමේ හා සංශෝධනය කිරීමේ පනතේ එකොලොස්වැනි වගන්තියයි.

(ii) සාමාන්‍ය උඩරට නීතිය යටතේ තම සැමියාගේ දේපල සම්පූර්ණයෙන් භුක්තිවිඳීමට තිබූ අයිතිය දැනට ඉහතකි පනතේ 11(1)(ඩී) වැනි වගන්තිය අනුව තවත් උරුමක්කාරයකු නොමැති අවස්ථාවලට පමණක් සීමා වී ඇත.

(iii) "තවත් උරුමක්කාරයකු නොමැති" යන වචනවල තේරුම නම් භාර්‍යාවට දේපලවල සම්පූර්ණ උරුමය ලැබිය හැක්කේ තවත් කොතරම් ඇත් වුවත් උරුමක්කාරයකු නොමැති අවස්ථාවක පමණක් බව ය.

(iv) ඉහ කී 11(1)(ඩී) ඡේදය අනුව අවජාතක පුතකුගේ උරුමක්කාරයා ඔහුගේ මව ය. ඇය මියගොස් නම් ඇගේ නීත්‍යානුකූල දරුවන් ඇගේ මාර්ගයෙන් උරුමක්කාරයන් බවට පත්වේ.

අනුගමනය කරන ලද නඩු තීන්දු: බණ්ඩා එ. බණ්ඩා නවනිති සංග්‍රහය 19 වෙනි කාණ්ඩය 126 පිටුව.
කුමා එ. බණ්ඩා නවනිති සංග්‍රහය 21 වෙනි කාණ්ඩය 294 පිටුව.

අධිනීතිඥවරු—රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා සමග, එල්. සී. සෙනෙවිරත්න සහ බී. ජේ. ප්‍රනාන්දු ඇපැල්කරු වෙනුවෙන්.
අධිනීතිඥ සී. ආර්. ගුණරත්න මහතා, වගඋත්තරකරුවන් වෙනුවෙන්.

තෙන්නකෝන් විනිශ්චයකාරතුමා.

මෙම නඩුව 1955 දී මියගිය සේදරා නමැත්තාගේ අත්කරගත් දේපල සම්බන්ධයෙන් ඇතිවූවකි. එය කෑගල්ල දිස්ත්‍රික් උසාවියේ 1906/ටී දරණ තෙස්තමේන්තු නඩුව අනුව පාලනය වේ.

සේදරා සිරි නම් ස්ත්‍රියකගේ අවජාතක පුත්‍රයාය. ඈ ඔහු ලැබුවේ අප්පුවා සමග ජීවත්වීම නිසා ය. සිරි ඩිංගිරියා නම් මිනිසකු සමග විවාහ වී හෝ අනියම් බිරිය ලෙස හෝ ජීවත් වූවාය. මෙහි වගඋත්තරකරුවන් මෙම විවාහයේ දරුවන් ය. සිරි 1942 දී මියගියා ය.

සේදරා දරුවන් නොමැතිව මියගිය හෙයින් ඔහුගේ දේපල ගැන එක අතකින් ඇපැල්කරු වූ ඔහුගේ වැන්දඹුව වන අනෙක් අතින්, වගඋත්තරකරුවන් ද අයිතිවාසිකම් දැක්වූහ. වැන්දඹුවට ඇත්තේ ජීවිත උරුමය පමණක්යැයි වග උත්තර කරුවෝ කියා සිටිති.

උගත් දිස්ත්‍රික් නඩුකාරතුමා වගඋත්තරකරුවන් සිරිගේ සහ ඩිංගිරියාගේ දරුවන් ලෙස පිළිගෙන, උඩරට නීතිය යටතේ අවජාතක පුතකු වැන්දඹුවක් හා තම මව්ගේ නීත්‍යානුකූල දරුවන් නැදෑයන් වශයෙන් පමණක් ජීවත්ව සිටිද්දී මියගිය විට උඩරට නීතිය ප්‍රකාශ කිරීමේ හා සංශෝධනය කිරීමේ පනතෙහි ඔහුගේ දේපල උරුමය සම්බන්ධයෙන් කරුණු සඳහන් නොවේ යයි පැවසීය. එම නිසා සාමාන්‍ය උඩරට නීතිය යටතේ එම ප්‍රශ්නය විසඳිය යුතුයයි ඔහුගේ මතය විය. ඒ අනුව එතුමා වැන්දඹුවට ඇත්තේ ජීවිත උරුමය පමණක් බවත් වගඋත්තරකරුවන් සිරිගේ නීත්‍යානුකූල දරුවන් නිසා සම්පූර්ණ උරුමක්කාරයන් බවත් තීරණය කළේ ය.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා මෙ ප්‍රශ්නය සාමාන්‍ය උඩරට නීතිය අනුව විසඳිය යුතුයයි උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා දක්වන මතය පිළිගත අතර මෙ පිළිබඳ සාමාන්‍ය උඩරට නීතිය තිත්තවෙල සංගි එ. තිත්තවෙල මොහොට්ටා (6 න.නී.වා. 201 පිට) සහ පුංචිරාල එ. පුංචිමැණිකා (2 ඇස්. සී. සී. වාර්තා 44 පිට) යන නඩු දෙකෙහි සඳහන් වී ඇති බැව් පැවසීය. මෙම නඩු තීන්දු අනුව, කෙනෙක් භාර්‍යාව ජීවත්ව සිටිය දී මියගිය හොත් ඔහුගේ දෙමව්පියන් හැරුණු විට අනෙක් නැදෑ-

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 52 වෙනි පිට බලනු.

යන්ට එම දේපල ගැන කිසි ම අයිතියක් නැති බවත්, භාර්‍යාවට සම්පූර්ණ ලත් හිමි අයිතිවාසිකම් ලැබෙන බවත් ජයවර්ධන මහතා පැවසී ය. ජයවර්ධන මහතාගේ මෙම සැලකිරීම අනුව වගඋත්තරකරුවන්, සිරිගේ නීත්‍යානුකූල හෝ නො වූ දරුවන් වුව ද දේපල පිළිබඳ කිසි ම අයිතිවාසිකමක් ඔවුන්ට නැත.

නව නීති සංග්‍රහයේ 6 වෙනි කාණ්ඩයේ සඳහන් නඩු තීන්දුව සාමාන්‍ය උඩරට නීතිය අනුව සැසඳෙන්නක් නොවන බව ගුණරත්න මහතා සැලකළේ ය. ඔහුගේ මතය හේලිගේ මතයෙන් තහවුරු වේ. (සිංහලයන්ගේ නීති සහ සිරිත් (1923) 365–366 පිටු) උඩරට නීතිය ප්‍රකාශ කිරීමේ සහ සංශෝධනය කිරීමේ පනත මේ සඳහා යෙදවිය. නොහැකි යයි උගත් දිස්ත්‍රික් විනිශ්චය කාරතුමා ගත් තීරණය සාවද්‍යයයි ගුණරත්න මහතා පැවසීය. මෙම පනතෙහි 11 වෙනි වගන්තියෙහි 1938 න් පසුව භාර්‍යාව ජීවත්ව සිටිය දී මියගිය තැනැත්තකුගේ දේපල උරුමය පිළිබඳව සම්පූර්ණ කරුණු සඳහන් වේයයි ඔහු සැලකළේ ය. මෙම වගන්තිය අනුව තම සැමියාගේ අත්කරගත් දේපලවල සම්පූර්ණ අයිතිය ලැබෙන්නේ වෙනත් උරුමක්කාරයින් නොසිටියහොත් පමණකි. එකොලොස්වැනි වගන්තියෙන් දක්වා ඇත්තේ වැන්දඹු භාර්‍යාවකට ස්වාමියාගේ දේපල පිළිබඳ අයිතිය ගැන බව ගුණරත්න මහතා දක්වා ඇති මතය සමඟ මම එකඟ වෙමි. 11(1) (ඩී) වැනි වගන්තියෙහි මෙසේ සඳහන් නොවේ.

> ''මියගිය තැනැත්තාගෙන් පසුව කිසි ම උරුමක්කාරයකු නොසිටියහොත්, ඔහුගේ වැන්දඹු භාර්‍යාව ඔහුගේ අත්කරගත් හා පරවේනි යන සෑම දේපලකට ම උරුමක්කාරිය වන්නී ය.''

මේ නිසා එක්තරා කිට්ටු ප්‍රමාණයක නැදෑ පිරිසක් පමණක් සිටියවිටක දී භාර්‍යාවට සැමියාගේ දේපල අයිතිවීම පිළිබඳ සාමාන්‍ය උඩරට නීතිය දැන් බලනොපවත්වයි. වෙනත් උරුමක්කාරයින් නොසිටීම යන්නෙහි තේරුම භාර්‍යාව අයින් කළ විට කොතරම් දුර වුවත් තවත් උරුමක්කාරයකු නොසිටිය යුතු බව ය. එවැනි උරුමක්කාරයකු සිටියහොත් භාර්‍යාවට ලැබෙන්නේ ජීවිත උරුමය පමණකි. භාර්‍යාවට සම්පූර්ණ උරුමය ලැබෙන්නේ එවැනි උරුමක්කාරයකු නොසිටියහොත් පමණකි.

මෙ නිසා විසඳීමට ඇත්තේ වගඋත්තරකරුවන් මියගිය සේදරාගේ උරුමක්කාරයින් ද? යන ප්‍රශ්නයයි. සේදරා ඔහුගේ මව්ගේ අවජාතක පුත්‍රයා ය. උඩරට නීතිය අනුව අවජාතක පුත්‍රයකුගේ දේපලවලට හිමිකමක් පියාට නැති අතර මවට එවැනි අයිතියක් නැත්තේ යයි කීමට තරම් සාධක නොමැත. මෙහි දුෂ්කරත්වය රඳා ඇත්තේ සිරි සේදරාට ප්‍රථමයෙන් මිය යාම නිසා ය. මේ නිසා සිරිගේ අවජාත පුත්‍රයාගේ උරුමක්කාරයින් හැටියට සිරිගේ ම නීත්‍යානුකූල දරුවන් පිළිගත හැකි ද?

මෙම ප්‍රශ්නයට උත්තර සෙවීම සඳහා උඩරට නීතිය පිළිබඳ ගත්කරුවන්ගේ පොත් කියවීමට සිදුවන නමුදු මෙම උසාවිය මේ පිළිබඳ නඩු තීන්දු දෙකක් දී ඇති හෙයින් එම පොත් කියැවීමෙන් වැළකිය හැකි වී තිබේ.

නව නීති සංග්‍රහයේ 19 වෙනි කාණ්ඩයේ 126 වෙනි පිටුවේ සඳහන් බණ්ඩා එ. බණ්ඩා යන නඩුවේ විස්තර මෙසේ ය. විත්තිකරු තමාගේ දේපල වලින් කොටසක් තම අවජාතක පුත්‍රයා වූ කිරිමුදියන්සේට ලියා දුන්නේ ය. කිරිමුදියන්සේ දරුවන් නොමැතිව මළේ ය. කිරිමුදියන්සේගේ මව් ඔහුට ප්‍රථමයෙන් මිය ගියා ය. එම බුදලය පිළිබඳව අද්මිනිස්ත්‍රාත්කාර බලය ලබාගත් පසුව කිරිමුදියන්සේගේ මවගේ හා වෙනත් සැමියකුගේ දුවරුන් විසින් එය පැමිණිලිකරුට විකුණන ලදී. පැමිණිලිකරුවන්ට එහි සම්පූර්ණ අයිතිය ඇති බව පිළිගත් සම්පායෝ විනිශ්චයකාරතුමා මෙසේ ද පැවසී ය. ''කිරිමුදියන්සේගේ මව ජීවත්ව සිටියා නම් ඔහුගේ උරුමක්කාරයා වනුයේ ඇ ය. ඇය මියගිය විට ඇගේ දරුවන් (එනම්, මියගිය අයගේ සහෝදරියන්) ඔහුගේ උරුමක්කාරියන් වනු ඇත.''

මෙවැනි ම ප්‍රශ්නයක් කුමා එ. බණ්ඩා යන නඩුවේ දී මතුවිය (21 න.නී.ස. 294 පිට). කිරිබණ්ඩා නමැත්තෙක් දේපල නොලියා 1919 දී මියගියේ ය. ඔහුගේ දෙමව්පියන් නඩුවේ විත්තිකරුවන් විය. මෙයින් මව් වූ කිරිමැණිකා 1886 දී විවාහ වූ නමුදු 1870 නීතිය යටතේ විවාහය ලියාපදිංචිකොට නොතිබින. කිරිමැණිකා කිරිබණ්ඩාට කලින් මියගියා ය. කිරිබණ්ඩාගේ ළඟ ම නැයා වූයේ ඔහුගේ මවගේ වෙනත් විවාහයක දරුවකු වූ රංහාමි ය. මෙම නඩුවේ පැමිණිලිකාරිය වූයේ මියගිය රංහාමිගේ දුවණියයි. ඇ කිරිබණ්ඩාගේ එක ම උරුමක්කාරිය හැටියට දේපලවල උරුමය ඉල්ලා සිටියා ය. විත්තිකරු වූ පියා කියා සිටියේ තමාගේ අවජාතක පුත්‍රයා වූ කිරිබණ්ඩාගේ උරුමක්කාරයා තමා බව ය. විත්තිකරුට අවජාත පුත්‍රයාගේ පියා හැටියට ඔහුගේ උරුමක්කාරයා විය නොහැකි බවත් නමුත් පැමිණිලිකාරිය මියගිය තැනැත්තාගේ මව්ගේ මාර්ගයෙන් එම දේපලවලට උරුමක්කාරිය වන බවත් පූර්ණ අධිකරණය මගින් තීරණය කරන ලදී. මෙම තීරණය යෙදීමෙන් සිරි හා ඩිංගිරියාගේ දරුවන් සේදරාගේ උරුමක්කාරයින් හැටියට මම තීරණය කරමි (ඔවුන්ගේ නීත්‍යානුකූල දරුකම පිළිබඳව මින් ඉදිරියට ඉදිරිපත් කරන කරුණු ද සැලකීමෙන් පසුව) මේ අනුව ඔවුන්ට සේදරාගේ දේපලවල උරුමය පෙත්සම්කාරියගේ ජීවිත භුක්තියට යටත්ව අයිති වේ.

වගඋත්තරකරුවන්ගේ නීත්‍යානුකූල දරුකම පිළිබඳව හොඳ ම සාක්ෂ්‍ය ඉදිරිපත් කිරීමේ ප්‍රතිපත්තිය උඩ ඔවුන්ගේ උප්පැන්න සහතික ඉදිරිපත් කිරීම (සිරි සහ ඩිංගිරියා දෙමව්පියන් බවත් කසාද බැඳ ඇති බවත් ඒවායේ සඳහන් වේ.) සාක්කි පනතේ 35 වෙනි වගන්තිය අනුව සිරිගේ සහ ඩිංගිරියාගේ විවාහය ඔප්පු කිරීම සඳහා අනුකූල වන්නක් විය හැක. නමුත් මෙම නඩුවෙහි දී එවැනි සාක්කි බැහැර කළ යුතුව ඇත. එසේ කළ යුත්තේ 1870 වේ උඩරට විවාහ පනතේ

8 වෙනි හා 36 වෙනි වගන්තිවල බලපෑම් නිසා යැයි කරුණු ඉදිරිපත් කර ඇත. එම වගන්තිවල කරුණු සඳහන් වී ඇත්තේ මෙසේ ය.

8 වෙනි වගන්තිය 1870 වෙන් පසුව සිදුවන කිසි ම විවාහයක් මෙම පනතෙහි දක්වා ඇති ආකාරයට ලියා පදිංචි නොකළහොත් වලංගු නොවේ.

36 වෙනි වගන්තිය එවැනි විවාහයක් කළ බවට හොඳ ම සාක්ෂිය නම් මෙම පනත යටතේ තබාගත යුතු පොතක විවාහය කළ බව සඳහන් වී තිබීමයි.

36 වෙනි වගන්තියෙහි සඳහන් ''හොඳ ම සාක්ෂිය'' යන වචන ඉංග්‍රීසි නීතියෙහි යෙදෙන ප්‍රකාරයෙන් ම යෙදිය යුතු බැව් තීරණය වී ඇත. මේ නිසා හොඳ ම සාක්කි ඊට වඩා පහත් අනෙක් සෑම සාක්කියක් ම බැහැර කරයි. (මේ සඳහා මාම්පිටිය එ. වැගොඩපොල 24 න.නී.ස. 130 පිට සහ සෙනෙවිරත්න එ. හලන්ගොඩ 22 න.නී.ස. 472 පිට බලන්න.)

පහළ උසාවියේ දී මෙම විවාහය සිරිත් අනුව සිදු වූවක් ද, 1870 උඩරට කසාද නීතිය අනුව සිදුවූවක් ද යන ප්‍රශ්නය මතු නො වූ බව එම නඩුව විභාග වූ අන්දම දෙස බලන විට පෙනේ. හබප්‍රශ්න මතු කිරීමක් පහළ උසාවියේ සිදුවී නැත. අධිනීතිඥතුමාගේ සැලකිරීම හා උගත් දිස්ත්‍රික් නඩුකාරතුමාගේ නඩු තීන්දුව දෙස බලන විට ද 1870 උඩරට කසාද නීතිය අනුව විවාහවිය යුතු බව ත්, කසාද සහතිකයක් ඉදිරිපත් කළ යුතු බවත්, යන ප්‍රශ්න නඩු විසඳීමෙහි දී මතුවූ බවක් නොපෙනේ. උඩරට කසාද නීතිය මේ කාලයෙහි දී බල පැවැත්වූව ද සාමාන්‍ය කසාද නීතිය අනුව ද ඔවුන්ට විවාහවීමට බාධාවක් නොතිබුන බව ජයවර්ධන මහතා ම පිළිගත්තේ ය. එම නීතිය අනුව හොඳ ම සාක්කිය ඉදිරිපත් කිරීමේ නීතියක් නොතිබින. මේ කරුණු අනුව මෙවැනි ප්‍රශ්ණ-යක් පළමුවන වරට ඇපැල් උසාවියේ දී මතුකිරීමට ඉඩ දීම වගඋත්තරකරුවන් වෙනුවෙන් සාධාරන නොවේ යයි සිතමි. මේ නිසා වගඋත්තරකරුවන් සිරිගේ සහ ඩිංගිරියාගේ නීත්‍යානුකූල දරුවන් හැටියට උගත් දිස්-ත්‍රික් විනිශ්චයකාරතුමා ගත් තීරණයට මම එකඟ වෙමි. මේ නිසා ඇපැල අසාර්ථක වන අතර, ගාස්තුවට ද යටත් වී නිෂ්ප්‍රභා වන්නේ ය.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැල නිෂ්ප්‍රභා විය.

(පරිවර්තනය අධිනීතිඥ ජේ. එච්. ආරියරත්න විසිනි)

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු සහ අබේසුන්දර විනිශ්චයකාරතුමන් ඉදිරිපිට දී ය

පෙරේරා, එ. තිසේරා සහ තවත් අය*

ශ්‍රෙ. අංක 135/64 (අතුරු ඇපැල) සහ ශ්‍රෙ. අංක 143/64 (අතුරු ඇපැල) — පානදුරේ දිස්ත්‍රික් උසාවිය අංක 8

විවාද කොට තීන්දු කළ දිනය: 16 නොවැම්බර්, 1965

උකස්කරයක් එය දෙවන විත්තිකරුට පවරා තිබීම — උකස් තැබූ තැනැත්තා විසින් ණය සහන මණ්ඩලයට අදිරිපත් කළ ඉල්ලීමක් — බේරුමකට බැස ගැනීම — මුලු මුදල සහ පොලිය නියමිත දිනයකට පෙර ගෙවිය යුතු බව එහි එක් කොන්දේසියක් වීම — එසේ කිරීම පැහැර හැරියොත් ඉල්ලීම ව්‍යර්ථ වූ ලෙස සලකා ගත යුතු වීම — ගෙවීම පැහැර හැරීම — උකස්කරු ගේ අයිතිවාසිකම් ඇස්කීසි මගින් විකිණීම සහ ඒවා පැමිණිලිකරු විසින් මිලට ගැනීම — පැමිණිලිකරු විසින් දමන ලද බෙදුම් නඩුවක් — එය නිෂ්ප්‍රභා වීම — ණය සහන ආඥා පනතේ 40(2) වන ඡේදය.

'ඇල්' සහ 'ඇස්' නමැත්තන් විසින් වර්ෂ 1948 දී යම් ඉඩමක තමන්ට තිබුණු අයිතිවාසිකම් උකස් තබා ඒවා වර්ෂ 1959 දී දෙවන විත්තිකරුට ඔවුන් විසින් පවරන ලදහ. 'ඇල්' සහ 'ඇස්' නමැත්තන්ට තිබුනු මෙම අයිතිවාසිකම් පිස්කල් නිලධාරියාගේ පැවරීමකින් 7/9/1959 දරණ දින මිල දී ගත් පැමිණිලිකරු මෙම බෙදුම් නඩුව දැම්මේ ය.

යථෝක්ත උකස්කරය වර්ෂ 1952 ණය සහන මණ්ඩලයට යවන ලද ඉල්ලීමකට පාත්‍ර වූ දෙයක් ව තිබුණි. පාර්ශ්වකරුවෝ එය බේරුමකට පත්කර ගැනීමට කැමැති වූහ. එහි එක් කොන්දේසියක් වූයේ මුල් මුදල සහ පොලිය සම්පූර්ණයෙන් ම 31/10/1953 වන දිනට පෙර ගෙවිය යුතු බව සහ එය පැහැර හැරියොත් ණය සහන මණ්ඩලයට කළ ඉල්ලීම වර්ථ වූ ලෙස සැළකිය යුතු බවත් ය. ඇත්ත වශයෙන් ම මේ අනුව කිසි ම ගෙවීමක් සිදු වී නැත.

පෙනී යන හැටියට උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා මෙම නඩුව නිෂ්ප්‍රභා කරන ලද්දේ ඔහු විසින් ණය සහන ආඥා පනතේ 40(2) වැනි ඡේදය වරදවා තේරුම් ගෙන ඇති බැවිනි.

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*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 55 වෙනි පිට බලනු.

තීන්දුව: (1) ණය සහන මණ්ඩලය ඉදිරියේ කරගත් බේරුමේ හේතුවෙන් ණය සහන ආඥා පනතේ පැනවීම්වලට අනුකූලව කෙරුණු එම පරීක්ෂණයේ දී එකී උකස්කරයට අනුව පාර්ශ්ව කරුවන්ට තිබුණු අයිතිවාසිකම් වෙනස් වීමකට බල පවත්වන්නේ නැති නිසාත් ඒවා නොකෙළෙසී පවතින නිසාත් මෙම නඩුව උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් නිෂ්ප්‍රභා කිරීම වැරැදි ය.

(2) කර ගන්නා ලද බේරුමට ණය සහන ආඥා පනතේ 40(2) දරණ ඡේදයේ පැනවීම් අදාල වන්නේ නැත. ඊට හේතුව එම බේරුම් කර ගැනීම නිසා ඉඩම පිළිබඳ වගකීමේ භාරයක් කොයි ලෙසකින් වත් නො පැවරීම සහ බේරුම් කර ගැනීමේ කොන්දේසි වලින් දෙපාර්ශවයේ මුලින් තිබූ අයිතිවාසිකම් වෙනස් නොවීමත් ය.

සිසිල් ද ඇස්. විජේරත්න මහතා, ශ්‍රෙ.අ. අංක 135 දරණ ඇපැලෙහි ඇපැල්කරු සහ එම අධිකරණයෙහි අංක 143 දරණ ඇපැලෙහි වගඋත්තරකරු වන පැමිණිලිකරු වෙනුවෙන්

ඇපැල් පෙත්සම් දෙකින් එකකටවත් අන්කිසිවෙක් පෙනී නොසිටියහ.

එච්. ඇන්. ජී. ප්‍රනාන්දු ශ්‍රෙෂ්ඨාධිකරණයේ විනිශ්චයකාරතුමා:

උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා මෙම බෙදුම් නඩුව නිෂ්ප්‍රභා කර ඇත්තේ අපට කිසි ලෙසකින් වටහා ගැනීමට නොහැකි හේතුන් උඩ ය. පැමිණිලිකරුට වර්ෂ 1959 සැප්තැම්බර් 27 වැනි දින දරණ ඔප්පුවකින් පිස්කල් නිලධාරිතැන විසින් පවරා දෙන ලද යම් කිසි ඉඩමක අයිතියක් ලැබී ඇති බව නඩුවේ දෙපක්ෂයම පිළිගෙන තිබේ. මේ අයිතිකම කලින් ලුවිස් තිසේරාට සහ සිරිපාල තිසේරාට හිමි වූවකි. සිරිපාල තිසේරාගේ අභාවයෙන් පසු ඔහුගේ උරුමක්කාරයන් ඔහු වෙනුවෙන් නඩුවට ඇතුළත් කර තිබේ. මෙහි විසඳීමට ඇති එකම අර්බුදය නම් පැමිණිලිකරු මිල දී ගත් එම අයිතිවාසිකම වර්ෂ 1948 දී සිරිපාල තිසේරා සහ ලුවිස් තිසේරා විසින් කරන ලද උකස් තැබීමකට යටත් වී ද යන්න සහ ඉහත කී පිස්කල් ඔප්පුව ලියන වකවානුවේ දී උකසේ අයිතිය දෙවැනි විත්තිකරු පිට පවරා තිබුණි.

මෙම උකස්කරය වර්ෂ 1952 දී ණය සහන මණ්ඩලයට යවන ලද ඉල්ලුම් පත්‍රයක සඳහන් වී එහි විමසිල්ලට භාජන වී තිබුණු දෙයකි. මෙම කරුණුවලින් පෙනී යන පරිදි පාර්ශ්වකරුවන් ණය සහන ආඥා පණතට අනුව එළඹුනා යයි සිතිය හැකි යම්කිසි බේරුමකට එළඹී තිබේ. මෙම බේරුමෙහි කරුණු අනුව එහි පොලිය සියයට 8 දක්වා අඩු විය යුතු ය. එපමණක් නොව මුළු මුදල සහ පොලිය වර්ෂ 1953.10.31 වන දිනට පෙර ගෙවා නිම කළ යුතු ය. එසේ ගෙවා නිම කිරීමට නොහැකි වූවහොත් ණය සහනදායක මණ්ඩලයට කරන ලද ඉල්ලීම නිෂ්ප්‍රභා වුනු ලෙස සැළකිය යුතු ය. ඇත්ත වශයෙන් ම එම බේරුමට අනුව කිසි ම ගෙවීමක් සිදු වී නැත. එම නිසා ඒ අනුසාරයෙන් සළකන විට උකස් කරයෙහි පාර්ශ්වකරුවන් අතර ඇති අයිතිවාසිකම් වලට කිසි ම බල පැවැත්වීමක් හෝ වෙනස්වීමක් ණය සහනදායක මණ්ඩලයේ දී කර ගත් සම්මුතියකින් සිදු නොවේ.

අභාග්‍යයකට මෙන් ණය සහන ආඥා පණතේ 40 වන ඡේදයෙහි දෙවන උප ඡේදයෙන් පැණවෙන ප්‍රඥප්තීන් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් වරදවා තේරුම් ගෙන ඇති බව පෙනේ. එම උප ඡේදයෙන් පැණ වෙන්නේ, යම් කිසි සම්මුතියකට එළඹීමක් නිසා ඉඩමක් පිළිබඳව කවර අයුරකින් හෝ බල පැවැත්වීමක් හෝ උකස් තැබීමක් පැවරුණු විට එසේ ස්ථාපිත වුණු එම බලපැවැත්වීම හෝ උකස් තැබීම ඉඩම් ලියාපදිංචි කරන කාර්යාලයෙහි ලියාපදිංචි කළ පසු එය උකස් තබන්නා විසින් සිය කැමැත්තෙන් ම කරන ලද එබඳු යම් කිසි උකස් තැබීමක් හෝ බල පැවැත්වීමක් ලෙස ක්‍රියාත්මක වෙන බවකි. මෙම නඩුවෙහි පෙනෙන පරිදි එම ණය සහන මණ්ඩලය ඉදිරියේ ඇති කරගත් බේරුමේ සම්මුතිය අනුව කිසි ම බලපැවැත්වීමක් නො කෙරෙන්නේ එය ඉඩම සම්බන්ධයෙන් කරන ලද යම් කිසි බලපැවැත්වීමක් නො වන හෙයිනි. එම නිසා ණය සහනදායක මණ්ඩලයෙහි ගන්නා ලද පියවර අනුව වෙනස් නො වී පවතින මේ උකස්කරය කලින් තිබුණු සේ ම බලපාන බව සලකා ගතයුතු ය. ණය සහන මණ්ඩලයෙහි ගන්නා ලද පියවර අනුව මෙහි යම් කිසි ආකූල ව්‍යාකූල තත්ත්වයක් ඇතැයි සලකා උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් මෙම නඩුව නිෂ්ප්‍රභා කිරීම වැරැදි යයි නිගමනය කිරීම සුදුසු ය.

අපට හැඟී යන පරිදි මෙබඳු කරුණු ඇති අවස්ථාවක කළ යුතු හොඳ ම ක්‍රියා සම්ප්‍රදාය, නඩුවෙහි දී මතු වුනු ප්‍රශ්න දෙක නැවත වරක් විනිශ්චයකාරවරයකු ලවා නව මුහුණුවරකින් මුල සිට විසඳීමට භාජනය කිරීමයි. මෙම නඩුවෙහි ආයාචනාවන්ගෙන් උද්ගත වන, විසඳිය යුතු වෙනත් කරුණු ඇතහොත් ඒවා ද විසඳා ගැනීමට දෙපාර්ශ්වයට ම මෙයින් ඉඩප්‍රස්ථාව සැලසේ.

දෙවන විත්තිකරු විසින් පවරන ලද ශ්‍රෙෂ්ඨාධිකරණයෙහි අංක 143/64 දරණ නඩුවෙහි අතුරු ඇපැල් පෙත්සම පිළිබඳව කිසිවකු පෙනී නොසිටි නමුත් ශ්‍රෙෂ්ඨාධිකරණයෙහි අංක 135/64 දරණ නඩුවෙහි මෙම ඇපැල පිළිබඳව දෙන මේ නියෝගය එම ඇපැල ඉදිරිපත් කළ දෙවන විත්තිකරුගේ ද වාසියට හේතු වනු ඇත. එසේ වන්නේ, ඔහුට ද තම ඉල්ලීම යළිත් ඉදිරිපත් කිරීමට මෙයින් අවස්ථාව සැලසෙන නිසා ය. එබැවින් ශ්‍රෙෂ්ඨාධිකරණයේ අංක 143/64 දරණ නඩුවෙහි ද නඩුව නිෂ්ප්‍රභා කරමින් දී ඇති තීරණය එහි ආකාරය අනුව නිතැතින් ම වෙනස් වේ.

අබේසුන්දර විනිශ්චයකාරතුමා

මම එකඟවෙමි.

තීන්දුව ඉවත්කර ආපසු යවන ලදී.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍රවිනිශ්චයකාරතුමා සහ ගරු ටී. ඇස්. ප්‍රනාන්දු, විනිශ්චයකාරතුමා ඉදිරිපිට දී ය

රැජිත එ. හේන්පිටගෙදර කුමාණසිංහ හිමි සහ තවත් අය*

අංක 34638/ඒ—අංක 372/67 දරණ කොළඹ මහේස්ත්‍රාත් උසාවි නඩුවේ විශේෂ ජූරි සභාවක් කැඳවීමට කරන ඉල්ලීමයි

තර්ක කළේ: 1967 ඔක්තෝබර් 12 වැනි දා
තීරණය කළේ: 1967 ඔක්තෝබර් 12 වැනි දා
හේතු දක්වන ලද්දේ: 1967 ඔක්තෝබර් 19 දා

ජූරි සභාව — දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ විත්තිකරුවන්ට අධිචෝදනා කරනු ලැබීම — ප්‍රාථමික නඩු විභාගය පැවැත්වීමෙන් පසු විත්තිකරුවන් සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව ඇසීමට කැමැතිවීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 222 වගන්තිය යටතේ විශේෂ ජූරි සභාවක් සඳහා ඇටෝර්නි-ජනරාල් විසින් ඉල්ලීමක් කිරීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 257 වැනි වගන්තියේ ජූරි සභිකයන් ගේ සුදුසුකම් දක්වා තිබීම — ඒවා අදට අදාළවීම — විත්තිකරුවන් ගේ විරෝධය — සාධාරණ වූ ද යුක්ති සහගත වූ ද ඉල්ලීමක් ද?

දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ දඬුවම් කළ හැකි වැරැදි ක්‍රියාවලට පහත දැක්වෙන චෝදනා යටතේ විත්තිකරුවෝ අධිචෝදනා ලැබූහ. (ඒ) රැජිනට විරුඬව යුඬ කිරීමට කුමන්ත්‍රණය කිරීම (බී) සාපරාධී බලහත්කාරයෙන් ලංකාණ්ඩුව බියපත් කිරීමට කුමන්ත්‍රණය කිරීම.

ප්‍රාථමික නඩු විභාගය අවසානයේ දී මහේස්ත්‍රාත්වරයා විසින් ප්‍රශ්න කළවිට අපරාධ නඩු සංවිධාන සංග්‍රහයේ 257(1) (බී) වගන්තියේ සඳහන් කෙරෙන පරිදි සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව විභාග කිරීමට විත්තිකරුවෝ කැමති වූහ. ඒ වගන්තියේ සඳහන් සුදුසුකම් නම් සිංහල භාෂාව කථා කිරීමට, කියැවීමට හා ලිවීමට හැකිවීමත්, වටිනාකමින් රු: 1,000 කට නො අඩු චංචල හෝ නිශ්චල දේපළ තමාගේ අයිතියෙන් හෝ තම භාර්‍යාවගේ අයිතියෙන් හෝ තිබීම; හෝ වර්ෂයකට රු 500 ක ආදායමක් තිබීමයි. ඉන්පසු (එම සංග්‍රහයේ 257(1) (බී) වගන්තිය යටතේ සැකසුණු) ලැයිස්තුවකින් විශේෂ ජූරි සභාවක් කැඳවීමට නියෝගයක් කරන ලෙස, 222 වැනි වගන්තිය යටතේ ඇටෝර්නි ජනරාල්වරයා විසින් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලීමක් කරන ලදී. එම ලැයිස්තුවට අයත් පුද්ගලයන්ට රු. 3,000 කට නොඅඩු වාර්ෂික ආදායමක් තිබීම හෝ වටිනාකමින් රු. 20,000 කට නො අඩු චංචල හෝ නිශ්චල හෝ දේපොළ තමා ගේ අයිතියෙන් හෝ තම භාර්‍යාව ගේ හෝ අයිතියෙන් තිබීම හෝ රුපියල් 500 ක මාසික වේතනයක් ලැබීම හෝ අපේක්ෂිත ය.

ඉල්ලීම සාධාරණ වූ ද යුක්ති සහගත වූ ද ඉල්ලීමක් බවට ශ්‍රේෂ්ඨාධිකරණය සෑහීමකට පත් වීම 222 වැනි වගන්තියෙන් අපේක්ෂිත ය.

ඉල්ලීමට පක්ෂව කරුණු දෙකක් දක්වන ලදී. එනම්: (ඒ) කුමන්ත්‍රණය ඔප්පු කිරීමට, විවිධ සිද්ධීන්ගෙන් හා විත්තිකරුවන්ගේ හැසිරීමෙන් පැන නැගෙන අනුමාන මත පැමිණිලි පක්ෂය බොහෝ දුරට රැඳී සිටින හෙයින් නඩුව අසාමාන්‍ය සංකීර්ණත්වයෙන් යුත් එකකි; (බී) සමහර විත්තිකරුවන් විසින් කරන ලද අපරාධෝච්චාරණ පැමිණිලි පක්ෂයෙන් ඔප්පු කරනු ලබන අතර ඒවායේ අඩංගු කරුණු නීතිය අනුව අනිත් විත්තිකරුවන්ට විරුඬව පිළිගත නොහැක යන ප්‍රතිපත්තිය පිළිගැනීමට, සිංහල කථා කරන ජූරි සභාවකට වඩා හොඳින් විශේෂ ජූරි සභාවකට හැකි වනු ඇත.

257 වැනි වගන්තියේ කවර අධ්‍යාපනික සුදුසු කමක්වත් සඳහන් නැති නමුදු විශේෂ ජූරි සභාවකට යථෝක්ත සුදුසුකම් නියම කිරීමේ දී ව්‍යවස්ථාදායකයේ චේතනාව වූයේ, විශේෂ ජූරි සභික නාම ලේඛනයේ සඳහන් පුද්ගලයන් අනිත් නාම ලේඛනවල සඳහන් පුද්ගලයන්ට වඩා හොඳ අධ්‍යාපනයක් ලබා තිබෙන අතර, කරුණු හා නීතිය පිළිබඳ සංකීර්ණතාවන්ට මුහුණ දීමට වඩා හොඳින් ඔවුන්ට හැකි වීමය යි රජයේ අධිනීතිඥවරයා තර්ක කෙළේ ය.

තීන්දුව: (1) යථෝක්ත සුදුසුකම් නියම කළ ව්‍යවස්ථාදායකය විසින් කරන ලද එකී පිළිගැනීම, අපරාධ නඩු සංවිධාන සංග්‍රහයේ සම්මත කළ කාලය වන 1898 දී වලංගු වුව ද අධ්‍යාපනික සුදුසුකම් සම්බන්ධයෙන් පමණක් නොව ආදායම් හා දේපළ සුදුසුකම් සම්බන්ධයෙන් ද නිදහස ලැබීමෙන් පසු ඇති වී තිබෙන මූලික වෙනස්කම් සලකා බලන විට, එය තව දුරටත් වලංගු නැත.

(2) මේ තත්වය යටතේ, සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව විභාග කිරීමට, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 165 (බී) වගන්තිය යටතේ විත්තිකරුවන් විසින් පාවිච්චිකර තිබෙන අයිතිය ඔවුන්ට අහිමි කිරීම, සාධාරණ සේ නො පෙනේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 57 වෙනි පිට බලනු.

විශේෂ ජූරි සභාවක් පත්කිරීම විත්තිකරුවන් ගේ යහපත පිණිස වෙති යි අපරාධ නඩු සංවිධාන සංග්‍රහයේ 222 වගන්තිය පදනම් කර කරන ලද තර්කය ගැන —

(3) විත්තිකරුවන් ඔවුන්ගේ උපදේශකයන් මාගීයෙන් විශේෂ ජූරි සභාවක් පත් කිරීමට විරුඬත්ත්වය ප්‍රකාශ කර සිටිය දී, විත්තිකරුවන් හා ඔවුන්ගේ උපදේශකයන් නිදහසේ කර තිබෙන තේරීමක් යුක්තිය ඉටුකිරීමේ ප්‍රයෝජනය පිණිස යයි කියා යටපත් කිරීම, අරුම පුදුම ත්‍යාගශීලිත්ත්වයක් හා අනුග්‍රහයක් දැක්වීමකි.

අනුගමනය කළ නඩු: රජු එ. නඩරාජා (1945) 46 න.නී.වා. 198
රජු එ. තෙලේනිස් අප්පුහාමි (1945) 46 න.නී.වා. 304

රජයේ අධිනීතිඥ වී. එස්. ඒ. පුල්ලෙනායගම් මහතා සමග රජයේ අධිනීතිඥ වේක්ලි පෝල් මහතා, ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා කේ. සී. ද සිල්වා, සී. ඩී. එස්. සිරිවර්ධන, එච්. ඇල්. කරවිට යන මහතුන් සමග පළමුවැනි විත්තිකරු වෙනුවෙන්.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා මැල්කම් පෙරේරා හා එච්. ඩී. ඇස්. බොරලැස්ස යන මහතුන් සමග පස් වැනි විත්තිකරු වෙනුවෙන්.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා හත්වැනි, අටවැනි සහ නවවැනි විත්තිකරුවන් වෙනුවෙන් උසාවියේදී ඔවුන් ගේ ඉල්ලීම පිට.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා මහතා, ආර්. වීරකෝන් මහතා සමග එකොළොස්වැනි හා දහසය වැනි විත්තිකරුවන් වෙනුවෙන්.

නෙවිල් සමරකෝන් මහතා පීලික්ස් ආර්. ඩයස් බණ්ඩාරනායක සහ නිහාල් ජයවික්‍රම යන මහතුන් සමග හතර වැනි විත්තිකරු වෙනුවෙන්.

පී. කේ. ලියනගේ මහතා එච්. ඇම්. ජයතිස්ස මහතා සමග තුන්වැනි හා දහතුන් වැනි විත්තිකරුවන් වෙනුවෙන්.

යූ. බී. වීරසේකර මහතා දහ අටවැනි විත්තිකරු වෙනුවෙන්.

ඩී. ඩබ්ලිව්. අබයකෝන් මහතා, හරිශ්චන්ද්‍ර මැන්දිස් හා වර්නන් ගුණරත්න මහතුන් සමග දහහතරවැනි විත්තිකරු වෙනුවෙන්.

ප්‍රින්ස් ගුණසේකර මහතා, විසිවැනි විත්තිකරු වෙනුවෙන්.

මොහොමඩ් නසීම් මහතා, දොළොස් වැනි විත්තිකරු වෙනුවෙන්.

පර්සි කරුණාරත්න මහතා, පහළොස් වැනි විත්තිකරු වෙනුවෙන්.

ඩී. ටී. පී. රාජපක්ෂ මහතා, එම්. ඩී. ඇස්. බොරලැස්ස මහතා සමග හය වැනි විත්තිකරු වෙනුවෙන්.

සරත් මුත්තෙට්ටුවෙගම මහතා, දහ හත් වැනි විත්තිකරු වෙනුවෙන්.

ජී. ඩී. සී. වීරසිංහ මහතා සමග හරිශ්චන්ද්‍ර මැන්ඩිස් මහතා, දෙවැනි විත්තිකරු වෙනුවෙන්.

හරිශ්චන්ද්‍ර මැන්ඩිස් මහතා දහ වැනි විත්තිකරු වෙනුවෙන්.

ස්ටැන්ලි තිලකරත්න මහතා සමග හරිශ්චන්ද්‍ර මැන්දිස් මහතා දහ නව වැනි විත්තිකරු වෙනුවෙන්.

මංගල මුණසිංහ මහතා, ජී. සී. වණිගසේකර මහතා සමග විසි දෙවැනි විත්තිකරු වෙනුවෙන්.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා:

මෙම නඩුවේ විත්තිකරුවන් විසි දෙදෙනා —

(i) 1965 දෙසැම්බර් මස 1 වැනි දා හා 1966 පෙබරවාරි මස 18 වැනි දා අතරතුර මෙම උසාවියේ අධිකරණ සීමාව ඇතුළත කොළඹ ප්‍රදේශය තුළ පිහිටි මහරගම, හෝමාගම, නුගේගොඩ, කොළඹ හා තවත් ස්ථානවල දී, ඔබ තවත් අය සමග රැජිනට විරුඬව යුඬ කිරීමට කුමන්ත්‍රණය කිරීම හා එයින් දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ දඬුවම් කළ හැකි වරදක් කර තිබේ; සහ

(ii) පූර්වෝක්ත කාලය තුළ හා ස්ථානවල දී එම ක්‍රියා කලාපයේ දී ම ඔබ තවත් අය සමග, සාපරාධී බලහත්කාරයෙන් හෝ සාපරාධී බලහත්කාරය පෙන්වීමෙන් හෝ ලංකාණ්ඩුව බිය පත් කිරීමට හා එයින් දණ්ඩ නීති සංග්‍රහයේ 115 වැනි වගන්තිය යටතේ දඬුවම් කළ හැකි වරදක් කර තිබේ:—

යන අධිචෝදනා කරනු ලැබූහ.

නඩු විභාගය ඉහළ උසාවියට තැබූ මහේස්ත්‍රාත්වරයා විසින්, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 165(බී) වගන්තිය යටතේ කළ ප්‍රශ්න කිරීමට පිළිතුරු වශයෙන්, සිංහල කථා කරන ජූරි සභික නාම ලේඛනයෙන්, එනම් 257 වැනි වගන්තියේ සඳහන් සිංහල භාෂාව කථා කිරීම, කියවීම හා ලිවීම කළ හැකි වූ ද, එම වගන්තියේ (1) වැනි උප වගන්තියේ (බී) ඡෙදයේ නියමිත අවශ්‍ය සුදුසුකම් දරන්නා වූ ද පුද්ගලයන් ගේ නාම ලේඛනයෙන්, නඩු විභාගය සඳහා ජූරි සභාව තෝරා ගත යුතු බවට විත්තිකරුවෝ කැමැත්ත ප්‍රකාශ කළහ. ඉන් පසුව විත්තිකරුවන්ට විරුඬව තිබෙන නඩුව විභාග කිරීමට විශේෂ ජූරි සභාවක් කැඳවීමට නියෝගයක් කරන ලෙස ඇටෝර්නි ජනරාල්වරයා විසින් ශ්‍රේෂ්ඨාධිකරණයට ඉල්ලීමක් ඉදිරිපත් කරන ලදී. උගත් රජයේ අධිනීතිඥවරයා ගේ තර්කවලට අප විසින් සවන් දීමෙන් පසු එම ඉල්ලීම ප්‍රතික්ෂේප කළ අපි දැන් ඊට හේතු දක්වමු.

ඉල්ලීම, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 222 වැනි වගන්තිය යටතේ කරන ලද ඉල්ලීමක් බව නිවැරදිව පෙන්වන ලදී. ඒ අනුව පැනනැගුණු ප්‍රශ්නය නම් විශේෂ ජූරි සභාවක් සඳහා කරන ඉල්ලීම, සාධාරණ වූ ද යුක්තිසහගත වූ ද ඉල්ලීමක් වශයෙන් උසාවිය සලකනවා ද යන්න යි. විශේෂ ජූරි සභාවක් විසින් විභාග කළ යුතු නඩුවක් බවට පක්ෂව කැරුණු තර්කයේ දී ප්‍රධාන හේතු දෙකක් දක්වන ලදී. පළමුව, සමහර සිද්ධීන් අතර සම්බන්ධය පහසුවෙන් නො පෙනෙන අන්දමේ සිද්ධීන් කිහිපයක් ගැන නඩු විභාගයේ දී සාක්ෂි ඉදිරිපත් කැරෙන අතර, කරන ලදැ යි කියන කුමන්ත්‍රණය ඔප්පු කිරීමට, විවිධ සිද්ධීන්ගෙන් හා විත්තිකරුවන් ගේ හැසිරීමෙන් පැන නැගෙන, අනුමාන මත, පැමිණිලි පක්ෂය බොහෝ දුරට රැඳී සිටින හෙයින්, නඩුව අසාමාන්‍ය සංකීර්ණත්ත්වයෙන් යුත් එකකි යන්නයි. දෙවනුව, සමහර විත්තිකරුවන් විසින් කරන ලද අපරාධෝච්චාරණ පැමිණිලි පක්ෂයෙන් ඔප්පු කරනු ලබන අතර ඒවායේ අඩංගු කරුණු නීතිය අනුව අනිත් විත්තිකරුවන්ට විරුඬව පිළිගත නොහැක යන ප්‍රතිපත්තිය පිළිපැදීමට, සිංහල කථා කරන ජූරි සභාවකට වඩා හොඳින් විශේෂ ජූරි සභාවකට හැකිවනු ඇත යන්නයි.

නඩුවේ දී උද්ගත වෙතැයි පූර්වයෙන් අපේක්ෂිත මේ දුෂ්කරතාවන්ට මුහුණ පෑමට සිංහල කථා කරන ජූරි සභාවකට වඩා විශේෂ ජූරි සභාවක් සුදුසුව සිටිත් ද යන ප්‍රශ්නය සලකා බැලීමේ දී පැන නගින පළමු කාරණය නම්, විශේෂ ජූරි සභික නාම ලේඛනය සහ අනිත් ජූරි සභික නාම ලේඛන අතර නීතියෙන් ඇති කර තිබෙන වෙනසින් සාමාන්‍ය ජූරි සභික නාම ලේඛනවල සඳහන් පුද්ගලයන්ට වඩා ප්‍රවීණ පුද්ගලයන් විශේෂ ජූරි සභා නාම ලේඛනයට ඇතුළත් වීම ප්‍රමාණවත් ලෙස ඉටු වෙනවා ද යන්න යි. 257 වැනි වගන්තියේ (i) (ඩී) ඡෙදය අනුව විශේෂ ජූරි සභික නාම ලේඛනයට ඉංග්‍රීසි භාෂාව කථා කිරීම, කියවීම හා ලිවීම කළ හැකි පුද්ගලයෝ පමණක් ඇතුළත් වෙති. ඒ සුදුසුකමට අමතරව (ඩී) ඡේදයට අනුව පහත සඳහන් සුදුසු කම්වලින් එකක් අවශ්‍ය වේ:

(අ) රු: 3,000/- ට නො අඩු වාර්ෂික ආදායමක් තිබීම

(ආ) වටිනාකමින් රු: 20,000/- කට නො අඩු චංචල හෝ නිශ්චල දේපළ තමා ගේ අයිතියෙන් හෝ තම භාර්‍යාව ගේ අයිතියෙන් තිබීම

(ඇ) රු: 500/- ට නො අඩු මාසික වේතනයක් ලැබීම

257 වැනි වගන්තියේ (i) (බී) ඡෙදයෙන් සිංහල භාෂාව කථා කිරීම, කියවීම හා ලිවීම කළ හැකි වූ ද, පහත සඳහන් අමතර සුදුසු කම්වලින් එකක් ඇත්තා වූ ද පුද්ගලයන්ගේ ලැයිස්තුවකට ඉඩ සැලසෙයි.

(i) වටිනාකමින් රු: 1,000/- ට නො අඩු චංචල හෝ නිශ්චල දේපොළ තමා ගේ අයිතියෙන් හෝ තම භාර්‍යාව ගේ අයිතියෙන් හෝ තිබීම

(ii) වර්ෂයකට රු: 500/- ක ආදායම දෙමළ කථාකරන ජූරි සභාවක නාම ලේඛනය සම්බන්ධයෙන් අනුරූප අවශ්‍යතා පිළිබඳ (සී) ඡෙදයෙන් සැලසෙයි.

257 වැනි වගන්තියෙන් දැක්වෙන වෙනස්කම්, පළමුව කෙනෙකුට කථා කිරීම, කියවීම හා ලිවීම කළ හැකි භාෂාව හා සම්බන්ධයෙන් වන අතර දෙවැනුව ආදායම නැත්නම් කෙනෙකුට හෝ ඔහු ගේ භාර්‍යාවට හෝ තිබෙන ධනය හා සම්බන්ධවයි. මේ අයුරින් 257 වැනි වගන්තියට අනුව අවස්ථා දෙකෙන් එකකදීවත් අඩුම අධ්‍යාපන සුදුසුකම් කෙලින් ම අපේක්ෂා නො කෙරේ. එසේ නමුදු, ව්‍යවස්ථාදායකය විසින් (ඩී) ඡෙදයෙන් විශේෂ ජූරි සභාවක් සඳහා සමහර සුදුසුකම් දක්වා ඇති බැවින්, ව්‍යවස්ථාදායකයේ චේතනාව හා අපේක්ෂාව වූයේ, විශේෂ ජූරි සභික නාම ලේඛනයේ සඳහන් පුද්ගලයන් අනිත් නාම ලේඛනවල සඳහන් පුද්ගලයන්ට වඩා හොඳ අධ්‍යාපනයක් ලබා තිබෙන අතර කරුණු හා නීතිය පිළිබඳ සංකීර්ණතාවන්ට මුහුණ දීමට වඩා හොඳින් ඔවුන්ට හැකි වනු ඇත යනුවෙන් අදහස් වෙතියි රජයේ අධිනීතිඥතුමා තර්ක කෙළේය.

වර්ෂ 1898 දී අපරාධ නඩු සංවිධාන පනත සම්මත කළ ව්‍යවස්ථාදායකය ඉහත සඳහන් කළ අන්දමේ චේතනාවක් හා අපේක්ෂාවක් පිළිගන්ට ඇත යන්න ගැන මම මුළුමනින් ම එකඟ වෙමි. එහෙත් ව්‍යවස්ථාදායකය ස්වකීය චේතනාව හා අපේක්ෂාව ඉෂ්ටකර ගැනීමට බලාපොරොත්තුව තැබූ, ව්‍යවස්ථාවෙන් පෙනෙන කරුණු සලකා බැලීම අවශ්‍ය වේ. ප්‍රථමයෙන් සඳහන් කළ කරුණ භාෂාව හා සම්බන්ධ එකක් වන අතර, ඉංග්‍රීසි භාෂාව පිළිබඳ දැනීමක් ඇති අය, සිංහල හෝ දෙමළ ගැන දැනීමක් ඇති අයට වඩා හොඳ අධ්‍යාපනයක් ලැබුවන් විය හැකි අය වශයෙන් 1898 දී ව්‍යවස්ථාදායකය අපේක්ෂා කළ බව පැහැදිලි ය. ලංකාවේ බ්‍රිතාන්‍ය ආණ්ඩුවේ අධ්‍යාපන ප්‍රතිපත්තියත් එහි ප්‍රතිඵලත් පිළිබඳ දන්නා කරුණු සලකා බැලීමේ දී එය බෙහෙවින් සහේතුක අපේක්ෂාවකි. 1898 දී හා මේ මෑතක් වන තුරු ම ද්විතීයික අධ්‍යාපන මාධ්‍යය ඉංග්‍රීසියට පමණක් සීමා වූ අතර පාලන හා වෙළෙඳ කටයුතු පිළිබඳ භාෂාව වැදගත් කරුණු අතින් ඉංග්‍රීසියට පමණක් සීමා විය. 257 වැනි වගන්තියේ (ඩී) ඡෙදයෙන් සැලසෙන විධිවිධානයෙන් විශේෂ ජූරි සභිකයකුගෙන් රු: 500/- ට නො අඩු මාසික වේතනයක් ලැබීම අපේක්ෂා කිරීමෙන් සෑහෙන උසස් අධ්‍යාපන සුදුසුකමක් හෝ වාණිජ නැත්නම් පාලනය පිළිබඳ පළපුරුද්දක් ද එසේත් නැත්නම් අධ්‍යාපනයත් වාණිජ හෝ පාලන පළපුරුද්ද යන දෙකමත් ඇත්ත වශයෙන් ම සහතික වූ අතර 1898 දී ඒ තරම් වේතනයක් ලබන සිංහල හෝ දෙමළ පමණක් දන්නා පුද්ගලයන් සිටින්ට ඇත්තේ බෙහෙවින් ටික දෙනෙකි. එම නිසා කෙටියෙන් කියනවා නම්, විශේෂ ජූරි සභික නාම ලේඛනයේ පුද්ගලයෙක්, බොහෝ කරුණු අතින්, අනිත් ජූරි සභික නාම ලේඛනවල සඳහන් පුද්ගලයන්ට වඩා ප්‍රවීණ ජූරි සභිකයෙකි යන හැම අතින් ම නිවැරදි පිළිගැනීමක්, 257 වැනි වගන්තියට පාදක වී තිබේ. එම නිසා 1898 න් පසු දීර්ඝ කාලයක් ම විශේෂ ජූරි සභාවක් මගින් සුදුසු අවස්ථාවක දී නඩුවක් විභාග කිරීමට නිර්දේශ කිරීම සාධාරණ වූ ද, යුක්ති සහගත වූ ද ක්‍රියාවක් වන්නට ඇත යන්න වැටහේ.

එහෙත්, විශේෂයෙන් ම නිදහස ලැබීමෙන් පසු මේ රටේ අවස්ථාවන් සම්බන්ධයෙන් සිදු වී තිබෙන මූලික වෙනස සලකා බලන විට, 1898 දී ව්‍යවස්ථාදායකය විසින් කරන ලද නිරවද්‍ය පිළිගැනීම, තවදුරටත් සත්‍ය නො වේ ය යන්න ගැන මම තෘප්තියට පත් වී සිටිමි. අද ද්විතීයික අධ්‍යාපනය සම්පූර්ණ කරන වැඩි දෙනෙකු අධ්‍යාපනය ලබන්නේ ඉංග්‍රීසි මාධ්‍යයෙන් නොව, සිංහල මාධ්‍යයෙනි යන්න පොදුවේ දන්නා කරුණකි. ඉංග්‍රීසි මාධ්‍යයෙන් ද්විතීයික අධ්‍යාපනය ලබන ටික දෙනාත්, එක්දහස් නවසිය හතළිස් ගණන්වලට පෙර ඉංග්‍රීසියෙන් උගතුන් ඉංග්‍රීසි භාෂාව පිළිබඳව ලැබූ ප්‍රවීණතාවට, කොහෙත් ම සමාන කළ හැකි තරමේ ඉංග්‍රීසි භාෂා, පිළිබඳ ප්‍රවීණතාවක් නො දරණ බව ද පොදුවේ දන්නා කරුණකි.

දැන් තරඟයකින් විශ්ව විද්‍යාලය අධ්‍යාපනය සඳහා තෝරා ගනු ලබන තරුණ පිරිසගෙන් වැඩි දෙනෙකුට ඉංග්‍රීසි භාෂාව පිළිබඳව තිබෙන්නේ සුලු දැනීමක් බව, නැත්නම් දැනීමක් කොහෙත් ම නැති බව ළඟ දී විශ්ව විද්‍යාලයයන්ට ඇතුළත් කර ගැනීමේ සංඛ්‍යා ලේඛනවලින් තහවුරු වන අතර, ඒ නිසා උගත් අධ්‍යාපන සුදුසුකම් තිබෙන බහුතර සංඛ්‍යාවක් විශේෂ ජූරි සභික නාම ලේඛනයට ඇතුළුවීමට ඉංග්‍රීසි භාෂාව නො දන්නාකමින් නුසුදුසුවන අවස්ථාවක් එළඹී ඇත. ඒ අයුරින් 257 වැනි වගන්තියේ (ඩී) ඡෙදයේ නිර්දේශිත භාෂා සුදුසුකම් නියම කිරීමට 1898 දී ව්‍යවස්ථාදායකයට හේතු වූ පිළිගැනීමට මූලික හේතුව තවදුරටත් වලංගු නැත.

ආදායම් සුදුසුකම සලකා බැලීමේ දී රු: 3,000/- ක වාර්ෂික ආදායම හෝ රු: 20,000/- ක දේපොළ දැරීම පිළිබඳ අවශ්‍යතාව නිසා විශේෂ ජූරි සභික නාම ලේඛනයකට ඇතුළත් පුද්ගලයන් ඒ තරම් වත්පොහොසත්කම් නැති අයට වැඩි අධ්‍යාපනයක් ලැබුවන් සේ සැලකීම, මෙම ශත වර්ෂය මුල් භාගයේ දී සහේතුක

විය හැකි වුව ද මුදලේ නියම වටිනාකම සම්බන්ධයෙන් ඇති වී තිබෙන වෙනස්කම් සැලකිල්ලට භාජනය කිරීමේ දී (ඩී) ඡෙදයෙන් පනවා තිබෙන සීමාවන්, මේ කාලයේ එවැනි අපේක්ෂාවන් ඇතිකර ගැනීම යුක්තිසහගත සේ සැලකීමට බැරි තරමට බෙහෙවින් මද ය.

මෙම නඩුවේ, නීතිඥවරයා කියනු ලබන සංකීර්ණත්වය, ගිණුම් සම්බන්ධ හෝ ව්‍යාපාර සම්ප්‍රදාය සම්බන්ධ හෝ කරුණු පිළිබඳ සාක්ෂි සහිත නඩුවක පැන නැගිය හැකි සංකීර්ණත්වයකට, සමාන කිරීමට ඔහු උත්සාහ කළේ ය. මේ නඩුව වැනි නඩුවක ජූරි සභාවේ කාර්‍යය අති විශේෂ නො වනු ඇත; ඔවුන් ගේ කාර්‍යය වනුයේ එක්තරා සිඩියක් සිදුවුන ද, එක්තරා අවස්ථාවක දී පුද්ගලයකු විසින් යමක් කියන ලද්දේ ද, නැත්නම් යමක් කරන ලද්දේ ද, වෙනත් විත්තිකරුවකු විසින් සිතේ ඇති කර ගත් යම් පරමාර්ථයක් විත්තිකරුවකු දැන සිටියේ ද, ඔප්පු කරන ලද සේ පිළිගත් කරුණුවලින් වරද දැක්වෙන අනුමිතියක් කළ යුතු ද යන දේ වැනි කරුණු තීරණය කිරීම ය. ගිණුම්, වෙළෙඳ හා විද්‍යාත්මක කරුණු පිළිබඳ දැනීමක් හෝ පළපුරුද්දක් තිබෙන පුද්ගලයන් හැරෙන විට අනිත් අයට සාක්ෂි නිසියාකාර තේරුම් ගැනීමට නො හැකි නඩුවක ජූරි සභාවක කාර්‍යයට එය කවරාකාරයකින්වත් සමාන නො වේ. 257(i) වගන්තියේ (ඩී) ඡෙදයේ දක්වා තිබෙන සුදුසුකම් දරණ පුද්ගලයන් දෙවැනිව සඳහන් කළ වර්ගයේ නඩුවක ජූරි සභිකයන් වශයෙන් සේවය කිරීමට, වැඩි ප්‍රවීණතාවයක් දැක්වීම විය හැකි වුව ද මෙහි දී අපේ සැලකිල්ල යොමු වී තිබෙන්නේ එවැනි නඩුවක් කෙරෙහි නො වේ.

ඉහත සඳහන් කළ කරුණු අනුව මෙම නඩුවේ දී විත්තිකරුවන් විසින් සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව විභාග කරවා ගැනීමට 165(බී) වගන්තිය යටතේ ඔවුන් පාවිච්චිකර තිබෙන අයිතිය ඔවුන්ට අහිමි කිරීම යුක්ති සහගත සේ මට නො පෙනේ.

සිංහල කථා කරන ජූරි සභාවක් මගින් නඩුව විභාග කරවා ගැනීමට විත්තිකරුවන් විසින් තෝරා ගැනීමේ ස්වකීය ව්‍යවස්ථානුකූල අයිතිය පාවිච්චිකර තිබෙන අවස්ථාවේ දී නඩුව විශේෂ ජූරි සභාවක් මගින් විභාග කිරීම සාධාරණ ද නැද්ද යන 222 වගන්තිය යටතේ පැන නගින සලකා බැලිය යුතු ඊළඟ කාරණය තිබේ. උගත් රජයේ නීතිඥවරයා ගේ දෙවෙනි තර්කය මේ කාරණයට අදාලව තිබේ. අනිත් විත්තිකරුවන් විසින් කරන ලදැ යි කියන අපරාධෝච්චාරණ සමහර විත්තිකරුවන්ට විරුඬව සැලකිල්ලට නො ගෙන සිටීමට විශේෂ ජූරි සභාවකට වඩා සිංහල කථා කරන ජූරි සභාවක් හැකියාවෙන් අඩුවිය හැකැ යි ඔහු ඇඟවීමක් කෙළේ ය. වෙනත් වචනවලින් කියතොත්, විශේෂ ජූරි සභාවක් පත් කිරීම විත්තිපක්ෂයේ යහපත පිණිස වෙතියි ඔහු පැවසී ය. විත්තිකරුවන් විසින් විරුද්ධත්වයක් නො දක්වන ලද නම්, විශේෂ ජූරි සභාවක් පත් කිරීමෙන් විත්ති පක්ෂයේ යහපත වඩා හොඳින් සැලසේ දැයි සලකා බැලීමේ වගකීමක් සමහර විට උසාවිය වෙත පැවරී තිබෙන්ට පුලුවන. එහෙත් විත්තිකරුවන් විසින් ම සිංහල කථා කරන ජූරි සභාවක් තෝරාගෙන, විත්තිකරුවන් ඔවුන්ගේ නීතිඥයන් ගේ මාර්ගයෙන් විශේෂ ජූරි සභාවක් පත්කිරීමට විරෝධය දක්වා තිබිය දී, විත්තිකරුවන් ගේ යහපත පිණිස යයි කියා, විත්තිකරුවන් හා ඔවුන්ගේ උපදේශකයන් විසින් නිදහසේ කරන ලද තෝරා ගැනීමක් යටපත් කිරීම, උසාවිය විසින් ත්‍යාගශීලිත්වයක් මෙන් ම මගේ සහෝදර විනිශ්චයකාරතුමා සඳහන් කළ පරිදි අනුග්‍රහයක් දැක්වීමක් වෙයි.

ඉදිරියට තිබෙන නඩු විභාගයේ දී සමහර විත්තිකරුවන් ඉංග්‍රීසියෙන් සාක්ෂි දෙනවා ඇතැයි මම විශ්වාස කරමි. එය එසේ නම් ඉංග්‍රීසි කථා කරන ජූරි සභාවක් ඉදිරියේ දී එම සාක්ෂි සිංහලයට පෙරළීම ව්‍යවහාරය නො වේ. ඒ නිසා විත්තිකරුවන් ගේ තෝරා ගැනීම අනුව නඩු විභාගය පැවැත්වුව හොත් ඔවුන්ට තිබෙන එක් වාසියක් නම් ඔවුන්ට පෞද්ගලිකව සියලු ම සාක්ෂි වටහාගත හැකි වන අතර වඩා ප්‍රයෝජනවත් ලෙස තමන් ගේ නීතිඥයන්ට උපදෙස් ඒ අනුව දීමට හැකිවීමයි.

ජූරි සභා තෝරා ගත යුතු එක්තරා භාෂාවක් කථා කරන ජූරි සභික නාම ලේඛනය තෝරා ගැනීමේ අයිතිවාසිකම විත්තිකරුවන්ට පාවිච්චි කිරීමෙන් ඔවුන්ට ව්‍යවස්ථාදායකය විසින් ලබාදීමට අදහස් කළැ යි කල්පනා කරනු ලබන අනිකුත් ක්‍රියාත්මක ලාභයන් සාකච්ඡා කිරීමට මම යෝජනා නො කරමි. එහෙත් ඒ අයුරින් පැවරී තිබෙන තෝරා ගැනීමේ පැහැදිලි අයිතිවාසිකම සම්බන්ධයෙන් බලන කල්හි බලවත් හේතූන් නිසා හැරෙන විට, තෝරා ගැනීම මෙම උසාවිය විසින් යටපත් කරනවා නම් යුක්තිය ඉටු කළා සේ නො පෙනේ. මෙම නඩුවේ දී සෑහෙන හේතූන් දක්වා නැති බව පෙන්වීමට මා විසින් දැනටමත් උත්සාහ කර තිබේ.

සිංහලය, සාමාන්‍යයෙන් පාලන කාර්‍ය හා අධ්‍යාපනය පිළිබඳ භාෂාවන් බොහෝ විට ව්‍යවස්ථාදායකයේ සාකච්ඡා මාධ්‍යයන් වී තිබෙන කාලයක, සිංහල කථා කරන ජූරි සභාවක් විසින් විභාග කරවා ගැනීමට විත්තිකරුවන් විසින් කැරුණු තෝරා ගැනීම මෙම උසාවිය විසින් ප්‍රතික්ෂේප කිරීම, මහජනයා ගේ සිත අවුල් කිරීමටත්

සිතේ සැක උපදවීමටත් හේතු වී ඒ මගින් අපේ උසාවි සැක කිරීමට මග පෑදේ. එය යුක්තිය පසිඳලීම හා සම්බන්ධව සිටින සෑම දෙනා විසින් ම වැළැක්වීම සඳහා සුපරීක්ෂාකාරීව සිටිය යුතු අනිෂ්ට දෙයකි.

165(බී) වගන්තිය යටතේ විත්තිකරුවන් ගේ තෝරා ගැනීම සාමාන්‍ය ජූරි සභාවක් වූ නමුදු විශේෂ ජූරි සභාවක් පත්කිරීමට කලින් නඩුවල දී නියෝග කරන ලද බව උගත් රජයේ නීතිඥවරයා නැවත නැවතත් සඳහන් කළේ ය. ඔහු බොහෝ විට ම සඳහන් කළ අවස්ථාව නම් දිවංගත අග්‍රාමාත්‍ය බණ්ඩාරනායක ඝාතන නඩු විභාගයයි. එම නඩුවේ දී, විත්තිකරුවන් ඉංග්‍රීසි කථා කරන ජූරි සභාවක් විසින් විභාග කිරීමට කැමති වූ සේ පෙනුන ද විශේෂ ජූරි සභාවක් සඳහා විත්තිකරුවන් විසින් ම කරන ලද ඉල්ලීමකට උසාවිය එකඟ විය. 257 වැනි වගන්තිය යටතේ විශේෂ ජූරි සභාවක් හැමවිට ම ඉංග්‍රීසි කථා කරන ජූරි සභාවක් බැවින් එහි ප්‍රතිඵලය වූයේ විත්තිකරුවන් ගේ තෝරා ගැනීම අනුව ම නඩු විභාගය කිරීම යි. විත්තිකරුවන් ගේ තෝරා ගැනීම උසාවිය විසින් යටපත් කිරීමේ ප්‍රශ්නයක් එහි දී උද්ගත නො වී ය. මෙම කාරණය නිසා, එම අවස්ථාව මෙම ඉල්ලීමට වාසිසහගතව නොව තරමක් පටහැණිව සිටී.

රජ එ. නඩරාජා (46 න.නී.වා. 198) නඩුවෙන් මෙම නඩුවේ රජයේ ඉල්ලීමට රුකුලක් නො ලැබේ. උතුරු අපරාධ අධිකරණයේ දී ඇසීමට අපේක්ෂිත නඩුවක් 165(බී) වගන්තිය යටතේ ඉංග්‍රීසි කථා කරන ජූරි සභාවක් විසින් විභාග කිරීමට එහි දී විත්තිකරුවන් විසින් කැමැත්ත දක්වා තිබිණ. ඉන්පසුව ඇටෝර්නි ජනරාල්වරයා විසින් කොළඹ, බටහිර අපරාධ අධිකරණයට නඩුව මාරු කළ අතර, විත්තිකරුවෝ ඊළඟට දෙමළ භාෂාව කථා කරන ජූරි සභාවක් විසින් නඩුව විභාග කරවන ලෙස ඉල්ලා සිටියහ. එම ඉල්ලීම පනතේ 222 වැනි වගන්තිය යටතේ නොව 224 වැනි වගන්තිය යටතේ කැරුණු එකකි. එම වගන්තිය යටතේ කරන ලද තෝරා ගැනීමකින් විත්තිකරු බැඳී සිටී යන 165 (බී) වගන්තියේ විධිවිධානය, නඩුව විභාග කළ විනිශ්චයකාරතුමා පදනම් කරගත්තේ ය. තෝරා ගැනීම වෙනස් කිරීමට කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කිරීමේ දී විනිශ්චයකාරතුමා 224 වැනි වගන්තිය යටතේ ස්වකීය අභිමතය පාවිච්චි කළේ ය. මෙම නඩුවේ දී පැන නැගුණාක් මෙන්, එම නඩුවේ දී 165 (බී) වගන්තිය යටතේ කැරුණු තෝරා ගැනීමක් යටපත් කිරීමේ ප්‍රශ්නයක් උද්ගත නො වී ය.

රජ එ. තෙලේනිස් අප්පුහාමි (46 න.නී.වා. 304) නඩුව 222 වැනි වගන්තිය යටතේ නොව 224 වැනි වගන්තිය යටතේ කැරුණු ඉල්ලීමකි. එම කාරණය ම එම නඩුව වෙන් කර ගැනීමට සෑහේ. විත්තිකරුවන් විසින් දෙමළ කථා කරන ජූරි සභාවක් තෝරා ගැනීම, 224 වැනි වගන්තිය යටතේ උසාවිය විසින් කැරුණු නියෝගයකින් යටපත් කැරුණු බව සත්‍ය නමුදු, විනිශ්චය කළ විනිශ්චයකාරතුමා ගේ මතය අනුව, මුලුමනින් ම අයුක්තිසහගත හේතූන් මත, සිංහල විත්තිකරුවන් විසින් දෙමළ කථා කරන ජූරි සභාවක් මගින් විභාග කරවා ගැනීමට කැරුණු තෝරා ගැනීමේ විශේෂ සිද්ධිය හේතුකොට ගෙන, විනිශ්චයකාරතුමා විසින් එම නියෝගය කළ බව පැහැදිළි ය.

මෙම විත්තිකරුවන් ගේ නඩුව විශේෂ ජූරි සභාවක් මගින් විභාග කළ යුතු බවට නියෝග කිරීම සාධාරණ වෙතියි මෙම නඩුවේ දී නිගමනය කිරීමට, රජයේ නීතිඥවරයා ඔහු ගේ තර්ක යේ දී දක්වන ලද අවස්ථා-වලින් හේතු සැලසෙන්නේ නැත.

අවසාන නිරීක්ෂණයක් කිරීම අවශ්‍ය ය. අපරාධ නඩු විනිශ්චය කිරීමට විශේෂ ජූරි සභික නාම ලේඛන තවදුරටත් අවශ්‍ය නැතැ යි යන මතය මා දරණ ලෙස වටහා නො ගත යුතු ය. එසේ නොව, සංග්‍රහයේ 257 වැනි වගන්තියේ දැනුම විශේෂ ජූරි සභික නාම ලේඛ-නය සඳහා දක්වා තිබෙන සුදුසුකම් යල් පැනපු ඒවා වන අතර, ඒවා ව්‍යවස්ථාදායකය විසින් නැවත සැල-කිල්ලට භාජනය කිරීමට වටිනා බව මම සිතමි.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඉල්ලීම නිෂ්ප්‍රභා විය.

(පරිවර්තනය: කේ. ගුණසේකර (බී.ඒ. ලංකා) විසිනි.)

අතිරේකය

ගරු ක්‍රිස්ටෝපර් ග්‍රෙගරි වීරමන්ත්‍රී මහතා

ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාර ධුරයකට පත්වීම නිමිත්තෙන්

1967 දෙසැම්බර් මස 17 වන දින පූර්වභාග 11.00 ට

අලුත්කඩේ පිහිටි උසාවි උත්සව ශාලාවේ දී

පවත්වන ලද

කථාවල සිංහල අනුවාදයයි.*

පැමිණ සිටි අය

ගරු හියු නෝමන් ග්‍රෙගරි ප්‍රනාන්දු, අග්‍ර විනිශ්චයකාරතුමා,
රාජනීතිඥ ගරු ආචාර්‍ය හෙන්රි විජයකෝන් තම්බයියා, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
රාජනීතිඥ ගරු අශෝක වින්ද හේමන්ත් අබේසුන්දර, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
ගරු ගාර්දියේ පුංචිහේවාගේ අමරසීල සිල්වා, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාර තුමා,
ගරු ඇල්බට් ලයනල් ස්ටැන්ලි සිරිමාන්න, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
ගරු ඇන්තනි ක්‍රිස්ටෝපර් ඔගස්ටස් අලස්, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
ගරු වීරවාගු සිව සුබ්‍රමනියම්, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
රාජනීතිඥ ගරු ජෝර්ජ් ටෙරන්ස් සමරවික්‍රම, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
රාජනීතිඥ ගරු වික්ටර් තෙන්නකෝන්, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,
ගරු ක්‍රිස්ටෝපර් ග්‍රෙගරි වීරමන්ත්‍රී, ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා,

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ශ්‍රේෂ්ඨාධිකරණයේ රෙජිස්ට්‍රාර් ඇන්. නවරත්නම් මහතා,
ශ්‍රේෂ්ඨාධිකරණයේ 1 වන නියෝජ්‍ය රෙජිස්ට්‍රාර් බී. ඇf්ජ්. පෙරේරා මහතා,
ශ්‍රේෂ්ඨාධිකරණයේ 2 වන නියෝජ්‍ය රෙජිස්ට්‍රාර් ඇල්. වික්‍රමසිංහ මහතා,
ශ්‍රේෂ්ඨාධිකරණයේ 3 වන නියෝජ්‍ය රෙජිස්ට්‍රාර් ඩී. මෙයිනර්ට් මහතා,
ශ්‍රේෂ්ඨාධිකරණයේ 4 වන නියෝජ්‍ය රෙජිස්ට්‍රාර් ඩී. ඊ. ඩබ්ලිව්. ද අල්විස් මහතා,

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රාජනීතිඥ ගරු ඒ. සී. ඇම්. අමීර්, ඇටෝර්නි-ජනරාල්තුමා,
රාජනීතිඥ ගරු ඊ. ඩබ්ලිව්. පී. ඇස්. ජයවර්ධන, සොලිසිටර්-ජනරාල්තුමා,
රාජනීතිඥ එච්. වී. පෙරේරා මහතා,
රාජනීතිඥ ඊ. බී. වික්‍රමනායක මහතා,
රාජනීතිඥ ජී. ජී. පොන්නම්බලම් මහතා,
රාජනීතිඥ සී. ත්‍යාගලිංගම් මහතා,
රාජනීතිඥ ඊ. ජී. වික්‍රමනායක මහතා,
රාජනීතිඥ ඇස්. නඩේසන් මහතා,
රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා,
රාජනීතිඥ එච්. සී. ද සිල්වා මහතා,
රාජනීතිඥ ජී. ඊ. විට්ටි මහතා,
රාජනීතිඥ පී. නවරත්නරාජා මහතා,

සහ නීතිඥ වෘත්තියේ අධිනීතිඥ පෙරකදෝරු යන ශාඛා දෙක්හිම නියෝජිතයන් බොහෝ දෙනෙක් පැමිණ සිටියහ.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 97 වෙනි පිට බලනු.

ගරු රාජනීතිඥ ඒ. සී. ඇම්. අමීර්, ඇටෝර්නි ජනරාල්තුමා:

ගරුතර විනිශ්චයකාරවරුනි,

ඉතාමත් ආඪ්‍යමත් ලෙස නීතිඥ මණ්ඩලයෙහි ක්‍රියා කළ හැකිව තිබිය දී විනිශ්චය මණ්ඩලයෙහි සිට රටට සේවය කිරීම උදෙසා ඒ සියල්ල කැප කිරීමෙන් සමරවික්‍රම විනිශ්චයකාරතුමා දැක් වූ අගනා ආදර්ශය නීතිඥ මණ්ඩලයෙහි අනික් සාමාජිකයන් විසින් ද අනුගමනය කෙරේනු ඇතැයි මා ප්‍රාර්ථනය කළේ මීට අවුරුද්දකට පමණ උඩ දී ය. අද මගේ ඒ බලාපොරොත්තුව සඵල වී තිබේ. අද අප මෙහි රැස්ව සිටින්නේ ලංකාවේ මුළු මහත් අධිකරණ ඉතිහාසයේ දී ම ශ්‍රෙෂ්ඨාධිකරණයේ විනිශ්චයාසනයට පත් වූ ඉතාමත් ලාබාල පුද්ගලයා ලෙස සැලකිය හැකි විරමන්ත්‍රී විනිශ්චයකාරතුමාට ශුභාශීංසනය කිරීම සඳහා ය. ඉහත දී එක්තරා වයෝවෘද්ධ නීතිඥයෙකු කීවා සේ විනිශ්චය මණ්ඩලය සුර ලොව වැනි කවුරුත් කවදා හෝ යන්නට කැමති එහෙත් කාටවත් අද ම නො යා හැකි තැනක් ලෙස මින්පසු සැලකීම වැරැදි බව මින් පැහැදිලි වනු ඇත.

විරමන්ත්‍රී විනිශ්චයකාරතුමනි, අධිනීතිඥයකු වශයෙන් දීප්තිමත් අනාගතයක් ඔබ සතුව තිබිය දී මීට අවුරුදු දෙකකට පෙර අපරාධ අධිකරණ කොමසාරිස්වරයකු ලෙස පත්වීම භාර ගැනීමෙන් ඔබ තුමා කළ පරිත්‍යාගය කෙබඳු වී දැ යි අපි හොඳින් ම දනිමු. විරුද්ධවාදීන්ට පමණක් නොව ප්‍රති-විරුද්ධ සාක්ෂිකරුවන්ට පවා ආචාරශීලිත්වයෙන්, සාධාරණත්වයෙන් හා මධ්‍යස්ථ භාවයෙන් යුතුව සැලකීමෙන් නීතිඥ කාර්යයෙහි සඵලතාවය නො අඩුව ඔප් නැංවිය හැකි බව පෙන්වා දෙමින් ඔබ තුමා නීතිඥ මණ්ඩලයෙහි ක්‍රියා කළ කාලයෙහි දී ඔබ නොයෙක් අතින් ආදර්ශමත් අධිනීතිඥයකු ලෙස සලකන ලද බව නො කිවමනා ය. නීතිඥ මණ්ඩලයෙහි ඔබ ලබා ඇති පළපුරුද්ද ඔබ ගේ පෘථුල ශාස්ත්‍රඥානය හා පාණ්ඩිත්‍යය ද, අපරාධ අධිකරණ කොමසාරිස්වරයකු ලෙස ඔබ ලත් අත් දැකීම් ද නිසා අද ඔබ භාර ගන්නා උතුම් කාර්‍යයට ඔබ සුදුස්සකු වෙනවා පමණක් ම නොව, එයින් ම ඔබතුමා කෙරෙහි පැවරෙන කාර්‍යභාරය පහසුවෙන් ඉටුකළ හැකි වන බව ද පැහැදිලි වේ.

අද ඔබ දිවරුම් දී භාර ගන්නා තනතුර ඔබ කෙරෙහි උසස් වගකීමක් පවරයි. ඒ වූ කලී කෙනකුට තමාගේ ම සෙවනැල්ලෙන් පැන යාමට නො හැක්කා හා සමාන දුෂ්කර කාර්‍යයක් වන්නා වූ ද, එහෙත් විනිශ්චයකරුවකු වශයෙන් ඔබ විසින් සෑම උත්සාහයකින් ම ඉටු කළ යුත්තා වූ ද අපක්ෂපාතීව සිටීමේ යුතුකමයි. පුද්ගලයින් කෙරෙහි ඇති පක්ෂපාතීත්වයෙන් පමණක් නොව යම් යම් තර්කවල ඇති පක්ෂපාතීත්වය ද ඔබේ මනසින් ඈත් කර දැමීමට මේ යුතුකම ඔබට ආරාධනය කරයි. එමෙන් ම ඔබේ යුතුකම වන්නේ ඉදිරිපත් කරන ලද ප්‍රතිවිරුද්ධ අදහස් දෙකකින් කුමක් හෝ එකක් තෝරා ගැනීමට නොව, ඔබේ ශාස්ත්‍රඥානය, පළපුරුද්ද හා පර්යේෂණයන් ද ඉවහල් කරගෙන ඉදිරිපත් වූ ප්‍රශ්න විසඳීම යි. උසාවිය කෙරෙහි මහජන විශ්වාසය ඇති වීමට නම්, නඩුවකට සම්බන්ධ පාර්ශ්වයන් පමණක් නොව පොදු මහජනතාවට ද යුක්තිය ඉෂ්ට වන බව ප්‍රත්‍යක්ෂ වීමට නම් ඔබ විසින් එසේ කිරීම අත්‍යාවශ්‍ය වන්නේ ය.

මේ අවස්ථාවේදී බර්කන්හෙඩ් සාමිවරයා එදා එංගලන්තයේ අග්‍රවිනිශ්චයකාර ධුරයට පත් වූ, මොහොතේ කළ ප්‍රකාශය සිහිපත් කිරීම වටී. ''අපි කිසිවකුට යුක්තිය අහිමි නො කරමු. කිසිවකුට එය පමා නො කරමු.'' යනුවෙන් එතුමා එදා පැවසී ය.

යුක්තිය වනාහි විනිශ්චය මණ්ඩලය විසින් ම පමණක් තනිව ඉටු කළ හැක්කක් නො වේ. තමාගේ පැත්ත හැකි තරම් හොඳින් උසාවියට ඉදිරිපත් කිරීමේ අවස්ථාව ආරවුලකට සම්බන්ධ දෙපක්ෂයට ම නො ලැබුනහොත් යුක්තිය ඉෂ්ට කළ හැකි නොවේ. උසාවිය ඉදිරි පිටට පැමිණෙන සිඩියක් නැවත එම කරුණු වලින් ම යුක්තව කවදාවත් පැමිණෙන්නේ නැත. කිසි ම නඩු දෙකක් එක හා සමාන නො වේ. මනුෂ්‍ය ජීවිතයෙහි පවත්නා නා නා විධ වූ අනපෙක්ෂිත සිදුවීම් සඳහා කල්තියා ම ප්‍රතිකර්ම යෙදීමට තරම් කිසිම නීතිදායකයෙක් සමර්ථ නො වේ. මිනිස් කටයුතු හා තදින් ම සම්බන්ධ, සාමාන්‍ය පුරවැසියා ගේ දෛනික ජීවිතයට බලපාන දෙයක් වන අධිකරණ පරිපාලනය වූ කලී විද්‍යාත්මක සිද්ධාන්තයන් හෝ රීතීන් මත ඉටු කළ හැක්කක් නො වේ. මිනිස් සබඳකම් නිසා පැන නැගි මිනිසුන් අතර පවත්නා ගැටීම්, සතුරුකම් ප්‍රාර්ථනාවන් ආශාවන් හා එය බැඳී පවතී. මේ නිසා ආරවුලකට මුල් වූ අයිතිවාසිකම් පිළිබඳව ඉතාමත් කාර්‍යක්ෂම වූ ද, ක්‍රියාත්මක කළ හැකි වූ ද, තීරණයකට එළඹිය හැකි මාර්ගය වනුයේ අපක්ෂපාතී තුන් වැන්නකු ඉදිරියේ දෙපක්ෂයෙන් ම ප්‍රකාශවන සෑම කියමනක් ම, කරුණක් ම පිළිබඳව නියුණු ලෙස තර්ක කොට, සුපරීක්ෂාකාරී ලෙස විමර්ශනය කොට,

තීන්දුවට එළඹෙන්නට ප්‍රථම සෑම පියවරක දී ම දෙපැත්තෙන් කරුණු විග්‍රහ කොට, තර්ක කොට අන්තිම තීරණයෙහි දී දෝෂ ඇති වීමට ඇති ඉඩ කඩ හැකි තරම් අඩු කොට විචාරාත්මක විවාදයක් පැවැත්වීමට සිදු වන්නේ ය. දෙපක්ෂය වෙනුවෙන් කරුණු හොඳින් ඉදිරිපත් කෙරුනු තරමට, විනිශ්චයකාරතුමා ඉදිරියෙහි පැවැත්වෙන විවාදය තීක්ෂණ ලෙසත්, දක්ෂ ලෙසත් පැවැත්වුනු තරමට එතුමාට සාධාරණ වූත් නිවැරැදි වූත් විනිශ්චයකට පැමිණීමේ ඉඩකඩ වඩාත් අධික වනු ඇත. ප්‍රබල නීතිඥ මණ්ඩලයක් ප්‍රබල විනිශ්චය මණ්ඩලයකට පදනම් වනු ඇතැයි කියන්නේ මේ නිසා ය. අප නීතිඥ මණ්ඩලයෙහි ස්වාධීනත්වය උසස් ලෙස අගය කරන්නේත්, සෑම අළුත් විනිශ්චයකාරතුමකුට ම අප සහයෝගය දක්වන්නේත් ඒ නිසා ම ය.

අප විනිශ්චය මණ්ඩලයෙන් ඉවසීම, අන්‍යෝන්‍ය අවබෝධය සහ ගුණවත්කම අපේක්ෂා කරනුයේ අධිකරණ පරිපාලනයෙහි ලා නීතිඥ මණ්ඩලය ද අත්‍යවශ්‍ය අංගයන් වන හෙයිනි. ඔබ තුමා තුළ මනුෂ්‍යයෙකු වශයෙන් පවතින උතුම් ගුණාංග ද, නීතිඥ මණ්ඩලයෙහි ලබන ලද පළපුරුද්ද ද නිසා විනිශ්චයාසනයේ සිට එසේ කිරීම කොතරම් දුෂ්කර වුව ද යුක්තිය ඉටු වූ බව පෙනී යාම සඳහා අත්‍යවශ්‍ය අවබෝධය හා කාරුණිකත්වය ඔබ දක්වනවාට අපට නිසැකව ම බලාපොරොත්තු විය හැකි ය. අප වෙතින් ඔබ තුමාට සම්පූර්ණ සහයෝගය සෑම විට ම ලැබෙන බවට ඔබ තුමා තුළ කිසිදු බියක් තිබිය යුතු නැත.

ඔබට විනිශ්චය මණ්ඩලයෙහි දීර්ඝ සේවා කාලයක් අයත් වනු ඇත. අප බොහෝ දෙනකු මෙලොව නැති කල පවා ඔබ මෙහි සිටිනු ඇත. ඔබ ඉදිරියෙහි ඇති අවුරුදුවල දී ඔබ අපේ නීති වාර්තා පොහොසත් කරනවා පමණක් නොව, ඔබට ම මේ රටේ අධිකරණ ඉතිහාසයේ විශිෂ්ට තැනක් ලබා ගන්නවා ඇත. නීතිඥ මණ්ඩලයෙහි ශුභාශිංසනය පිරිනමමින් ඔබ තුමාට දීර්ඝ වූත්, විශිෂ්ටවූත් සේවා කාලයක් ප්‍රාර්ථනය කරමින් මගේ මේ වචන ස්වල්පය පෞද්ගලික සඳහනක් ද කරමින් අවසාන කිරීමට සිතමි. එනම්, අදත් මා අතිශය ගෞරවයෙන් හා ආදරයෙන් සිහිපත් කරන මගේ පැරණි ගුරුදේවයකුගේ පුත්‍රයකු වෙනුවෙන් මේ කාර්‍යය ඉටු කිරීමේ අවස්ථාව ලැබීම මගේ විශේෂ සන්තෝෂයට හේතු වූ බවයි.

ගරු ඩී. ජී. වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

මට ශුභාශිංසනය කරමින් කරන ලද කථාවට ඔබට ස්තුතියි, නීතිපතිතුමනි,

ලංකාවේ නීතිය ක්‍රියාවේ යොදවමින් එය පරිපාලනය කරන අපි ප්‍රෞඪ සම්ප්‍රදායයකට උරුමක්කාරයෝ වෙමු. පරම්පරා ගණනාවක සිට අපේ මිනිස්සු උසාවියෙන් ඉතා උසස් ම පරමාර්ථයන් අපේක්ෂා කළහ. ඔවුන් ගේ ඒ අපේක්ෂාවන් නිෂ්ඵල වූයේ ද නො වේ. මේ පරමාර්ථයන් උසාවිය මගින් මනාව පෝෂණය කොට ආරක්ෂා කරන ලද්දා සේ ම, අපේ මිනිසුන් ගේ හදවත් තුළ උසාවියට ඉමහත් ගෞරවයක් පැවතින. මේ නිසා උසාවි මහජන විශ්වාසයේ කේන්ද්‍රස්ථාන බවට ද, මහජන අයිතිවාසිකම් පිළිබඳ ආරක්ෂාස්ථානය බවට ද, පත් වී ඇති අතර එහි ඓතිහාසික සම්ප්‍රදායයන් ගේ මෙන් ම වර්තමාන කර්තව්‍යයන්හි ද අප රටේ ජීවිතයේත් ඉතා ම පොහොසත් වූත්, ශ්‍රේෂ්ඨවූත් අංග ලක්ෂණයන් දැකිය හැක.

එම නිසා මා විනිශ්චය මණ්ඩලයට කැඳවන ලදැයි යන හැඟීමෙන් මසිත ගැඹුරු නිහතමානිත්වයකින් පිරී යන අතර ම විනිශ්චය මණ්ඩලයෙහි සිටින අප හැම කෙනකුන් කෙරෙහි ම පවත්නා වගකීම බරින් මා තෙරපී යයි. ඒ වගකීම් වූ කලී මා ඉහත සඳහන් කළ ගත වූ පරම්පරාවන්හි දී අභාවයට නො ගොස් දීප්තිමත්ව පැවතී ගෙන එන ඓතිහාසික සම්ප්‍රදායයන් පිළිබඳ ආරක්ෂකයින් වීමේ කාර්‍යය වන්නේ ය. එම සිතුවිල්ල මේ තනතුරෙහි වගකීම වලට මුළුමනින් ම ඇප කැපවීමට ද මේ උතුම් දායාදය ආරක්ෂා කරගෙන නියම කාලය පැමිණි විට අනාගත පරම්පරාව වෙත එහි ඉපැරණි නිර්මලත්වයෙන් ඔවුන්ව හිමිකිරීමේ අරමුණ ඇතිව ක්‍රියා කිරීමට ද පොළඹවයි.

නීතිඥමණ්ඩලයෙන් ම පමණක් ලැබිය හැක්කා වූ සහෝදරත්වය, කාරුණිකත්වය හා හිතවත් භාවය ද ප්‍රබෝධමත් ව ගෙවූ ඒ ප්‍රීතිමත් කාල පරිච්ඡේදයට මා ආයුබෝවන් කියන්නේ මා හද

තුළින් පැන නගින එක්තරා ශෝකී හැඟීමකින් යුතුව ය. මා පළමුවරට නීතිඥයින් ගේ පුස්තකාලයට පා තැබූ දින සිට අද දක්වා ජ්‍යෙෂ්ඨයින්ගෙන් මෙන් ම, කණිෂ්ඨයින්ගෙන් ද, නීතිඥ මණ්ඩලයේ දෙපාර්ශ්වයෙන් ම ද එක සේ නො අඩුව ලත් පුදුමාකාර කාරුණිකත්වය පිළිබඳ ප්‍රසන්න වූත්, මා අගය කරන්නා වූත්, සිතුවිලි ද රැගෙන මම මගේ මෙම අළුත් පදවියේ වගකීම් භාර ගන්නෙමි. නීති පරිපාලනයෙහි ලා මා සහාය වූ පසුගිය අවුරුදු දෙකහමාර තුළ දී එවැනි ම සුහදතාවයකින් මේ පැත්තෙන් ද — එනම් විනිශ්චය මණ්ඩලයෙන් ද ලැබුනු බව මම සිහිපත් කරමි. දැන් මට මේ පැත්තට වී සිටීමට සිදු වී ඇති හෙයින්, විනිශ්චය මණ්ඩලය මෙන් ම නීතිඥ මණ්ඩලය ද කැප වී සිටින යුක්තිය ඉටු කිරීමේ කාර්‍යය සඳහා අනාගතයෙහි දී දීර්ඝ කාලයක් ම අපට එවැනි සුහදතාවයකින් ක්‍රියා කිරීමට හැකි වෙනු ඇතැ යි අපේක්ෂා කරමි.

නීතිඥ මණ්ඩලයෙන් ජීවිතයට ලැබිය හැක්කේ කුමක් ද යන්න දීර්ඝ කාලයක් තිස්සේ ඉතා ප්‍රීතියෙන් භුක්ති විඳ, නීතිඥ මණ්ඩලයෙහි දී උගත හැකි දේ කොපමණ දැයි දැන ගෙන විනිශ්චය මණ්ඩලයට පත්වීම මා ලත් විශාල වරප්‍රසාදයක් ලෙස සළකමි. නීතිඥ වෘත්තියෙහි ඇති ගැටළු, අමාරුකම්, දුෂ්කරතා ගැන මම හොඳින් දනිමි. අපේ නීතිඥ මණ්ඩලයෙහි ආවේනික ලක්ෂණයක් වන පක්ෂපාතිත්වය හා කැපවීම පිළිබඳ උසස් හැඟීම් ද, මනසින් හා හදවතින් දැක්වෙන උතුම් ගතිගුණ ද මම හොඳින් දනිමි. අධිෂ්ඨාන ශක්තිය ද ස්වාධීනත්වය ද සම්බන්ධයෙන් එය සැම දා ලබා ඇති ගරුත්වය ගැන ද මම දනිමි. මේ රටේ අධිකරණය කෙරෙහි එය සැම දා දක්වා ඇති ගරුත්වය හා පක්ෂපාතිත්වය ද මම දනිමි. නීතිඥ මණ්ඩලයෙහි සහයෝගය ඉල්ලා සිටීම මෙවැනි අවස්ථාවල දී සිරිතක් වශයෙන් කෙරෙන්නක් වෙනවා මිස එම ඉල්ලීම ඇත්තෙන් ම අනවශ්‍ය එකක් බව ද මම දනිමි. ඔබගේ සහයෝගය, ඔබගේ ආධාරය, ඔබගේ සුහදතාවය සැමවිට ම නො අඩුව ද, නො කැලැල්ව ද ලැබෙන බව මම දනිමි. මේවා මට බෙහෙවින් අවශ්‍ය වන්නේ ය.

මේ කරුණු ඔබෙන් ඉටුවේය යන්න ගැන මා විශ්වාසයෙන් සිටිනවා මෙන් ම, මගෙන් ද ඉතා ප්‍රීතිමත් දීර්ඝ කාලයක් ඔබ වෘත්තියෙහි නියැලුණු කෙනකු වශයෙන් ඔබ එවැනි ම කාරුණිකත්වයක්, සුහදතාවයක් හා අවබෝධයක් ලැබෙන බවට නීතිඥ මණ්ඩලයට විශ්වාසයෙන් සිටිය හැක. අනාගතය අපේ වෘත්තියෙහි සෑම කෙනකුට ම අභියෝගයක් කරයි. ඊට හේතුව නම් නීතිය ස්ථාවර විය යුතු වුව ද එයට නිශ්චලව සිටිය නො හැකි වීම යි. නීතියෙහි වැඩීම් හා සංවර්ධනය නොකඩවා කෙරෙයි. කාලයා ගේ වෙනස් වීම් මගින් අළුත් අභියෝගයක් කෙරෙන අතර වෙනස් වන අවස්ථාවන් මගින් අළුත් ප්‍රශ්න ද පැන නගී. මේ සියල්ලට ම මුහුණ දිය යුතුව තිබේ. නීති ක්‍රමයක් පූර්ණ පරිණත භාවයට පා තැබීමට සදා දරන උත්සාහය සඵල කර ගත හැක්කේ එසේ කිරීමෙන් පමණි.

ශ්‍රේෂ්ඨ විනිශ්චයකරුවකු වන **කාඩෝසෝ** ගේ වචනවලින්, ''දැනට පවතින නීති රීති හා මූල ධර්ම මගින් අපට දැන් සිටින තැනත්, අපේ මාර්ග සටහන හා අප සිටින අක්ෂාංශය හා දේශාංශයද අපට දැනගත හැකි ය. රාත්‍රියට අපට රැකවරණය දෙන නවාතැන ගමනෙහි අවසානය නොවේ. දේශාටකයා මෙන් ම නීතිය ද අනාගතය සඳහා ලෑස්තියෙන් සිටිය යුතු යි.'' මේ නිසා ඔබත්, මමත් අපේ ශක්තිය යුක්තිය පසිඳීමේ කාර්‍යය සඳහා යොදවන කල, අප නිශ්චිත වෙනස් කළ නො හැකි රීති මාලාවක් ක්‍රියාත්මක කරන පරිපාලකයින් පිරිසක් ලෙස නො සිතන ලෙසත්, නීති සංවර්ධන කාර්යයෙහි යෙදුන විශේෂ වරප්‍රසාද ලත් පිරිසක් ලෙස සලකන හැටියටත් ඉල්ලමි. එසේ නොවුවහොත් නීතිය අපේ අතෙහි නිසෝල්මන්ව පවතින හෙයින් අපි අප කෙරෙහි පවරන ලද විශ්වාසය කඩ කළා වෙමු. මේ කාර්යයෙහි ද මෙන් ම අපේ නීතිය හා අපගේ සම්ප්‍රදායයන් නිර්මලත්වයෙන් හා ශ්‍රේෂ්ඨත්වයෙන් පවත්වාගෙන යාම සඳහා ඔබගේ මග පෙන්වීම ද, සහාය ද, සුහදතාවය ද අපේක්ෂා කරමි.

ඇටෝර්නි-ජනරාල් තුමනි, මිත්‍රවරුනි, ඔබ හැම මට දක්වන ලද හෘදයංගම පිළිගැනීම ගැන මම නැවතත් ඔබට ස්තුතිවන්ත වෙමි.

(පරිවර්තනය චූල්පත්මේන්ද්‍ර දහනායක විසිනි).

ගරු ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා ඉදිරිපිට දී ය

ඇල්. ආබ්‍රහම් පෙරේරා එ. ඩබ්ලිව්. ජේ. බී. පෙරේරා*

ශ්‍රෙෂ්ඨාධිකරණ අංක 377/1967

පින්වත්තේ ග්‍රාමීය උසාවියේ අංක 11036 දරණ නඩුවේ දුන් නියෝගයක් සංශෝධනය කරවීමට කරන ලද ඉල්ලීම.

වාද කළේ: නොවැම්බර් 25, 1967
තීන්දු කළේ: දෙසැම්බර්, 1967

ගම්සභා උසාවි පනත යටතේ චෝදනාවක්—විත්තිකරු නිදහස් වීම—එම තීන්දුවෙන් පැමිණිලිකරු දිස්ත්‍රික් විනිශ්චය-කාරතුමාට ඇපැල් ගැනීම — ඇපැලේ දී එම තීන්දුව ඉවත්කර දඬුවම් නියම කිරීමට ගම් සභා උසාවියට නඩුව ආපසු යැවීම—විත්තිකරුට දඬුවම් නියම කිරීම— එම තීන්දුවට විරුඬව ශ්‍රෙෂ්ඨාධිකරණයට සංශෝධන ඉල්ලීමක් කිරීම. — ගම්සභා පනත, 26(1), 41(1), 41(5), 42 යන ඡේද — උසාවි ආඥා පනත 3 වැනි ඡේදය.

ගම්සභා උසාවියක විනිශ්චයකාරතුමකු විසින් විත්තිකාරයකු නිදහස් කරමින් දී ඇති තීන්දුවකට විරුඬව දිස්ත්‍රික් විනිශ්චයකාරතුමකු වෙත ගන්නා ලද ඇපැලක දී එම දිස්ත්‍රික් විනිශ්චයකාරතුමා විසින් එම තීන්දුව වෙනස් කොට විත්තිකරු වරදකරු ලෙස තීන්දුකරමින්, දඬුවම් නියම කිරීම සඳහා ගම්සභා උසාවියට එම නඩුව ආපසු යවන ලදී. ඒ අනුව ගම්සභා උසාවියේ විනිශ්චයකාරතුමා විසින් රු: 25/- දඩයක් නියම කොට එය නොගෙවීවොත් සිර දඬුවම් විඳිමට ද නියම කරන ලදී.

මේ තීන්දුව සංශෝධනය කිරීමට ඉල්ලුම් පත්‍රයක් විත්තිකරු විසින් ශ්‍රෙෂ්ඨාධිකරණයට ඉදිරිපත් කරනු ලැබී ය.

විත්තිකාර පෙත්සම්කරු වෙනුවෙන් පහත සඳහන් තර්ක ඉදිරිපත් කරන ලදී.

ගම්සභා උසාවි පනතේ 41(1) උප වගන්තිය අනුව දිස්ත්‍රික් නඩුකාරවරයකුට, නිදහස් කළ විත්තිකරුවකු නැවත වරදකරුවකු ලෙස තීන්දු කිරීමට බලයක් නැත.

මීට පිළිතුරු වශයෙන් වගඋත්තරකරු විසින් (ඒ) ගම්සභා උසාවි පනතේ 41(5) උප වගන්තිය අනුව, ගම් සභාඋසාවියකින් දිස්ත්‍රික් නඩුකාරවරයකු ඉදිරියට ගනු ලබන ඇපැලකට විරුඬව 41 (5) වගන්තියේ සඳහන් පරිදි මිස ඇපැල් ගැනීමට එම වගන්තිවලින් අවසරයක් නොමැත.

(බී) ගම්සභා උසාවි පනතේ 42 වැනි වගන්තිය අනුව ගම්සභා උසාවියක තීරණයකට විරුඬව කරන ඇපැලක දී දිස්ත්‍රික් නඩුකාරවරයකු දී ඇති තීරණයකට විරුඬව ශ්‍රෙෂ්ඨාධිකරණයට සංශෝධන ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කිරීමට ද බලයක් නොමැත. එසේ වෙනස් කිරීමක් කළ හැකි වනුයේ 'සර්ටියරාරායි' ආඥාවකින් පමණකි.

තීන්දුව: (1) උසාවි ආඥා පනතේ 3 වැනි වගන්තිය අනුව, සලකා බලන කල ගම්සභා උසාවියක් ද එම වගන්තිය යටතේ ගැනෙන උසාවි සංඛ්‍යාවෙහි ඇතුලත්වේ.

(2) සංශෝධන ඉල්ලුම් පත්‍රය, ගම්සභා උසාවියක තීරණයක් පමණක් පිළිබඳ හෙයින් එය වෙනස්කිරීමේ බලය ශ්‍රෙෂ්ඨාධිකරණයට ඇත.

ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා විසිනි — "මෙම සිඩියේ දී ශ්‍රෙෂ්ඨාධිකරණයෙහි බලය පිළිබඳ ප්‍රකාශය සියලු දුෂ්කරතාවලින් මිදී නැති නමුදු, පෙත්සම්කරුට පීඩා කර වූ කිටටුම නියෝගය ඇපැලේ දී දිස්ත්‍රික් විනිශ්චයකරු කළ නියෝගය නොව, 1967 අගෝස්තු 4 වැනි දින ඔහුට ග්‍රාමීය උසාවියෙන් දුන් දඬුවම බැව් පැහැදිලිව පෙනී යන්නේ ය."

ඇල්. ඇන්. ඩී. ජයසූරිය මහතා, පෙත්සම්කරු වෙනුවෙන්

ඩෙස්මන්ඩ් ප්‍රනාන්දු මහතා, වග-උත්තරකරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 113 වෙනි පිට බලනු.

ටී. ඇස්. ප්‍රනාන්දු වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා:

8 වන පරිච්ඡේදය වන 1945 අංක 12 දරන ග්‍රාමීය උසාවි ආඥා පනතේ 26(1) වගන්තියෙන් දඬුවම් ලැබිය හැකි වරදක යෙදීම සම්බන්ධයෙන් පින්වත්තේ ග්‍රාමීය උසාවියේ දී පෙත්සම්කරු චෝදනා ලැබුවේ ය. අන්තරාදායක හෝ පීඩාකාරී ව්‍යාපාරයක යෙදීම, එනම් ගම්කායම් සභාවේ සභාපතිගෙන් අවසරයක් නො ලැබ රබර් ගීට් දුම් ගැස්වීම හා නිපදවීම කරගෙන යාමේ හේතුවෙන් පෙත්සම්කරු විසින් මෙම වරද කරන ලදැයි චෝදනා කොට ඇත.

නඩු විභාගයෙන් පසුව, උගත් ග්‍රාමීය උසාවියේ සභාපතිවරයා, පෙත්සම්කරු නිදොස් කරමින් 1967 මැයි මස 19 වැනි දින තම තීන්දුව දුන්නේ ය. පැමිණිලි කරු (මා ඉදිරියේ ඇති සංශෝධන ඉල්ලීමේ දී වග-උත්තරකරු) ග්‍රාමීය උසාවි ආඥා පනතේ 41 වන වගන්තිය ප්‍රකාර දිස්ත්‍රික් විනිශ්චයකරු වෙත ඇපැල් ගත්තේ ය. එම විනිශ්චයකරු 1967 ජූලි 11 වන දින දරන තම නියෝගයෙන් ග්‍රාමීය උසාවියේ දී තිබුණු නිදොස් කිරීමේ තීරණය ඉවත් කොට, වැදගත් නීති ප්‍රශ්නයක් සම්බන්ධයෙන් ග්‍රාමීය උසාවියේ සභාපති වරයා නො මග ගොස් ඇතැයි යන හේතුවක් උඩ පෙත්සම්කරු වරදකරු කළ බවක් පෙනේ. ඔහු කෙළේ, නීත්‍යානුකූල දඬුවමක් දෙන ලෙස නියෝග කරමින් නඩු වාර්තාව ග්‍රාමීය උසාවියේ සභාපති වෙත ආපසු යැවීම ය. ඒ අනුව, වාර්තාව ලැබුණු පසු, උගත් සභාපති, 1967 අගෝස්තු 4 වන දින දී, පෙත්සම්කරු හමුවේ ඔහුට රු: 25/- ක දඩයක් ද, එය ගෙවීම පැහැර හැරියොත් පෙත්සම්කරු විඳිය යුතු දෙසතියක බරපතල සිර දඬුවමක් ද පැනෙව්වේ ය.

ග්‍රාමීය උසාවියක නියෝගයකින් ගත් ඇපැලක දී නිදොස් කිරීමේ නියෝගයක් වෙනසකට පත් කිරීමේ බලයක් දිස්ත්‍රික් විනිශ්චයකාරවරයකුට නැතැයි පෙත්සම්කරු වෙනුවෙන් කරනු ලබන ප්‍රකාශය වගඋත්තරකරුගේ නීතිඥයා විසිනිදු විවාදයට භාජන කරනු නො ලැබේ. ප්‍රතිවිරුද්ධ මතයක් ඉදිරිපත් කළ නො හැකි අන්දමින් ම 41(1) වගන්තියේ අතුරු විධානය ඉතා පැහැදිලි ය.

41(5) වන උප-වගන්තියේ සඳහන් ක්‍රියා මාර්ගයට අනුකූලව හැර, 41 වන වගන්තිය යටතේ දිස්ත්‍රික් විනිශ්චයකරුවකු වෙත ඉදිරිපත් කෙරෙන ඇපැලක දී ඔහු විසින් දී ඇති තීරණයකින් මෙම උසාවියට ඇපැල් ගැනීම 41(5) වගන්තියෙන් වළක්වා ඇත. එහෙයින් ම, මෙම උසාවියේ ඇති සංශෝධන පිළිබඳ බලතල ක්‍රියාවේ යොදවමින් මැදහත් වීමක් පෙත්සම්කරු අපේක්ෂා කරයි. ග්‍රාමීය උසාවි ආඥා පනතේ 42 වන වගන්තියෙන් තමන් වෙත පැවරී ඇති ඇපැල් බලතල ක්‍රියාවේ යොදවමින් දෙනු ලැබූ නියෝගයක් සංශෝධනය කිරීමට බලයක් මෙම උසාවියට නැතැයි ද, පෙත්සම්කරුට සහනයක් වෙතොත්, එය සර්ටියොරාරි ස්වරූපයේ අධිකරණ විධානයක මාර්ගයෙන් සිදු විය යුතු යයි ද වගඋත්තරකරුගේ නීතිඥයා මතයක් ගෙන හැර පායි. මෙම සිඩියේ දී ශ්‍රේෂ්ඨාධිකරණයෙහි බලය පිළිබඳ ප්‍රශ්නය සියලු දුෂ්කරතාවලින් මිදී නැති නමුදු, පෙත්සම්කරුට පීඩාකර වූ කිට්ටුම නියෝගය ඇපැලේ දී දිස්ත්‍රික් විනිශ්චයකරු කළ නියෝගය නොව, 1967 අගෝස්තු 4 වන දින ඔහුට ග්‍රාමීය උසාවියෙන් දුන් දඬුවම බැව් පැහැදිලිව පෙනී යන්නේ ය. එම දඬුවම ඇපැලේ දී දිස්ත්‍රික් විනිශ්චයකරු දුන් නියෝගයෙන් කෙළින් ම පහළ වුව ද, සංශෝධනය ඉල්ලා සිටින්නේ පෙත්සම්කරුට දඬුවම් පමුණුවමින් ග්‍රාමීය උසාවියෙන් දුන් නියෝගය වෙනුවෙනි. ග්‍රාමීය උසාවිය වූ කලි (6 වන පරිච්ඡේදය වන) උසාවි ආඥා පනතේ අදහස් කරන ලද උසාවියකි — 3 වන වගන්තිය බලන්න — එහෙයින් ම පෙත්සම්කරුගේ මෙම මතය පිළිගත යුතුයයි මම අදහස් කරමි.

මෙතරම් කෙටියෙන් සඳහන් කළ හේතුව නිසා ම, ග්‍රාමීය උසාවියෙන් පෙත්සම්කරු වෙත පවරන ලද දණ්ඩනය නිෂ්ප්‍රභා කරමි.

ඉල්ලීමට ඉඩ දී දඬුවම ඉවත්විය.

ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා සහ සිවසුප්‍රමනියම්, විනිශ්චයකාරතුමා ඉදිරිපිට දී ය.

ඇස්. දෙන් සිරිසේන එ. ඇල්. ජී. සිරිවර්ධන සහ තව කෙනෙක්*

ශ්‍රේෂ්ඨාධිකරණ ඉල්ලීම අංක 428/1966
අධිකරණ ආඥා පනතේ 42 වන ඡේදය අනුව ක්වෝ වොරන්ටෝ සහ මැන්ඩාමුස් ආඥාවක විලාස ඇති අධිකරණ විධානයක් ඉල්ලා සිටීම පිළිබඳවයි.

වාද කළේ සහ තීන්දු කළේ: දෙසැම්බර් 5, 1967
කරුණු ප්‍රකාශයට පත් කළේ: දෙසැම්බර් 10, 1967

නගර සභා ආඥා පනත, 17(3), (5) ඡේද සහ 18(2) වැනි ඡේදය — සභාපතිවරයෙක් තේරීමේ රැස්වීම — සාමාජිකයෙකුට තමාගේ ම නම සභාපති ධුරයට යෝජනා කළ හැකිද යන්න?

මෙහි ඉල්ලුම්කරු සහ වග-උත්තරකාර දෙදෙන බලන්ගොඩ නගර සභාවේ සාමාජිකයෝ ය. පළමු වන වග-උත්තරකරු වූ කලී සභාපතිවරයකු තෝරා පත්කර ගැනීම සඳහා නගර සභා ආඥා පනත අනුව පත් කරන ලැබූ

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*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 73 වෙනි කා., 111 වෙනි පිට බලනු.

සහකාර කොමසාරිස්වරයා ය. ඔහු සභාපතිවරයෙක් තෝරා ගැනීමට කැඳ වූ නගර සභාවේ රැස්වීමක 3.10.66 වැනි දින මුලසුන ඉසිලී ය.

රැස්වීමේ දී දෙවැනි වග-උත්තරකරුගේ නම සභාපති ධුරයට තෝරා ගැනීමට ඒ සභාවේ සාමාජිකයන් දෙදෙනකු විසින් යෝජනා ස්ථිර කරන ලදී. ඉක්බිති ඉල්ලුම්කරුගේ නම සභාපති ධුරයට ඔහු විසින් ම යෝජනා කරනු ලදුව, වෙන සාමාජිකයකු විසින් ස්ථිර කරන ලදී.

එවිට පළමුවැනි වග-උත්තරකරු, ඉල්ලුම්කරුට තමාගේ ම නම නීත්‍යානුකූලව සභාපති ධුරයට යෝජනා කළ නො හැකි යැයි තීරණයකර, ඉල්ලුම්කරුගේ ඉදිරිපත්වීම ප්‍රතික්ෂේප කොට දෙවැනි වග-උත්තරකරු නිතරගයෙන් සභාපති ධුරයට පත්වූයේ යැයි ප්‍රකාශ කරන ලදී.

ඉල්ලුම්කරු වෙනුවෙන් අප ඉදිරියේ තර්ක කළේ නගර සභා ආඥා පනතේ 18 වැනි වගන්තිය අනුව ඉල්ලුම්කරුට තමාගේ නම යෝජනා කිරීමට ඉඩ තිබුන බවයි.

තීන්දුව: පළමුවැනි වග-උත්තරකරු විසින් දුන් යට කී තීරණය නීත්‍යානුකූල නො වන නිසා දෙවැනි වග-උත්තරකරු සභාපති වශයෙන් පත්වීම අවලංගු කළ යුතුයයි කියායි.

නිමල් සේනානායක මහතා, බාල නඩරාජා, ඇඩලා පී. අබේරත්න සහ ඩී. සේනානායක යන මහතුන් සමග, ඇපැල්කරු වෙනුවෙන්.

රජයේ නීතිඥ මර්වින් ප්‍රනාන්දු මහතා, 1 වැනි වග-උත්තරකරු වෙනුවෙන්.

ඇන්. ආර්. ඇම්. දලුවත්ත මහතා, 2 වැනි වග-උත්තරකරු වෙනුවෙන්.

ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා:

නගර සභාවකට සභාපතිවරයකු තෝරා පත් කර ගැනීම හා සම්බන්ධ වූ වැදගත් කාරණයක් මෙම ඉල්ලුම් පත්‍රයෙන් මතු කෙරේ.

ඉල්ලුම්කරුත්, දෙවන වග-උත්තරකරුත් බලංගොඩ නගර සභාවේ සාමාජිකයෝ ය. පළමුවන වග-උත්තරකරු වූ කලී, සභාපතිවරයකු තෝරා පත්කර ගැනීම සඳහා තමා විසින් කැඳවනු ලබන නගර සභාවේ රැස්වීමක මුලසුන ඉසිලිය යුතුයයි (255 පරිච්ඡේදය) නගර සභා ආඥා පනතේ 17 වෙනි වගන්තියේ (3) හා (5) උප-වගන්තිවලින් නියම කරනු ලැබූ පළාත් පාලනය පිළිබඳ සහකාර කොමසාරිස්වරයායි. 1966 ඔක්තෝබර් 3 වන දිනට එබඳු රැස්වීමක් කැඳවනු ලැබූ බවත්, පළමුවන වග-උත්තරකරු එහි මුලසුන දැරූ බවත් පොදුවේ පිළිගනු ලැබූ කාරණයකි.

1966 ඔක්තෝබර් 3 වන දින පැවැත්වුණු එම රැස්වීමේ වැඩකටයුතුවලින් මෙම ඉල්ලුම් පත පිළිබඳව තීරණයකට එළඹීමේ කාර්‍යය සඳහා අවශ්‍ය ප්‍රමාණයක් මෙහි දී සැලකිල්ලට ගත යුතුව ඇත. සභාපති වශයෙන් තෝරා පත්කර ගැනීම සඳහා වග-උත්තරකරුගේ නාමය, සභාවේ වෙනත් සාමාජිකයන් දෙදෙනකු විසින් යෝජනා කරන ලදුව ස්ථිර කරන ලද්දේ ය. මෙහි දී ඉල්ලුම්කරු විසින් නිලයට තෝරා පත් කර ගැනීම සඳහා ස්වකීය නාමය යෝජනා කරන ලද්දෙන්, එම යෝජනාව ස්ථිර කිරීම සඳහා කවරකු හෝ නොසිටින්නට ඉඩක් තිබිය හැකි වගක් 1 වන වග-උත්තරකරු ප්‍රකාශ කෙළේ ය. 1 වන වග-උත්තරකරු එබඳු කරුණක් පළ කෙළේ කුමක් නිසා ද යන්න ප්‍රකට නැත. එම ප්‍රකාශය වූකලී දුර්බුද්ධිමත් ප්‍රකාශයකැයි සඳහන් කිරීමට මට නිදහස තිබේ. කෙසේ වුවද, ඉල්ලුම්කරු විසින් යෝජිතවූ ඔහුගේ නම, සභාවේ තවත් සාමාජිකයකු විසින් ස්ථිර කරනු ලැබිණ. මෙහි දී 1 වන වග-උත්තරකරු කෙළේ, සභාපති වශයෙන් තම නම යෝජනා කිරීමට ඉල්ලුම් කරුට අයිතියක් නැති බැව් තීරණය කොට, යෝජනාව නීතියෙන් සාවද්‍යයයි පළ කිරීම ය. නිලය සඳහා ඉල්ලුම්කරුගේ අපේක්ෂක භාවය එහෙයින්ම ප්‍රතික්ෂේප කරන ලද්දේ ය. මෙහි ප්‍රතිඵලයක් වශයෙන්, තෝරා පත් කර ගැනීම සඳහා එක ම අපේක්ෂකයෙක් යෝජනා කොට ස්ථිර කරනලදැයි යන පදනමෙහි පිහිටා, නිතරගයෙන් 2 වන වග-උත්තරකරු තෝරා පත් කෙරුණු හැටියට ප්‍රකාශ කරන ලද්දේ ය. 18(2) (ඒ) වගන්තිය බලන්න.

වර්තමාන නීති කාන්‍යයෙහි ලා අප විසින් තීරණය කළ යුතු ප්‍රශ්නය වනාහි 1 වන වග-උත්තකරු විසින් කරන ලද ඉහත කී නිගමනය නීතියෙන් නිරවද්‍ය ද යන්න ය. පවත්නා ස්වභාවය අනුව නගර සභා ආඥා පනතේ 18 වන වගන්තිය වූ කලී, 1951 අංක 39 දරන පළාත් පාලන අධිකාරී (නිලධාරීන් තෝරා පත් කිරීම) පනත මගින් අදාළ නීතිය සංශෝධනය කිරීමෙන් පහළ වුණු ප්‍රතිඵලයකි. එය, වෙනත් කරුණු අතර, මහ නගරාධිපතිවරුන් හෝ නගර සභාපතිවරුන් හෝ නියෝජ්‍ය නගරාධිපතිවරුන් හෝ නියෝජ්‍ය නගර සභාපතිවරුන් හෝ තෝරා පත් කර ගැනීමේ ක්‍රමය පිළිබඳ අළුත් විධිවිධාන යෙදීම සඳහා පළාත් පාලන නීතිය සංශෝධනය කිරීම උදෙසා පැනවුණු පනතකි. 1951 අංක 39 දරණ පනතින් සංශෝධන යෙදීමට පෙරාතුව පවා, මහ නගර සභාවකට නගරාධිපතිවරයකු හෝ නියෝජ්‍ය නගරාධිපතිවරයකු හෝ තෝරා පත්

කර ගැනීමේ කාර්‍යයට බලපාන අන්දමකට නම් — (1947 අංක 29 දරණ මහ නගර සභා ආඥා පනතේ 14(4) වගන්තිය බලන්න) — මෙම නිල දෙක සඳහා අපේක්ෂකයන්ගේ නාමයන් යෝජනා කිරීම හා ස්ථිර කිරීම ''වෙනත් සභා සාමාජිකයකු විසින්'' කළ යුතු යයි නියම වී ඇත. 1951 පනතින් නීතියේ එම අංශය වෙනස් කිරීමක් බලාපොරොත්තු නොවූයේ ය. ඇත්ත වශයෙන් ම, ගම් සභාවකට සභාපතිවරයකු තෝරා පත් කර ගැනීමේ කාර්‍යයෙහි දී අදාළ නීතිය මහ නගර සභාවක නගරාධිපතිවරයකු පත් කර ගැනීමේ නීතියට සමාන ය. (257 පරිච්ඡේදය), 1951 අංක 39 දරන පනතෙන් සංශෝධිත වුණු 1924 අංක 9 දරන ගම් සභා ආඥා පනතේ 19 වන වගන්තියෙන්, සභාපති හැටියට තෝරා ගැනීම සඳහා සාමාජිකයකු නාමය ''තවත් කවර හෝ වේවා සාමාජිකයකු'' විසින් යෝජනා කළ යුතු යයි ද ස්ථිර කළ යුතු යයි ද නියම වී ඇත. මහ නගර සභාවලටත්, ගම් සභාවලටත් අදාළ වන අනුරූප විධිවිධාන ගැන අදහසක් ව්‍යවස්ථාදායක අංශය තුළ ඒ අවස්ථාවේ දී ම තිබුණු නමුදු, නීතිය මගින් දේශයේ පිහිටුවා ඇති අනෙක් පළාත් පාලන බල මණ්ඩල වන නගර සභාවලට හා සුළු නගර සභාවලට සභාපතිවරුන් හා උප සභාපතිවරුන් සම්බන්ධයෙන් නීති සම්පාදනයෙහි දී එම විධිවිධාන වලින් බැහැර වී ගිය බවක් පෙනේ. මෙම පළාත් පාලන බල මණ්ඩල දෙක සම්බන්ධයෙන්, ''වෙනත් මණ්ඩල සාමාජිකයකු'' හෝ ''වෙනත් සාමාජිකයකු' විසින් යෝජනා කිරීමත්, ස්ථිර කිරීමත් පිළිබඳ විධිවිධානය ඇතුළත් කර නැත. දේශයේ සියලු ම පළාත් පාලන බල මණ්ඩලවලට නිලධාරීන් ව්‍යවස්ථාදායක අංශය අළුත් විධිවිධාන සම්පාදනය කරන එබඳු අවධියක දී, 1951 අංක 39 දරන සංශෝධන පනතින් ඉදිරිපත්වුණු විශේෂය, විචාරණයෙන් හා සංකල්පයෙන් කරන ලද්දක් මිස අන් කිසිවකැයි අපට අදහස් කළ නොහැකිය. එහෙයින් ම, ව්‍යවස්ථාදායක අංශයේ ප්‍රකටවූත්, සංකල්පයෙන් පහළ කරන ලද්දාවූත් අධ්‍යාශය ක්‍රියාත්මක කිරීමට අපට සිදු වී ඇත. එබඳු අවස්ථාවක් තිබෙද්දී, වෙනස පිළිබඳ හේතුවක් සෙවීම සඳහා අප තැත් කිරීම අවශ්‍ය නැති නමුදු, නගර සභාවක හෝ සුළු නගර සභාවක හෝ සාමාජිකත්වය කුඩා වීම එයින් එක් හේතුවක් විය හැකි ය යන්න අපගේ නිරීක්ෂණයයි. නගර සභාවක් හා සුළු නගර සභාවක් සංස්කරණය වීම සඳහා අඩු ම සාමාජිකයන් ගණන, වියයුතු පරිද්දෙන්, හතර හා තුන වශයෙන් තිබෙතත්, මහ නගර සභාවක් හෝ ගම් සභාවක් හෝ වඩා විශාල සාමාජිකයන් ගණනකින් සමන්විත ය. අදාළ පුරාණ ලේඛනවල කිසියම් විමර්ශණයක යෙදී ඇති උගත් රජයේ අධිනීතිඥවරයා කෙටුම්පත්කරුගේ මනසේ පැවති අදහස මෙය ම යයි ඇත්ත වශයෙන් ම අපට දන්වා සිටිය නමුදු, ලිඛිත නීතියෙහි අපේ ම අර්ථ කථනයකට එළඹීම සඳහා එම දැනුම අප විසින් ප්‍රයෝජනයට ගත නොහැක්කේ ය.

1 වන වග–උත්තරකරු වෙනුවෙන් පෙනී සිටි රජයේ අධිනීතිඥවරයා, ප්‍රස්තුත රැස්වීමේ දී වග–උත්තරකරු විසින් කරන ලද තීරණයට තමාට අනුකූලතාවය දැක්විය නො හැකි වග පළ කිරීමට තරම් නිර්ව්‍යාජ බවක් දැක්වූවේ ය.

පොදු සමාගම් හා පළාත් පාලන රැස්වීම් පැවැත්වීම (1956, 19 වන සංස්කරණය) නමැති ක්‍රැගේ පිළිගත් කෘතියේ දැක්වෙන පාඨයකට ඉල්ලුම්කරුගේ අධිනීතිඥවරයා විසින් අපේ අවධානය යොමු කරන ලද්දේ ය. 28 වන පිටුවෙහි ඇති එය මෙහි පහත උපුටා දක්වන්නෙමි:—

> ''පුද්ගලයකු තමා ම සභාපති හැටියට යෝජනා කරනු ලැබීම හෝ ස්ථිර කරනු ලැබීම අමනෝඥ වුව ද, එබඳු ක්‍රියා මාර්ගයක් වැළැක්වීම සඳහා සාමාන්‍ය යෙන් කිසිවක් නැත. කුමක් වුව ද, තමා වෙනුවෙන් ඡන්දය දීමේ අයිතියක් ඔහුට ඇත.''

18(1) වගන්තියේ යොදා ගන්නා ලද භාෂාවෙහි ව්‍යවස්ථාදායක අංශය විසින් කර්මකාරකය යොදා ගැනීම — ''කවර සාමාජිකයෙක් වුව ද ස්වකීය කැමැත්ත ඇතිව යෝජනා කරනු ලැබිය හැකි ය'' — පදනම් කොට ගෙන 2 වන වග–උත්තරකරු වෙනුවෙන් ඉදිරිපත් කළ හැකිව තිබුණු කිසියම් තර්කයක් වෙතොත්, එය, එක් අතෙකින් මහ නගර සභාව හා ගම් සභාව ද අනෙක් අතින් නගර සභාව හා සුළු නගර සභාව ද අතර එකී ව්‍යවස්ථාදායක අංශය විසින් ම වෙනසක් කිරීම නිසා, නිෂ්ඵල වන්නේ ය. මෙසේ මවිසින් සඳහන් කරන ලද හේතූන් නිසා ,ක්වෝ වොරන්ටෝ ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් සඳහා ඉල්ලුම් පත්‍රය අදාළ වන ප්‍රමාණයකින්, තර්කය නිමාවුණු කල්හි අපි මෙම උසාවියෙන් කලින් නිකුත් වී තිබුණු නයිසයි ආඥාව නියත බවට පත් කෙළෙමු. තවද, 1966 ඔක්තෝබර් 3 වන දින බලංගොඩ නගර සභාවේ සභාපති වශයෙන් 2 වන වග–උත්තරකරු තෝරා පත් කරනු ලැබීම අපි නිෂ්ප්‍රභා කළෙමු.

මෙම ඉල්ලුම් පත්‍රය මත මැන්ඩාමුස් ආඥාව ද ඉල්ලා ඇති නමුදු, මේ අවස්ථාවේ දී එබඳු කවර හෝ ආඥාවක් නිකුත් කිරීම අවශ්‍යයයි අපි කල්පනා නො කරමු. ඇත් ඉතින්, 2 වන වග–උත්තරකරුගේ තෝරා පත්වීම අවලංගු කර ඇති හෙයින්, 1 වන වග–උත්තරකරු හෝ ඔහුගෙන් පසුව එම නිලය වෙන කෙනකු දරතොත්, ඔහු හෝ අප්‍රමාදව අවශ්‍ය රැස්වීම කැඳවා සභාපතිවරයකු පත් කර ගැනීම සඳහා ක්‍රියා කරන බවට අපට සැකයක් නැත. සහකාර පළාත් පාලන කොමසාරිස් වෙත දෙනු ලබන උපදේශය ඇත්ත වශයෙන් ම එය බැව උගත් රජයේ අධිනීතිඥවරයා අපට හැඟවූයේ ය.

මෙම ඉල්ලුම් පත්‍රයේ ගාස්තුව සමාන කොටසින් 1 වන හා 2 වන වග–උත්තරකරුවන්ගෙන් අය කර ගැනීමේ අයිතිය ඉල්ලුම්කරුට හිමිවන්නේ ය.

සිවසුබ්‍රමනියම් විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඉල්ලීමට ඉඩ දෙන ලදී.