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with a Section in Sinhala

VOLUME LXXIV

WITH A DIGEST

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INDEX OF NAMES

DIGEST

Administrative Regulations

Of Government — Have they the force of law?

Advocate

Name struck off the roll on being found guilty of a crime of dishonesty — Application for re-admission after lapse of thirty years.

Appeal

Question of law raised for the first time in appeal — When permissible — Issue of law — In what circumstances can such issue be framed in appellate court.

Attorney-General

Discretionary powers of, under section 391 *of the Criminal Procedure Code — Whether directions by Attorney-General under section* 391 *can amount to interference with judicial power.*

Bail

Courts Ordinance (Cap. 6), section 31 *— Application for bail — Accused charged with murder, attempted murder and rioting, while being members of an unlawful assembly— Pending trial, attempt made on life of eye-witness by relative of one accused — Material to suggest that accused capable of acting jointly or singly for a common purpose — Whether indirect attempt by one accused to tamper with a witness is relevant in considering whether any of the other accused are to be allowed bail.*

Five accused were charged with murder, attempted murder and rioting, while being members of an unlawful assembly. Pending trial before the Supreme Court, the Attorney-General quashed the committal of the 1st and 4th accused. An application for bail under section 31 was made on behalf of the 2nd, 3rd and 5th accused. It was in evidence, by way of an affidavit by the Police that an attempt had been made on the life of an eye-witness one Wimaladasa, by persons among whom were close relatives of the 2nd accused, and the 4th accused who had now been discharged. Wimaladasa had alleged that the attempt on his life was made with a view to preventing him from giving evidence for the prosecution.

Held: That in view of the fact that there was material which suggested that the accused were capable of acting jointly and singly to serve their common ends, the 2nd accused's alleged indirect attempt to do away with witness Wimaladasa is relevant in considering the cases of the 3rd and 5th accused for bail, and is good reason to apprehend that any of them if released on bail, would be a source of danger to the witnesses for the prosecution.

Bills of Exchange

Cheque, action on — Averment in plaint that notice of dishonour given — No plea that such notice unnecessary — Notice in fact not given — Such notice a condition precedent to right of action on cheque — Can plaintiff obtain judgment on basis that no notice necessary — Words "not arranged for" on cheque — Need to lead evidence as to their meaning — Cheques not presented on date they were due for presentment — Burden on plaintiff to show that no funds in defendant's Bank on that date.

The plaintiff sued the defendant on five cheques marked 'A' to 'E' and this appeal was concerned with two of them, viz. 'D' and 'E'. The trial Judge had given judgment for the plaintiff in a sum of Rs. 11,000/- being the value of the two cheques 'D' and 'E' together with legal interest and costs.

The plaintiff had pleaded in his plaint that he had given notice of dishonour of these cheques. He had not pleaded that although there was no such notice, such notice was not necessary in view of the absence of effects in the defendant's Bank. The defendant denied that notice of dishonour had been given and put the plaintiff to strict proof of that fact.

The defendant raised two issues numbered 8 and 9 at the trial which read as follows:—

"8. Was notice of dishonour according to the provisions of the Bills of Exchange Ordinance given in respect of all or any of the cheques marked A, B, C, D, and E.

9. If not can the plaintiff have and maintain this action on all or any of the cheques marked A, B, C, D and E."

The trial Judge answered issue No. 8 in favour of the defendant and issue No. 9 in favour of the plaintiff as far as cheques 'D' & 'E' were concerned. It was submitted on behalf of the appellant that once the learned trial Judge answered issue No. 8 in the defendant-appellant's favour, the plaintiff's action should have been dismissed, as the only question that arose on the pleadings and issues was whether notice of dishonour had been given. It was submitted that such notice was a condition precedent to the right of action on these cheques.

It was submitted on behalf of the plaintiff-respondent that the cheques contained the word "not arranged for" and that this was evidence which would support the learned trial Judge's finding that notice of dishonour was not necessary. It was further submitted that the defendant had not objected to the admission of the said cheques in evidence. In reply, it was submitted on behalf of the defendant-appellant that on the basis of the pleadings and issues the defendant had been entitled to presume that nothing turned on the words "not arranged for" and that the plaintiff should have called evidence to show what they meant. It was also submitted that there was no proof even as to who wrote those words on the cheques.

Held: (1) That this case was one which should be decided in accordance with the pleadings and the issues raised thereon and the evidence led relevant to those issues.

(2) That notice of dishonour was a condition precedent to the right of action on the said cheques. Such notice had not been given in this case.

(3) That the plaintiff should not now be given a further opportunity to prove what the words "not arranged for" meant as this alone would not conclude the matter. The plaintiff would also have to prove that there were no funds to meet the cheques when they were due for presentation, as they had been presented after the due date.

(4) That, further, to give the plaintiff another chance would be to enable him to show that the decision of the learned trial Judge, given on grounds which the plaintiff had then not sought to establish, was in fact correct.

Ceylon (Constitution) Order-in-Council 1946

Section 87(1) — *Administrative Regulations of Government — Have they the force of law.*

Cheques

See under — BILLS OF EXCHANGE

Child

Father's preferential right to custody of.

Civil Procedure Code

Civil Procedure Code, section 192 — *Interest on money decreed — Does the section permit a Court to give interest in respect of claims for unliquidated damages.*

Held: (1) That section 192 of the Civil Procedure Code does not limit the power of the Court to award interest to cases seeking decrees in respect of liquidated debts. The language used must be construed as including a claim in unliquidated damages.

(2) That the court has a discretion to give or refuse interest.

See also under — WRIT OF EXECUTION

Conciliation Boards

Unreasonable delay in issuing certificate — Mandamus.

Control of Price Act

Alleged sale of a 14 *oz. tin of Milk Maid condensed milk above the controlled price — Burden on the prosecution to prove the quantity of milk sold by the accused—Admissibility in Evidence of the label appearing on the tin — Rule against hearsay.*

Price Control Act — Emergency Regulation making section 325 *of the Criminal Procedure Code inapplicable to offences under the Act — Does the Regulation apply to offences committed before Regulation became law — Is such Regulation desirable?*

Held: That the Regulation made on 27/11/67 by the Governor-General under section 5 of the Public Security Ordinance to the effect that section 325 of the Criminal Procedure Code shall not apply in the case of persons charged with an offence under the Control of Prices Act as amended by Act No. 16 of 1966 does not exclude the application of the said section 325 in the case of offences committed before the Regulation became law.

Emergency Regulation making section 325 *of the Criminal Procedure Code inapplicable to offences under the Price Control Act — Appeal argued and order reserved before Emergency regulation came into force. Accused not to be prejudiced by delay of court in delivering judgment.*

Control of Prices (Food) Act — Price Control Order fixing wholesale and retail prices of Condensed Milk — Sale of "Farm Brand" Condensed Milk 14 *oz. tin in excess of controlled price of* 90 *cts. — Charge and conviction for contravening price order — Is the statement in the label of the tin as to weight of contents, hearsay? — Evidence Ordinance, section* 114 *— Presumption to be drawn thereunder.*

Held: (1) That when a retailer sells an article bearing a label which specifies the quantity of its contents e.g. "14 oz. condensed milk", "1/2 lb. butter" or "20 Cigarettes" he adopts the specification in the label and admits by his conduct that the weight or number of the contents without further proof.

(2) That in such circumstances the presumption under section 114 of the Evidence Ordinance as to "the existence of any fact which the court thinks likely to have happened regard being had to the common course of human conduct ..... and public and private business" must be applied.

Co-owners

Co-owners — Prescription among — Enmity between the co-owners from time each acquired title to half share — Possession of entire land over ten years by one of them — Unreasonableness in applying presumption that one co-owner possessed on behalf of the other.

P and K were co-owners of a land in its entirety. K by deed D1 of 1929 purported to transfer the entire land to his son H. through whom the defendants claimed the land.

U, another son of K purchased P's 1/2 share within a week from that day, obviously with a view to contest D1.

There was evidence that in 1930 U instituted action against H in respect of other lands and there was consequent enmity between them.

The evidence also established the fact that H was in occupation of the land from 1929 and took all the produce without giving any portion of it to U.

Held: That in view of the special circumstance that there had been enmity between brothers from and after the time when each of them acquired title to this land it would be unreasonable to apply the presumption that one co-owner was possessing on behalf of the other.

See also under—PRESCRIPTION

Court of Criminal Appeal Decisions

Court of Criminal Appeal — Convictions of murder — Prosecution version different from defence version as to circumstances of incident — Suggestions by prosecuting Counsel, unsupported by evidence, placed before Jury in summing-up without comment — Verdict of murder unreasonable — Duty of trial Judge — Warning necessary against speculative inference.

The two accused (brothers) were convicted of the murder of one T.S. by stabbing him. The prosecution gave one version of the circumstances of the incident, and the defence gave a different version.

The defence version was supported by certain proved facts and by the evidence of some witness called by the prosecution.

The prosecuting Crown Counsel made certain suggestions to the Jury which were not substantiated by evidence that might have been called. The trial Judge referred to the suggestions in his summing-up, but without any recommendation either way as to whether the suggestions were worthy of acceptance. The verdict of the Jury implied that they had based their verdict on the supposition put forward by the prosecution.

Held: (1) That but for the acceptance of the prosecution suggestions, one item of evidence at the least cast a reasonable doubt on the truth of the prosecution version of the circumstances in which the stabbing occurred, and it was unreasonable for the Jury to base their verdict on the supposition put forward by the prosecution, unsupported by evidence.

(2) That it is always open to a Jury to infer the existence of a fact, if the inference readily and reasonably arises from other facts which are clearly proved; but where the prosecution invites the Jury to make an inference of fact, the actual existence of which is probably capable of being established by direct evidence, then the position is different. In such a case it is not appropriate for the trial Judge to present the prosecution suggestion to the Jury without comment. Instead there should be a warning against a speculative inference of a fact, which if true could and should have been proved by direct evidence.

(3) That the verdict of murder was unreasonable.

Sentence — Court of Criminal Appeal — Sentence of imprisonment — Accused's life endangered when he struck fatal blow — Apprehension of danger — Sentence excessive — Bound over — Criminal Procedure Code, section 325(2).

Where in a case of murder, in the course of the trial, a plea of culpable homicide not amounting to murder had been tendered and accepted, and the facts show that the accused himself had received a number of injuries at the hands of a companion of the deceased, two of which were each sufficient in the ordinary course of nature to cause death, and that thereafter the accused, when on the point of death inflicted one stab-wound on the deceased who had picked up the knife which had been dropped by his companion, and for which there was a struggle between the accused and the deceased, and that the accused was a man of good character —

Held: That the sentence of five years' rigorous imprisonment which had been imposed was excessive and should be set aside. The appellant was ordered to enter into a bond under section 325(1) in Rs. 500 personal security to be of good behaviour for two years.

Criminal Procedure Code, section 243 *— Non-compliance with provisions thereof — Failure of trial Judge to refer to evidence in charge to jury — Effect — Non-direction amounting to misdirection.*

Court of Criminal Appeal — Charge of murder — Need to charge jury on all defences arising on the evidence — Exceeding right of private defence — Question of fact to be left to jury — Accused acting with intention to kill — Whether he thereby falls outside scope of law of private defence — Whether substantial miscarriage of justice in present case — Court of Criminal Appeal Ordinance (Cap. 7) ,proviso to section 5(2).

Held: (1) That in the present case there had been no compliance with the express and imperative provisions of section 243 of the Criminal Procedure

Code in that the trial Judge had failed to refer to the evidence at all in his charge to the jury. This was a non-direction amounting to a misdirection.

(2) That, further, the law as regards grave and sudden provocation, sudden fight and the right of private defence one or more of which defences arose on the evidence, should have been explained to the jury, but had not so been explained.

(3) That whether the accused had exceeded the right of private defence or not was a question of fact which should have been left to the jury.

(4) That even if the accused acted with the intention to kill, if his act fell within the right given by the law of private defence he would be entitled to an acquittal. The learned trial Judge had erred when he directed the jury that if they took the view that the accused had a murderous intention they should find him guilty of murder.

Held further: (5) That in view of the defects in the charge to the jury it could not be said that there had been no substantial miscarriage of justice. The proviso to section 5(1) of the Court of Criminal Appeal Ordinance could, therefore, not be applied.

Per **Sri Skanda Rajah, J.:** "We would observe that the jury were not even told of the presumption of innocence of an accused person and the impact of that presumption on the evidence."

QUEEN *v.* GUNASENA 25

Unlawful assembly and rape — Double hearsay on material point capable of corroborating evidence of virtual complainant — Inadmissible — May have influenced verdict of jury — Retrial.

The six accused — Appellants were convicted of being members of an unlawful assembly, the common object of which was to commit rape on the virtual complainant. The 1st, 2nd and 3rd accused were convicted of rape.

The evidence as to the actual rape was only that of the virtual complainant. Her husband had been away from the village on the night of the incident. On the next day the virtual complainant went to a distant place in search of her husband, and explained that she did so because on the evening of the day of the incident,she had sent her servant girl to "the junction", and the servant girl had returned and informed her that the *mudalali* at junction had told the servant girl that the husband had gone away in a car, because the 1st accused had sent him to that place.

Though the servant girl gave similar evidence, neither the *mudalali* nor the husband was called to speak to this matter.

Held: (1) That the evidence as to this matter would have afforded strong corroboration of the virtual complainant's evidence of the rape, it was impossible to be sure that the Jury were not influenced by the knowledge of this fact, and the convictions should be set aside.

THE QUEEN *v.* DISSANAYAKE & SIX OTHERS .. 110

Courts Ordinance

Sections 19 *and* 37 *— Revisionary powers of Supreme Court in relation to non-summary proceedings.*

ATTORNEY-GENERAL *v.* SIRISENA & OTHERS .. 1

Section 31 *— Application for bail — Accused charged with murder, attempted murder and rioting — Circumstances in which bail should be refused.*

HETTIARACHCHI & OTHERS *v.* THE QUEEN .. 63

Criminal Procedure Code

Sections 19, 159, 160, 161(1), 161(2), 163, 164, 337, 356, 391.

Attorney General, discretionary powers of, under section 391 *of the Criminal Procedure Code — Non-summary inquiry on charge of alleged murder against P and respondents — P. committed for trial but respondents discharged without proceeding to act under section* 159, 160 *and* 161 *of the Criminal Procedure Code.*

Directions by Attorney-General under section 391 *of Code to Magistrate to take further steps with a view to committal of respondents—Magistrate complying with some instructions but discharging respondents again — Return of record by Attorney-General with direction to commit respondents for trial to Supreme Court — Refusal by magistrate to comply on ground that original order of discharge made under inherent powers of Court and Attorney-General had no power to give directions under section* 391 *of the Code.*

Judicial power — Whether directions by Attorney-General under section 391 *can amount to interference with judicial power.*

Revisionary powers of Supreme Court — Do they apply to said order of refusal to comply with Attorney-General's directions — Criminal Procedure Code, sections 19, 159, 160, 161(1), 161(2), 163, 164, 337, 356, 391 *— Is an order under section* 162(1) *made under inherent powers of Court or under statutory powers — Nature of duties of a committing Magistrate.*

Courts Ordinance, sections 19 *and* 37.

After non-summary proceedings on an alleged charge of murder against one P and the three respondents abovenamed, the learned Magistrate made order committing P for trial and discharging the three respondents without proceeding to act in respect of them under sections 159, 160 and 161 of the Code on the grounds,

(a) that the prosecution witnesses contradicted each other and their evidence was to some extent contradicted by their previous statements.

(b) that the witnesses failed or delayed to make statements incriminating the respondents and therefore the evidence did not justify the committal of the respondents.

Thereafter the Attorney-General in purported exercise of powers conferred by section 391 directed the Magistrate

(*a*) to record further evidence as may be adduced by the prosecution.

(*b*) to read the charge to the respondents and to inform them that they have the right to call witnesses and if they so desire to give evidence on their own behalf.

(*c*) to comply with the provisions of sections 160 and 161 of the Criminal Procedure Code.

(*d*) to conduct and conclude the inquiry in accordance with the law.

At the inquiry held for the purpose on counsel for the Crown stating that he was not calling any further evidence, the learned Magistrate complied with (b) and (c) above, but again made order discharging the respondents.

The Attorney-General again returned the record to the Magistrate with a direction to commit the respondents for trial before the Supreme Court. The Magistrate refused to comply with this direction stating as his ground that he had made his original order of discharge under inherent powers of Court and that the Attorney-General had no power to give directions under section 391 of the Code.

The Attorney-General applied for the revision of this order.

Held: (1) That where a Magistrate at the close of the prosecution case in non-summary proceedings considers the evidence not sufficient to put the accused on his trial, he could make an order of discharge under section 162(1) of the Criminal Procedure Code and such an order is made in the exercise of the statutory power conferred by that sub-section and not by virtue of the inherent or other power referred to in sub-section 2 of section 162 of the Code.

(2) That the only power to make the first order of discharging made in this case on either of the grounds (a) and (b) aforesaid is conferred by sub-section 1 of section 162 of the Code. The claim by the Magistrate in his last order that he made the 1st order of discharge under inherent powers referred to in section 162(2) is untenable.

(3) That section 164 of the Code permits a Magistrate, in exercising his discretion to discharge, to rely on evidence "in favour of the accused" in case of a conflict ,and is not in terms limited to a contradiction between prosecution evidence on the one hand and defence evidence or evidence on behalf of the accused on the other. This discretion is also statutory.

(4) That the operation of sub-section 1 of section 162 is not restricted to a case in which non-summary inquiry has been concluded. It also applies to a case where the prosecution evidence is insufficient to put the accused on his trial — before the Stage of Compliance with section 159, 160 and 161 of the Code.

(5) That in view of the above conclusions, the Attorney-General clearly had the power to give directions under section 391 of the Code and the Magistrate's refusal to comply was unlawful.

(6) That the said order of refusal is an order within the meaning of section 356 of the Criminal Procedure Code and section 37 of the Courts Ordinance and the revisionary powers of the Supreme Court are exercisable in respect thereof.

(7) That section 19 of the Courts Ordinance read with section 5 of the Criminal Procedure Code is wide enough to confer powers of revision in relation to non-summary proceedings.

(8) That accepting the explanation of the term "Judicial power" as given by Griffith, C.J., in *Appleton* vs. *Moorehead* (1908 8 Commonwealth Reports 330) in the case of an order committing a person for trial before a Court or discharging him from liability to trial, there is no determination of any right of a citizen or of the state: hence the purported exercise by the Attorney-General of powers under section 391 of the Code is not illegal as one interfering with the powers of Court.

Per **H. N. G. Fernando, C.J.** "(*a*) A committal need not in law be followed by a remand, and even when it is, the committing Magistrate does not in his capacity as such, make any determination as to whether or not the accused person is to be deprived of his liberty."

"(*b*) These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers."

"(*c*) It is well to remember that, just as much as Chapter XVI of the Code confers a certain measure of discretion on a Magistrate before whom non-summary proceedings are taken, other provisions of the Code equally confer on the Attorney-General a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter XVI will terminate in a manner determined in the exercise of that discretion."

Section 243 — *Non-compliance with provisions thereof — Failure of trial judge to refer to evidence in charge to jury — Effect.*

Section 338(2) — *Attorney-General's right to appeal against any judgment or final order of a Magistrate's Court or District Court.*

Section 413 — *Accused charged with possession of 'Jackpot' machines — Offence under sub-section* 3(*B*)(1) *of the Gaming Ordinance as amended by Acts No.* 26 *of* 1927 *and* 48 *of* 1961 — *Acquittal of accused — Application by accused for return of the 'Jackpots' produced at trial — Refusal by Magistrate — Revision.*

The accused petitioner sought the revision of an order made by the learned Magistrate refusing an application made for the return of two '*Jackpot*' machines which were productions in proceedings in which he was charged with their possession in contravention of sub-section 3 B(1) of the Gaming Ordinance as amended by Acts No. 26 of 1957 and 48 of 1961 and acquitted.

It was contended for the petitioner that the learned Magistrate had in his order assumed (*a*) that inasmuch as the prosecution failed to prove its charge, the petitioner would also fail in establishing possession for the purpose of his application for return of the production;

(*b*) that upon the return of these implements and appliances, the petitioner would automatically be committing a fresh offence of possession to which he would be able to plead in defence the Courts' order returning the productions.

Held: (1) That the Magistrate was in error when he applied to the question before him the high standard of proof required in a criminal prosecution.

(2) That it was the Magistrate's duty to address his mind to the powers vested in him under section 413 of the Criminal Procedure Code independent of any decision he may have arrived at in the criminal trial.

(3) That possession *per se* of these articles is not illegal as there may be circumstances though in very rare cases in which their possession would not amount to a criminal offence. This, therefore, was a fit case for a fresh inquiry.

Section 325 — *Applicability to offences under Control of Prices Act.*

Section 353 — *Case stated by Magistrate for opinion of Supreme Court — Is it open to a Magistrate to state such a case when, without proceedings to conviction, he orders the accused to enter into a Probation order to be of good behaviour.*

Debt Conciliation Ordinance

Debt Conciliation Ordinance, sections 43 *and* 56 — *Amending Act No.* 5 *of* 1959 — *Clause in agreement entered into before the Board setting out conditions for the determinations of debtor's rights of retransfer — Payment by monthly instalments — In default of any instalment right to retransfer at an end — Effect of such a clause — Applicability of procedure in section* 43 — *Is proceeding pending before the Board — Prevention of Frauds Ordinance, section* 2.

By deed of transfer No. 2613, dated 11th January, 1958, the defendants-appellants transferred their interests in the land forming the subject matter of this action, to the plaintiff-respondent, subject to the condition that the plaintiff would reconvey the said interests on the payment of a certain sum of money within a specified period of time. The defendants-appellants made an application for relief to the Debt Conciliation Board and a settlement was arrived at between the parties whereby the principal sum and the interest thereon was to be repaid to the plaintff-respondent on certain dates fixed in the settlement and upon the payment of the full sum due, the plaintiff respondent was to reconvey the said land to the defendants-appellants. It was also agreed that in the event of a single default the right to redeem would be at an end.

The plaintiff's proctor subsequently applied to the Debt Conciliation Board for an order dismissing the defendants-appellants' application on the basis of a default but no order of dismissal was made in view of the provisions contained in the settlement itself in regard to the consequences following a default.

Upon the plaintiff-respondent filing action, for declaration of title, ejectment and damages the defendants-appellants raised objections on the ground (1) that by virtue of the provisions in the Amending Act No. 5 of 1959, the conditional transfer executed by the appellants was in fact a mortgage and that proceedings before the Debt Conciliation Board were pending at the time action was filed, thereby debarring the plaintiff from maintaining this action; (2) that the only remedy available to the plaintiff was the one provided by section 43 of the Debt Conciliation Ordinance.

Held: (1) That Act No. 5 of 1959, amending the Debt Conciliation Ordinance did not remove the necessity for notarial attestation in the creation of a valid mortgage, required under section 2 of the Prevention of Frauds Ordinance.

(2) That the inclusion of the definition of the term "mortgage" in the amending Act, enables the Debt Conciliation Board to effect settlements in the case of conditional transfers to the extent of settling the terms and conditions of repayment and retransfer.

(3) That where it was agreed before the Debt Conciliation Board between the parties that the right to retransfer would be at an end upon a default by the debtor, and a default was in fact committed, the Board could have no further jurisdiction to deal with any matter relating to the transaction, and the application in respect of such a transaction could not be pending.

(4) That the plaintiff was entitled to maintain this action without resorting to the summary procedure laid down in section 43 of the Ordinance.

Decree

Execution of money decree — Writ allowed but not actually served — Application for notice under section 219 *Civil Procedure Code — Notice not served though*

issued and re-issued several times — Notice of second application for writ — Served — Failure of judgment debtor to appear in response to notice — Order to issue writ — Can court vacate such order subsequently and dismiss application for writ on ground of want of due diligence.

Delegated Legislation

See under — SUBSIDIARY LEGISLATION

Divorce

Adultery of wife — No marital relations since marriage — Husband entitled to nominal damages only.

Employees' Provident Fund Act

Employees' Provident Fund Act, No. 15 of 1958, sections 3(1), 3(2), 23, 24, 46(1) — Employee contributing to Fund as member — Nomination of person to receive all amounts lying to credit of member on his death — Subsequent Last Will made by such member bequeathing the amount to others as well — Claim and counter claim by Executor named in Will and person nominated — Who is entitled to the benefit?

One W. an Engineer, who died on 23/7/66 was a member of the Employees' Provident Fund and in terms of the Employees' Provident Fund Act No. 15 of 1958 made contributions to the said Fund. He had nominated the 1st respondent as the person entitled to be paid all amounts lying to his credit in the Fund in the event of his death.

W. had also left a Last Will in which he had bequeathed his property including the sum lying to his credit in the said Fund to the appellant, and the 1st, 3rd and 4th respondents.

The 2nd respondent as Executor of the said Last Will claimed the amount lying to the credit of W. from the Commissioner of Labour, The 1st respondent counter-claimed as the person nominated by W.

The Commissioner, acting under section 28 of the Act made a determination that the first respondent was enttled to the entirety of the amount, which decision was affirmed by the Tribunal of Appeal on an appeal taken to it.

On an appeal to the Supreme Court from the last decision under section 29(2) of the Act.

Held: (1) That in view of the provisions of section 3(2) of the said Act it could not be argued that the nomination of the 1st respondent was revoked or superseded by the Last Will.

(2) That the argument for the appellants that the 2nd respondent as executor was entitled to the payment of the said benefit under sub-paragraph (a) of section 24 of the Act could not be accepted as:

(*a*) this section was intended to apply only in cases where a member dies and there is no valid or effective nomination.

(*b*) 'nomination' is the only method provided by the Act by which a member of the Fund can control the destination of the amounts standing to his credit in the event of his death.

(*c*) a member of the Fund cannot make a testamentary disposition of such money.

(3) That the 1st respondent being nominee was therefore entitled to receive the benefit.

Estate Duty

Estate Duty Ordinance — Section 21(1) — Stamp Ordinance Parts II and III in Schedule A — Application for conferment of sole testamentary jurisdiction on District Court — Stamp duty leviable on documents filed by petitioner — How computed.

Estoppel

Doctrine of promissory estoppel — When can such plea be taken — No estoppel in face of statute.

Evidence

In a prosecution for selling a 14 oz. tin of condensed milk above the controlled price, the statements on the label of the tin constitute only hearsay evidence and are therefore not admissible to prove the quantity of condensed milk in the tin.

Evidence Ordinance

Evidence Ordinance, sections 68, 69 and 71 — Applicability in Criminal case where deed impugned as forgery—Indictment for forgery of deed of transfer—Vendee, two attesting witnesses and two of the alleged executants accused — Objection raised by defence counsel when deed shown to first witness at trial, on ground that section 68 not complied with — Objection upheld—Prosecuting counsel taken by surprise—Application for date to consult Attorney-General—Refusal—Order discharging and acquitting accused — Appeal by Solicitor-General— Whether this amounts refusal by Crown to lead evidence — Notaries Ordinance, section 31—Criminal Procedure Code, section 338(2).

The five accused were indicted *inter alia* on a charge of conspiracy to commit forgery of a deed of transfer. It was alleged that (*a*) the 1st and 2nd accused were two of the eleven executants, (*b*) the 3rd & 4th accused the attesting witnesses, (*c*) the 5th accused was the vendee.

At the trial when the 1st witness for the prosecution a person claiming to be one of those in truth entitled to the land purported to have been conveyed by the deed was shown the alleged forged deed, counsel for the defence objected to its production on the ground that section 68 of the Evidence Ordinance was not complied with, i.e. that the execution of the deed had not been proved by calling at least one of the attesting witnesses.

The learned District Judge upheld the objection mainly on the ground that the prosecution had not given an opportunity to the witnesses to the deed (3rd and 4th accused) to deny the execution of the document or to say that they cannot recollect its execution.

Thereupon the proctor who was conducting the prosecution applied for a postponement to enable him to consult the Attorney-General for instructions necessitated by the order upholding the objection. This was refused and the trial Judge made order acquitting and discharging the accused.

The Solicitor-General appealed.

On a preliminary objection to the appeal on the ground that what took place after the order upholding the objection was in reality a refusal on the part of the Crown to lead evidence —

Held: That considering the novelty and difficulty of the point of evidence that arose so early at the trial, the trial Judge should have granted a postponement for the purpose indicated by the proctor, even directing the Crown to pay the day's costs, if he thought such a step expedient. Bearing in mind also the provisions of section 338(2) of the Criminal Procedure Code, the preliminary objection shouid therefore be overruled.

Held further: (1) That section 68 of the Ordinance has no application to a criminal case where the prosecution has made the attesting witnesses also accused in the case and are not seeking to use a deed as evidence, but to prove that it is a forged instrument.

(2) Thát in such a case the elements of the charges which have to be established by the prosecution may be established in any of the ways permitted by law.

(3) That the trial Judge misdirected himself completely when he held that the execution of the deed could in view of section 71 of the Evidence Ordinance be proved by other evidence only where attesting witnesses deny or do not recollect the execution of the document for he has inadvertenlty overlooked the important circumstance that being a criminal trial, the 3rd and 4th accused, were not competent witnesses for the prosecution.

(4) That an attesting witness who is not legally not competent to give evidence comes within the expression "if no such attesting witness can be found" occurring in section 69 of the Evidence Ordinance.

(5) That even the words "capable of giving evidence" in section 68 should be interpreted to include legal capacity or competency. Therefore, even on an assumption that section 68 would ordinarily have been applicable the legal incompetency of the 3rd or 4th accused to testify for the prosecution brings this case within the class of cases contemplated in seciton 69 of the Evidence Ordinance.

Section 114 *— Label on tin of condensed milk stating weight of contents to be* 14 *oz.—Is proof of weight necessary in case of contravention of a price control order.*?

Habeas Corpus

Writ of Habeas Corpus — Application by mother for custody of child — Preferent right of father — Principles applicable in determining such question.

Held: (1) That in an application for the custody of a child the paramount consideration is the welfare of the child. It is settled law that subject to that consideration, so long as the matrimony subsists, the father, as the natural guardian has a preferential right to the custody of the child born of the marriage.

(2) That the burden is on the mother who seeks to obtain custody, to prove that the interests of the child require that the father should be deprived of his legal rights. This burden, the petitioner had failed to discharge in this case.

Per **Siva Supramaniam, J.** "The learned Magistrate, however, has stated as an additional reason for his recommendation that if the custody of the second respondent is granted to the petitioner, both children will be able to grow up together and the second respondent will have a companion to play with. While it is undoubtedly very desirable that the children of a family should have the companionship of each other, particularly when they are young, that can hardly be the deciding factor in the determination of the question under consideration."

Heavy Oil Motor Vehicles Taxation Ordinance

Heavy Oil Motor Vehicles Taxation Ordinance, sections (1) *and* 4(1) *— Amendment of section* 2 *by Finance Act No.* 2 *of* 1963 *by inserting sub-section* 7 *— Power given to Minister to vary rates of taxation by order published in Gazette — Temporary validity of such Order till approval by House of Representatives within a month or as specified in sub-section* 7 *— Consequences of long delay in bringing before House for approval.*

Revenue Protection Ordinance (*Cap.* 250).

The Magistrate of Galle made orders in terms of section 4(1) of the Heavy Oil Motor Vehicles Taxation Ordinance for the recovery, as fines from the Petitioner two amounts specified in two Certificates issued by the Government Agent under the same section on 12/8/67 and 14/8/67 in respect of two motor vehicles

for certain periods commencing from 1/6/64 and 1/5/63 respectively.

Section 2(1) of the Ordinance provides that such tax shall be paid in accordance with rates prescribed in the First Schedule to the Ordinance.

Finance Act No. 2 of 1963 amended this section by inserting a new sub-section 7,

(a) enabling a Minister to vary the rates in the First Schedule from time to time by Order published in the Gazette.

(b) requiring *inter alia* the House of Representatives to pass a motion within one month from the date of publication of such Order in the Gazette or if no meeting is held within that period, at the first meeting of the House held after the expiry of that period.

The order varying the rates of tax under the new sub-section 7 was published in the Gazette in 29/4/64 and the motion for approval of the House was made on 20/8/64.

On an application to the Supreme Court for the revision of the said orders by the Magistrate, it was argued for the petitioner that because the motion for approval was not passed in the House within the time specified in (b) above, the order was fully inoperative or alternatively that it became operative only on the date of the approval of the House.

Held: (1) That it is a fundamental principle of British Constitutional law that the subject cannot be taxed except directly by Statute enacted by Parliament or alternatively by Resolution of the House of, Commons passed by virtue of enabling power in a statute.

(2) That the new sub-section 7 aforesaid provides for this alternative method which is prescribed in the Revenue Protection Ordinance (Cap. 250).

(3) That a *sine qua non* for such temporary validity of a taxation Order is that the Minister responsible must perform the obligation which he owes to Paliament to bring the Order before the House of Representatives for approval.

(4) That paragraph (c) of sub-section 7, which provides that even if the House refuses to approve such a taxation Order and it therby become revoked, the levy of taxes prior to the time of such revocation will be valid, is of no avail, where as in this case it is brought before Parliament long after the prescribed time.

(5) That, therefore, the failure to comply with the provisions of paragraph (b) of sub-section 7 had the consequence that the aforesaid Order published in the Gazette of 27/4/63 had no validity as such.

(6) That the new Schedule of rates became valid and operative only as from the date of the passing of the motion of approval i.e. as from 20/8/64.

(7) That the Government Agent might yet be entitled to recover by means of the issue of fresh Certificates tax for the period ending 20/8/64 at the rates specified in the original schedule and for the periods subsequent to 20/8/64 at the new rates.

ILLEPERUMA SONS LTD., *v.* GOVERNMENT AGENT, GALLE 56

Husband and Wife

Husband and Wife — Duty of support — Right of a deserted wife to remain in the matrimonial home — Maintainability of an action for ejectment filed by the husband during the subsistence of the marriage.

A divorce action in which both husband and wife were claiming a divorce from each other was filed by the appellant (husband) in March 1956. On December, 20 1962, the District Court entered decree *nisi* in favour of the respondent. The appellant filed an appeal against the judgment of the District Court which appeal was finally disposed of in 1967.

On December 29, 1962, the appellant gave notice to the respondent to quit the flat of which he was the owner and which, he alleged, she occupied "with his leave and licence". On February 20, 1963, the respondent not having left the premises, the appellant instituted the present action in which he prayed for her ejectment and for damages.

Held: (1) That on the date of the notice to quit as well as on the date of the institution of this action, the divorce action was pending, and the parties were still husband and wife in law.

(2) That the appellant, by reason of his duty of support, had to provide the respondent with accommodation food, clothing, medical attention and whatever else she reasonably required,

(3) That a deserted wife has the right to remain in the matrimonial home unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her.

(4) That the present action was therefore not maintainable.

The following dictum of Lord Upjhon in *Provincial Bank Ltd.* v. *Ainsworth* was quoted with approval:

"A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property, She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licencee of her husband, she is lawfully there as a wife, the situation is one *sui generis*. She may be described as a licencee if that word means no more than one who is lawfully present, but it is objectionable, for the description of anyone as a licencee at once conjures up the notion of a licensor, which her deserting husband most emphatically is not."

CANAKERATNE *v.* CANAKERATNE 37

Divorce — Adultery of wife — No marital relations since marriage — Husband entitled to nominal damages only.

Industrial Disputes Act

Industrial Disputes Act No. 43 *of* 1950—*Creation of Labour Tribunals by Amending Act No.* 62 *of* 1957 — *Rule making powers conferred on Minister by sections* 31A(2) *and* 39(1) *thereof — Regulation* 16 *enacted by Minister specifying time limit for making applications to a Labour Tribunal — Validity of such Regulation — Whether such Regulation belongs to field of substantive law or procedure — Whether necessary for giving effect to principles of Act — Power of Courts to declare it ultra vires even though approved by Parliament — Industrial Disputes Act, sections* 31A(2), 31B(1), 31 D(3), 39(1) *and* (2) *— Interpretation Ordinance* (*Cap.* 2), *section* 17(1)(*e*).

Statutes — Retrospective operation — Presumption against interference with vested rights — Distinction between rights and existing rights — Whether Amending Act No. 62 *of* 1957 *applicable retrospectively to a termination which occurred prior to the introduction of the Act — No right to relief under Act in such a case.*

In terms of Regulation 16 of the Regulations made by the Minister of Labour under section 39 of the Industrial Disputes Act (No. 43 of 1950 as amended by Act No. 62 of 1957) an application by a workman to a Labour Tribunal for relief or redress must be made within 3 months of the termination of the workman's services.

The appellant in the present case had made an application to a Labour Tribunal on 14th August 1965. There was a finding of fact by the President of the Tribunal that the actual date of the termination of his services was in the year 1957. In terms of Regulation 16 the application was therefore out of time and it was rejected by the Tribunal as the date of dismissal was held to be more than three months anterior to the application.

The only point taken in appeal for the appellant was that Regulation 16 was *ultra vires* the powers conferred on the Minister by the Industrial Disputes Act. While contending that this Regulation was *intra vires*, counsel for the respondent took the further point that the appeal could not in any event succeed as at the date of the termination there was no Tribunal in existence to which an application for relief could have been made. Part IV A of the Act (brought in by Act No. 62 of 1957), which created the Labour Tribunals, was enacted in its entirety only on 31st December, 1957 which was a date subsequent to the termination of the workman's services.

Held: (1) That Regulation 16 made by the Minister was *ultra vires*. This Regulation enacted a rule that was one of substantive law rather than procedure and would not, therefore, come within the scope of the rule-making powers conferred on the Minister by sections 31 A (2) and 39(1) of the Industrial Disputes Act, as amended; nor was such a rule necessary in terms of section 39(1)(h) for carrying out the provisions of the Act or giving effect to its principles.

(2) That the requirement of approval by Parliament found in section 39(2) of the Act, which made every regulation so approved "as valid and effectual as though it were herein enacted", did not have the effect of removing such regulations from the purview of the Courts once Parliamentary approval had been obtained.

(3) That although the regulation in question was *ultra vires*, the Act did not apply retroactively to a termination which had occurred prior to its introduction as this would involve an interference with vested rights for which there was neither express provision nor necessary implication in the Act. The workman in the present case had no right of access to the Labour Tribunal since his services had been terminated prior to the statute creating the Tribunals coming into operation.

Insurance

Motor Insurance — Action by insurer for declaration of non-liability under section 109 *of Motor Traffic Act on ground of breach of specified condition — Payments already made by insurer on claim being made — False declaration by dependant — Facts not known to insurer — Effect of earlier payments.*

Interpretation

Interpretation Ordinance section 17(1)(e)—*Validity of rules not made within the rule making power — Interpretation of terms in which delegated powers are conferred.*

Section 17(1)(c)— *Does not apply to the Administration Regulations of Government.*

Jaffna Matrimonial Rights and Inheritance

Jaffna Matrimonial Rights and Inheritance Ordinance (*Cap.* 58), *section* 37 — *Estate of deceased parent devolving on minor child — Surviving parent possessing and enjoying income and effecting improvements — Is he entitled to compensation for such improvements?*

Held: (1) **That the rights of a surviving parent as** set out in section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance are narrower in scope than those of a usufructuary, while as regards his rights of possession of the property and enjoyment of the income thereof, a surviving parent is in the very same position as a usufructuary.

(2) That a usufructuary is not in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of usufruct.

(3) That even if the defendant, (who is the surviving parent of the deceased minor child and whose rights have devolved on the plaintiff) is regarded as a *bona fide* possessor, he is not entitled to claim compensation for the improvements made on the land he possessed under section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance as he had had the use and enjoyment of the improvements for the entire anticipated period, viz. the period of minority.

ARUMUGASAMY IYER *v.* MUTTUCUMAROE IYER .. 34

Judicial Power

Whether directions by Attorney-General under section 391 *of the Criminal Procedure Code can amount to interference with judicial power.*

ATTORNEY-GENERAL *v.* SIRISENA & OTHERS .. 1

Land Acquisition

Land Acquisition Act — Action for declaration and Injunction — Acquisition alleged to be unlawful — Interim Injunction — Description of land as portion out of larger land— Corpus indeterminate — Insufficient in law — Particular land — Section 4 *notice, section* 5 *declaration and section* 38 *order bad — Acquiring officer and owner should know identity of Corpus — Land Acqusition Act (Cap.* 460) *as amended by Act No.* 28 *of* 1964, *sections* 2, 4, 4*A*, 5 *and* 38.

The plaintiff-appellant instituted this action in the District Court of Matara for a declaration, *inter alia*, that a proposed acquisition of land belonging to him was wrongful and unlawful and for a permanent injunction restraining the defendants from taking steps to acquire the land. He also sought an interim injunction.

The present appeal was from an order dismissing the application for the interim injunction, and discharging the enjoining order entered earlier.

The notice under section 4, the declaration under section 5 and the order under section 38 of the Land Acquisition Act (Cap. 460) described the land to be acquired as a portion in extent 1 a. 1 r. 16 p. out of the land called Hambu Ela Watta. The boundaries of the land to be acquired were so stated that whatever way one attempted to ascertain where precisely within Hambu Ela Watte that portion was to be found, one would be met with uncertainty as to its location. The corpus sought to be acquired as described in the documents was an indeterminate one.

Held: (1) That the description adopted in the instant case failed to give effect to the requirements of the Land Acquisition Act.

(2) That to enable the Acquiring officer to give notice under section 4 to the owner or owners, it must follow that such officer should know the particular land proposed to be acquired; and to enable the owner or owners to file objections to the proposed acquisition, they should know the precise location of such land.

(3) That the written declaration under section 5 must also relate to that particular land; and the order under section 38 must also set out the particular land to be acquired. The acquisition cannot be of an indeterminate corpus.

(4) That in view of the provisions of section 4A (contained in Amending Act No. 28 of the 1964), any interpretation which would involve the result that a person would be prevented from dealing with all his lands in a particular area, because he does not know what is the land in that area that he cannot dispose of without contravening the Act, should be avoided.

(5) That the three documents under sections 4, 5 and 38 in this case did not have the force and effect which the Land Acquisition Act contemplates.

KARUNANAYAKE *v.* DE SILVA & ANOTHER .. 16

Landlord and Tenant

Landlord and Tenant — Lease expiring by effluxion of time — Lessee remaining on premises thereafter landlord entitled to insist that such tenant pay the authorised rent and not the rent due in terms of the lease — Sum held by lessor as deposit — Whether arrears of rent can be set off against such sum — Rent Restriction Act (Cap. 274), *sections* 3(1), 14 *— English Increase of Rent and Mortgage Interest (Restriction) Act*, 1920, *section* 15(1).

Held: (1) That where a lease expires by effluxion of time and the lessee remains on the leased premises as a tenant protected by the Rent Restriction Act, the landlord is entitled to demand from the tenant the authorised rent of the premises in terms of the Rent Restriction Act.

(2) That in such a case, where in terms of the lease the lessee had to pay a certain rent and also to pay the rates, on the expiry of the lease the lessee was in the position of a monthly tenant and the landlord could decide to pay the rates himself and insist that the tenant pay to him the authorised rent of the premises.

(3) That where there is a sum paid at the commencement of a lease as a deposit by way of security for the due performance of the terms of the lease, such a deposit did not in the absence of express agreement relieve the tenant of his obligation to pay the current rate for each month. Rent due to the landlord could not therefore be set off against this sum.

Per **Sirimane, J.** "If, for instance, a lease for a long period is ended by effluxion of time, when rental values of properties are very different, from those that prevailed at the time the lease was entered into, it would be manifestly unfair to permit the tenant to remain in possession and insist on the landlord accepting the rent payable under the defunct contract, and deny the landlord the right to claim the rent which the law authorises him to charge."

THEIVENDARAJAH *v.* SANOON 4

Lease

See under — LANDLORD AND TENANT
PREVENTION OF FRAUDS ORDINANCE

Magistrate

Refusal by Magistrate to comply with directions given by Attorney-General under section 391 *of the Criminal Procedure Code on the ground that his (Magistrate's) order of discharge was made under inherent powers of the Court and the Attorney-General had no power to give directions under section* 391 *— Revisionary powers of Supreme Court.*

Mandamus

Does it lie in regard to local authorities.

Writ of Mandamus — Premises occupied by Conciliation Board — Failure to pay assessment rates for over six years — Unsuccessful attempts by landlord (Town Council) to recover possession of premises — Application for certificate, (a pre-requisite to instituting action for declaration of title and ejectment) to same Conciliation Board — Unreasonable delay in issuing certificate — Conduct of Board deplorable.

After an unsuccessful attempt to seize and sell a house occupied by the Conciliation Board (constituted under the Conciliation Boards Act) and situated within a Town Council area, for non-payment of assesment rates by the Chairman of the Council for over 6 years, the Council caused it to be vested in itself.

This step too did not enable the Council to obtain possession of the premises and notwithstanding a further two years' time being granted, possession could not be recovered. Thereupon on 11.6.67 the Council applied to the same Conciliation Board of which the first respondent is the Chairman for a certificate which is a pre-requisite under the Conciliation Boards Act for the instituting of an action for declaration of the title and for ejectment.

As there was unreasonable delay in issuing the Certificate asked for, the Town Council applied for a writ of Mandamus on the respondents who are the Chairman and members of the Board.

Held: That it was clear that the Conciliation Board was adopting an obstructionist attitude towards this matter and hence the applicant was entitled to a Writ of Mandamus compelling the respondents to take all necessary steps to issue the certificate forthwith.

Mandamus, Writ of — Two petitions by public servant addressed to Public Service Commission and Secretary to the Treasury forwarded through respondent as Head of Department — Delay in receiving replies to petitions — Application for Writ of Mandamus praying for directions to respondent to forward petitions to respective addressees — Is the respondent under a statutory duty to do so? — Administrative Regulations laid down in Manual of Procedure — Do they have the force of law?

Ceylon (Constitution) Order in Council, Articles 72, 87(2), 87(1)88*—Interpretation Ordinance, section* 17(1).

Held: (1) That the Administrative Regulations laid down in the Manual of Procedure do not have the force of 'law' and that non-compliance wth these rules cannot be enforced by mandamus. They only regulate a course of conduct for the guidance of public officers and are intended pirmarily to ensure the smooth functioning of work in Government Departments.

(2) That the duty to comply with the regulations is one which the respondent as a public servant himself owes to the Crown, whose servant he is, and not to the petitioner who is a subordinate officer in his department.

(3) That section 17(1)(e) of the Interpretation Ordinance contemplates only such rules, regulations or by laws as are made under any enactment, which has been defined to include an Ordinance as well as an Act of Ceylon. An Order in Council does not fall within the definition of an enactment.

Misdirection

See under — COURT OF CRIMINAL APPEAL DECISIONS

Motor Traffic Act

Motor Traffic Act (Cap. 203), *section* 109 *— Action by Insurer for declaration of non-liability under that section on ground of breach of specified condition — Payment already made by Insurer on claim being made — False declaration by defendant — Facts not known to Insurer — Effect of earlier payment.*

Waiver — Whether payment made without knowledge of full facts constitutes waiver — Must be intentional voluntary relinquishment of known right — Elements necessary — Effect of section 109 *of Motor Traffic Act.*

The defendant who had taken out a policy of insurance in respect of his motor car with the plaintiff Company made a claim for the damages suffered by his vehicle while driven by him, in a collision with another car. The policy provided *inter alia* that the plaintiff Company should not be liable if the accident occurred while the car was being driven by a person who was not a licensed driver. In making his claim to the plaintiff Company the defendant had stated that he was a licensed driver and a sum of Rs. 1,433/22 was paid to him. Subsequently the plaintiff Company having learnt that the defendant had no driving licence at the time of the collision took steps to recover the money and sought a declaration under section 109 of the Motor Traffic Act that a breach of a condition specified in the Policy had been established.

It was held by the trial Judge that though the breach of a condition specified in the Policy had been established, the plaintiff Company was not entitled to obtain the declaration it sought as the payment of the defendant's claim was a waiver of all the Insurer's rights.

Held: (1) That no question of waiver could arise here. Waiver was the intentional or voluntary relinquishment of a known right, and unless express, there must be such conduct as warrants an inference of such intentional or voluntary relinquishment.

(2) That the payment whether made with or without the knowledge of the fact that the defendant had no driving licence at the time of the collision did not operate as a bar to the insurer's getting a declaration under section 109 of the Motor Traffic Act.

Per **Sansoni, J.** "The defence of waiver must also fail because there is no evidence that the defendant acted, in any way, to his detriment by reason of anything that the Company did."

Municipal Councils

Municipal Council — Action against Council for damages consequent on negligence of its servants — Issue raised as to whether due notice of action given under section 307 *of the Municipal Councils Ordinance — Judge answering in favour of plaintiff on all issues including the issue on due notice under sub-section* 1 *of section* 307, *but holding against him on sub-section* 2 *of that section without an issue being framed—Effect.*

In an action against a Municipal Council for damages arising from a negligent act of its servants (which resulted in the minor plaintiff's mother's death) the learned trial Judge answered all issues in favour of the plaintiff except one. This issue was whether due notice of action was given in terms of section 307 of the Municipal Councils Ordinance. He held that notice had been given under seb-section (1) of section 307, but found against the plaintiff on the ground that the plaintiff did not comply with sub-section 2 of section 307 in that he had failed to commence the action within three months' of the accrual of the cause of action.

The main point argued for the plaintiff appellant was that the learned trial Judge had erred in holding against the plaintiff on a question not raised in the form of an issue.

Held (1) That, if an issue had been framed, the plaintiff could have led some relevant evidence on the question whether the action taken by the Municipal authorities which resulted in this dispute was something done under the Municipal Council Ordinance.

(2) That section 307 aforesaid is not applicable as it would appear *prima facie* that the negligent act on which the plaintiffs' claim is based one was done under section 16 of the Electricity Act and one which a Municipal Council had no power to perform under any of the provisions of the Municipal Councils Ordinance.

Municipal Councils Ordinance — Right of a member to bring forward for discussion relevant matters — Power or discretion of Mayor to rule out of order any matter — Writ of Mandamus — Does it lie in regard to local authorities — Availability of an alternative remedy — Municipal Councils Ordinance, sections 17, 18(2), 19, 20 *and* 40(1)(r) — *By-laws* 2(B), 12(1) *and* 12(2) *of the Kandy Municipal Council.*

Section 40(1)(r) of the Municipal Councils Ordinance conferred upon a Municipal Council, for the purpose of the discharge of its duties thereunder, the power to bring forward general questions connected with the Municipal Fund. The applicant, who was a member of the Municipal Council of Kandy, gave due notice of the following motion:

> "In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967."

The 1st Respondent, who was the Mayor of the Municipal Council of Kandy, ruled the above motion out of order, and it was consequently not included in the agenda of the first general meeting held after notice of the motion had been given.

On the ground that his motion was not one which the 1st Respondent had power to rule out of order, the applicant applied to the Supreme Court for a mandate in the nature of a Writ of Mandamus to compel the 1st respondent to include the motion in the agenda of the first general meeting of the Council to be held following the determination of his application.

It was urged on behalf of the 1st respondent that:

(*a*) by virtue of the following by-law, he had an absolute discretion to rule any motion out of order —

> "12(1)— All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda.

(*b*) the Municipal Council was master of its own house, and the Supreme Court will not seek to review the correctness of what is essentially a domestic question;

(*c*) section 20 of the Municipal Councils Ordinance enabled the applicant to bring up his motion by obtaining the permission of the Council, and therefore provided an alternative remedy available to him, but which had not been invoked.

Held: (1) That the motion in question was one raising a general question of financial policy and, therefore fell within the meaning of section 40(1)(r).

(2) That a by-law cannot be construed so as to frustrate the exercise of a power conferred by the statute itself, and that, consequently, By-law 12(2) did not vest in the 1st respondent an absolute power or discretion to rule out of order a motion which was otherwise lawful.

(3) That the 1st respondent had no discretion to rule out of order a motion of which a member had a statutory right to give notice.

(4) That by making the ruling complained of, the 1st respondent had failed or refused to perform his statutory duty, a duty he owed to the application on behalf of the ratepayers of Kandy, and Mandamus was the appropriate remedy. The jurisdiction to compel by Mandamus the performance by local authorities of statutory duties had been exercised by the Supreme Court for a long period of time.

(5) That section 20 did not provide an alternative remedy.

Per **T. S. Fernando, J.** "No reason is advanced here as a justification for ruling the motion out of order save the plea of absolute power or discretion. A court must surely be slow to recognise the existence of such a power in an officer elected to head local body exercising powers affecting the public and functioning apparently within a democratic framework."

Non-direction

See under — COURT OF CRIMINAL APPEAL DECISIONS

Notaries

Is a notary who attests an instrument an attesting witness.

Parent and Child

Application by mother for custody of child — Preferential right of father.

Partition

Partition action — Interlocutory decree ordering sale by public auction subject to a life-interest in an undivided share — Has the Court power to make such order? — Certificate of sale — Does the purchaser get title free from all encumbrances? — Partition Act No. 16 of 1951, sections 4, 5. 18. 25. 26. 46. 47, 48(1), 50, 51 and 54.

By his Last Will a testator devised certain interests in common out of a land and buildings thereon to the plaintiff, the 1st defendant and the 3rd defendant and a life interest in a 1/3 share of the soil and buildings to the 2nd defendant subject to a forfeiture on remarriage.

In a partition action instituted by the plaintiff, a decree for sale was entered under section 26 in the following terms:— "It is further ordered and decreed that the said land and premises be sold by Public Auction in conformity with Partition Act No. 16 of 1951, subject to the life interest in favour of the 2nd defendant in respect of a 1/3 share of the buildings and the proceeds thereof be entitled (*sic*) to the parties according to their proportionate shares."

On an appeal by the plaintiff the Supreme Court held (vide 67 N.L.R. 97) that on a proper construction of sections 5, 26, 38, 47, 47, 48 and 54 of the Partition Act, the title which a certificate of sale confers on a purchaser of the land and buildings thereon is free from any life interest or usufruct declared in favour of a person in the interlocutory decree entered under section 26 read with section 48. The purchaser thus gets title free from all encumbrances except the interests of the proprietor of a nindagama specially preserved under section 54. (It also held that the interests awarded to the 2nd defendant should be valued and he should be paid the estimated value of his usufruct out of the proceeds of sale.)

From this order the 1st defendant appealed to the Privy Council.

Held: (1) That the word "title" in section 25 of, the Act includes a title which may be subject to an encumbrance.

(2) That the term "the land" in sections 25 and 26 and 46 of the Act means simply "the land the subject of the action", such as it is with all its burdens and advantages. To compel persons other than co-owners having encumbrances on the land or on shares in it, including owners of servitudes, of usufructs or life-interests, or *fideicommissaries* to accept some assessed compensation for their rights though, no doubt, a possible result of legislation, amounts to a substantial interference with their rights. This should not be imposed in the absence of clearly expressed provisions including adequate methods of assessing the value of their rights.

(3) That the argument strongly relied on by the respondents, that the effect of section 46 is that when the purchaser receives the certificate of sale he acquires an indefeasible title free from encumbrances, is untenable, as section 46 cannot be regarded as, anything more than a conveyancing section, the purpose and effect of which is to establish the certificate of sale as

a new and conclusive root of title without the necessity of any conveyance from the co-owners or any investigation of title.

(4) That section 47 provides merely for a schedule of distribution to be prepared by a party and approved by the Court and does not provide the mechanism by which encumbrances from which the land is liberated, pass and attach to the proceeds of sale as contended for the respondent.

(5) That sub-section (1) of section 48 makes it clear that after the interlocutory decree has been entered the land is freed from all encumbrances not specified in it and must be taken to support the conclusion that the land is sold subject to the encumbrances specified in the decree. If the intention were that on a sale, the land were *ipso facto* to be freed from encumbrances specified in the interlocutory decree, the language used in the section would be different.

(6) That this view gains support from sub-section (2) of section 50 and section 51 of the Act.

(7) That section 54 is contained in a part of the Act dealing with special cases and is confined to those specifically mentioned. It affords no guidance as to the intention of the general portion of the Act.

(8) That therefore, in proceedings under the Partition Act the court has power, when ordering a sale of land in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land.

Partition Action — Exclusion of a portion of land as a separate land the title to which is in some other person — Transfer of such excluded portion pending partition — Is it rendered void by section 67 of the Ordinance?

Res judicata — Point of contest allowed by trial Judge to remain as a guide for him, not for enabling any parties to obtain adjudication on it — Effect of a finding on such point of contest.

Held (1) That where a particular portion of land is excluded from a partition on the ground that some person or persons have title to it as a separate land, section 67 of the Partition Ordinance does not render void dealings with that portion during the pendency of that action.

(2) That if a party to an action set out a claim of title, and if a finding as to his title has to be reached and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion or inclination to the contrary which the trial Judge might entertain.

Penal Code

Section 311 — Grievous hurt — Requirement that there must be severe bodily pain for twenty days.

Held: (1) That where a medical report merely states that "the injuries caused the sufferer to be in bodily pain for thirty days," this would not be sufficient to establish the charge of grievous hurt. It is the fact that there must be *severe* bodily pain for twenty days that makes the differences as to whether the hurt complained of was grievous or not.

Criminal Procedure Code, section 353 — Case stated by Magistrate for opinion of Supreme Court — Is it open to a Magistrate to state such a case when without proceeding to conviction he orders the accused to enter into a Probation order to be of good behaviour?

Penal Code, section 311 — Accused charged for grievous hurt — Medical evidence that blow inflicted on complainant caused partial loss of hearing but would become permanent — Does this injury come within the definition of grievous hurt.

Voluntarily causing grievous hurt — Absence of intention.

Held: (1) That section 353 of the Criminal Procedure Code only applies when a person has been convicted and sentenced to some penalty or punishment. When a Magistrate did not proceed to conviction it is strictly not open to him to have stated a case for the opinion of the Supreme Court.

(2) That where the Magistrate held that the accused did not have the intention to cause grievous hurt, he could be convicted only of simple hurt.

(3) That the ear is a 'member' within the meaning of section 311 of the Ceylon Penal Code and that permanent impairment of an ear falls within the 5th category of hurt set out in it, and is therefore grierous hurt.

Pleadings

See under—BILLS OF EXCHANGE

Prescription

Possession by agent on behalf of co-owners — Claim by parties seeking to dispossess co-owners stating such agent possessed on their behalf too — Can agent

so possess in dual capacity — Standard of proof required to establish adverse possession against co-owners by such agent — Whether notice required to all co-owners of this change in the nature of such agent's possession.

This was a partition action in which the contest centred around the undivided 1/6th share that devolved on one Agiris. The plaintiffs claimed on the basis that this share devolved on the surviving brothers and sisters of Agiris. At the trial the contesting defendants based their claim to this undivided 1/6th share on prescriptive title. It was their case that one Jayaneris had possessed on their behalf.

This same Jayaneris at the time he was stated to have been entrusted with possession on behalf of the contesting defendant, was already in possession on behalf of certain co-owners, namely the 1st defendant and the 5th defendant.

The claim of the contesting defendants based as it was on the possession of their agent Jayaneris therefore raised the question of possession by an agent acting in disparate capacities — on the one hand for the benefit of co-owners claiming by a rightful title and on the other for the benefit of those seeking to dispossess them.

The only evidence was that Jayaneris had planted "catch crops" on the land and there was no evidence of a division of this produce between two sets of principals. There was also no demarcation of the crops to support the suggestion that he was acting in a dual capacity.

The case of prescriptive possession set up by the contesting defendants had not been envisaged by them in their pleadings and on their pleadings they had claimed on the basis that Agiris had conveyed his share by Deed to one Salman to whose interests they succeeded on intestacy. The fact that they relied mainly on prescriptive possession became apparent only at the trial and indeed after the close of the plaintiffs' case.

Held: (1) That a contention such as the one made by the contesting defendants could only be based upon clear and cogent evidence, pointing unmistakably to this dual nature of the agent's possession. The evidence in the present case was nowhere near this high order of proof required to establish adverse possession by Jayaneris as the agent of the contesting defendants.

(2) That just as possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, so also possession through an agent is incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent. However, no express communication of the change in the nature of the agent's possession is required, and all that is necessary is that the agent's conduct carries without ambiguity the message of the altered nature of his possession.

(3) That where notice of the altered character of a person's possession is necessary, this notice is necessarily required to all the co-owners and a notice to some alone will not suffice.

(4) That the plaintiffs in the present case had not been called upon to meet a case of adverse possession and indeed on the basis of the pleadings they would have been entitled to assume that the contesting defendants based their title upon a transfer by Agiris. No adverse inference therefore could be drawn against the plaintiffs from their failure to meet in advance this altered case of the contesting defendants and in this context the adverse comments made by the learned trial Judge in regard to the evidence of possession given by the plaintiffs lost their force.

JAYANERIS & ANOTHER *v.* SOMAWATHIE & OTHERS.. 22

Among co-owners — Circumstances in which presumption that one co-owner prescribed against another co-owner may be reasonably drawn.

TENNEKOON *v.* KOIN MENIKE 109

Prevention of Frauds Ordinance

Act No. 5 of 1959 amending the Debt Conciliation Ordinance did not remove the necessity for notarial attestation in the creation of a valid mortgage.

JOHANAHAMY & OTHERS *v.* SUSIRIPALA .. 30

Prevention of Frauds Ordinance (Cap. 70), section, 2 — Lease of land for cultivation of crops by plaintiff — Rental payable annually — Lease informal and not in compliance with section 2 — Dispossession by defendants — Action for damages — Can claim be maintained — Nature of liability in question — Whether also delictual or quasi-contractual — Plaintiff's right to claim compensation for improvements.

Estoppel — Doctrine of promissory estoppel — When such plea be taken — No estoppel in face of statute.

Appeal — Question of law raised for first time in appeal — When permissible — Issue of law — In what circumstances can such issue be framed in appellate Court.

Plaintiff sued the defendants claiming Rs. 3,500/- as damages alleging —

(a) that from 1961 the defendants had leased a garden to him at an annual rental of Rs. 180/- payable in July of the year following that in which the lease was commenced;

(b) that payments had been made up to July, 1963;

(c) that on 10.1.64 while plaintiff was in possession in terms of the lease then current, the first defendant, acting for himself and on behalf of the 2nd and the 3rd defendants dispossessed the plaintiff, removed certain water-lifting machinery from the land, destroyed a water course and damaged the crop of onions and tomatoes raised by the plaintiff.

The defendants in their answer while denying the averments in the plaint pleaded—

(a) that no valid cause of action had accrued to the plaintiff to sue them;

(b) that the 1st defendant had allowed the plaintiff to cultivate the land for a period of one year only on his paying in advance a sum of Rs. 180/- for the year beginning 1.10.61.

(c) that on his entreaties the plaintiff was permitted to cultivate the land for a further year on a similar payment but he failed to pay it;

(d) that when pressed for the rent in January 1963, the plaintiff promised to pay in July 1963 and to quit the land by September 1963 and accordingly the plaintiff left the land;

(e) that when the plaintiff after quitting the land attempted to re-enter to plough it on 12.11.63 the 1st defendant protested against it and complained to the appropriate authorities.

The learned District Judge held against the defendant and awarded damages to the plaintiff in a sum of Rs. 2,400/-.

The defendants appealed and it was contended on their behalf (although not raised at the trial), that the lease relied on by the plaintiff was contrary to section 2 of the Prevention of Frauds Ordinance and was therefore null and void.

Counsel for the plaintiff-respondent in reply argued that causes of action sounding in delict and quasi-contract could be alternative bases for his claim. He further suggested that the doctrine of estoppel could be also called in aid by him as a ground for relief.

Held: (1) That though this legal issue was not specifically taken earlier, the appellant was entitled to take the point based on the Prevention of Frauds Ordinance in appeal, as a perusal of the evidence led at the trial placed it beyond doubt that the lease relied on was an informal lease and as no prejudice had resulted to plaintiff from the failure to take this point at the trial.

(2) That on the basis of the pleadings no action for damages would lie for the reason that the lease relied on by the plaintiff lacked the formalities prescribed by section 2 of the Prevention of Frauds Ordinance and was therefore null and void.

(3) That, following *Perera* v. *Perera* (1967) 70 N.L.R. 79, the informal lease in question was not one which might be treated as a tenancy from month to month.

(4) That the plaintiff could not base his claim on delictual liability as such a liability must flow from the breach of a duty recognised by law and not from a contract which the statute expressly renders null and void.

(5) That the plaintiff was not enitled to claim any compensation for improvements,

(a) as the damage claimed does not fall within the principles of retention or compensation.

(b) as the trial Judge had found that the plaintiff's state of mind was not that of a bona fide possessor.

(6) That a court of appeal will not raise an issue on the existence of a quasi-contractual obligation to restore what had been received, in the absence of necessary averments to raise such issue or clear circumstances showing the existence of such obligation.

(7) That the question of estopped raised on behalf of the respondent was in effect a plea based on the doctrine of promissory estoppel. However, while an estoppel may afford a defence against the enforcement of otherwise enforceable rights, it cannot create a new cause of action.

(8) That the doctrine of estoppel cannot be invoked in the face of a statute.

(9) That, therefore, the doctrine of estoppel afforded no basis on which a plaintiff could build legal claim.

Per **Weeramantry, J.** (a) "Moreover although infringement of contractual rights by a third person, may constitute a delict, the breach of a contract by one of the parties to it cannot constitute a delict."

(b) "Wheareas common law estoppel was confined to representations of existing fact, promissory estoppel is not so circumscribed in its scope and may be founded upon a representation in regard to future conduct."

Privy Councils Decisions

Public Servants

Public Servant — Termination of services by Head of Department by virtue of powers delegated by the Public Service Commission — Scope of such powers — Plaintiff's services terminated on ground outside the terms of delegation — Powers of Appeal Court to grant relief under general prayer "for such other and further relief as to the court may deem meet."

In his plaint the plaintiff prayed (a) for damages against the defendant (the Director of Land Development) — for an alleged unlawful termination of his services and (b) for such other and further relief as to the Court may deem meet.

The Attorney-General intervened under section 463 of the Civil Procedure Code and the only issue tried was whether the defendant terminated the services of the plaintiff unlawfully and without just and reasonable cause.

The learned District Judge dismissed the action holding that the plaintiff's services were rightly terminated and that he did not come within the category of persons who have a right to employment under the Government of Ceylon.

The letter terminating the plaintiff's service showed that the reason for such termination was that plaintiff was not authorised to stay in Ceylon because his final visa had expired.

On an appeal by the plaintff.

Held: (1) That the terms of delegation of powers by the Public Service Commission to the Heads of Departments as published in Gazette No. 10847 of 7.10.1955, for dismissing, or otherwise punishing a public officer working in a department assigned to a Minister, for misconduct on any ground other than the ground of conviction, did not authorise the head of the department to dismiss an officer otherwise than on misconduct.

(2) That therefore, the termination of the plaintiff's services on the ground that he was not authorised to stay in Ceylon is void and inoperative.

(3) That, it is open to a public servant who is aggrieved by the unlawful termination of his services to institute an action for a declaration that the termination of his services were void and inoperative.

(4) That having regard to the prayer of the plaintiff " for such other and further relief " it is open to the Supreme Court to make a declaration that the termination of the plaintiff's services by the Director of Land Development was void and inoperative.

Public Service Commission

Delegation of powers to Head of Department — Head acting in excess of delegated power — Powers of Supreme Court.

Rent Restriction

See also under — LANDLORD AND TENANT

Rent Restriction Act (Cap. 274) Section 13(1)(d) — Action for ejectment by landlord on ground that tenant convicted of using premises for illegal purpose — Tests applicable — Whether user of premises for illegal purpose essential element.

Held: (1) That where the question is whether a landlord is entitled to a decree in ejectment against his tenant in terms of Section 13(1)(d) of the Rent Restriction Act, the test applicable would be whether the tenant has taken advantage of the premises and the opportunity they afforded for committing the offence and not whether the user of the premises constitutes an essential element in the offence for which the occupier or his licencee has been convicted.

(2) That therefore in the present case the conviction for the sale of arrack is a conviction of using the premises for an illegal purpose within the meaning of section 13(1)(d).

Res Judicata

Point of contest allowed by trial judge to remain as a guide for him, not for enabling any parties to obtain

Writ of Execution

Writ — Execution of money decree — Writ allowed, but not actually issued — Application for notice under section 219, Civil Procedure Code — Notice not served though issued and re-issued several times — Notice of second application for writ — Served — Failure of judgement-debtor to appear in response to notice —Order to issue writ—Can court vacate such order subsequently and dismiss application for writ on ground of want of due diligence.

Held: (1) That where an application for writ is served on a Judgment-debtor and an order made for writ to issue in the absence of the judgment-debtor by reason of his failure to appear in response to the notice, the order made is one inter-partes which the Court has no jurisdiction to vacate or set aside.

(2) That where the order to issue writ was made upon an affidavit placed, before the District Judge showing material or affording grounds for the making of the order, it cannot be said that such order was made *per incuriam* merely for the reason that the learned Judge came to a different conclusion after he had heard evidence in respect of the same matter.

Writs

Habeas Corpus

Mandamus

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

ATTORNEY-GENERAL *vs.* W. K. DON SIRISENA & OTHERS*

S.C. Application No. 327/67

In the matter of an application for revision in M.C. Colombo 37693/*C*

Argued on: 18th, 19th, 20th & 21st December, 1967.
Decided on: 27th January, 1968

Attorney-General, discretionary powers of, under section 391 *of the Criminal Procedure Code — Non-summary inquiry on charge of alleged murder against P and respondents—P. committed for trial but respondents discharged without proceeding to act under section* 159, 160 *and* 161 *of the Criminal Procedure Code.*

Directions by Attorney-General under section 391 *of Code to Magistrate to take further steps with a view to committal of respondents — Magistrate complying with some instructions but discharging respondents again—Return of record by Attorney-General with direction to commit respondents for trial to Supreme Court — Refusal by Magistrate to comply on ground that original order of discharge made under inherent powers of Court and Attorney-General had no power to give directions under section* 391 *of the Code.*

Judicial power,—Whether directions by Attorney-General under section 391 *can amount to interference with judicial power*

Revisionary powers of Supreme Court — Do they apply to said order of refusal to comply with Attorney-General's directions—Criminal Procedure Code, sections 19, 159, 160 161(1), 161(2), 163, 164, 337, 356, 391 *— Is an order under section* 162(1) *made under inherent powers of Court or under statutory powers — Nature of duties of a committing Magistrate.*

Courts Ordinance, sections 19 *and* 37.

After non-summary proceedings on an alleged charge of murder against one P and the three respondents abovenamed, the learned Magistrate made order committing P for trial and discharging the three respondents without proceeding to act in respect of them under sections 159, 160 and 161 of the Code on the grounds.

(a) that prosecution witnesses contradicted each other and their evidence was to some extent contradicted by their previous statements.

(b) that the witnesses failed or delayed to make statements incriminating the respondents and therefore the evidence did not justify the committal of the respondents.

Thereafter the Attorney-General in purported exercise of powers conferred by section 319 directed the Magistrate

(*a*) to record further evidence as may be adduced by the prosecution.

(*b*) to read the charge to the respondents and to inform them that they have the right to call witnesses and if they so desire to give evidence on their own behalf.

(*c*) to comply with the provisions of seeking 160 and 161 of the Criminal Procedure Code.

(*d*) to conduct and conclude the inquiry in accordance with the law.

At the inquiry held for the purpose on counsel for the Crown stating that he was not calling any further evidence, the learned Magistrate complied (b) and (c) above, but again made order discharging the respondents.

The Attorney-General again returned the record to the Magistrate with a direction to commit the respondents for trial before the Supreme Court. The Magistrate refused to comply with this direction stating as his ground that he had made his original order of discharge under inherent powers of Court and that the Attorney-General had no power to give directions under section 391 of the Code.

* For Sinhala translation, see Sinhala section, Vol. 16, part 8, p. 1

The Attorney-General applied for the revision of this order.

Held: (1) That where a Magistrate at the close of the prosecution case in non-summary proceedings considers the evidence not sufficient to put the accused on his trial, he could make an order of discharge under section 162(1) of the Criminal ProcedureCode and such an order is made in the exercise of the statutory power conferred by that sub-section and not by virtue of the inherent or other power referred to in sub-section 2 of section 162 of the Code.

(2) That the only power to make the first order of discharge made in this case on either of the grounds (a) and (b) aforesaid is conferred by subsection 1 of section 162 of the Code. The claim by the Magistrate in his last order that he made the 1st order of discharge under inherent powers referred to in section 162(2) is untenable.

(3) That section 164 of the Code permits a Magistrate in exercising his discretion to discharge to rely on evidence "in favour of the accused" in case of a conflict, and is not in terms limited to a contradiction between prosecution evidence on the one hand and defence evidence or evidence on behalf of the accused on the other. This discretion is also statutory.

(4) That the operation of sub-section 1 of section 162 is not restricted to a case in which non-summary inquiry has been concluded. It also applies to a case where the prosecution evidence is insufficient to put the accused on his trial—before the Stage of Compliance with section159, 160 and 161 of the Code.

(5) That in view of the above conclusions, the Attorney-General clearly had the power to give directions under section 391 of the Code and the Magistrate's refusal to comply was unlawful.

(6) That the said order of refusal is an order within the meaning of section 356 of the Criminal Procedure Code and section 37 of the Courts Ordinance and the revisionary powers of the Supreme Court are exercisable in respect thereof.

(7) That section 19 of the Courts Ordinance read with section 5 of the Criminal Procedure Code is wide enough to confer powers of revision in relation to non-summary proceedings.

(8) That (accepting the explanation of the term "Judicial power" as given by Griffith, C.J., in *Appleton* vs. *Moorehead* (1908 8 Commonwealth Reports 330) in the case of an order committing a person for trial before a Court or discharging him from liability to trial, there is no determination of any right of a citizen or of the state: hence the purported exercise by the Attorney-General of powers under section 391 of the Code is not illegal as one interfering with the powers of Court.

Per **H. N. G. Fernando, C.J.** "(*a*) A committal need not in law be followed by a remand, and even when it is, the committing Magistrate, does not in his capacity as such, make any determination as to whether or not the accused person is to be deprived of his liberty."

"(*b*) These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers."

"(*c*) It is well to remember that, just as much as Chapter XVI of the Code confers a certain measure of discretion on a Magistrate before whom non-summary proceedings are taken, other provisions of the Code equally confer on the Attorney-General a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter XVI will terminate in a manner determined in the exercise of that discretion."

Cases referred to: *de Silva* vs. *Jayatillake* (1965) 67 N.L.R. 169.
Samsudeen vs. *Marikar* (1934) 36 N.L.R. 89.
Attorney-General vs. *Kanagaratnam* (1950) 52 N.L.R. 121,
Appleton vs. *Moorehead* (1908) 8 Commonwealth Law Reports, 330.

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

G. E. Chitty, Q.C., with *A. S. Vanigasooriar* and *Nihal Jayewickreme*, for the 1st respondent.

Colvin R. de Silva, with *Nihal Jayawickrema and P. Ilayaperuma*, for the 2nd respondent.

K. C. Nadarajah with *D. T. P. Rajapakse*, for the 3rd respondent.

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

On 26th October, 1966, proceedings were instituted in the Magistrate's Court, Colombo, against one Premasiri and the three respondents to the present application, on a charge of alleged murder by shooting. At the inquiry under Chapter XVI of the Criminal Procedure Code the learned Magistrate committed Premasiri for trial, but he made order on 18th February 1967 discharging the three respondents without proceeding to act in respect of them under sections 159, 160 and 161 of the Code. Thereafter on 8th April 1967 the Attorney-General in purported exercise of powers conferred by section 391, directed the Magistrate —

(*a*) to record such further evidence as may be adduced on behalf of the prosecution:

(*b*) to read the charge to the 2nd, 3rd and 4th accused and inform them that they have the right to call witnesses and if they so desire to give evidence on their own behalf;

(*c*) to comply with the provisions of section 160 and 161 of the Criminal Procedure Code in regard to the said accused;

(*d*) to commit the said accused for trial before the Supreme Court on the said charge and to take such other and further steps as are required or authorised by law.

Subsequently, the Attorney-General directed the Magistrate to strike out paragraph (d) of his instructions, and directed him instead to "conduct and conclude the inquiry in accordance with law". On 4th June 1967, Counsel for the Crown stated in Court that he was not calling any further evidence, and it thus became unnecessary for the Magistrate to comply with paragraph (a) of the instructions. He then read the charge to the three respondents in terms of section 159, and proceeded to comply with sections 160 and 161; but thereafter he again made order discharging these respondents.

On 18th June 1967 the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August 1967, the learned Magistrate, refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under inherent powers, and that the Attorney-General has no power to give directions under section 391 in a case where an order of discharge is made under such power. The present application of the Attorney-General is for the revision by this Court of the Magistrate's order of 14th August 1967.

During the argument of learned Crown Counsel, reference was made to the judgment of a Divisional Bench in the case of *de Silva* vs. *Jayatillake* (67 N.L.R. 169), expressing the opinion that the power of discharge referred to in section 191 of the Code is an inherent right of the Court. Having regard to the similarity of the language employed in section 191 and in sub-section (2) of section 162, that opinion is probably applicable to the last-mentioned section as well. We informed Counsel that for present purposes we would regard the power of discharge referred to in sub-section (2) of section 162 as being an inherent power, and would hear argument to the contrary only if that course became unavoidable. It turns out that the present case can be decided without the need to rule on the question whether or not section 162(2) refer to inherent power.

The order discharging the three respondents, which the learned Magistrate made on 18th February 1967 sets out his reasons for the discharge, and in that order the three respondents are referred to respectively as the 2nd, 3rd and 4th accused. A witness, *Wijesuriya*, had testified that the 2nd, 3rd and 4th accused had been present with the 1st accused at the time of the alleged incident, that the 2nd accused had handed a gun to the 1st and instigated him to shoot at the deceased, and that the 3rd and 4th accused had been armed with clubs. Another witness, Wickramapala, testified that he had seen the 2nd accused handing a gun to the 1st and the latter shoot in the direction of a Co-operative Store, and that he then saw the deceased man running from the steps of the same Store crying out that he had been shot. This witness stated that he did not hear any instigation by the 2nd accused, and that he did not see the 3rd and 4th accused at the scene. The learned Magistrate was of opinion that these two witnesses "contradicted each other hopelessly". He relied also on the fact that *Wijesuriya*, in his statement to the Police, had stated that the 3rd and 4th accused did not have anything in their hands, and on the further fact that all the prosecution witnesses had apparently failed or delayed to inform the Police of the names of the alleged assailants. The Magistrate further stated his opinion that the Police had conducted their investigations in an unorthodox and irregular manner, and had built up a false case implicating the 2nd, 3rd and 4th accused. On these and other grounds, the learned Magistrate took the view that the evidence of the principal prosecution witness was totally unworthy of credit, and reached the conclusion that "the evidence does not justify the committal of the 2nd, 3rd and 4th accused."

Sub-section (1) of section 162 of the Code provides that "if the Magistrate considers that *the evidence against the accused is not sufficient to put him on his trial*, the Magistrate shall forthwith order him to be discharged"; section 163 provides that "if the Magistrate considers *the evidence sufficient to put the accused on his trial*, the Magistrate shall commit the accused for trial". One of the main arguments urged for the respondents is that both these provisions of the Code come into operation only after an accused has been charged in terms of section 159 and after sections 160 and 161 have been complied with. This argument is manifestly correct in relation to section 163, because a Magistrate can only commit for trial after section 160 and 161 have been followed. But, for reasons which I am about to state, sub-section (1) of section 162 can apply before the stage of compliance with sections 159, 160 and 161.

Section 159 quite clearly applies at the stage when the prosecution has led all its evidence and imposes a particular duty to be performed by the Magistrate at that stage. This duty is to consider whether "the case should be dealt with in accordance with the provisions of section 162". If the Magistrate gives an answer in the affirmative to the question which he is thus directed to consider, he must discharge the accused. In terms then, section 159 directs the Magistrate's attention to section 162 at the stage when the prosecution's case is closed. Sub-section (1) of section 162 provides for discharging if *the evidence is not sufficient to put the accused on his trial*, and the most common ground for discharge in non-summary cases is stated in this sub-section. There is literally nothing in the terms of the sub-section to exclude its application at the stage when the prosecution has led all its evidence, and no grounds of law or common-sense were urged in favour of the contrary contention. Indeed, the contention was that a discharge at this stage is referable only to sub-section (2) of section 162, which means in effect that the legislature, in directing the Magistrate by section 159 to consider whether the case should be dealt with in" accordance with the provisions of section 162," intended to refer the Magistrate only to sub-section (2) of section 162. Moreover, if the assumption on which we are acting for present purposes be correct, namely that sub-section (2) of section 162 refers only to an inherent power of discharge, then the contention means that the Legislature failed to provide a statutory power to discharge in the clear and eminently fit case where the prosecution evidence is insufficient to put the accused on his trial.

I must note here that learned Crown Counsel himself appeared to support this same contention. That support was apparently based on the judgment of Macdonell, C.J. in *Samsudeen* vs. *Marikar* (36 N.L.R. 89) in a case decided before the 1938 Amendments of the Criminal Procedure Code. The Code formerly contained 3 provisions relating to discharge in non-summary proceedings:— 1. *section* 156(2) provided that when all the prosecution evidence had been adduced, the Magistrate shall discharge the accused if the evidence does not establish a *prima facie* case of guilt; 2. *section* 157(1) provided that "*when the inquiry has been concluded*, the Magistrate shall discharge the accused if there are not sufficient grounds for committing the accused for trial"; and 3. *section* 157(3) was the same as the present section 162(2). In that context, it was perfectly clear that section 157(1) applied only when the whole inquiry was concluded. But the present Code has no section like the former section 156(2). In place of that Section and of Section 157(1), there is the present section 162(1) providing for discharge where the Magistrate considers that the evidence is not sufficient. Unlike the former section 157(1), this present section 162(1) is not prefaced by the words "when the inquiry has been concluded"; the omission of these words was quite clearly intentional, and its only apparent purpose was to provide that the statutory power or duty to discharge is to be exercised when the evidence is considered insufficient, whether at the stage when the prosecution evidence has been led or at the later stage after the accused has made his statement or led evidence.

The contention that the operation of sub-section (1) of section 162 must be restricted to a case in which a non-summary inquiry has been concluded, although propounded on behalf of the respondents in this case, is clearly unfavourable to accused persons; it means that although a Magistrate may consider the evidence to be insufficient at the close of the prosecution case, he has no statutory power to make the obvious order of discharge, which the operation of the presumption of innocence demands in such a situation.

The contention also involves the proposition that section 164, which refers to "a conflict of evidence", only applies in a case where evidence has been led on behalf of an accused, and not also where (as stated in the order of the Magistrate in the instant case) a conflict is thought to arise upon the evidence led for the prosecution. But the

language of section 164 does not admit of a construction so unfavourable to accused persons. This Section permits a Magistrate to rely on evidence "*in favour of the accused*" in case of a conflict, and is not in terms limited to a contradiction between prosecution evidence on the one hand, and defence evidence or evidence *on behalf of* the accused on the other.

Let me take a charge of stabbing, in which a witness called by the prosecution gives evidence that he saw the complainant being stabbed, not by the accused, but by some other person. Surely such evidence is "evidence in favour of the accused" which contradicts other prosecution testimony on a material point. Hence section 164 will permit the Magistrate on this ground to consider that the evidence is not"sufficient to put the accused on trial". If such is the opinion of the Magistrate when the prosectuion case is closed, it would be absurd that he cannot give effect to his opinion at that stage and must instead defer the making of an order of discharge.

Section 164 echoes the language of section 162(1) in using the words "consider the evidence sufficient to put the accused on his trial". When therefore, there is a conflict of testimony on material points, whether on the prosecution evidence alone, or else between that evidence and evidence for the defence, the discretion to discharge is statutory (section 164) and the power to make the order of discharge is also statutory (section 162(1)).

For these reasons, I would hold that sub-section (1) of section will apply at the close of the prosecution case if the Magistrate at that stage considers the evidence not sufficient to put the accused on his trial. If an order of discharge is then made for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of section 162,

The summary which I have earlier made of the learned Magistrate's order of 18th February shows that he had two main grounds for deciding to discharge the three respondents: *firstly* the prosecution witnesses contradicted each other, and their evidence was to some extent contradicted by their previous statements; *secondly*, the witnesses had failed or delayed to make statements incriminating the respondents. The first ground is that which is expressly stated in section 164, and I have already shown that a discharge on that ground is one made in exercise of the statutory power conferred by section 162(1). I do not propose to consider whether it is lawful for a Magistrate to take any account of the second ground; but even if a discharge on that ground is lawful, I hold that the power to make the order of discharge is again that conferred by sub-section (1) of section 162. Where, as in such a case, the Magistrate's opinion is based on a consideration of the evidence and on the probability that a Jury would not believe it, the reason for the order of discharge (if lawful) would be that the evidence is insufficient. I am quite unable to accept the submission that, if the Legislature did intend to permit a discharge for such a reason, it felt the validity of the discharge to rest on inherent power.

I accordingly hold that in law, the only power which the Magistrate had to make his order of 18th February 1967 was the power conferred by sub-section (1) of section 162. Indeed a reading of the order itself leaves no room for doubt that the learned Magistrate had in mind the provisions of that sub-section and of section 164. Even in the order of 4th June 1967, the learned Magistrate stated "I have already held that *there is no prima facie case* made out against the 2nd, 3rd and 4th accused". Although this is not the precise language of section 162(1), it conveys much the same idea: if the evidence is not sufficient, then there is no *prima facie* case. At the end of the order of 4th June, the Magistrate stated his "considered view that *the evidence is not sufficient to warrant a committal*"; here he actually employed the language of section 162(1) with only an immaterial variation. It is only in the last order, that of 14th August 1967, that the Magistrate claims to have made the first order of discharge under inherent power referred to in sub-section (2) of section 162. I regret that, in the face of the reasons stated in the two earlier orders, I have to declare that claim to be untenable.

In the result, I hold that the first order of discharge was in exercise or purported exercise of the power conferred by section 162(1). Accordingly the Attorney-General clearly had the power to give his subsequent directions under section 391. It was not and could not be argued that a Magistrate may in any circumstances refuse to comply with such directions, and I must hold that the Magistrate's refusal so to comply was unlawful.

Even on the basis that the directions of the Attorney-General in this case were in due exercise of the powers conferred by section 391 of the Code,

Counsel for the respondents contended that this Court has no power, in the present application, to direct the Magistrate to comply with the Attorney-General's directions in this case.

It was argued that the powers of this Court in revision are not exercisable in the present case because there is not within the meaning of section 356 of the Code *any sentence or order* which may now be examined by this Court. The Magistrate (it was submitted) was directed to make an order of committal; but he made no such order, and therefore there does not exist any order which we may now reverse or correct under section 37 of the Courts Ordinance. A simple answer to this argument, it seems to me, is that in law the Magistrate in this case has made an order refusing to make the order of committal which the Attorney-General directed him to make, and that such an order of refusal is an order within the meaning of section 356 of the Code and section 37 of the Courts Ordinance. Alternatively, the Magistrate has in substance made order holding that the Attorney-General had no power to give the directions which he did give, and that is an order which this Court can reverse or correct.

Counsel for the 1st respondent drew an analogy between the omission or refusal of a Magistrate to comply with directions under section 391 and a refusal to issue process. He urged that if the cases are analogous, then in each case the only remedy open to the Attorney-General would be by way of mandamus. The unsoundness of this argument is demonstrated by section 337 of the Code; although the section provides that a Mandamus shall lie to compel a Court to issue process, it expressly contemplates that an appeal will also lie against a refusal of process, though only at the instance or with the sanction of the Attorney-General. If therefore, the cases are in truth analogous, section 337 might even afford ground for the contention that the Attorney-General had a right of appeal in the present case.

It was also argued that section 356 is limited to cases already tried or pending trial, and that proceedings under Chapter XVI of the Code do not involve the trial of any case. This same submission was rejected in *Attorney-General* vs. *Kanagaratnam* (1950) 52 N.L.R. 121, following previous decisions, and I am in agreement with the judgment in the cited case holding that section 9 of the Courts Ordinance, read with section 5 of the Criminal Procedure Code, are wide enough to confer powers of revision in relation to non-summary proceedings.

There was also a further argument of a nature which in my opinion is being adduced in our Courts far too frequently. Relying on recent decisions holding that the principle of the Separation of Powers is recognised in the Constitution of Ceylon, it was argued that an order of discharge in non-summary proceedings is a judicial order, and the purported exercise by the Attorney-General of powers under section 391 is an interference with the powers of a Court and is therefore illegal. Counsel for the 1st respondent emphatically urged that the order of a Magistrate, to commit an accused for trial or else to discharge him, "satisfied every test" requisite for holding it to be a judicial order. The fallacy of this argument is exposed in the judgment of Griffith, C.J. in *Appleton* vs. *Moorehead* (1908) 8 Commonwealth Law Reports 330, which has been recognised by many Courts in other Commonwealth countries as being the most acceptable explanation of the words "judicial power."

The learned Chief Justice gave to the words "judicial power" the meaning "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property". Decisions in other jurisdictions, including Ceylon, have in adopting the dictum of Griffith, C.J., laid down as an essential feature of the exercise of judicial power the requisite that there must be a determination of rights as between citizen and citizen, or citizen and the State. In the case of an order committing a person for trial before a Court or discharging him from liability to trial, there is no determination of any right of a citizen or of the State.

Any order may of course be called a "judicial order", if and on the ground that it is made by a Judge; but it does not follow that therefore the order is made in the exercise of the judicial power of the State. The Magistrate conducting an inquiry under Chapter XVI of the Code makes no determination whether or not the accused person has committed an offence; all that he decides is whether or not the evidence is sufficient to put the accused on his trial. Nor do I see anything in the argument that, because a committal for trial may be followed by a remand, the committal thus

interferes with the accused person's right to liberty and is therefore the exericse of judicial power. A committal need not in law be followed by a remand, and even when it is, the committing Magistrate, does not in his capacity as such, make any determination as to whether or not the accused person is to be deprived of his liberty. Purely administrative orders are daily made which deprive citizens of their rights, while not at the same time determining or deciding any controversy as to such rights. A common and simple example is the case of an order for the compulsory acquisition of land or movable property whether with or without the payment of compensation.

The judgment of Griffith, C.J. in itself deals at some length with the nature of the power of Magistrates to commit for trial or discharge in pre-trial proceedings. I see no reason whatsoever to disagree with the grounds stated in that judgment for the conclusion that a Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is be to committed for trial.

There is also I think another answer to the argument invoking the doctrine of the Separation of Powers in this case. Our law has, since 1883 if not earlier, conferred on the Attorney-General in Ceylon powers, directly to bring an alleged offender to trial before a Court, to direct a Magistrate who has discharged an alleged offender to commit him for trial, and to direct a Magistrate to discharge an offender whom he has committed for trial. These power of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers. This Court has, upon similar considerations, upheld the validity of Statutes conferring criminal jurisdiction on Courts Martial and conferring on revenue authorities the power to impose penalties for the breach of revenue restrictions.

I should add lastly that the instant case appears to have taken the turn it did, only because of some idea in the mind of the learned Magistrate that the Attorney-General was attempting improperly to interfere with judicial proceedings, and that the directions given by the Attorney-General were a reflection on the correctness of views formed by the Magistrate on the evidence in this case. It is well to remember that, just as much as Chapter XVI of the Code confers a certain measure of discretion on a Magistrate before whom Non-summary proceedings are taken, other provisions of the Code equally confer on the Attorney-General a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter XVI will terminate in a manner determined in the exercise of that discretion. Indeed, the arguments of Counsel who appeared in this case for the respondents actually involved the alarming proposition (which I am certain none of them would concede in a different situation) that the Attorney-General may not lawfully direct the discharge of a person whom a Magistrate commits for trial.

For these reasons, I would, in exercise of the powers of revision of this Court, set aside the order of discharge made by the Magistrate on 14th August 1967, and remit the record to the Magistrate's Court for compliance by that Court with the direction given by the Attorney-General on 18th June 1967 to commit the three respondents for trial before the Supreme Court on the charge specified in that direction and to take further steps according to law.

Abeyesundere, J.

I agree.

Silva, J.

I agree.

Order of discharge made by Magistrate set aside.

Privy Council Appeal No. 3 *of* 1967

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

CEYLON THEATRES LIMITED *vs.* CINEMAS LIMITED AND OTHERS

From
THE SUPREME COURT OF CEYLON

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

Delivered: 23rd January, 1968

Partition action — Interlocutory decree ordering sale by public auction subject to a life-interest in an undivided share—Has the Court power to make such order?—Certificate of sale—Does the purchaser get title free from all encumbrances?—Partition Act No. 16 *of* 1951, *sections* 4, 5, 18, 25, 26, 46, 47, 48(1), 50, 51 and 54.

By his Last Will a testator devised certain interests in common out of a land and buildings thereon to the plaintiff, the 1st defendant and the 3rd defendant and a life interest in a 1/3 share of the soil and buildings to the 2nd defendant subject to a forfeiture on remarriage.

In a partition action instituted by the plaintiff, a decree for sale was entered under section 26 in the following terms:— "It is further ordered and decreed that the said land and premises be sold by Public Auction in conformity with Partition Act No. 16 of 1951, subject to the life interest in favour of the 2nd defendant in respect of a 1/3 share of the buildings and the proceeds thereof be entitled (*sic*) to the parties according to their proportionate shares."

On an appeal by the plaintiff the Supreme Court held (vide 67 N.L.R. 97) that on a proper construction of sections 5, 26, 38, 46, 47, 48 and 54 of the Partition Act, the title which a certificate of sale confers on a purchaser of the land and buildings thereon is free from any life interest or usufruct declared in favour of a person in the interlocutory decree entered under section 26 read with section 48. The purchaser thus gets title free from all encumbrances except the interests of the proprietor of a nindagama specially preserved under section 54. (It also held that the interests awarded to the 2nd defendant should be valued and he should be paid the estimated value of his usufruct out of the proceeds of sale.)

From this order the 1st defendant appealed to the Privy Council.

Held: (1) That the word "title" in section 25 of the Act includes a title which may be subject to an encumbrance.

(2) That the term "the land" in sections 25 and 26 and 46 of the Act means simply "the land the subject of the action ", such as it is with all its burdens and advantages. To compel persons other than co-owners having encumbrances on the land or on shares in it, including owners of servitudes, of usufructs or life-interests, or *fideicommissaries* to accept some assessed compensation for their rights though, no doubt, a possible result of legislation, amounts to a substantial interference with their rights. This should not be imposed in the absence of clearly expressed provisions including adequate methods of assessing the value of their rights.

(3) That the argument strongly relied on by the respondents, that the effect of section 46 is that when the purchaser receives the certificate of sale he acquires an indefeasible title free from encumbrances, is untenable, as section 46 cannot be regarded as, anything more than a conveyancing section, the purpose and effect of which is to establish the certificate of sale as a new and conclusive root of title without the necessity of any conveyance from the co-owners or any investigation of title.

(4) That section 47 provides merely for a schedule of distribution to be prepared by a party and approved by the Court and does not provide the mechanism by which encumbrances from which the land is liberated, pass and attach to the proceeds of sale as contended for the respondent.

(5) That sub-section (1) of section 48 makes it clear that after the interlocutory decree has been entered the land is freed from all encumbrances not specified in it and must be taken to support the conclusion that the land is sold subject to the encumbrances specified in the decree. If the intention were that on a sale, the land were *ipso facto* to be freed from encumbrances specified in the interlocutory decree, the language used in the section would be different.

(6) That this view gains support from sub-section (2) of section 50 and section 51 of the Act.

(7) That section 54 is contained in a part of the Act dealing with special cases and is confined to those specifically mentioned. It affords no guidance as to the intention of the general portion of the Act.

(8) That therefore, in proceedings under the Partition Act the courts has power, when ordering a sale of land in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land.

Case referred to: *Fernando* vs. *Cadiravelu* (1927) 28 N.L.R. 492

E. F. N. Gratiaen, Q.C., with *M. P. Solomon*, for the 1st defendant-appellant.

S. Nadesan, Q.C., with *N. Chiniwasagam, Mark Fernando* and *L. B. Rajapakse*, for the plaintiff-respondent.

Lord Wilberforce

This appeal from the Supreme Court of Ceylon raises the question whether, in proceedings under the Partition Act (No. 16 of 1951) the court has power, when ordering a sale of land in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land sold (as was held by the District Judge) or whether (as was held by the Supreme Court) such sale must be made so as to pass a title free from the life interest.

The property in question consists of land and buildings at Panchikawatte Road in the Municipality of Colombo. It is not necessary further to particularise it beyond stating that almost the whole of the land is occupied by a building called the Tower Hall Theatre. The relevance of this is that no physical partition of the property is practicable. The common interests in the property arose under the Will of one G. A. Don Hendrick Appuhamy (or Seneviratne) dated 7th April 1929 and in consequence of certain subsequent devolutions.

For the purpose of this appeal it is sufficient to set out the findings of the District Judge, which, on this matter, are not challenged. He held the parties to be entitled as follows:

"Plaintiff (1st Respondent) to an undivided 11/18 share of which 3/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).

The 1st Defendant (Appellant) to an undivided 5/18 share of which 2/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).

The 3rd Defendant (3rd Respondent) to an undivided 2/18 share of which 1/8 share is subject to life interest in favour of the 2nd Defendant (2nd Respondent).

All the buildings will belong to the parties in the same proportion as their soil rights above-mentioned, and the 2nd Defendant (2nd Respondent) also will be entitled to the life interest in respect of 1/3 share of soil and 1/3 share of the buildings."

It may be material to add that the life interest of the 2nd defendant (2nd respondent) was under the terms of the Will subject to forfeiture on remarriage.

The decree then continued:

"It is further ordered and decreed that the said land and premises be sold by Public Auction in conformity with Partition Act No. 16 of 1951 subject to the life interest in favour of the 2nd Defendant in respect of 1/3 share of the soil and 1/3 share of the buildings, and the proceeds thereof be entitled (*sic*) to the parties according to their proportionate shares."

Although the 2nd defendant, who as stated was entitled to the life interest in 1/3 of the land and buildings, was duly made a party to the partition proceedings, she took no part in the present appeal which was argued between the appellant (1st defendant) on the one side and the respondent (plaintiff) on the other. No objection was raised on either side to this procedure.

The present law in Ceylon as to partition of immovable property is contained in the Partition Act (No. 16) of 1951. It is upon the construction of that Act that the issues in this appeal must be decided. It may be convenient to preface examination of the relevant sections with some observations of a general character as to the nature of the rights and interests involved in the case.

First, rights of co-ownership, under the Roman Dutch Law, are regarded as *quasi-contractual.* One of the obligations so imposed, or treated as accepted, by the co-owners is the obligation to allow a division of the property — *in communione nemo compellitur invitus detineri.* Both by the common law, and under the successive pieces

of legislation which have been passed in Ceylon concerning partition, partition may be effected by agreement or by decree of a competent court. Partition, when effected by judicial decree, appears, according to the prevailing opinion, to be in the nature of an alienation by purchase, the alienees deriving their title from the decree of the court. The position under the Partition Ordinance (Cap. 56) of 1863, the legislation which preceded the Act of 1951, has been described as follows:

> "When common ownership becomes burdensome the Partition Ordinance enables it to be determined at the instance of a co-owner by the conversion of undivided shares into shares in severalty by partition, or when that is not possible by the sale of the land. Upon the issue of a certificate of sale to the purchaser under decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser and the land cease to be held in common by the original owners." *Fernando* vs. *Cadiravelu* per Garvin J. 28 N.L.R. 492, 497.

Thus, the conception underlying judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owners' shares.

It must be obvious that cases will arise where there are encumbrances affecting either the common property as a whole or individual shares and that their existence may give rise to difficulty in cases of sale. Some recognition of this difficulty and an attempt to deal with it is to be found in the Partition Ordinance (Cap. 56) of 1863. Express provision was there made for sale, under order of the court, subject to "any mortgage or other charges or encumbrances" on the property and there were other provisions dealing with the case where there was a mortgage over an undivided share. These provisions were evidently incomplete, and in the interval between 1863 and 1951 a number of cases came before the courts where the property was subject to *fideicommissa* or trusts. These are referred to in the judgment of Tambiah J. in the Supreme Court where he expresses the opinion that such complex questions were never contemplated by the framers of the Ordinance. The Act of 1951 deals somewhat more fully with the position of encumbrances and the ultimate question for decision must be how far it has altered, or extended, the pre-existing law.

Secondly, as to the life interest of the 2nd respondent (2nd defendant). In this case the interest arises by way of usufruct and is confined to an interest in the income of the property. It is subject to forfeiture on remarriage. There is no doubt that it constitutes an encumbrance within the meaning of the Partition Act 1951. But it is necessary to bear in mind that the Act applies generally to life interests and usufructs of any character, whether affecting the whole or a part only, and whether conferring a mere interest in income or a closer interest in the land itself. Any interpretation of the Act must take account of the varied character of these rights.

With these preliminary observations the relevant statutory provisions contained in the Partition Act 1951 may now be considered. The Act commences with a general statement of the nature and purpose of partition proceedings (section 2). These may be brought where land belongs in common to two or more owners, and may be instituted by any one or more of them for the partition or sale of the land. This follows and adopts the common law conception that partition (or sale) is a right attaching to co-ownership and that the purpose of partition proceedings is to give effect to that right.

Section 4 requires the plaintiff to specify in his plaint particulars of any right, share or interest in the land and the names of all persons claiming to be entitled thereto and section 5 requires that such persons are to be made parties to the action. Section 5 (*a*) (i) describes these persons as those who 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."

The comprehensive nature of this list is noticeable: it includes rights and interests (i) which can without difficulty be given a value in money — *e.g.*, mortgages (ii) which could be given a value in money by an appropriate procedure of valuation, *e.g.*, usufructs, trusts, *fideicommissa*, or life interest, though this would be a matter of some difficulty in the case of *fideicommissary* interests, or other interests subject to a contingency or (as in the present case) subject to defeasance, (iii) which could hardly be the subject of compensation at all *e.g.*, certain servitudes essential for the dominant land, where the compensation would, in effect, be equivalent to its value (see for a description of the variety of servitudes recognised in Roman Dutch Law Lee, An Introduction to Roman Dutch Law 5th Ed. pp. 164 ff.).

It will be seen that the Act returns to this list in a later important section (section 48).

The Act continues with a number of procedural provisions, of which it is only necessary to mention section 18 which deals with the report to be made by the commissioned surveyor. This must state the nature and value "of the land surveyed" and the details of the computation of such value: it must also refer to the parties to the action present at the survey and the name of any 'person not a party who has preferred any claim and the nature of such claim. Thus, although no explicit reference is made to any encumbrances on the land, it would seem that the surveyor, whose commission is accompanied by a copy of the plaint (section 16(2), is assumed to be aware of their existence and nature. Sections 25 and 26 are of cardinal importance. Section 25 relates to the trial of the partition action. It requires the court to examine the title of each party, to try any issue of law and fact in regard to the right share or interest of each party to, of, or in the land, and to consider and decide which of the orders mentioned in section 26 should be made. The word "title" in this context evidently includes a title which may be subject to an encumbrance: it is, as Garvin, J. said in the passage quoted above "the title declared to be in the co-owners". Section 26 requires the court, at the conclusion of the trial, to pronounce an interlocutory decree in accordance with the findings. It states (subsection (2) that the interlocutory decree may include one or more of the following orders namely:

"(*a*) order for a partition of the land;

(*b*) order for a sale of the land in whole or in lots"

or orders . . . whether for partition or sale relating to specified portions or shares of the land.

The form of the interlocutory decree in practice is well illustrated by the decree made in the present case, the relevant portion of which has been set out above.

Much of the rival arguments submitted in the appeal has been focussed upon these sections and in particular upon the use of the words"the land". On the one side for (the respondents) it is said that the only reference here is to "the land" which must mean the actual physical property the subject of the suit, so that all that may be partitioned or sold, under the order of the court, is this property. No power is conferred, and none consequently exists, to sell the land subject to any encumbrance: so the inference must be that the land is to be sold free from all encumbrances.

On the other side (for the appellants) it is said that, recognition having been given by the Act to the possibility that encumbrances may exist, these must be assumed to continue unless provision is expressly made for their discharge and satisfaction. Neither does section 26 provide for their discharge nor elsewhere in the Act (except in section 50, to be referred to later) is any provision made for their satisfaction. On the contrary, such subsequent references as there are to encumbrances assume that (with certain carefully specified exceptions) they continue to affect the land. On this argument "the land" means simply "the land the subject of the action" such as it is, with all its burdens and advantages.

Their Lordships, at this stage of the argument, would be disposed to prefer the latter of these two views. The absence from section 26 of any such words as "free from encumbrances", if the intention was that they should be discharged, appears to them more significant than an omission to add "subject to encumbrances", if the intention was to preserve them. The reason for this is that, as has been stated, the basic object of the partition action is to sever the co-ownership, as between the co-owners, so that if the rights of other persons are to be affected, the Act might be expected so to state. To compel persons other than co-owners having encumbrances on the land or on shares in it, including owners of servitudes, owners of usufructs or life interests, or *fideicommissaries*, to accept some assessed compensation for their rights, though no doubt a possible result of legislation, amounts to a substantial interference with their rights. This should not be imposed upon them in the absence of clearly expressed provisions including adequate methods of assessing the value of the rights. Silence as to these rights appears to indicate that they are not to be affected. But the argument is not conclusive at this stage and the rest of the Act has to be considered for other indications.

The Act continues with a number of additional sections governing the manner in which partition or sale (as the case may be) is to be carried out. These contain references to "the land" but they do not in their Lordships' opinion carry the argument as to the meaning of these words any further. The sections can be operated according to their terms whether "the land" which is ordered to be partitioned or sold is the land subject to existing encumbrances, or whether it is the land free from encumbrances. They provide little assistance in choosing between these alternatives.

The next critical provisions are contained in sections 46 and 47. It is convenient to reproduce these in full.

> "46. Upon the confirmation of the sale of the land or of any lot, the court shall enter in the record a certificate of sale in favour of the purchaser and the certificate so entered under the hand of the Judge of the court shall be conclusive evidence of the purchaser's title to the land or lot as on the date of the certificate. The court may, on the application of the purchaser, attach to the certificate a plan of the land or lot prepared at the cost of the purchaser and authenticated by the court.
>
> 47. (1) The court shall cause to be prepared by a party named by the court a schedule of distribution showing the amount which each party is entitled to withdraw out of the money deposited in court.
>
> (2) No money shall be withdrawn from court by any party until the schedule of distribution has been approved by the court.
>
> (3) A party entitled to compensation in respect of a plantation or a building or otherwise shall share proportionately with the other parties in any gain or loss, as the case may be, resulting from the sale of the land at a figure above or below the value determined by the court under section 38."

These sections were strongly relied upon by the respondent and indeed they formed the principal basis for the judgment of Tambiah, J. in the Supreme Court. Section 46, it was said, shows that what the purchaser takes is "the land," and the effect of the section is that, when he receives the certificate of sale, he acquires an indefeasible title free from encumbrances. Section 47 is the necessary counterpart of this: it provides the mechanism by which encumbrances, from which the land is liberated, pass and attach to the proceeds of sale. This section, it was claimed (and the argument logically follows) applies to all encumbrances of whatever nature with the sole exception of the interest of a proprietor of a *nindaganta* which is specially preserved by section 54.

In spite of the force these arguments derive from their acceptance by the Supreme Court, their Lordships feel obliged to take a contrary view. In their opinion these sections are unable to support the weight placed upon them. Section 46 they cannot regard as more than a conveyancing section the purpose and effect of which is to establish the certificate of sale as a new and conclusive root of title without the necessity of any conveyance from the co-owners or any investigation of their title. Reference has already been made to the use of the words "the title" in section 25, in an open sense, meaning merely the title such as it is—free from, or subject to encumbrances: it means no more in the present context. The words "the land" here repeated, carry the matter no further than it already stands under section 26. It is noticeable that a provision in terms very similar to section 46 appears in section 8 of the Partition Ordinance of 1863, a section which in terms provides for a sale to be made "subject to any mortgage, charge or encumbrance". Although these latter words have been dropped, this fact alone is not sufficient reason to ascribe to similar terminology now appearing in section 46 a totally different effect, *i.e.*, to pass the land free from encumbrances.

Section 47, similarly, in their Lordships' opinion, fails adequately to support the respondents' argument. It provides merely for a schedule of distribution to be prepared by a party and approved by the court. If the intention was that encumbrances, of the varied character mentioned in section 5, were to be compulsorily discharged out of the proceeds of sale, it appears to their Lordships inconceivable that so scanty a mechanism should have been provided. On the one hand it can never have been intended that the amount to be paid to an encumbrancer should merely be fixed by the party presenting the schedule: on the other hand no procedure for valuation — which, as has been shown, may in some cases be complicated and controversial — is so much as indicated. The argument for the respondent extends, and necessarily must extend, to all encumbrances, whether those affecting the land as a whole, or those affecting undivided shares: and if it is right, it represents a considerable departure from the scheme of the former Ordinance, even as this was interpreted by the courts: yet this departure is founded entirely on inference. That inference their Lordships cannot draw.

There remain for consideration three sections which appear in the Act under the heading "Special Provisions Relating to Decrees". Section 48(1) is significant. It reads:

> "Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and

the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection 'encumbrance' means any mortgage, lease, usufruct, servitude, *fideicommissum*, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a *nindagama*."

The drafting of this subsection is not entirely clear. It refers, in the first place to the interlocutory decree entered under section 26: this, in addition to declaring the rights of the parties, would contain an order for partition or for sale. The subsection continues with a reference to the final decree of *partition*, and to the right share or interest *awarded* to any persons, expressions in each case appropriate to partition and not to sale. The explanation of this appears to be that whereas in the case of partition, there is a decree of the court giving effect to the partition, in the case of sale this takes place upon the basis of the order contained in the interlocutory decree. The subsection, therefore, at the least, makes it clear that, after the interlocutory decree has been made, the land is freed from all encumbrances *not specified* in it, and the only question remains whether it goes on to prescribe, or whether it merely assumes, that, as regards encumbrances *specified* in the decree, the land remains, on a sale (as it clearly does on a partition), subject to these encumbrances. Their Lordships do not find it necessary to express a final opinion on these alternatives, since on either view the subsection must be taken to support the conclusion that the land is sold subject to encumbrances. To repeat an argument already used in other connections, it is difficult to understand how this subsection could have been drafted as it is if the intention were that, on a sale, the land were, *ipso facto*, to be freed from encumbrances specified in the interlocutory decree.

Next there is section 50 which deals with cases where an undivided share is subject to a mortgage or lease. Subsection (1) deals with the case of partition and, in effect, confines the mortgage or lease to the divided share allotted to the mortgagor or lessor.

Subsection (2) is as follows:

"If in an interlocutory decree for sale any undivided share of the land constituting the subject-matter of the partition action in which such decree is entered is declared to be subject to a mortgage or lease, the rights of the mortgagee or of the purchaser of the mortgaged share under a mortgage decree, or of the lessee, shall be limited to the mortgagor's or lessor's share of the proceeds of the sale of the land."

In their Lordships' opinion this provision must be regarded as strong support for the argument that encumbrances generally, apart that is to say from those here dealt with, continue to attach to the land. For if the respondents' arguments were correct, these mortgages and leases, like all other encumbrances, automatically would be transferred to the proceeds of sale by virtue of sections 26, 46 and 47 and this provision would be entirely otiose. Comparison between this section, with its reference to mortgages and leases, and section 48 (1) with its listed reference to encumbrances generally, strongly points the contrast between those encumbrances which remain attached to the land, or to shares in it, and those which, exceptionally attach to the proceeds of sale. It may be added that the language used in subsection (2) which after mentioning the declaration contained in the interlocutory decree of sale, then continues by stating the consequences to the purchaser of the land, when compared with that used in section 48(1), suggests that the latter subsection is intended to effect (rather than that it assumes) that other encumbrances continue to bind the land.

Thirdly there is section 51. This provides for registration of any interlocutory decree made under section 25, any final decree of partition, or any certificate of sale under section 46. The fact that an interlocutory decree, which, under sections 25 and 26, must specify encumbrances, is required to be registered, suggests, somewhat strongly, that such specified encumbrances continue to bind the land. Moreover, when the section continues by requiring registration of the certificate of sale, the natural conclusion to draw from this would be that the certificate of sale would conform with and produce the same result as the interlocutory decree itself — *i.e.*, that under it, encumbrances would be preserved. For if, as the respondent contends, the certificate of sale was intended to pass an unencumbered title, it would be expected either that an interlocutory decree providing for sale should not be registered, or that, if registered, it should be removed when, or before, registration of the certificate of sale. But the section requires the respondent to register each document as an instrument affecting the land to which it relates.

Finally section 54 contains an express reservation of the rights of a proprietor of a *nindagama*. The Supreme Court relied upon this as inconsistent

with the view that the encumbrances generally should be preserved. This section however is contained in a section of the Act dealing with Special Cases and is confined to those specifically mentioned. They are not within the general category of rights or interests previously dealt with. The section therefore affords no guidance as to the intention of the general portion of the Act.

For these reasons their Lordships are of opinion that the order made by the learned District Judge was correct. They will humbly advise Her Majesty that the appeal be allowed, and the order of the District Judge restored. The 1st respondent must pay the appellant's costs of this appeal and in the Supreme Court.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.** (*President*), **T. S. Fernando, J. and Tambiah, J.**

Appeal Nos. 154 & 155 *of* 1967 *with Application Nos.* 202 & 203 *of* 1967
S.C. 304/66 *M.C. Panadura* 98470.

THE QUEEN *vs.* HENNEDIGE RAYMON SOYSA & ANOTHER

Argued and decided on: January 30, 1968
Reasons delivered on: February 14th, 1968

Court of Criminal Appeal — Convictions of murder — Prosecution version different from defence version as to circumstances of incident — Suggestions by prosecuting Counsel, unsupported by evidence, placed before Jury in summing-up without comment — Verdict of murder unreasonable — Duty of trial Judge — Warning necessary against speculative inference.

The two accused (brothers) were convicted of the murder of one T.S. by stabbing him. The prosecution gave one version of the circumstances of the incident, and the defence gave a different version.

The defence version was supported by certain proved facts and by the evidence of some witnesses called by the prosecution.

The prosecuting Crown Counsel made certain suggestions to the Jury which were not substantiated by evidence that might have been called. The trial Judge referred to the suggestions in his summing-up, but without any recommendation either way as to whether the suggestions were worthy of acceptance. The verdict of the Jury implied that they had based their verdict on the supposition put forward by the prosecution.

Held: (1) That but for the acceptance of the prosecution suggestions, one item of evidence at the least cast a reasonable doubt on the truth of the prosecution version of the circumstances in which the stabbing occurred, and it was unreasonable for the Jury to base their verdict on the supposition put forward by the prosecution, unsupported by evidence.

(2) That it is always open to a Jury to infer the existence of a fact, if the inference readily and reasonably arises from other facts which are clearly proved; but where the prosecution invites the Jury to make an inference of fact, the actual existence of which is probably capable of being established by direct evidence, then the position is different. In such a case it is not appropriate for the trial Judge to present the prosecution suggestion to the Jury without comment. Instead there should be a warning against a speculative inference of a fact, which if true could and should have been proved by direct evidence.

(3) That the verdict of murder was unreasonable.

E. R. S. R. Coomaraswamy, with *G. C. Wanigasekera*, *Kumar Amerasekera*, *C. Chakradaran* and *Clarence M. Fernando*, for the accused-appellant.

I. F. B. Wickramanayake, Crown Counsel, for the Attorney-General.

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

The two accused in this case, who are brothers, were charged with the murder of one Tudor Silva and were convicted of that offence by a verdict of 5 to 2.

The prosecution case depended largely on the evidence of one Jayasiri who stated that on the evening of the incident he set out from his house about 7 or 7.30 p.m. to go to his sister's house. Shortly before he reached that house he met the deceased man Tudor also going in the same direction as himself. Jayasiri then turned off from the lane in which he was walking and entered his sister's house. According to him, Tudor proceeded further along the lane, which lane formed a junction about 20 yards ahead with a road called Sri Jina Mawatha. Just after Jayasiri entered his sister's house he heard people coming running along the lane from the direction of the junction. He then saw Tudor coming towards his sister's house, being chased by the two accused. The 1st accused then seized Tudor and shouted to the younger brother "cut this fellow", whereupon the 2nd accused who had a manna knife in his hand then dealt one blow with the knife on Tudor. At this stage Jayasiri's sister took him inside the house and he did not see anything more of the incident. Tudor was subsequenly found to have several injuries on both his arms and he died shortly afterwards as a result of those injuries.

Jayasiri's sister, a woman named Tulin, said that she was in her house with her children when she heard a sound of footsteps as of people running; then (in her own words) in order to ascertain who it was she opened the door and immediately saw Jayasiri at the entrance to the kitchen. Jayasiri then told her that there was a fight between Raymond (1st accused), Tymon (2nd accused) and Tudor. She then took her brother into the house and later heard someone crying out "I am finished, I am being cut", and when she looked out of the window she saw the two accused running towards the junction.

The 1st accused gave evidence at the trial, and the defence called other evidence to establish their version of the incident. According to this version the deceased man Tudor was a person who had many cases pending against him. In addition to that, two of his cousins were being charged with assault and robbery and the 1st accused was to be the principal witness for the prosecution in that case. On the evening of the incident, the accused in that case together with others including the deceased Tudor, and the witness, Jayasiri, had pelted stones at the accused's house sometime after it became dark. At this stage the 1st accused sent for a taxi, and his mother went in the taxi to complain to the police about the pelting of stones. About half an hour after the mother left, the stone throwing was resumed and in consequence a piece of tile fell on a little child who was in the house. The 1st accused then came out to the place from which the stones were being thrown and saw Tudor and the others there. Tudor then struck the 1st accused with a chisel, and after that the 1st accused ran back to his house, and came out again with a manna knife. He was in fear at this stage because he was hit and chased by the other men, and he then in self defence struck at Tudor with the manna knife.

The defence proved that the accused's mother arrived at the Panadura Police Station at 8.35 p.m., and shortly thereafter made a complaint that Tudor and some others had thrown stones at her house. It was proved also that when the Police came to the scene at 10.30 p.m. on receipt of information from the Hospital regarding Tudor, they found that the roof of the accused's house had been rather badly damaged and that there were stones inside the house itself and on the compound.

The prosecuting Crown Counsel made to the Jury a suggestion that the accused's mother had left her home to the Police Station only after the actual stabbing incident, and that her complaint regarding stone throwing was false and intended to provide a basis for a false version of the stabbing. The learned trial Judge referred to this suggestion in the summing up, but without any recommendation either way as to whether the suggestion was worthy of acceptance. The principal contention for the defence in the appeal was that the verdict was explicable only on the basis that the Jury accepted this suggestion, and that a verdict reached on such a basis was unreasonable.

Considering that the accused's mother reached the Police Station just about 8.30 p.m., and considering the distance of the accused's house from the Police Station and the time required to procure a taxi, it became clear upon the evidence that the accused's mother could not have left her home earlier than 8 o'clock. The prosecution suggestion (mentioned in the preceding paragraph) was

therefore only reasonable if the evidence in the case rendered it certain that the stabbing incident took place before 8 o'clock. But the learned trial Judge himself remarked that Jayasiri placed the time of the stabbing at one stage at 7.30 and at other stages at 8 or 8.30. Even the evidence of the woman Tulin rendered it quite possible that the stabbing took place after 8 o'clock ; according to this witness her children were asleep at the time, and it is at least likely that one of those children, who was 11 years old at the time, would not have been asleep quite so early as 8 o'clock. Moreover the first person to come on the scene, who lived only a hundred yards away, stated that he came there about 8.30 having heard about a stabbing from a passer-by. Having regard to this uncertainty in the prosecution evidence as to the time of the stabbing, it was in our opinion unfair for the prosecution to invite the Jury to hold that the accused's mother left her home only after the stabbing incident, or in other words to decide with certainty that the stabbing took place before 8 o'clock. Such an invitation could have been done for instance by eliciting from Jayasiri and Tulin whether or not they had yet had their evening meal.

The prosecution's suggestion also implied that the physical evidence of a stone throwing had been "framed" by the accused as a cover for their version of the incident. Here again, the prosecution was surely in a position to call evidence of neutral neighbours in order to establish positively that stones had not been thrown that night at the accused's house. Indeed, if there was any truth in the prosecution's suggestion, it should not have been too difficult to establish that people in the accused's house damaged their roof and scattered stones in their compound after Tudor had been stabbed.

Having regard to the uncertainty concerning the time of the stabbing and the time when the accused's house was damaged, it was in our opinion unreasonable for the Jury to base their verdict on the supposition put forward by the prosecution. But for acceptance of the prosecution's suggestion, the evidence as to the complaint of stone throwing at the least cast a reasonable doubt on the truth of Jayasiri's version of the circumstances in which the stabbing occurred.

It is perhaps possible to state in general terms the principle underlying the opinion we formed in this case. It is always open to a Jury to infer the existence of a fact if the inference readily and reasonably arises from other facts which are clearly proved; but where the prosecution invites the Jury to make an inference of fact, the actual existence of which is probably capable of being established by direct evidence, then the position is different. In such a case it is not appropriate for the trial Judge to present the prosecution suggestion to the Jury without comment. Instead there should be a warning against a speculative inference of a fact, which if true could and should have been proved by direct evidence.

On these grounds we upheld the contention for the defence that the verdict of murder was unreasonable, and we substituted convictions of culpable homicide and sentences of four years' rigorous imprisonment.

Verdicts of murder set aside. Convictions of culpable homicide not amounting to murder substituted.

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

P. KARUNANAYAKE *vs.* C. P. DE SILVA, MINISTER OF LANDS & ANOTHER

S.C. 99 (*Inty.*) *of* 1967 — *D.C. Matara No.* 2460/L

Argued & decided on: February 9, 1968.
Reasons delivered on: February 22, 1968.

Land Acquisition Act—Action for declaration and Injunction—Acquisition alleged to be unlawful—Interim Injunction — Description of land as portion out of larger land — Corpus indeterminate— Insufficient in law —Particular land — Section 4 notice, section 5 declaration and section 38 order bad — Acquiring officer and owner should know identity of Corpus—Land Acquisition Act (Cap. 460) as amended by Act No. 28 of 1964, sections 2, 4, 4A, 5 and 38.

The plaintiff-appellant instituted this action in the District Court of Matara for a declaration, *inter alia*, that a proposed acquisition of land belonging to him was wrongful and unlawful and for a permanent injunction restraining the defendants from taking steps to acquire the land. He also sought an interim injunction.

The present appeal was from an order dismissing the application for the interim injunction, and discharging the enjoining order entered earlier.

The notice under section 4, the declaration under section 5 and the order under section 38 of the Land Acquisition Act (Cap. 460) described the land to be acquired as a portion in extent 1 a. 1 r. 16 p. out of the land called Hambu Ela Watta. The boundaries of the land to be acquired were so stated that whatever way one attempted to ascertain where precisely within Hambu Ela Watte that portion was to be found, one would be met with uncertainty as to its location. The corpus sought to be acquired as described in the documents was an indeterminate one.

Held: (1) That the description adopted in the instant case failed to give effect to the requirements of the Land Acquisition Act.

(2) That to enable the Acquiring officer to give notice under section 4 to the owner or owners, it must follow that such officer should know the particular land proposed to be acquired; and to enable the owner or owners to file objections to the proposed acquisition, they should know the precise location of such land.

(3) That the written declaration under section 5 must also relate to that particular land; and the order under section 38 must also set out the particular land to be acquired. The acquisition cannot be of an indeterminate corpus.

(4) That in view of the provisions of section 4A (contained in Amending Act No. 28 of the 1964), any interpretation which would involve the result that a person would be prevented from dealing with all his lands in a particular area, because he does not know what is the land in that area that he cannot dispose of without contravening the Act, should be avoided.

(5) That the three documents under sections 4, 5 and 38 in this case did not have the force and effect which the Land Acquisition Act contemplates.

E. R. S. R. Coomaraswamy, with *L. W. Athulathmudali*, for the plaintiff-appellant.

Mervyn Fernando, Crown Counsel, with *G. P. S. de Silva, Crown Counsel*, for the defendants-respondents.

T. S. Fernando, J.

The plaintiff-appellant instituted action No. 2460/L in the District Court seeking (1) a declaration *inter alia* that a proposed acquisition of land belonging to him is wrongful and unlawful and (2) a permanent injunction restraining the defendants from taking steps to acquire the said land. He also sought an interim injunction pending the determination of the action restraining the defendants from taking steps as aforesaid. An enjoining order was issued by the District Court on *ex-parte* application and notice thereof was ordered on the defendants.

After the defendants appeared on notice, an inquiry was held in the District Court, and by an order made on the 27th February the learned District Judge dismissed the application for the interim injunction and, therefore, discharged the enjoining order.

This appeal canvasses the correctness of the order of the 27th February, 1967 above referred to.

The notice required to be given in terms of section, 4, the declaration required to be made under section 5 and the Order for taking possession that may be published under the proviso to section 38 of the Land Acquisition Act (Cap. 460) all require that the land proposed to be acquired should be indicated in the respective documents. It is contended on behalf of the appellant that all three documents in respect of this proposed acquisition are so defective in regard to the description of the land as to render them of no force or effect in law.

The proviso to section 38 enables the Minister to take steps on occasions calling for urgent acquisitions provided a notice under section 2 or section 4 has been exhibited. While a notice under section 2 will ordinarily specify only an area and such a notice is sufficient authority for the authorised officer to enter any land situated within that area, nevertheless possession of any such land can be taken only after deciding or determining the particular land of which it is necessary to take possesion. There would be no

difficulty to demarcate with sufficient precision the land intended to be taken and, it must be noted, the authorised officer is empowered by section 2(3) to enter and survey the land.

Section 4 relates to a stage after investigations for selecting land have taken place, and that section requires the Minister to direct the acquiring officer to give notice to the owner or owners of the particular land which the Minister considers is needed for a public purpose and has to be acquired. To enable the acquiring officer to give notice to the owner or owners it must follow that he (the acquiring officer) should know the particular land proposed to be acquired. The circumstances that the law contemplates objections to the proposed acquisition involves necessarily that the precise location has to be known not only to the officers of the government charged with the duty of acquiring the land but also to the owner or owners thereof.It is only after the objections have been disposed of as provided in section 4 that the decision to acquire can be taken by the Minister. The written declaration that follows such decision also must relate to that particular land. I am, therefore, of opinion that the notice under section 4, the declaration under section 5 and the Order under section 38 must each set out the particular land to be acquired. The contention of the appellant that the acquistion cannot be of an indeterminate corpus is, in my opinion, sound and has to be upheld.

That the view I have reached as above set out is correct — at any rate in respect of acquisitions after the amendment to the Land Acquisition Act by Act No. 28 of 1964 (which came into force on 12th November) — will be apparent on an examination of the provisions of section 4A of the Act (inserted by section 3 of Act No. 28 of 1964) which has been designed to nullify the disposal of and to prevent damage to land in respect of which a notice has been issued or exhibited under section 2 or section 4. Sub-section (2) of this section 4A renders null and void and sale or other disposal of land in contravention of sub-section (1), while sub-section (3) declare such a contravention to be a punishable offence. If a person is to be punished for selling or otherwise disposing of certain land, surely he must be informed of the precise location and extent of such protected land. Any interpretation which will involve the result that a person will be prevented from dealing with all his lands in a particular area, because he does not know what is the land in that area he cannot sell or dispose of without contravening the Act, should be avoided.

When we turn to the three relevant documents in this case, viz. X1 of 5th April 1966 (the notice under section 4), X2 of 14th May 1966 (the declaration under section 5), and X3 of 14th May 1966 (the Order under section 38), each of them is found to describe the land in exactly the same terms. That description is set out below:—

> "A portion in extent about 1A, 1R, 16P. out of the land called Hambu Ela Watta and bounded as follows:—
>
> North and East by the remaining portion of the same land and V.C. road;
>
> South and West by Polwatta Ganga and the remaining portion of the same land."

In whatever way one may attempt to ascertain where precisely within Hambu Ela Watta this portion of about 1A. 1R. 16P. is to be found one will be met with uncertainty as to its location. Indeed, Crown Counsel had in the end to concede that there is uncertainty in this description and, therefore that the corpus sought to be acquired as described in the documents was an indeterminate one.

We do not apprehend that there would be any difficulty for Government, with the resources available to it, to have a proper survey plan prepared in the case of each acquisition. Indeed, our own experience is that such plans are usually made and are the basis of the Minister's own decision to acquire land. If so, what difficulty is there to describe that land by reference to such a survey plan and even to make it available to parties affected? We do not however intend to say that the situation of a land cannot ever be described without reference to a survey or other plan; but the description adopted in the instant case fails to give effect to the requirements of the Act. As so often happens, action taken hastily in the supposed interests of expedition actually results in a delay greater than that which would have been occasioned by a resort to the procedure which the legislature had in contemplation.

As the Order under section 39 and indeed the other two documents as well are not in conformity with the law, they do not, in our opinion, have that force and effect which the Land Acquisition Act contemplates. For this reason we set aside the order of the District Court made on the 27th February 1967 which discharged the enjoining order and dismissed the application for an interim injunction. The enjoining order has to be restored and the interim injunction applied for by the plaintiff granted, and we have made order accordingly. The appellant is entitled to the costs of the inquiry in the District Court and of this appeal.

Alles, J.

I agree.

Appeal allowed.

Present: **Siva Supramaniam, J.**

A. MADULAWATHIE *vs.* E. A. WILPUS & ANOTHER

H.C. Application No. 223/64.

Argued on: 17th July 1967
Decided on: 22nd August, 1967

Writ of Habeas Corpus — Application by mother for custody of child — Preferent right of father — Principles applicable in determining such question.

Held: (1) That in an application for the custody of a child the paramount consideration is the welfare of the child. It is settled law that subject to that consideration, so long as the matrimony subsists, the father, as the natural guardian has a preferential right to the custody of the child born of the marriage.

(2) That the burden is on the mother who seeks to obtain custody, to prove that the interests of the child require that the father should be deprived of his legal rights. This burden, the petitioner had failed to discharge in this case.

Per **Siva Supramaniam, J.**—"The learned Magistrate, however, has stated as an additional reason for his recommendation that if the custody of the second respondent is granted to the petitioner, both children will be able to grow up together and the second respondent will have a companion to play with. While it is undoubtedly very desirable that the children of a family should have the companionship of each other, particularly when they are young, that can hardly be the deciding factor in the determination of the question under consideration."

Cases referred to: *Calitz* vs. *Calitz* 1939 A.D. 36
Ivaldy vs. *Ivaldy* (1956) 58 N.L.R. 568
Weragoda vs. *Weragoda* (1961) LIX C.L.W. 49; 66 N.L.R. 83

R. D. C. de Silva, for the petitioner.

L. W. Athulathmudali, for the 1st respondent.

Siva Supramaniam, J.

This application concerns the custody of the 2nd respondent Daya Luxmie Edirisinghe, a a girl 5 years and 9 months of age at present. The petitioner is her mother and the 1st respondent her father.

The petitioner and the 1st respondent were married in 1960 and they have another child, a boy about 3 years of age, who is with the petitioner. According to the petitioner, the 1st. respondent left the matrimonial home on 9th November 1963 and, in her absence, removed the elder child Daya Luxmie on 13th November 1963. The version of the 1st respondent, on the other hand, is that he had a quarrel with the petitioner on the 11th November in consequence of which the petitioner ordered him to leave the house along with the children. Accordingly he left the house on the 12th November taking with him only the elder child, who has been with him since that date. On 9.1.64 the petitioner made an attempt to remove that child from the 1st respondent's house but was unsuccessful. Thereafter she made the present application to this Court for the issue of a writ of Habeas Corpus against the 1st respondent and for an order granting her the custody of the said child. The 1st respondent made a similar application in respect of the younger child who was

in the custody of the petitioner but his application was dismissed on 6.4.1965 mainly on the ground that the child who was of tender years (being only a little over one year of age then) needed a mother's care and attention.

The grounds of the present application were set out by the petitioner in her petition as follows:—

(*a*) "The respondent cannot give proper care, attention and motherly affection to the 2nd. respondent, her daughter, and in consequence the child is in a continuous state of nervous anxiety".

(*b*) "There is no proper person to look after the child as the 1st respondent is always away from his home".

(*c*) "The 1st respondent threatened me with bodily harm whenever I visited to see the child".

At the enquiry held by the Magistrate into this petition, the petitioner alleged that the 1st respondent was on terms of illicit intimacy with one Leelawathie but she made no attempt at all to prove that allegation, which was denied by the 1st respondent. The 1st respondent made a counter allegation that the petitioner was on terms of incestuous relationship with her step-brother, one Sirisena, which, he said, was the cause of the quarrels between himself and the petitioner culminating in his leaving the matrimonial home. He led some evidence in support of his allegation but the learned Magistrate rejected it as a fabrication.

In an application of this nature for the custody of a child, the paramount consideration is the welfare of the child. It is settled law that, subject to that consideration, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. (Vide *Calitz* vs. *Calitz* (1939) A.D. 36, *Ivaldy* vs. *Ivaldy* 57 N.L.R. 568 and *Weragoda* vs. *Weragoda* 66 N.L.R. 83). Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right. It would follow that unless she discharges that burden the father is entitled to the custody. In the instant case, the learned Magistrate, to whom the petition was sent for enquiry and report appears to have overlooked this aspect of the question when he recommended that the custody of the child should be granted to the petitioner.

Of the three grounds set out by the petitioner in her petition the last one, namely that the 1st respondent threatened her with bodily harm whenever she visited the child is irrelevant to the question under consideration. I should state, however, that on the evidence led by her, that allegation is without any foundation. Her first ground, that the child is in a continuous state of nervous anxiety owing to want of care and attention on the part of the 1st respondent, is also unsupported by any evidence and would appear to be false. Her second ground, that there is no proper person to look after the child as the 1st respondent is always away from his home, although it appears to have impressed the learned Magistrate, does not bear examination. The evidence of the 1st respondent is that he is a cultivator. He could be away from home when he has to attend to his duties as a cultivator. The 1st respondent stated in evidence that he lives with his parents and younger sister and they are in a position to attend to the needs of the child in his absence. One does not expect a father who wishes to have the custody of his child to give up all employment and remain at home to be in constant attendance on the child. Besides, the child is now of school-going age and the 1st respondent will be in a better position to attend to her educational needs.

The learned Magistrate, however, has stated as an additional reason for his recommendation that if the custody of the 2nd respondent is granted to the petitioner, both children will be able to grow up together and the 2nd respondent will have a companion to play with. While it is undoubtedly very desirable that the children of a family should have the companionship of each other, particularly when they are young, that can hardly be the deciding factor in the determination of the question under consideration.

On the evidence led by the petitioner before the Magistrate, she has failed to show that the interests of the child require that the custody should be granted to her. In my view, the child will be looked after equally well by either parent and from the point of view of her welfare it would appear to be immaterial whether she is with the petitioner or with the 1st respondent. There does not seem to be any substance in the petitioner's allegation that the 1st respondent does not possess adequate means to bring up the child in reasonable

comfort. There is no sufficient ground therefore to interfere with the 1st respondent's legal right and to deprive him of the custody of the child. In this view of the matter, it is unnecessary to examine the 1st respondent's allegation that the environment in the petitioner's home will be detrimental to the moral welfare of the child.

I dismiss the petitioner's application.

If the petitioner wishes to have access to the child, the 1st respondent will make suitable arrangements for that purpose. If the parties cannot agree on these arrangements, it will be open to the petitioner to make an application to the Magistrate who will give necessary directions after hearing both parties.

Application dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **T. S. Fernando, A.C.J.** (*President*), **Abeyesundere, J. and Alles, J.**

THE QUEEN *vs.* PERUMAL MUNIYANDY

Application No. 158 *of* 1967 *S.C. No.* 355 *of* 1967 — *M.C. Colombo* 34201/*B*

Argued and decided on: November, 2, 1967.

Sentence—Court of Criminal Appeal—Sentence of imprisonment— Accused's life endangered when he struck fatal blow—Apprehension of danger—Sentence excessive — Bound over — Criminal Procedure Code, section 352(2).

Where in a case of murder, in the course of the trial, a plea of culpable homicide not amounting to murder had been tendered and accepted, and the facts show that the accused himself had received a number of injuries at the hands of a companion of the deceased, two of which were each sufficient in the ordinary course of nature to cause death, and that thereafter the accused, when on the point of death inflicted one stab-wound on the deceased who had picked up the knife which had been dropped by his companion, and for which there was a struggle between the accused and the deceased, and that the accused was a man of good character—

Held: That the sentence of five years' rigorous imprisonment which had been imposed was excessive and should be set aside. The Appellant was ordered to enter into bond under section 325(2), Criminal Procedure Code in Rs. 500/- personal security to be of good behaviour for 2 years.

E. R. S. R. Coomaraswamy, with *C. Chakradaran* and *M. Devasagayam*, for the accused-appellant.

E. R. de Fonseka, Crown Counsel, for the Crown.

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

The appellant who was being tried on a charge of murder tendered in the middle of his trial a plea of guilty of culpable homicide not amounting to murder, and a sentence of 5 years' rigorous imprisonment has been imposed upon him. He now appeals against this sentence.

It would appear that on the evening in question he was going peacefully along the Queen's highway when the deceased who was coming towards him spat out, and some of the spittle accidentally fell on the appellant's garments. The appellant protested at the couduct of the deceased, whereupon an argument ensued. In the course of that argument a companion of the deceased attacked the appellant with a knife and caused a number of injuries. Two of these injuries, each taken individually, according to the medical evidence, was sufficient to cause the death of the appellant had there been no medical treatment of him. After the appellant had received these injuries and when the assailant's attention had been drawn by the deceased to the fact that there was blood on the appellant's body, the assailant apparently threw the knife and got away. The deceased thereupon picked up the knife and the appellant struggled with the deceased for the knife and, wresting it from the deceased, inflicted one injury on the latter which unfortunately proved fatal.

In the course of the evidence for the prosecution itself, as recorded at the trial, the witness Shanmugavel stated that the appellant, presumably fearing that the deceased was going to stab him, snatched the knife from the deceased and inflicted

one stab. At another stage the same witness said that the appellant may have felt that the deceased intended using the knife on him. The evidence shows that the deceased was a fairly stout strong and well-built man. In the state of these facts it is somewhat difficult to understand why this plea of guilty was tendered. We have, however, to consider this appeal on the basis that the plea has in fact been tendered and accepted; but, at the same time, we feel strongly that the sentence imposed upon the appellant is manifestly execessive. The appellant was on the point of death when he stabbed the man who was the companion of his assailant and who, immediately prior to the stabbing had picked up the knife that had fallen on the ground. The appellant may well have thought that his life was in further danger. He has hitherto been of good character and we do not think that he should suffer further imprisonment. We, therefore, delete the sentence of 5 years' rigorous imprisonment and direct that the appellant do enter into a bond in terms of Section 325(2) of the Criminal Procedure Code in a sum of Rs. 500/- by way of personal security to be of good behaviour for two years.

Sentence set aside. Appellant ordered to enter into bond under section 325(2), *Criminal Procedure Code.*

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

JAYANERIS & ANOTHER *v.* U. G. SOMAWATHIE & OTHERS

S.C. No. 41/66(*Inty.*) — *D.C. Galle No.* 2504/*P*

Argued on: 29th February, 1968
Decided on: 8th March, 1968

Prescription — Possession by agent on behalf of co-owners — Claim by parties seeking to dispossess co-owners that such agent possessed on their behalf too — Can agent so possess in dual capacity— Standard of proof required to establish adverse possession against co-owners by such agent—Whether notice required to all co-owners of this change in the nature of such agent's possession.

This was a partition action in which the contest centred around the undivided 1/6th share that devolved on one Agiris. The plaintiffs claimed on the basis that this share devolved on the surviving brothers and sisters of Agiris. At the Trial the contesting defendants based their claim to this undivided 1/6th share on prescriptive title. It was their case that one Jayaneris had possessed on their behalf.

This same Jayaneris at the time he was stated to have been entrusted with possession on behalf of the contesting defendants, was already in possession on behalf of certain co-owners, namely the 1st defendant and 5th defendant.

The claim of the contesting defendants based as it was on the possession of their agent Jayaneris therefore raised the question of possession by an agent acting in disparate capacities—on the one hand for the benefit of co-owners claiming by a rightful title and on the other for the benefit of those seeking to dispossess them.

The only evidence was that Jayaneris had planted "catch crops" on the land and there was no evidence of a division of this produce between two sets of principals. There was also no demarcation of the crops to support the suggestion that he was acting in a dual capacity.

The case of prescriptive possession set up by the contesting defendants had not been envisaged by them in their pleadings and on their pleadings they had claimed on the basis that Agiris had conveyed his share by Deed to one Salman to whose interests they succeeded on intestacy. The fact that they relied mainly on prescriptive possession became apparent only at the trial and indeed after the close of the plaintiffs' case.

Held: (1) That a contention such as the one made by the contesting defendants could only be based upon clear and cogent evidence, pointing unmistakably to this dual nature of the agent's possession. The evidence in the present case was nowhere near this high order of proof required to establish adverse possession by Jayaneris as the agent of the contesting defendants.

(2) That just as possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, so also possession through an agent is incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent. However, no express communication of the change in the nature of the agent's possession is required, and all that is necessary is that the agent's conduct carries without ambiguity the message of the altered nature of his possession.

(3) That where notice of the altered character of a person's possession is necessary, this notice is necessarily required to all the co-owners and a notice to some alone will not suffice.

(4) That the plaintiffs in the present case had not been called upon to meet a case of adverse possession and indeed on the basis of the pleadings they would have been entitled to assume that the contesting defendants based their title upon a transfer by Agiris. No adverse inference therefore could be drawn against the plaintiffs from their failure to meet in advance this altered case of the contesting defendants and in this context the adverse comments made by the learned trial Judge in regard to the evidence of possession given by the plaintiffs lost their force.

Followed: *Corea* v. *Appuhamy* (1911) 15 N.L.R. 65 (P.C.)
Naguda Marikar v. *Mohammadu* (1903) 9 N.L.R. 91 (P.C.)

H. W. Jayewardene, Q.C., with *S. S. Basnayake*, for the plaintiffs-appellants.

M. T. M. Sivardeen, for the 7th, 8th and 9th defendants-respondents.

Weeramantry, J.

In this case the plaintiffs seek to partition a land orginally belonging to one Odiris de Silva, who died intestate leaving six children. The contest in this case centred around the undivided one-sixth share that devolved on Agiris, one of the children of Odiris. It was common ground that this Agiris had not been heard of for several years and according to the plaintiffs his share devolved on his surviving brothers and sister on the basis that he died intestate, unmarried and issueless. The seventh, eighth and ninth defendants on the other hand laid claim to the undivided share of Agiris on the basis that Agiris had conveyed his share by deed to one Salman to whose interests they succeeded upon intestacy. However, though this was the position envisaged by them in their pleadings, these defendants (hereinafter called the contesting defendants) proceeded to trial on the basis of a claim to this undivided one-sixth share by purely prescriptive title, the possession alleged by them being in the main a period of possession on their behalf by one Jayaneris who acted as their agent.

This same Jayaneris, at the time he is stated to have been entrusted with possession on behalf of these contesting defendants, was already in possession of the land on behalf of certain co-owners, namely the first defendant and the fifth defendant, who claimed under the common title devolving from Odiris. The possession of one co-owner must necessarily ensure to the benefit of all. The contesting defendant's claim based on the possession of Jayaneris therefore raises the interesting question of possession by an agent acting in disparate capacities — on the one hand for the benefit of co-owners claiming by a rightful title and on the other for the benefit of those seeking to dispossess them.

Mr. Jayewardene argues, and rightly in my view, that such a contention can only be based upon clear and cogent evidence pointing unmistakably to this dualism in the nature of his possession. The adverse aspect of his possession cannot in other words remain a mere concept in the recesses of the agent's mind but must so manifest itself that those against whom it is urged may see in it a challenge to their claims. Even as possesion *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, *Corea* v. *Appuhamy* (1911) 15 N.L.R. 65, P.C., so also is possession through an agent incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent, *Nagudu Marikar* v. *Mohammadu* (1903) 9 N.L.R. 91, P.C.

This does not mean however that express communication is required of the change in the nature of the agent's possession. So long as the agent's conduct carries without ambiguity the message of the altered nature of his possession, express communication may well be dispensed with; but we have here no conduct so unambiguous, no distinction of capacities so clear, that we may with assurance invest the co-owners with knowledge that adverse possession had commenced or was running against them.

The only material before us on this matter is that Jayaneris planted "catch crops" on the land. There is no evidence of a division of this produce between two sets of principle nor is there such a demarcation of the crops as to lend colour to the suggestion that he played a dual role. His simple activity on the land would appear difficult therefore to relate to the sophisticated notion of agency in opposed capacities, as contended for by the respondents. Jayaneris was there on behalf of some of the holders of a lawful title and hence on behalf of them all. It would thus be as difficult

for us to attribute to him a simultaneous possession eroding that same title as it was for the Privy Council in *Corea* v. *Appuhamy*, (1911) 15 N.L.R. 65, P.C., to permit Iseris who entered under a legal title to "masquerade as a robber or a bandit"; and we are drawn back again to the cardinal principle approved in *Corea* v. *Appuhamy* and consistently followed ever since, that "possession is never adverse if it can be referred to a lawful title".

The material before us does not in this view of the matter bring us anywhere near the high order of proof required to establish adverse possession, the burden of which rests entirely upon the contesting defendants.

It has been submitted by learned Counsel for the contesting defendants that the dichotomous nature of Jayaneris' possession was admitted by two defendants, namely the second and the fifth. These defendants are brothers of Jayaneris and are parties who are entitled to other undivided shares than those deriving from Agiris.

However the defendants who would otherwise succeed to Agiris' share have not admitted that Jayaneris' possession was of the character claimed by Jayaneris or the second and fifth defendants, and, in the absence of any admission by them the admisssion by the second and fifth defendants cannot avail the contesting defendants. Moreover, where notice of the altered character of a person's possession is necessary, this notice is necessarily required to all the co-owners, and a notice to some alone will not suffice to stamp the possession in question as adverse.

Another observation I feel constrained to make is that the case of prescriptive possession set up by the contesting defendants became apparent only at the trial and indeed after the close of the plaintiffs' case. The plaintiffs were entitled to assume upon the pleadings of the contesting defendants that their title was based upon a transfer by Agiris. Indeed when the points of contest were formulated at the commencement of the trial, the learned Judge noted that, apart from the usual issue relating to prescriptive rights of parties, the only dispute was whether Agiris died without marriage or issue and whether the rights of Agiris devolved on his surviving brothers and sisters as stated by the plaintiffs or whether Agiris sold his rights to Salman who died leaving the contesting defendants as his heirs.

It would be wrong, therefore, to say that a case of adverse possession was the case which the plaintiffs were called upon to meet or that there was a burden on them to lead evidence in disproof of prescriptive title on the part of the contesting defendants. Consequently I do not think that an adverse inference can be drawn against the plaintiffs from their failure to meet in advance this altered case of the contesting defendants. In this context the comments made in the judgment on the weakness of the plaintiffs' evidence of possession and on their failure to call other witnesses on this point would appear to lose their force.

Another item of evidence relied upon by the contesting defendants in support of prescriptive title, is an inventory of 1930 filed in the testamentary case of Salman, their predecessor. This document is relied upon to show that a land by the same name as that of the corpus in this case was included in the estate of Salman. The appellants contend that the inventory is inadmissible as evidence of ownership unless the affirmant to the affidavit filed therewith is called as a witness. The appellants further dispute the identity of the land referred to therein, in view of a discrepancy between the extent there stated and the extent of the corpus.

Be these objections as they may, the inventory is at best a pointer to possession in or around the year 1930 and is insufficient of its own force to establish prescriptive possession. In the view indicated above of the nature of Jayaneris' possession, the inventory does not advance the case of the contesting defendants.

In the result, therefore, we hold that the claim of the contesting defendants to an undivided one-sixth share of the corpus on the basis of prescriptive possession must fail. The order of the learned Judge is hence set aside in so far as he holds the contesting defendants entitled to the undivided one-sixth share of Agiris. The rights to this one-sixth share will devolve in the manner set out in the plaint and the interlocutory decree will be amended accordingly.

As regards the costs of contest, the order of the trial Judge will be reversed and the seventh, eighth, and ninth defendants must pay a sum of rupees sixty-three to the plaintiff and a like sum to the third and sixth defendants. The plaintiffs will be entitled to the costs of this appeal. The costs of the action, including survey fees, will be borne by the parties *pro rata*.

T. S. Fernando, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Sri Skanda Rajah, J. (*President*), Alles, J. and Siva Supramaniam, J**

THE QUEEN *v.* M. K. GUNASENA

Appeal No. 93 *of* 1966 — *Application No.* 155 *of* 1966 — *S.C. No.* 63 *M.C. Galle* 36032

Argued and decided on: January 15, 1967.
Reasons delivered on: January 26, 1967.

Criminal Procedure Code, section 243 — *Non-compliance with provisions thereof — Failure of trial Judge to refer to evidence in charge to jury — Effect — Non-direction amounting to misdirection.*

Court of Criminal Appeal — Charge of murder — Need to charge jury on all defences arising on the evidence — Exceeding right of private defence— Question of fact to be left to jury — Accused acting with intention to kill — Whether he thereby falls outside scope of law of private defence — Whether substantial miscarriage of justice in present case—Court of Criminal Appeal Ordinance (Cap. 7), proviso to section 5(2).

Held: (1) That in the present case there had been no compliance with the express and imperative provisions of section 243 of the Criminal Procedure Code in that the trial Judge had failed to refer to the evidence at all in his charge to the jury. This was a non-direction amounting to a misdirection.

(2) That, further, the law as regards grave and sudden provocation, sudden fight and the right of private defence one or more of which defences arose on the evidence, should have been explained to the jury, but had not so been explained.

(3) That whether the accused had exceeded the right of private defence or not was a question of fact which should have been left to the jury.

(4) That even if the accused acted with the intention to kill, if his act fell within the right given by the law of private defence he would be entitled to an acquittal. The learned trial Judge had erred when he directed the jury that if they took the view that the accused had a murderous intention they should find him guilty of murder.

Held further: (5) That in view of the defects in the charge to the jury it could not be said that there had been no substantial miscarriage of justice. The proviso to section 5(1) of the Court of Criminal Appeal Ordinance could, therefore, not be applied.

Per **Sri Skanda Rajah, J.** — "We would observe that the jury were not even told of the presumption of innocence of an accused person and the impact of that presumption on the evidence."

Cases referred to: *Fernando* v. *The Queen* (1952) 54 N.L.R. 255.
Joseph Albert Attfield (1961) 45 Cr. App. Reports 309.

H. Rodrigo with *Mackenzie Pereira*, assigned for the accused-appellant.

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

Sri Skanda Rajah, J.

At the conclusion of the argument we allowed the appeal, quashed the conviction and sentence and directed a re-trial on a charge under section 296 of the Penal Code. We now set down the reasons for that order.

The accused was convicted of murder by a 5 to 2 verdict, on an indictment which charged him with having on or about the 24th day of November, 1964, committed the murder of one Wickremanayake.

It is desirable to state shortly the calendar in regard to the trial itself. The case was called towards the end of the day on October 30, 1966, the accused entered a plea of not guilty, the jury was empanelled and the Crown Counsel opened the case for the Crown. On October 31, at 9.45

a.m. the trial was resumed, when witnesses were called, including the present appellant. The evidence for the prosecution consisted of that of two alleged eye-witnesses, the doctor, an employee of the estate, where the deceased was tea maker, and a police officer. Then both Counsel addressed the jury and the learned Judge summed-up very briefly. In fact, the summing-up consists of only just a little over seven pages of typescript. The jury retired at 1.22 p.m. and returned at 1.30 p.m.

It is observed that in the summing-up there is no reference to the evidence of the prosecution witnesses or of the accused. Mr. Pullenayagam quite properly conceded that the provisions of section 243 of the Criminal Procedure Code had not been complied with; but, he invited us to consider whether this omission amounted to a failure of justice. He relied on the recent case of Joseph Albert Attfield (1961) 45 Criminal Appeal Reports 309. In that case the summing-up took twenty-five minutes. In that case too the learned Recorder omitted to discuss any of the evidence (except that as to the appellant's character).

In dismissing the appeal Ashworth, J., said

"Before parting with the case, it might be desirable to mention again that, while dismissing the appeal, this Court does not approve of the course that was taken in this case. It would have been very much better if the learned Recorder on the Tuesday afternoon had summarised the evidence by directing the jury's attention to the salient points."

At page 312 Ashworth, J., pointed out,

"No case has laid down, so far as we are aware, that it is essential for the validity of a summing-up that there should be a reference to the evidence, but equally there is no case that, so to speak, absolves a court from what is normally its function of assisting the jury by dealing with the evidence."

In England charge to the jury is governed by the common law. There is no statutory provision corresponding to our section 243, which is of an imperative nature. It reads:

"When the case for the defence and the prosecuting counsel's reply (if any) are concluded the Judge *shall charge the jury summing up the evidence* and laying down the law by which the jury are to be guided."

In this case the learned Judge has failed to comply with this express provision. He has not merely not referred to the salient points in the evidence either for the prosecution or the defence but has failed to refer to the evidence at all. This non-direction amounts to a mis-direction. We cannot say that there has been no substantial miscarriage of justice. Therefore, we are unable to apply the proviso to section 5(1) of the Court of Criminal Appeal Ordinance.

Also, we are constrained to point out other defects in the charge. The law as regards grave and sudden provocation, sudden fight and the right of private defence, one or more of which defences arose on the evidence given by the accused, was not explained to the jury.

In view of the evidence of the accused that he thought that Wickramanayake would kill him it was necessary to explain the law as regards private defence — what it is, when it might arise, when it ceases, and under what circumstances it would entitle him to kill the assailant.

Whether the accused had exceeded the right of private defence or not is a question of fact which should have been left to the jury. But the learned Judge in saying: "If you accept his version you are entitled to say, when in attempting to defend himself he exceeded the right of private defence and therefore he is guilty of culpable homicide not amounting to murder on that ground," precluded the jury from considering whether the act of accused fell within the right, if any, given him by the law to kill the deceased in the exercise of the right of defence of his own person.

When the learned Judge said, "If you answer that question (i.e. whether the accused had a murderous intention) in the affirmative, you will find him guilty of murder" he was in serious error. Even if the accused acted with an intention to kill, if his act fell within the right given by the law of private defence he could not be convicted of murder, or of culpable homicide not amounting to murder but would be entitled to be acquitted.

We would also observe that the jury were not even told of the presumption of innocence of an accused person and the impact of that presumption on the evidence.

These omissions cannot be overlooked in applying the proviso to section 5(1).

In *Fernando* v. *The Queen* (1952) 54 N.L.R. 255 it was pointed out that the trial Judge should apply the relevant law to the relevant facts in the course of the analysis of those facts.

Alles, J.

I agree.

Siva Supramaniam, J.

I agree.

Appeal allowed and re-trial ordered.

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

CEYLON MOTOR INSURANCE ASSOCIATION LIMITED *v.* JAYAWEERASINGHAM

S.C. No. 502/59 — *D.C. Colombo No.* 40799/*M*

Argued and decided on: April 26, 1961.

Motor Traffic Act (*Cap.* 203), *section* 109 — *Action by Insurer for declaration of non-liability under that section on ground of breach of specified condition — Payment already made by Insurer on claim being made — False declaration by defendant — Facts not known to Insurer — Effect of earlier payment.*

Waiver—Whether payment made without knowledge of full facts constitutes waiver—Must be intentional voluntary relinquishment of known right — Elements necessary — Effect of section 109 *of Motor Traffic Act.*

The defendant who had taken out a policy of insurance in respect of his motor car with the plaintiff Company made a claim for the damages suffered by his vehicle while driven by him, in a collision with another car. The policy provided *inter alia* that the plaintiff Company should not be liable if the accident occurred while the car was being driven by a person who was not a licensed driver. In making his claim to the plaintiff Company the defendant had stated that he was a licensed driver and a sum of Rs. 1,433/22 was paid to him. Subsequently the plaintiff Company having learnt that the defendant had no driving licence at the time of the collision took steps to recover the money and sought a declaration under section 109 of the Motor Traffic Act that a breach of a condition specified in the Policy had been established.

It was held by the trial Judge that though the breach of a condition specified in the Policy had been established, the plaintiff Company was not entitled to obtain the declaration it sought as the payment of the defendant's claim was a waiver of all the Insurer's rights.

Held: (1) That no question of waiver could arise here. Waiver was the intentional or voluntary relinquishment of a known right, and unless express, there must be such conduct as warrants an inference of such intentional or voluntary relinquishment.

(2) That the payment whether made with or without the knowledge of the fact that the defendant had no driving licence at the time of the collision did not operate as a bar to the insurer's getting a declaration under section 109 of the Motor Traffic Act.

Per **Sansoni, J.**:—"The defence of waiver must also fail because there is no evidence that the defendant acted, in any way, to his detriment by reason of anything that the Company did."

C. Ranganathan, for the plaintiff-appellant.

A. C. M. Uvais, with *M. T. M. Sivardeen*, for the added defendant-respondent.

Basnayake, C.J.

This is an action by the Ceylon Motor Insurance Association Limited for a declaration under section 109 of the Motor Traffic Act No. 14 of 1951, and for the recovery of a sum of Rs. 1,433/22 from the defendant. The defendant took out a policy of insurance dated 22nd March 1956 in respect of a motor vehicle No. EL 4852 owned by him. Under the heading of "General Exceptions"that policy provided, that the Company shall not be liable under the Policy in respect of four specified cases of which the one material to the instant case reads:—

"(3) any accident loss damage and/or liability caused, sustained or incurred whilst any Motor Vehicle in respect of or in connection with which insurance is granted under this Policy is —

(*a*) being used for any purpose within the definition of "Excluded Use" contained in the Schedule hereto, or

(*b*) being driven by or is for the purpose of being driven by him in the charge of an "Excluded Driver" as defined in the said Schedule."

The definition in the Schedule reads:

"The expression 'Excluded Driver' shall mean:

(i) any person other than the Insured or a person driving with the Insured's express or implied permission.

(ii) any person who is not the holder of a certificate of competence unless he has held and is not disqualified for obtaining such a certificate."

It is admitted that the defendant's car collided with car No. CN 6019 on 30th April 1956 when he was driving it and that at that time he had no driving licence. In a claim made to his insurer for the value of the damages that his vehicle suffered in the collision he stated that he was a licensed driver. Proceeding on the statements made in his claim his insurer paid a sum of Rs. 1,433/22. Subsequently the added-defendant who was injured in the collision sued the defendant. Thereafter the company having learnt that the defendant had made a false declaration in his claim took steps to recover the money paid out by it, and protect itself by seeking a declaration under section 109 of the Motor Traffic Act. That section, omitting the proviso which is not material in the instant case, reads:-

"No sum shall be payable by an insurer under section 105 in respect of any decree if, in proceedings commenced before or within three months after the institution of the action in which the decree was entered, the insurer has obtained from a court of competent Jurisdiction a declaration that a breach has been established of a condition specified in the policy, being one of the conditions enumerated in section 102(4)."

The learned District Judge holds, and we agree with his view, that a breach of a condition specified in the policy has been established; but he is wrong in holding that the plaintiff was not entitled to obtain the declaration it sought on the ground that the payment of the defendant's claim of Rs. 1,433/22 was a waiver of all the insurer's rights. Waiver is the intentional or voluntary relinquishment of a known right. Unless it is express there must be such conduct as warrants an inference of the intentional or voluntary relinquishment of such right. No question of waiver arises here. The payment, whether it was made with or without the knowledge of the fact that the defendant had no driving licence at the time of the collision, in our opinion, does not operate as a bar to the insurer's getting a declaration under section 109 of the Motor Traffic Act.

We therefore set aside the judgment of the learned District Judge and direct that decree be entered declaring that a breach of the condition that the motor vehicle should not be driven by any person who is not the holder of a driving licence has been established. Although the policy of insurance speaks of a certificate of competence, an expression known to the enactment which was repealed by the Motor Traffic Act, instead of a driving licence, we do not think that the use of that expression matters.

The appellant is entitled to his costs both here and in the court below.

Sansoni, J.

I agree to the order proposed by My Lord the Chief Justice. In my view the learned District Judge was wrong in holding that the plaintiff had waived the breach of the condition relating to the driving of the motor vehicle by an unlicensed person. There could be no waiver since all the relevant facts and circumstances were not known to the company when it paid the sum of Rs. 1,433/22. Indeed, the Company had been misinformed of the true position by the defendant who falsely and dishonestly represented to it in the claim form that he had a licence to drive a car.

The defence of waiver must also fail because there is no evidence that the defendant acted, in any way, to his detriment by reason of anything that the Company did.

Appeal allowed.

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

IN RE BATUVANTUDAVE

Supreme Court Application No. B. 52 of 1967

In the matter of an application by Upali Batuvantudave for readmission and re-enrolment as an Advocate of the Supreme Court.

Argued on: December 7, 1967.
Decided on: December 11, 1967.

Advocate of the Supreme Court — Name struck off the Roll of Advocates — Application for re-admission after lapse of thirty years.

Held: That the Supreme Court has power to re-admit an Advocate who had been convicted of "serious offences involving gross fraud" and subsequently disenrolled, if it is satisfied that the applicant has expiated his offence and redeemed his character.

Cases considered: *In re Batuwantudawe* (1950) 51 N.L.R. 513; XLII C.LW. 7
In re Seneviratne (1928) 30 N.L.R. 299
In re an Advocate (1951) 52 N.L.R. 559.

E. B. Wikramanayake, Q.C., with *M. Rafeek*, for the applicant.

A. C. M. Ameer, Q.C., Attorney-General, with *M. Kanagasunderam*, Crown Counsel as *amicus curiae* on notice from the Court.

A. H. C. de Silva, Q.C., with *E. R. S. R. Coomaraswamy* and *Desmond Fernando*, for the General Council of Advocates, as *amicus curiae* at the instance of the Court.

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

The applicant who had been called to the English Bar was admitted and enrolled as an Advocate of this Court on August 4, 1932. Rule 51 (as it then stood) of the Rules set out in the second Schedule to the Courts Ordinance permitted persons called to the English Bar to be so admitted and enrolled. He was convicted on June 19, 1936 in the District Court of Colombo on charges which alleged that he had committed "very serious offences involving gross fraud in each". His name was struck off the roll of Advocates on October 8, 1937. Some thirteen years after his disenrolment he applied to the Court for readmission as an Advocate, and this Court, having given the matter very careful consideration, dismissed his application on April 5, 1950 — see *In re Batuvantudawe* (51 N.L.R. 513). This second application for readmission has been presented more than 17 years after the rejection of the first, and nearly a third of a century after the disenrolment.

In an affidavit attached to his petition the applicant sets out the manner in which he has since his conviction by the court and subsequent disenrolment from the profession led an honest and industrious life devoting his time to religious and cultural pursuits. We must take note also of the fact that during this period he had been elected to the country's then legislature, the State Council, and served as a member thereof for some seven years. To this affidavit he has attached a number of certificates from men who have held high and distinguished office in this Country, certificates which go to prove that the applicant has expiated his offences and re-established his character. In these circumstances he is entitled to a favourable reception by us of his present application.

Where an advocate had been convicted of cheating and had subsequently been disenrolled, this Court, — (see *In re Seneviratne* (1928) 30 N.L.R. 299) — while it refused readmission where an application therefor had been made even before five years had elapsed since disenrolment, however accepted the proposition that it had power to readmit when an applicant has expiated his offence and redeemed his character. While the present applicant's earlier attempt to gain readmission, although made some thirteen years after disenrolment, failed, we have to remember that thirty years have now passed since the day the applicant lost his right to practise his profession in our Courts. He is said to be 57 years of age today, and the offences which entailed the loss of his professional rights were committed in 1935 when he was but 25 years old.

It is not clear whether he intends actively to pursue a professional career, but in regard to our inquiry relative thereto, we have been referred by the learned Attorney-General to the observations of this Court in *In re an Advocate* (1951) 52 N.L.R. at 562. The Court, while there affirming the view taken on an earlier occasion that "we should be very careful in admitting to the profession a man who has been guilty of a crime of dishonesty", went on to endorse the following opinion:— "But that is not to say that character once lost cannot be redeemed." In that case the Court also observed that it saw no reason why the intention of the applicant before it to continue his career as a teacher should stand in the way of his readmission to the profession of advocates.

A point touching procedure did at one stage of the hearing cause us some concern. As the applicant came to be admitted here by virtue of his call to the English Bar from which too we assume he has been disbarred, the question did arise in

our minds whether a pre-condition to his readmission is not a recall to the English Bar. The learned Attorney-General and the learned Queen's Counsel who appeared on behalf of the General Council of Advocates both submitted that such a recall is not imperative, a submission endorsed by the applicant's counsel as well.

I might add that for the first time in the case of applications of this nature the Court invited the presence at the hearing of counsel on behalf of the General Council of Advocates, as we deemed it prudent to hear any submission the Council wished to make either for or against the application. Counsel who so appeared made no submission and offered no argument tending towards a rejection of this application. Nor indeed did the learned Attorney-General. In these circumstances we make order in this case directing a restoration of the name of the applicant to the Roll of Advocates of this Court.

Tambiah, J.
I agree.

Alles, J.
I agree.

Application allowed.

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

JOHANAHAMY AND THREE OTHERS *v.* SUSIRIPALA

S.C. 46/64(*F*) — *D.C. Galle No. L*(*N*) 6708

Argued on: 28th February, 1967 and 1st March, 1967.
Decided on: 3rd December, 1967.

Debt Conciliation Ordinance, sections 43 *and* 56— *Amending Act No.* 5 *of* 1959 — *Clause in agreement entered into before the Board setting out conditions for the determination of debtor's rights of retransfer—Payment by monthly instalments—In default of any instalment right to retransfer at an end—Effect of such a clause—Applicability of procedure in section* 43—*Is proceeding pending before the Board —Prevention of Frauds Ordinance, section* 2.

By deed of transfer No. 2613, dated 11th January, 1958, the defendants-appellants transferred their interests in the land forming the subject matter of this action, to the plaintiff-respondent, subject to the condition that the plaintiff would reconvey the said interests on the payment of a certain sum of money within a specified period of time, The defendants-appellants made an application for relief to the Debt Conciliation Board and a settlement was arrived at between the parties whereby the principal sum and the interest thereon was to be repaid to the plaintiff-respondent on certain dates fixed in the settlement and upon the payment of the full sum due, the plaintiff respondent was to reconvey the said land to the defendants-appellants. It was also agreed that in the event of a single default the right to redeem would be at an end.

The plaintiffs' proctor subsequently applied to the Debt Conciliation Board for an order dismissing the defendants-appellants' application on the basis of a default but no order of dismissal was made in view of the provisions contained in the settlement itself in regard to the consequences following a default.

Upon the plaintiff-respondent filing action, for declaration of title, ejectment and damages the defendants-appellants raised objections on the ground (1) that by virtue of the provisions in the Amending Act No. 5 of 1959, the conditional transfer executed by the appellants was in fact a mortgage and that proceedings before the Debt Conciliation Board were pending at the time action was filed, thereby debarring the plaintiff from maintaining this action; (2) that the only remedy available to the plaintiff was the one provided by section 43 of the Debt Conciliation Ordinance.

Held: (1) That Act No. 5 of 1959, amending the Debt Conciliation Ordinance did not remove the necessity for notarial attestation in the creation of a valid mortgage, required under section 2 of the Prevention of Frauds Ordinance.

(2) That the inclusion of the definition of the term "mortgage" in the amending Act, enables the Debt Conciliation Board to effect settlements in the case of conditional transfers to the extent of settling the terms and conditions of repayment and retransfer.

(3) That where it was agreed before the Debt Conciliation Board between the parties that the right to retransfer would be at an end upon a default by the debtor, and a default was in fact committed, the Board could have no further jurisdiction to deal with any matter relating to the transaction, and the application in respect of such a transaction could not be said to be pending.

(4) That the plaintiff was entitled to maintain this action without resorting to the summary procedure laid down in section 43 of the Ordinance.

Per **Manicavasagar, J.**—" The question whether a matter is pending before the Board is one of fact, dependent on the terms of settlement."

Cases referred to: *Adaicappa Chetty* v. *Caruppen Chetty*, (1920) 22 N.L.R. 417 (P.C.)
Saverimuttu v. *Thangavelautham*, (1954) 55 N.L.R. 529; LI C.L.W. 17 (P.C.)
William Fernando v. *Cooray*, (1957) 59 N.L.R. 169; LV C.L.W 25

C. Ranganathan, Q.C., with *N. Jayawickrema*, for the defendants-appellants.

H. W. Jayewardene, Q.C., with *G. P. J. Kurukulasuriya*, and *V. Basnayake*, for the plaintiff-respondent.

Samerawickrame, J.

The plaintiff-respondent brought this action against the defendants-appellants for declaration of title to the land described in schedule B to the plaint and for ejectment of the defendants from it.

It would appear that upon deed 2613 dated 11th January, 1958, the defendants-appellants and one Leelaratne transferred their interests in the said land to the plaintiff-respondent subject to an agreement to reconvey the said interests on payment of a sum of Rs. 11,400/- within two years from 11th January, 1958. The defendants-appellants and the said Leelaratne made an application to the Debt Conciliation Board and in proceedings held upon that application, a settlement was arrived at between the plaintiff-respondent on the one hand and the defendants-appellants and Leelaratne on the other, whereby it was agreed that the arrears of interest due to the plaintiff-respondent and the capital amount due to him should be paid on dates fixed in the settlement. The last two paragraphs of the settlement were as follows:—

(5) that in the event of any single default the right to redeem will be at an end.

(6) that on payment of the full sum the creditor should execute a deed of reconveyance to the debtors at the cost of the debtors.

Thereafter the Proctor for the plaintiff-respondent wrote a letter to the Chairman of the Debt Conciliation Board stating that the debtors had committed default in making payments and asked that the Board should make an order dismissing the application made to it. By his letter (P. 3), the Chairman wrote to the Proctor for the plaintiff-respondent referring to clause 5 of the settlement and stating that an order dismissing the application was not necessary. The plaintiff-respondent thereafter filed the present action against the defendants-appellants alone as Leelaratne had died and his interests had devolved on the defendants-appellants.

The defendants-appellants took up the position in their answer that the conditional transfer executed by them was in fact a mortgage, that the proceedings before the Debt Conciliation Board were pending at the time the action was filed and that the plaintiff was not entitled, therefore, to have and maintain the action in view of the provisions of Section 43 and 56 of the Debt Conciliation Ordinance.

At the trial, various issues were framed and the Court took up for decision as preliminary issues the following:—

(14) Is the plaintiff entitled to maintain this action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance?

(15) Was the matter pending before the Debt Conciliation Board at the time this action was instituted?

(16) If so, can the plaintiff have and maintain this action?

The learned District Judge has answered these issues in favour of the plaintiff-respondent and the defendants-appellants have appealed against his order.

Mr. Ranganathan, Q.C., appearing for the defendants-appellants, submitted that the amendment to the Debt Conciliation Ordinance made by Act No. 5 of 1959 had recognised the creation of a mortgage by the execution of a conditional transfer of land. He submitted, therefore, that the title to the land was at all times in the defendants

and that the plaintiff, therefore, could not maintain the action. He further submitted that upon a settlement under Section 30 of the Debt Conciliation Ordinance, the contract in respect of the debt was merged in the settlement and that the mortgage or security created by the conditional transfer subsisted under the settlement to the extent of the amount payable under it in respect of the debt. He submitted that this was the effect of Section 40 of the Debt Conciliation Ordinance. He further submitted that the plaintiff's only remedy was that given by Section 43 of the Ordinance.

It was held as far back as the year 1921 by the Privy Council in the case of *Adaicappa Chetty* v. *Caruppen Chetty*, 22 N.L.R. 417, that Section 2 of the Prevention of Frauds Ordinance prevented the creation of a mortgage otherwise than by a notarial instrument duly executed according to law. It has also been held in the long line of cases that where a person transferred land on a notarial deed, which on the face of it is a transfer, it is not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage. The leading of such oral evidence is directly prohibited by Section 92 of the Evidence Ordinance. The principle laid down in these cases has been upheld by the Privy Council in the case of *Saverimuttu* v. *Thangavelautham*, 55 N.L.R. 529, and by a Divisional Bench of Five Judges of this Court in the case of *William Fernando* v. *Siriwardena*, 59 N.L.R. 169. Accordingly, if it had been the intention of the Legislature to alter the law so as to permit the creation of a mortgage by an agreement other than one set out in an instrument which is notarially attested, one would have expected that such alteration of law would have been done by an unambiguous and substantive enactment. I find it difficult to think that the Legislature intended such a far-reaching alteration in the law by inserting a definition of the term 'mortgage' in the Debt Conciliation Ordinance by Amendment Act No. 5 of 1959.

That amendment provides for the insertion of the following definition of mortgage in Section 64 of the Act which sets out the meanings to be given to terms contained in the Ordinance "unless the context otherwise requires". The definition is as follows:— " 'Mortgage' with reference to any immovable property includes any conditional transfer of such property which having regard to all the circumstances of the case is in reality intended to be security for the payment to the transferee of a sum lent by him to the transferor". Inclusion of this definition permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage and to exercise jurisdiction under that Ordinance in respect of such a transaction. The Board would, therefore, be entitled to seek to effect a settlement between the transferor and the transferee in respect of the conditional transfer. The settlement would obviously relate to the terms and conditions of payment upon which the transferor would be entitled to obtain a retransfer and would provide for a transfer to be effected by the transferee upon the conditions being satisfied. The settlement P1 provides in clause 6 for such a transfer between the transferee to the transferor upon the payment of the full sum due under the settlement. In clause 5 it further provided that if there was default in any payment the right to redeem would be at an end. As the settlement itself provides that the right to redeem would be at an end, upon the debtors committing a default in payment, I do not see that there can be any disability for the plaintiff to bring an action upon the title that he obtained by the deed of transfer in his favour upon the footing that there had been a default resulting in the right to redeem having come to an end.

Upon the view that I have taken that the amendment to the Debt Conciliation Ordinance does not have the effect of enabling persons to create mortgage other than by notarially attested instruments and that, therefore, the transferee upon conditional transfer has the title, it is unnecessary to consider the elaborate argument put forward by Mr. Ranganathan upon the basis that the title remained in the debtors. I am also of the view that, upon the assumption that a default in payment had been committed as alleged by the plaintiff-respondent, in terms of clause 5 of the settlement, the right to redeem would have ceased to exist and the Board could have no further jurisdiction to deal with any matter relating to this transaction and that, therefore, the application in respect of it could not be said to have been pending thereafter.

I am, accordingly, of the view that the learned District Judge has come to correct findings in respect of the preliminary issues and that his order must be affirmed. The case will now have to go back for trial in respect of the other issues. The plaintiff-respondent will be entitled to his costs of appeal.

Manicavasagar, J.

I agree with the order made by my brother. The sole purpose of the amendment of 1959 is to enable a vendor, who has entered into an agreement to have the immovable property which he had sold reconveyed to him by the vendee, to seek the intervention of the Board to effect a settlement either in regard to the consideration payable by him on reconveyance, or extension of time, or any other matter which may appear just and reasonable to the Board. Prior to the amendment, the vendor did not have this remedy because an agreement to reconvey was not a contract of security in respect of a debt within the meaning of the Ordinance. The amendment, as my brother points out, did not create an exception in respect of an execution of a mortgage, to the formalities imposed by Section 2 of the Prevention of Frauds Ordinance.

The question whether a matter is pending before the Board is one of fact, dependent on the terms of settlement. The settlement effected by the Board and contained in document P1 concluded the matter before the Board, which was functus thereafter.

Appeal dismissed.

Present: **Abeysundere, J.**

YAPATILLEKE, FOOD AND PRICE CONTROL INSPECTOR, MATALE

v.

HEWA LIYANAGE PIYADASA

S.C. 1132/67 — *M. C. Matale Case No.* 699

Argued and Decided on: 31st March, 1968.

Control of Prices Act — Alleged sale of a 14 *oz. tin of Milk Maid Condensed milk above the controlled price — Burden on the prosecution to prove the quantity of milk sold by the accused — Admissibility in evidence of the label appearing on the tin — Rule against hearsay.*

A Price Order made under the Control of Prices Act fixed the maximum retail price of a "14 oz. tin of Milk Maid condensed milk". The accused was convicted of having charged a price in excess of the controlled price.

The evidence of the decoy was that he had asked the accused, who was a retail dealer, for a, 'tin of milk'. Thereupon the accused handed over a tin, on the metal surface of which was embossed the figure of a milk maid, and on the paper label was printed, *inter alia*, the legend: "nett weight 14 ozs." There was no other evidence relating to the weight of the contents or of the tin.

Held: (1) That it was incumbent on the prosecution to prove that the quantity of Milk Maid condensed milk sold by the accused was 14 ounces..

(2) That the statements on the label constituted hearsay evidence, and were therefore not admissible to prove the quantity of condensed milk in the tin.

Nihal Jayawickrama, for the accused-appellant.

V. S. A. Pullenayagam, Senior Crown Counsel, with *Lalith Rodrigo*, Crown Counsel, for the Attorney-General.

Abeysundere, J.

In this case the accused was charged with selling one tin of 14 ozs. of milk maid condensed milk above the maximum retail price fixed by a price control order in force under the Control of Prices Act. After trial he was convicted of the offence with which he was charged and sentenced to pay a fine of Rs. 1,500/- and to a month's rigorous imprisonment and, in default of the payment of the fine, to a further 6 weeks' rigorous imprisonment. The accused has appealed from the conviction and sentence.

Counsel appearing for the appellant submits that the prosecution has failed to prove that the tin of condensed milk sold by the accused contained 14 ozs. of condensed milk of the variety known as

Milkmaid condensed milk. The evidence led for the prosecution has established that the tin sold contains embossed on its metal surface the figure of a milk maid and that such figure and the label appearing on the tin indicate that the tin of milk contains the trade mark of a milk maid. The evidence of the witness Mutukaruppan Ramiah is that when he asked from the accused for a tin of milk he was given the tin which has been produced in this case. That evidence was relied on by the prosecution to establish that the accused acknowledged that the tin contained condensed milk. But there is no evidence, apart from the label on the tin which the prosecution submitted as evidence of the contents of the tin, that the tin contained 14 ozs. of condensed milk. I agree with the submission of counsel for the appellant and it is also conceded by Crown Counsel appearing for the Attorney-General that the statements on the label constitute hearsay evidence which cannot be relied on to prove the quantity of condensed milk in the tin. It was submitted by Crown Counsel that the controlled article should not be determined by reference to the weight of the contents of the tin. But I note from a perusal of the price control order relevant to this case that the controlled article is a tin of 14 ozs. of condensed milk of the kind known as Milk Maid Condensed Milk. I am of the view that in this case it was incumbent on the prosecution to prove that the quantity of Milk Maid condensed milk sold by the accused was 14 ozs. As the label does not constitute evidence to prove the contents of the tin, I hold that there is no evidence to prove that a tin of 14 ozs. of Milk Maid condensed milk was sold by the accused. I therefore set aside the conviction and sentence and acquit the accused.

Accused acquitted.

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

K. ARUMUGASAMY IYER *v.* K. MUTTUCUMAROE IYER

S.C. No. 141/1965 — *D.C. Pt. Pedro* 6717/*L*

Argued on: 22nd and 23rd October, 1967.
Decided on: 30th October, 1967

Jaffna Matrimonial Rights and Inheritance Ordinance (*Cap.* 58), *section* 37— *Estate of deceased parent devolving on minor child — Surviving parent possessing and enjoying income and effecting improvements — Is he entitled to compensation for such improvements?*

Held: (1) That the rights of a surviving parent as set out in section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance are narrower in scope than those of a usufructuary, while as regards his rights of possession of the property and enjoyment of the income thereof, a surviving parent is in the very same position as a usufructuary.

(2) That a usufructuary is not in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of usufruct.

(3) That even if the defendant, (who is the surviving parent of the deceased minor child and whose rights have devolved on the plaintiff) is regarded as a *bona fide* possessor, he is not entitled to claim compensation for the improvements made on the land he possessed under section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance as he had had the use and enjoyment of the improvements for the entire anticipated period, viz. the period of minority.

Cases referred to: *Hassanally* v. *Cassim*, (1960) 61 N.L.R. 529; LVII C.L.W. 100; 1960 A.C. 592
Urtel v. *Jacobs* 1920 C.P.D. 487
Brunsden's Estate v. *Brunsden's Estate and Others* 1920 C.P.D. 159
Wait v. *Estate Wait* 1930 C.P.D. 1

C. Ranganathan, Q.C., with *V. Arulambalam*, for the defendant-appellant.

S. Sharvananda, for the plaintiff-respondent.

Siva Supramaniam, J.

The question that arises for decision in this appeal is whether a surviving parent who continues to possess the estate of the deceased parent which has devolved on a minor child and enjoys the income thereof in terms of section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58) (hereinafter referred to as the Ordinance) is entitled to claim compensation for improvements effected by him on a land which forms part of such estate.

This was an action for a declaration of title to a share of a piece of land called Kaluvanuvayandi described in the schedule to the plaint and depicted on survey plan No. 243 dated 25.3.1962 and to the entirety of the buildings standing on lot 4A thereof. The following facts were common ground:— The parties are governed by the provisions of the Ordinance. The defendant's wife had been entitled to 1/44 share of the land in question and on her death that share devolved on Balasubramanya Iyer, her only child of the marriage, who was then about 3 years of age. Balasubramanya Iyer was also entitled to another 1/144 share by right of inheritance from his grandfather. He continued to reside with the defendant and was looked after and maintained by him. The defendant was in possession of lot 4A of the said land in lieu of the 1/72 share which belonged to his son. Under section 37 of the Ordinance the defendant was entitled to possess and enjoy the income only from the share which his son inherited from his mother. On the said lot 4A, between the years 1953 and 1955, the defendant put up buildings to the value of about Rs. 25,000/-. The defendant's son died in 1956 but the defendant continued to be in possession of the said lot 4A and the buildings standing thereon even at the date of the present action.

The parties were not agreed as to whether the defendant's son had attained majority at the time of death but it was conceded that, if he had not, he would have attained majority in 1957. His interests in the land in question devolved on his maternal grandmother who, by deed No. 7350 dated 10.2.1960, donated the same to the plaintiff. The plaintiff instituted this action as the defendant refused to deliver possession of the said lot 4A and the buildings standing thereon to him. The plaintiff also claimed certain other undivided shares in the land through other sources. The trial Judge entered judgment in favour of the plaintiff and the defendant has appealed.

At the trial, the defendant set up alternative defences. He alleged that lot 4A on which the buildings stood was not part of the land called Kaluvanuvayadi but formed a part of another land called Kalivilappu of which he was the sole owner. He claimed to be entitled to the said land on certain deeds. The trial Judge rejected this claim and characterised the deeds as fabrications. Learned Counsel for the appellant did not seek to canvas that finding.

Alternatively, the defendant claimed a sum of Rs. 25,000/- as compensation for improvements and a *jus retentionis*. This claim too was rejected by the trial Judge. It is this finding that has been canvassed in appeal.

The parties were at variance in regard to the source of the funds with which the buildings in question were constructed. According to the defendant, he utilised his own monies for that purpose. The plaintiff stated, on the other hand, that the defendant's son was entitled to a substantial income from a temple and the defendant collected that income and utilised it for the construction of the buildings. The defendant denied that he collected his son's share of the income from the temple but his evidence was not accepted by the trial Judge. Apart, however, from the fact that there is no evidence to prove that the defendant utilised the monies he collected as his son's share of the income from the temple to construct the buildings in question, it should be borne in mind that the defendant was entitled to appropriate to himself the share of the income from the temple to which his son was entitled by way of inheritance from his mother.

It was submitted by learned Counsel for the appellant that the defendant had a vested interest in the land under the law, that he put up the buildings in question *bona fide* for his own benefit and not for the benefit of his son, and that the son's heirs or representatives in title were not entitled to take advantage of the improvements effected by him without making compensation. I shall examine the submission of Counsel on an assumption of the facts most favourable to the defendant, namely, that he effected the improvement out of his own funds and for his own benefit.

It was argued that the defendant was a *bona fide* occupier of the land when he put up the buildings and that he was, under the Roman-Dutch law, entitled to claim compensation for the useful expenses incurred by him. Learned Counsel

relied on the judgment of the Privy Council in *Hassanally* v. *Cassim*, 61 N.L.R. 529 in the course of which their Lordships stated: ".....the right of an improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity." The question that arose for decision in that case was whether a person who had lawfully occupied a land under a lease and, in that capacity, had made improvements was entitled to compensation when his term of lease was prematurely terminated by operation of law. In upholding the claim of an improver for compensation in those circumstances, their Lordships cited with approval several decisions of the South African Courts which laid down that not only a "possessor" in the strictly juristic sense of the term but also "a *bona fide* occupier" whose occupation was prematurely terminated was entitled to claim compensation for improvements effected by him in the expectation that he would have the benefit of the improvements until the expiration of the period during which the occupation was to last. The basis of the claim is the deprivation of the use and enjoyment of the improvements by the improver by reason of a premature termination by the owner of the period of anticipated occupation. Where, therefore, a *bona fide* occupier effected improvements and enjoyed the benefit of such improvements for the full period of occupation contemplated by himself and the owner, he would have no claim whatsoever for compensation.

The position was set out clearly by Gardiner J. in the case of *Urtel* v. *Jacobs* (1920) C.P.D. 487 at p. 492 as follows:— "Where improvements have been made by a person in the faith that he will enjoy these improvements either as owner or as occupier with the right of occupying for a certain fixed period and he has been disappointed in this expectation or his occupation for a certain fixed period has been prematurely terminated, that is, prior to what he had expected, he is entitled to compensation if the real owner has benefited by the improvements..... A lessee who occupies for a fixed period and makes improvements during that period, if his term is allowed to run to an end, or he becomes in default, gets no compensation for improvements."

In the instant case, had his son not died in 1956, the maximum period during which the defendant would have been entitled to remain in occupation of the land was the period of minority of his son, namely, till some date in 1957. But he has, in fact, continued in possession till long after that period. Consequently, even if he came within the category of "a *bona fide* occupier", referred to above, he has no basis for a claim for compensation in as much as he has had the use and enjoyment of the improvements for the entire anticipated period.

The character of the occupation of the defendant, however, was that of a usufructuary and it is now well settled that under the Roman-Dutch Law a usufructuary is not entitled to claim compensation for improvements. The question whether a usufructuary is entitled to claim for expenses voluntarily incurred by him in the improvement of the property, subject to his usufruct, was examined by Kotze J. in a learned judgment in the case of *Brunsden's Estate* v. *Brunsden's Estate and Others* (1920) C.P.D. 159 at pp. 171 *et seq.* and he held that "both principle and authority lead to the conclusion that a usufructuary is not, in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of usufruct." This decision has been followed in subsequent cases in South Africa (vide *Urtel* v. *Jacobs* (supra); *Wait* v. *Estate Wait* (1930) C.P.D. 1) ,and has been adopted by text writers of such high authority as Wille, *Principles of South African Law* (2nd edition) p. 214 and Lee. *An Introduction to Roman-Dutch Law* (4th Edition) p. 182.

Learned Counsel for the appellant argued that the rights of a surviving parent under the Ordinance are larger than that of a usufructuary and the Roman-Dutch Law in regard to claims of usufructuaries is not applicable to the facts of this case. Section 37 of the Ordinance provides as follows:— "When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority". The rights of the surviving parent, therefore, are (1) to possess the property and (2) to enjoy the income thereof. The rights of a usufructuary under the Roman-Dutch Law are set out by Lee (supra, page 181) as follows:— (1) To use the property and take its fruits as owner (2) To possess the property and to recover possession from the dominus or from a third party (3) To alienate the right of use and enjoyment but only for the term of the usufruct and (4) To give the property in pledge or mortgage and to suffer

it to be taken in execution but only to the extent of his usufructuary interest. It will be seen, therefore, that the rights of a surviving parent as set out in section 37 of the Ordinance are narrower in scope than those of a usufructuary, while as regards his rights of possession of the property and enjoyment of the income thereof a surviving parent is in the very same position as a usufructuary. In the instant case no special circumstances were established by the defendant which would entitle him to claim compensation.

In view of the above conclusion, it becomes unnecessary to examine the submission of respondent's counsel that the presumption of advancement will apply in favour of the defendant's son in regard to the expenditure incurred by the defendant in constructing the buildings in question.

The learned District Judge was right in rejecting the defendant's claim for compensation for improvements.

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

I agree.

Appeal dismissed.

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

N. J. CANEKERATNE *v.* RACHEL MATILDA DAVIES CANEKERATNE

S.C. No. 332 (*Final*) *of* 1964 — *D.C. Colombo* 58606/*M*

Argued on: January 24 and 25, 1968
Decided on: January 25, 1968
Reasons delivered on: February 17, 1968

Husband and Wife — Duty of support — Right of a deserted wife to remain in the matrimonial home — Maintainability of an action for ejectment filed by the husband during the subsistence of the marriage.

A divorce action in which both husband and wife were claiming a divorce from each other was filed by the appellant (husband) in March 1956. On December 20 1962, the District Court entered decree *nisi* in favour of the respondent. The appellant filed an appeal against the judgment of the District Court, which appeal was finally disposed of in 1967.

On December 29, 1962, the appellant gave notice to the respondent to quit the flat of which he was the owner and which, he alleged, she occupied "with his leave and licence". On February 20, 1963, the respondent not having left the premises, the appellant instituted the present action in which he prayed for her ejectment and for damages.

Held: (1) That on the date of the notice to quit as well as on the date of the institution of this action, the divorce action was pending, and the parties were still husband and wife in law.

(2) That the appellant, by reason of his duty of support, had to provide the respondent with accommodation food, clothing, medical attention and whatever else she reasonably required.

(3) That a deserted wife has the right to remain in the matrimonial home unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her.

(4) That the present action was therefore not maintainable.

The following dictum of Lord Upjohn in *Provincial Bank Ltd.* v. *Ainsworth* was quoted with approval:

... ...

"A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licencee of her husband, she is lawfully there as a wife, the situation is one *sui generis*. She may be discribed as a licencee if that word means no more than one who is lawfully present, but it is objectionable for the description of anyone as a licencee at once conjures up the notion of a licensor, which her deserting husband most emphatically is not."

Case referred to: *National Provincial Bank* v. *Ainsworth*, (1965) 2 A.E.R. 472

C. Thiagalingam, Q.C., with *P. N. Wickramanayake* and *P. Edirisuriya*, for the plaintiff-appellant.

Maureen Seneviratne, with *Clarence Fernando*, for the defendant-respondent.

T. S. Fernando, J.

The appellant married the respondent in the year 1950 and they appear to have lived together till December 1954 when they separated, and the appellant left the matrimonial home which at the time he was leaving was the flat from which he seeks in these proceedings to eject the respondent. The parties appear to have moved into this flat about June 1953.

A divorce action in which both husband and wife were claiming a divorce from each other was filed by the appellant in March 1956, and that action was eventually decided in the District Court on 20th December 1962 with the entering of a decree *nisi* in favour of the respondent. Decree absolute could therefore not have been entered before 20th March 1963. The appellant filed an appeal against the judgment of the District Court granting decree *nisi*, an appeal that was finally disposed of only sometime in 1967.

The action we are concerned with on this appeal was instituted by the appellant on 20th February 1963, and in the plaint filed by him on that day he alleged that the respondent occupied the flat in question — (the appellant is the owner of the flat) — with his leave and licence. On 29th December 1962 he had given her notice to quit the flat and prayed in the action for her ejectment with damages at the rate of Rs. 600/- per mensem which he alleged was the reasonable rent therefor. The learned trial judge has held that on the date of the notice to quit as well as on the date of the institution of this action the divorce action was pending — indeed it was the appellant himself who had presented the appeal against the judgment of the District Court — and therefore the parties were then still husband and wife in law, and that the action so filed was not maintainable. We are in complete agreement with that view of the learned judge, and indeed appellant's counsel was constrained to abandon an argument to the contrary he had begun to outline in this court.

Some argument was addressed to us as to whether a deserted wife has an irrevocable licence to remain in occupation of the matrimonial home or whether she is only a contractual licencee, and it was pointed out to us that certain English cases relied on by the respondent had recently been overruled by the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth*, (1965) 2 A.E.R. 472 but we need not enter here upon an examination of a deserted wife's right under the English law to occupation of the matrimonial home as against third parties. It is sufficient to say that under the Roman-Dutch law the husband, by reason of his duty of support, has to provide his wife with accommodation, food, clothing, medical attention, and whatever else she reasonably requires. Professor Hahlo in his treatise "*The South African Law of Husband and Wife*" — (2nd ed. 1963. at p. 101)— states "The husband's duty to support his wife does not necessarily come to an end if the joint household breaks up. On the principle that no one can escape his legal obligations by his own wrongdoing, the husband's duty of support continues if the separation was due to his fault — he deserted his wife without just cause or drove her away by his misconduct."

Mr. Thiagalingam referred to a certain issue raised in the course of the trial relating to the effect of section 2 of the Prevention of Frauds Ordinance (Cap. 70) upon the wife's claim to remain in the flat, and contended that the upholding of her claim may involve a recognition of a new kind of land tenure in this Country. I do not think that the upholding of a deserted wife's right to remain in the matrimonial home unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her means establishing any such tenure. I need only refer to certain observations made by Lord Upjohn in the case to which I have referred above — see page 485 — as to the position of the wife in relation to her matrimonial home. "A wife does not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licencee of her husband, she is lawfully there as a wife, the situation is one *sui generis*. She may be described as a licencee if that word means no more than one who is lawfully present, but it is objectionable for the description of anyone as a licencee at once conjures up the notion of a licensor, which her deserting husband most emphatically is not."

Certain other arguments were addressed to us bearing on the questions: (1) whether in an action for recovery of immovable property a claim to recover moveables can be added and (2) whether on a decree granting a divorce or a separation the wife can be granted a right to receive alimony. These questions involve the interpretation of

sections 35 and 615 respectively of the Civil Procedure Code. We do not propose on this appeal to examine these arguments as in regard to (1) the inclusion of the claim to recover movables was the act of the husband himself and in regard to (2) the question is one which should have been raised in the divorce case if it was ever intended seriously to pursue it.

For reasons briefly outlined above we have dismissed the appeal with costs.

Alles, J.

I agree.

Appeal dismissed.

H. N. G. Fernando, C.J. and Siva Supramaniam, J.

S. M. WICKRAMASOORIYA ARATCHI & ANOTHER

v.

SPECIAL COMMISSIONER, MUNICIPAL COUNCIL GALLE*

S.C. No. 435/64 — *D.C. Galle* 3110/*M*

Argued and decided on: 20th May, 1967

Municipal Council — Action against Council for damages consequent on negligence of its servants — Issue raised as to whether due notice of action given under section 307 *of the Municipal Councils Ordinance — Judge answering in favour of plaintiff on all issues including the issue on due notice under sub-section* 1 *of section* 307, *but holding against him on sub-section* 2 *of that section without an issue being framed — Effect.*

In an action against a Municipal Council for damages arising from a negligent act of its servants (which resulted in the minor plaintiffs' mother's death), the learned trial Judge answered all issues in favour of the plaintiff except one. This issue was whether due notice of action was given in terms of section 307 of the Municipal Councils Ordinance. He held that notice had been given under sub-section (1) of section 307, but found against the plaintiff on the ground that the plaintiff did not comply with sub-section 2 of section 307 in that he had failed to commence the action within three months' of the accrual of the cause of action.

The main point argued for the plaintiff appellant was that the learned trial Judge had erred in holding against the plaintiff on a question not raised in the form of an issue.

Held: (1) That, if an issue had been framed, the plaintiff could have led some relevant evidence on the question whether the action taken by the Municipal authorities which resulted in this dispute was something done under the Municipal Council Ordinance.

(ii) That section 307 aforesaid is not applicable as it would appear *prima facie* that the negligent act on which the plaintiffs' claim is based one was done under section 16 of the Electricity Act and one which a Municipal Council had no power to perform under any of the provisions of the Municipal Councils Ordinance.

D. R. P. Goonatillake, for the plaintiffs-appellants.

C. Ranganathan, Q.C., with *P. Nagendra*, for the defendant-respondent.

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

In this case, in which the plaintiff sued the Municipal Council of Galle as the next friend of two minor children for damages suffered by the death of the mother of the two children through the negligence of the servants of the Council, the learned District Judge found in favour of the plaintiffs on all the issues except issue No. 14. That issue was whether due notice of the action had been given in terms of section 307 of the Municipal Councils Ordinance.

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* For Sinhala translation, see Sinhala section, Vol. 16, part 5, p. 9

The provison for giving due notice of action occurs in sub-section 1 of section 307 and the learned Judge held that the plaintiff had in fact given notice which would comply with the provisions of that sub-section; but he found against the plaintiff on the ground that the action was not commenced within three months after accrual of the cause of action, and that therefore the plaintiff had failed to comply with the provisions of Sub-section (2) of section 307.

The main point relied on by plaintiff's Counsel in appeal is that there was no issue raising the question whether sub-section (2) of section 307 had been observed. The failure to frame the issue may not have been important if it could have been decided purely as a question of law. But it seems to us that the question whether the action taken by the Municipal authorities which has given rise to this dispute was something done under the Municipal Councils Ordinance is one concerning which the plaintiff may have been in a position to lead some relevant evidence, if an issue had been raised. On that ground we would hold that the trial Judge was wrong in deciding against the plaintiff on an issue which was not specifically raised in the pleadings or at the time of the framing of issues.

In addition, it would appear *prima facie* that the act which led to the death of the mother of the minors was one done under section 16 of the Electricity Act, and one which a Municipal Council had no power to perform under any of the provisions of the Municipal Councils Ordinance. We are, therefore, inclined to the view that this action is not one against the Council for anything done under the provisions of the Municipal Councils Ordinance. On that ground section 307 of that Ordinance was not applicable. We would allow the appeal and direct that decree be entered for the payment by the defendant of a sum of Rs. 6,000/- to each of the plaintiffs or Rs. 12,000/- in all. The sum will be deposited in Court to the credit of this action.

The decree will also provide for the payment to the plaintiff of the costs of the action in both courts.

Siva Supramaniam, J.

I agree.

Appeal allowed.

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

GUNAYA *v.* PEDORISA

S.C. 508/65(*F*) — *D.C. Avissawella* 11147/*D*

Argued and decided on: 22nd November, 1966

Divorce — Adultery of wife — No marital relations since marriage — Husband entitled to nominal damages only.

Held: That where parties to a marriage have had no marital relations and have not even resided together since the marriage, the husband is not entitled to anything more than nominal damages on account of the wife's adultery.

Annesley Perera, with *I. S. de Silva*, for the 2nd defendant-appellant.

R. N. Hapugalle, for the 1st defendant-respondent.

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

In view of the fact that the parties to this marriage have had no marital relations and have not even resided together since the marriage, this is a case where the husband would not have been entitled to anything more than nominal damages on account of the wife's adultery.

In the circumstances we direct the decree to be amended by altering the sum of Rs. 1,000/- awarded as damages to the sum of Rs. 250/- We make no order as to the costs of the appeal.

Samerewickrame, J.

I agree.

Varied.

Present: **Sirimane, J.**

K. V. K. THEIVENDARAJAH *v.* A. L. M. SANOON

S.C. 1 *of* 1966 (*R.E.*) — *C.R. Colombo* 87698

Argued on: 1st, 4th and 26th July, 1967.
Decided on: 21st August, 1967.

Landlord and Tenant — Lease expiring by effluxion of time — Lessee remaining on premises thereafter as tenant protected by Rent Restriction Acts — Whether landlord entitled to insist that such tenant pay the authorised rent and not the rent due in terms of the lease — Sum held by lessor as deposit — Whether arrears of rent can be set off against such sum — Rent Restriction Act (*Cap.* 274), *sections* 3(1), 14 — *English Increase of Rent and Mortgage Interest* (*Restriction*) *Act*, 1920, *section* 15(1).

Held: (1) That where a lease expires by effluxion of time and the lessee remains on the leased premises as a tenant protected by the Rent Restriction Act, the landlord is entitled to demand from the tenant the authorised rent of the premises in terms of the Rent Restriction Act.

(2) That in such a case, where in terms of the lease the lessee had to pay a certain rent and also to pay the rates, on the expiry of the lease the lessee was in the position of a monthly tenant and the landlord could decide to pay the rates himself and insist that the tenant pay to him the authorised rent of the premises.

(3) That where there is a sum paid at the commencement of a lease as a deposit by way of security for the due performance of the terms of the lease, such a deposit did not in the absence of express agreement relieve the tenant of his obligation to pay the current rate for each month. Rent due to the landlord could not therefore be set off against this sum.

Per **Sirimane, J.:-** "If, for instance, a lease for a long period is ended by effluxion of time, when rental values of properties are very different, from those that prevailed at the time the lease was entered into, it would be manifestly unfair to permit the tenant to remain in possession and insist on the landlord accepting the rent payable under the defunct contract, and deny the landlord the right to claim the rent which the law authorises him to charge."

Cases referred to: *Sideek* v. *Sainambu Natchiya* (1954) 55 N.L.R. 367; LI C.L.W. 2
Britto v. *Heenatigale* (1956) 57 N.L.R. 327; LIII C.L.W. 62
Vadivel Chetty v. *Abdu* (1953) 55 N.L.R. 67
Phillips v. Copping (1935) 1 K.B. 15; 152 L.T. 175; 50 T.L.R. 533
Dean v. *Bruce* (1951) 2 A.E.R. 926; (1952) 1 K.B. 11
Nadarajah v. *Naidu* (1965) 68 N.L.R. 230
Kanapathypillai v. *Dharmadasa* (1960) LVIII C.L.W. 79.

C. Ranganathan, Q.C., with *S. Sharvananda and C. Chakradaran*, for the defendant-appellant.

H. W. Jayawardene, Q.C., with *H. D. Tambiah* and *N. S. A. Goonetilleke*, for the plaintiff-respondent.

Sirimane, J.

The defendant was the lessee of the premises in question on deed of lease P4, for a period of 5 years from 1.1.1957 to 31.12.1961. The plaintiff purchased these premises during the subsistence of the lease and the defendant thus became the lessee of the plaintiff. The defendant did not leave the premises on the expiry of the lease, but, seeking the protection of the Rent Restriction Act, remained in occupation as the plaintiff's "statutory tenant." (I use this term for the sake of convenience though it has been looked upon with disfavour at times).

The rent payable according to the terms of the lease was Rs. 45/- per month (the lessee had also to pay the rates).

By P14, dated 9.4.1962, the plaintiff requested the defendant to pay Rs. 86/66 per month (which the learned Commissioner has found to be the authorised rent of the premises) as damages. He was informed that he should not pay the rates. The defendant however did not pay the rent demanded by the plaintiff, but continued to pay at the rate stipulated in the lease, i.e. Rs. 45/- per month. The plaintiff sued him for ejectment both on the ground of arrears of rent and

on the ground that the premises were reasonably required by him for the purpose of his business. He has succeeded on both grounds and the defendant has appealed.

In view of the provisions of the amending Ordinance, No. 12 of 1966, it is admitted that the decree is unenforceable in so far as it is based on "reasonable requirement."

The only question is whether the defendant has been in arrears of rent.

It was conceded that if the rent or damages which the defendant was liable to pay was Rs. 45/- per month he was not in arrears, but that he was in default if his liability was to pay Rs. 86/66 per month. The question for decision therefore is this — Is a landlord entitled to demand the authorised rent from a tenant after the original contract has terminated?

For the defendant, reliance was placed mainly on the decisions in three cases. The 1st of these was, *Sideek* v. *Sainambu Natchiya* (55 N.L.R. 367) where Gratiaen, J. in the course of his judgment said, that the tenant enjoys the statutory right of occupation (after the expiry of a lease) so long as he pays the monthly rent "at the original contractual rate." But in that case the present question did not arise. In fact the tenant had offered to pay rent even at a higher rate than the contractual rate, but the landlord refused to accept any rent whatsoever. In those circumstances the learned Judge held that the tenant was protected if he paid at the contractual rate.

In the next case, *Britto* v. *Heenatigala* (57 N.L.R. 327), it was decided that a decree for sale under the old Partition Ordinance did not affect a month to month tenancy, and the tenant could not be ejected if he continued to pay rent at the old contractual rate to the purchaser at the partition sale. There again the present question did not arise.

In the last case, *Vadivel Chetty* v. *Abdu* (55 N.L.R. 67), the agreed rent was Rs. 18/- per month. The landlord raised it to Rs. 29/18 *during the subsistence of the contract*, and the tenant refused to agree to pay this amount. Weerasooriya, J. held that the landlord could not unilaterally raise the rent to a sum higher than that agreed upon. The landlord had thereafter given the tenant a notice to quit thus terminating the contract. An issue had been raised in the lower Court whether there was a valid termination of the contract, which issue had been answered in the affirmative. No argument had been addressed in appeal on that point and in the course of the judgment Weerasooriya, J. said that he would decide the case on the footing that there was a valid termination of the contract. But, there is nothing in the judgment to indicate that the learned Judge addressed his mind to the question whether the landlord could have increased the rent (if such increase was legally permissible) *after* the termination of the contract. In fact that question did not arise at all, and the appeal was decided on an entirely different ground. The landlord in that case having consistently refused to accept Rs. 18/- per month as rent had later called upon the tenant to pay for a number of months at that rate, within a very short time and filed the action a couple of days after the period granted to the tenant had expired. In these circumstances it was held that the tenant was not in arrears of rent for a month after it had become due.

Section 3(1) of the Rent Restriction Act, (Chap. 274) empowers a landlord to increase the rent up to the authorised rent, but there is no section in the Act which is applicable to the present question. Section 14 is not helpful in dealing with this problem as it only provides for the continuance of the original contract of tenancy where an action for ejectment *has been dismissed by reason of the provisions of the Act.*

Section 15 of the English Increase of Rent and Mortgage Interest (Restriction) Act, 1920, and the decisions thereon are helpful. The relevant part of that section reads as follows:-

> Section 15(1) "A tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act....."

In *Phillips* v. *Copping* (152 Law Time Reports, page 175) it was held that the landlord of a dwelling house may raise the rent to the standard rent, provided that on terminating the tenancy due notice of his intention to do so has been given to the tenant. In the course of his judgment Maughan, L.J. said, "Since the permitted increases are additions to the standard rent there is nothing to show that the common law right of the landlord to terminate an existing tenancy and to fix the rent for the new tenancy at the standard rent is interfered with."

In *Dean* v. *Bruce* (1951, 2 A.E.R. page 926), Denning, L.J. said at page 928, "Once the contractual tenancy is at an end and the tenant remains in possession by virtue of the statute, the rent of the house is regulated by the statute and is not affected by terms or conditions or estoppels. On giving proper notice the landlord can raise the rent to the full amount permitted by the statute."

In the local case, *Nadarajah* v. *Naidu* (68 N.L.R. 230) it was held that where a landlord before claiming from his tenant a permitted increase of rent in terms of section 6(1)(b) of the Rent Restriction Act, sells the premises, the purchaser is entitled to claim the permitted increase from the tenant. An argument advanced in that case that a permitted increase must be agreed upon between the new landlord and the tenant was rejected.

After a contract of tenancy is terminated, a tenant who wishes to remain in possession must pay the rent which the landlord may lawfully demand. He cannot be permitted, in my view, to seek the protection of the Rent Restriction Act and remain in possession, and deny the landlord the latter's right under that same Act to charge the authorised rent. If, for instance, a lease for a long period is ended by effluxion of time, when rental values of properties are very different, from those that prevailed at the time the lease was entered into, it would be manifestly unfair to permit the tenant to remain in possession and insist on the landlord accepting the rent payable under the defunct contract, and deny the landlord the right to claim the rent which the law authorises him to charge.

At a late stage of the argument, in fact, in his reply to Counsel for the plaintiff-respondent, Counsel for the defendant-appellant, submitted that the landlord could not ask the tenant not to pay the rates and pay them himself, and further that as the tenant had, at a certain stage, sent Rs. 85/- per month to the landlord, the arrears were very small, and that the sum of Rs. 540/- paid at the commencement of the lease should be taken into account to cover this sum.

Once the lease expired the defendant was in the position of a monthly tenant. There was nothing to prevent the landlord from deciding to pay the rates himself and there can be several good reasons for the landlord choosing to do so. The tenant took a risk when he decided to ignore the landlord's directions.

I might state that on the question as to whether the tenant was entitled to set off any rent due against the sum of Rs. 540/-, it seems to me from the terms of the lease that this sum was a "deposit" by way of security for the due performance of the terms of the lease, and that such a deposit did not, in the absence of an express agreement relieve the tenant of his obligation to pay the current rent for each month. (See, *Kanapathypillai* v. *Dharmadasa*, 58 C.L.W. 79). However that may be, even having given credit for this sum, the learned Commissioner has correctly found that the tenant was still in arrears of rent within the meaning of the Act.

The appeal is dismissed with costs.

Appeal dismissed.

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

C. D. DE SILVA *v.* D. V. A. SURIAGE

S.C. 143/66 (*Inty*) *and S.C.* 52/66 (*Inty.*) — *D.C. Colombo No.* 26042/*S*

Argued on: 6th October, 1967
Decided on: 14th December, 1967

Writ—Execution of money decree — Writ allowed, but not actually issued — Application for notice under section 219, *Civil Procedure Code— Notice not served though issued and re-issued several times — Notice of second application for writ — Served — Failure of judgment-debtor to appear in response to notice — Order to issue writ—Can court vacate such order subsequently and dismiss application for writ on ground of want of due diligence*

Held: (1) That where an application for writ is served on a Judgment-debtor and an order made for writ to issue in the absence of the judgment-debtor by reason of his failure to appear in response to the notice, the order made is one inter-partes which the Court has no jurisdiction to vacate or set aside.

(2) That where the order to issue writ was made upon an affidavit placed, before the District Judge showing material or affording grounds for the making of the order, it cannot be said that such order was made *per incuriam* merely for the reason that the learned Judge came to a different conclusion after he had heard evidence in respect of the same matter.

Case referred to: *William Perera* v. *Ibrahim Lebbe*, (1910) 5 S.C.D. 48

C. Ranganathan, Q.C., with *Miss N. Naganathan*, for the plaintiff-appellant in S.C. 143/66 and for the plaintiff-respondent in S.C. 52/66.

E. B. Wikramanayake, Q.C., with *V. Arulambalam*, for the defendant-respondent in S.C. 143/66 and for the defendant-appellant in S.C. 52/66.

Samerawickrame, J.

S.C. 143/66 (Inty) is an appeal by the plaintiff from an order disallowing the issue of writ on the ground that on a previous application, due diligence had not been used to secure complete satisfaction of the decree. S.C. 52/66 (Inty) is an appeal by the defendant against a finding that notice of application for writ was served on him.

The plaintiff-appellant had obtained a consent decree for Rs. 28,000/-, interest and costs. The decree provided that the amount due was payable in monthly instalments of Rs 1,000/-, and that in the event of two consecutive defaults, writ was to issue for the balance amount due.

On 6/7.11.63, the plaintiff-appellant, alleging that there had been two consecutive defaults and that no sum whatsoever had been paid out of the amount due, made an application for writ and the Court made order to issue writ. On 26/27.11.63, the plaintiff-appellant moved for a notice under Section 219 of the Civil Procedure Code, on the defendant. The writ ordered to issue against the defendant was not actually issued because the plaintiff-appellant had failed to take some requisite step. There was considerable difficulty in serving the notice under Section 219, which was issued and re-issued, on several dates, without any service being effected. On the 25th February, 1965, plaintiff-appellant made a fresh application for writ and notice of this application was ordered to be served on the defendant-respondent. On 17.6.65, notice of application for writ was served on the defendant, but he failed to appear in response to such notice. On 8.7.65, the Court made order for the issue of writ. Thereafter, on 14.7.65, the defendant filed petition and affidavit stating that the notice of the application for writ had not been served on him as alleged by the plaintiff and that as there had been a want of due diligence on the previous application, the plaintiff-appellant was not entitled to writ.

The learned District Judge held inquiry on two dates, into this matter, and after the first date he made order holding that notice of the application for writ had been served on the defendant-respondent. He thereafter held inquiry on a second date, after which he held that there had been a want of due diligence by the plaintiff-appellant on his previous application. He, accordingly, made order dismissing the application for writ. The plaintiff-appellant has appealed against this order and the defendant has also appealed against the finding of the learned District Judge that notice of the application for writ was served on him.

In regard to the appeal by the defendant, the question whether notice of the application was or was not served on him is a question of fact and the order of the learned District Judge is supported by evidence led at the inquiry before him. We are unable, therefore, to alter that finding. The appeal filed by the defendant is, therefore, dismissed.

In respect of the appeal by the plaintiff-appellant, Mr. C. Ranganathan, Q.C., appearing for him, submitted that where notice of an application for writ has been served on a judgment-debtor and an order has been made for writ to issue in the absence of the defendant, by reason of his failure to appear in response to the notice, the order made is one inter-partes which the learned District Judge had no jurisdiction to vacate or set aside. He referred to the case of *William Perera* v. *Ibrahim Lebbe*, 5 S.C.D. p. 48.

Mr. E. B. Wikramanayake, Q.C. appearing for the defendant-respondent, submitted that the learned Judge was entitled to vacate his order because it was an order that had been made per incuriam. The mere fact that the learned Judge came to a different conclusion after he had heard evidence in respect of a matter does not mean that the order he had made earlier, upon an affidavit placed before him, was made per incuriam.

If the affidavit showed material or afforded grounds for the making of the order, it cannot be said that the order made by the learned District Judge was one made per incuriam. In this matter, when the plaintiff-appellant made his second application for writ, there was an affidavit placed before Court, which stated that the plaintiff had exercised due diligence upon his previous application. Mr. Ranganathan went further and stated that there was in fact no want of due diligence on the part of the plaintiff-appellant in not taking out writ, in as much as no useful purpose was served by taking out writ before the plaintiff-appellant had ascertained by the examination of the defendant-respondent, what property or other means he had to satisfy the decree. It is unnecessary to decide whether the plaintiff-appellant had in fact exercised due diligence on his previous application for writ, as it appears to us that the order made by the learned District Judge, upon the application, was not one made per incuriam and was, therefore, not one which the learned Judge had any jurisdiction to vacate or set aside.

We, accordingly, allow the appeal of the plaintiff-appellant and set aside the order of the learned District Judge dated 13.7.66. Though the learned Judge had ordered the issue of writ and writ had issued on the second application made by the plaintiff -appellant when the defendant-respondent filed papers, the Court made order staying execution and after inquiry disallowed writ. We, therefore, order that writ should now issue upon the application made by the plaintiff-appellant and send the case back in order that writ may be taken out and execution may be proceeded with. The plaintiff-appellant will be entitled to costs of his appeal and of the inquiry in the Court below.

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

I agree.

Appeal No. 143/66 *allowed.*

Appeal No. 52/66 *dismissed.*

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

SUBRAMANIAM PARARAJASEKERAM & TWO OTHERS *v.* CHELLAPPAH VIJEYARATNAM

S.C. No. 414/1966 (*F*) — *D.C. Jaffna No.* 2736/*M*

Argued on: 9th and 11th March, 1968.
Decided on: 30th March, 1968.

Prevention of Frauds Ordinance (*Cap.* 70), *section* 2 — *Lease of land for cultivation of crops by plaintiff —Rental payable annually— Lease informal and not in compliance with section* 2*—Dispossession by defendants — Action for damages — Can claim be maintained? — Nature of liability in question — Whether also delictual or quasi-contractual — Plaintiff's right to claim compensation for improvements.*

Estoppel— Doctrine of promissory estoppel—When can such plea be taken — No estoppel in face of statute.

Appeal—Question of law raised for first time in appeal—When permissible—Issue of law—In what circumstances can such issue be framed in appellate Court.

Plaintiff sued the defendants claiming Rs. 3,500/- as damages alleging—

(a) that from 1961 the defendants had leased a garden to him at an annual rental of Rs. 180/- payable in July of the year following that in which the lease was commenced;

(b) that payments had been made up to July, 1963;

(c) that on 10.1.64 while plaintiff was in possession in terms of the lease then current, the first defendant, acting for himself and on behalf of the 2nd and the 3rd defendants dispossessed the plaintiff, removed certain water-lifting machinery from the land, destroyed a water course and damaged the crop of onions and tomatoes raised by the plaintiff.

The defendants in their answer while denying the averments in the plaint pleaded—

(a) that no valid cause of action had accrued to the plaintiff to sue them;

(b) that the 1st defendant had allowed the plaintiff to cultivate the land for a period of one year only on his paying in advance a sum of Rs. 180/- for the year beginning 1.10.61;

(c) that on his entreaties the plaintiff was permitted to cultivate the land for a further year on a similar payment but he failed to pay it;

(d) that when pressed for the rent in January 1963, the plaintiff promised to pay in July 1963 and to quit the land by September 1963 and accordingly the plaintiff left the land;

(e) that when the plaintiff after quitting the land attempted to re-enter to plough it on 12.11.63 the 1st defendant protested against and it complained to the appropriate authorities.

The learned District Judge held against the defendant and awarded damages to the plaintiff in a sum of Rs. 2,400/-.

The defendants appealed and it was contended on their behalf (although not raised at the trial), that the lease relied on by the plaintiff was contrary to section 2 of the Prevention of Frauds Ordinance and was therefore null and void.

Counsel for the plaintiff-respondent in reply argued that causes of action sounding in delict and quasi-contract could be alternative bases for his claim. He further suggested that the doctrine of estoppel could also be called in aid by him as a ground for relief.

Held: (1) That though this legal issue was not specifically taken earlier, the appellant was entitled to take the point based on the Preventon of Frauds Ordinance in appeal, as a perusal of the evidence led at the trial placed it beyond doubt that the lease relied on was an informal lease and as no prejudice had resulted to plaintiff from the failure to take this point at the trial.

(2) That on the basis of the pleadings no action for damages would lie for the reason that the lease relied on by the plaintiff lacked the formalities prescribed by section 2 of the Prevention of Frauds Ordinance and was therefore null and void.

(3) That, following *Perera* v. *Perera* (1967) 70 N.L.R. 79, the informal lease in question was not one which might be treated as a tenancy from month to month.

(4) That the plaintiff could not base his claim on delictual liability as such a liability must flow from the breach of a duty recognised by law and not from a contract which the statute expressly renders null and void.

(5) That the plaintiff was not entitled to claim any compensation for improvements,

(a) as the damage claimed does not fall within the principles of retention or compensation.

(b) as the trial Judge had found that the plaintiff's state of mind was not that of a bona fide possessor.

(6) That a court of appeal will not raise an issue on the existence of a quasi-contractual obligation to restore what had been received, in the absence of necessary averments to raise such issue or clear circumstances showing the existence of such obligation.

(7) That the question of estopped raised on behalf of the respondent was in effect a plea based on the doctrine of promissory estoppel. However, while an estoppel may afford a defence against the enforcement of otherwise enforceable rights, it cannot create a new cause of action.

(8) That the doctrine of estoppel cannot be invoked in the face of a statute.

(9) That, therefore, the doctrine of estoppel afforded no basis on which a plaintiff could build legal claim.

Per **Weeramantry, J.**:- (a) "Moreover although infringement of contractual rights by a third person may constitute a delict, the breach of a contract by one of the parties to it cannot constitute a delict."

(b) "Whereas common law estoppel was confined to representations of existing fact, promissory estoppel is not so circumscribed in its scope and may be founded upon a representation in regard to future conduct."

Cases referred to: *Hinniappuhamy* v. *Kumarasinghe* (1957) 59 N.L.R. 566.
Samarakoon v. *van Starrex* (1965) LXXI C.L.W. 25.
Perera v. *Perera* (1967) 70 N.L.R. 70
Adaicappa Chetty v. *Caruppan Chetty* (1921) 22 N.L.R. 417
Arsecularatne v. *Perera* (1927) 29 N.L.R. 342, P.C.
Nugapitiya v. *Joseph* (1926) 28 N.L.R. 140
William Silva v. *Attadassi Thero* (1962) 65 N.L.R. 181; LXII C.L.W. 27
Hassanally v. *Cassim* (1960) 61 N.L.R. 529; LVII C.L.W. 100; 1960 A.C. 592
Peiris v. *Municipal Council, Galle* (1963) 65 N.L.R. 595.
Jayawickrema v. *Amarasuriya* (1918) 20 N.L.R. 289 P.C.
Niles v. *Velappa* (1921) 23 N.L.R. 241.
Punchimahatmaya Menike v. *Ratnayake* (1940) XVIII C.L.W. 18
Ratwatte v. *Owen* (1896) 2 N.L.R. 141
Bank of Ceylon, Jaffna v. *Chelliah Pillai* (1962) 64 N.L.R. 25 P.C.
Lyle-Meller v. *Lewis & Co.* (Westminster) *Ltd.* (1956) 1 All E.R. 247
Combe v. *Combe* (1951) 1 All E.R. 767; (1951) 2 K.B. 215
Kok Hoong v. *Leong Cheong Kweng Mines Ltd.* (1963) 71 C.L.W. 41; (1964) 2 W.L.R. 150, P.C.
In re a Bankruptcy Notice (1924) 2 Ch. 76; 131 L.T. 307
Beesley v. *Hallwood Estates Ltd.* (1960) 2 All E.R. 315; (1961) 1 W.L.R. 549
In re Stapleford Colliery Co. (1880) 14 Ch. D. 432

C. Ranganathan, Q.C., with *P. Sivaloganathan* and *Mrs. K. Thirunavukarasu*, for the defendants-appellants.

V. Arulambalam, for the plaintiff-respondent.

Weeramantry, J.

The plaintiff-respondent claimed in this case that from the year 1961 the defendants-appellants had leased a garden to him annually at a rental of Rs. 180/-. The rent for each year of lease was payable according to the plaintiff in July of the year following that in which the lease commenced, and payments had been so made up to July 1963. When on 10th January 1964 the plaintiff was in possession in terms of the lease then current, the first defendant, acting for himself and as agent for the second and third defendants, is alleged to have dispossessed the plaintiff, removed certain water lifting machinery from the land, destroyed a water course and damaged the crop of onions and tomatoes raised by the plaintiff. The plaintiff estimated the damages and prospective loss so caused to him at Rs. 3,500/- and on this basis averred that a cause of action had accrued to him to sue the defendants jointly and severally for the recovery of this sum.

The defendants denied all the averments in the plaint save and except those specifically admitted in their pleadings. They further averred that no valid cause of action had accrued to the plaintiff to sue them and that the plaintiff did not and could not have suffered any damages whatsoever.

By way of further elucidation of their case the defendants further pleaded that the first defendant had allowed the plaintiff to cultivate the land for a period of one year only, on his paying to the first defendant in advance a sum of Rs 180/- as rent for the year beginning 1st October 1961. On the entreaties of the plaintiff the first defendant permitted him to cultivate the land for a further period of one year, a similar sum being payable by way of advance rent for the year beginning 1st October 1962. The plaintiff did not however pay this rent although he had agreed to pay it and, when pressed for the rent in January 1963, promised to pay the rent in or about July 1963 and to quit the land by the end of September 1963. He accordingly paid the rent in July 1963 and left the land in September 1963 in terms of his undertaking.

It was the defendants' position that after quitting the land the plaintiff attempted to re-enter the land and to plough it on or about 12th November 1963. The first defendant objected to these acts on the part of the plaintiff and made complaint accordingly to the Grama Sevaka but thereafter in January 1964 the plaintiff wrongfully and forcibly entered the said land. The first defendant protested against this illegal entry and made complaint to the appropriate authorities.

Arising from certain subsequent acts on the part of the plaintiff the first defendant claimed in reconvention a sum of Rs. 5,000/- as damages and consequential damages.

The learned District Judge held against the defendants on the question whether the plaintiff had promised to quit the land at the end of September 1963 and had in fact done so. He further held that the plaintiff was corroborated both by oral and documentary evidence on his refusal to vacate the land and on the forcible attempt by the defendants to eject him therefrom. He consequently held that the first defendant acting for himself and on behalf of the second and third defendants had forcibly dispossessed the plaintiff in January 1964 from the land, prevented him from using the water lifting machinery and destroyed the water channel, thus causing damage to the crops of onions and tomatoes raised by the plaintiff. In this view of the facts the learned District Judge awarded the plaintiff damages which he, has assessed at Rs. 2,400/-. The first defendant's claim in reconvention was dismissed with costs.

The learned Judge's findings on questions of fact are strong and stand unassailed. This judgment therefore proceeds on the basis of the facts as found by the learned District Judge.

It would perhaps not be inappropriate for us at this point to express our disapproval of the conduct of the defendants in forcibly dispossessing the plaintiff who was on the land on the basis of an informal lease, but unfortunately the compelling legal issue raised by learned Counsel for the defendants and referred to in the next succeeding paragraph, precludes us from giving relief to the plaintiff on this basis.

Learned Counsel for the defendants takes up the point in appeal that no action for damages as claimed will lie on the basis of the pleadings for the reason that the lease relied on by the plaintiff lacks the formalities prescribed by section 2 of the Prevention of Frauds Ordinance and is by the clear terms of that section rendered null and void. He therefore submits that despite the findings of fact against the defendants, the award of damages cannot stand, dependent as it is on a contract which has no validity in law.

The point raised does not appear to have been taken in the trial court nor do the respective parties appear to have given their minds specifically to this aspect of the case. This is perhaps attributable to the view formerly taken that an informal lease could operate as a tenancy from month to month thereby removing it from the operation of section 2 of the Prevention of Frauds Ordinance. This view of the law has however been stated on more than one occasion by this Court to be erroneous, [*Hinniappuhamy* v. *Kumarasinghe* (1957) 59 N.L.R. 566; *Samarakoon* v. *Van Starrex* (1965) 71 C.L.W. 25] a view of the law which now stands confirmed by a decision of a Divisional Bench. [in *Perera* v. *Perera* (1967) 70 N.L.R. 79 at 82.] We must proceed therefore on the basis that the informal lease in question is not one which may be treated as a tenancy from month to month and is therefore subject to the formalities prescribed by the Prevention of Frauds Ordinance.

Though, as already observed, the legal issue now relied on was not specifically taken, there was a general denial in the answer of the averment in the plaint and there was no admission by the defendants of notarial attestation. Furthermore the first issue raised at the trial was on the question whether the plaintiff was a tenant under the defendant in respect of the land described in the plaint for the period July 1963 to July 1964, and the burden this issue placed upon the plaintiff could not be discharged otherwise than by proof of notarial attestation. Proof of a mere informal agreement null and void in law could in no correct view of the matter lead to an answer to this issue in the plaintiff's favour.

Learned Counsel for the plaintiff submits to us that the defendants cannot be permitted to take this point of law here in appeal in view of their failure to canvass it before the learned trial Judge. He submits that prejudice is thereby caused to his clients as the trial proceeded on the assumption that there was a valid lease and he argues that his clients have not had an opportunity of placing before the Court such evidence as they might have placed had the validity of the lease been questioned before the learned Judge.

This argument is no doubt attractive, but a perusal of the evidence led at the trial places it beyond doubt that the lease relied on is an informal one. The evidence of the witness Subramaniam, a cultivator under the first defendant, was that the agreement in 1961 was not reduced to writing, and the plaintiff himself has so stated in a rural court case the evidence in which was marked as a production both by plaintiff (P1) and defendants (D4). The first defendant has given similar evidence in the Rural Court. We are thus left in little doubt as to the true factual position.

Seeing then that no prejudice has resulted to the plaintiff from the failure of the defendants to

take this point in the trial court, we hold that the appellant is entitled to take this point in appeal, and proceed now to an analysis of the plaint with a view to ascertaining the juristic basis of the cause of action revealed therein. This examination is necessitated by the contention of learned Counsel for the plaintiff that his claim against the defendants is one not necessarily sounding in contract, Apart from contract he suggests as possible alternative bases for his claim, causes of action sounding in delict and in quasi-contract, and he suggests further that estoppel, or, to be more accurate, the doctrine of promissory estoppel, may also be called in aid as a ground for relief.

The contractual aspect of the claim need not detain us much longer. It is trite law that section 2 of our Statute of Frauds is more stringent in its provisions than its English conterpart and renders null and void those contracts which infringe its provisions. While the English Statute considers the question merely from the point of view of enforceability the Ceylon Statute concerns itself with essential validity and is hence "much more drastic". [*Adaicappa Chetty* v. *Caruppan Chetty* (1921) 22 N.L.R. 417 at 426; *Arsecularatne* v. *Perera* (1927) 29 N.L.R. 342, P.C.]

If therefore the plaintiff's claim be one in contract it cannot succeed. The plaint avers dispossession from a land leased to the plaintiff and damages sustained in consequence. There seems little doubt that one of the bases if not the basis of the claim is the violation of contractual rights flowing from the lease. Apart from the lease referred to no other right is averred on the basis of which the plaintiff entered on or possessed the land.

A claim for damages on this basis, being built upon a contract which is null and void, is one which clearly cannot be sustained.

The first alternative basis on which learned Counsel for the plaintiff sought to rest his case was that of delictual liability. He argued that his right to be on the land had been violated by the defendants and that wrongful loss had been caused to him in consequence.

It is clear however that delictual liability in a claim of this nature must flow from the breach of a duty recognised by law. Of what particular duty lying upon them, the defendants are in breach, the plaint leaves us unaware, unless it be contended that it was a duty created by the informal contract. However, neither such a duty nor an associated right in the plaintiff can take its origin from a contract which statute expressly renders null and void. Moreover although infringement of contractual rights by a third person may constitute a delict, the breach of a contract by one of the parties to it cannot constitute a delict, Wille, *Principles of South African Law* 5th ed. p. 501; Wessels, 2nd ed. s. 841. The attempt to rest the claim on a delictual footing must therefore fall.

Two further bases on which it is alleged that the claim can be sustained now call for examination and these are quasi-contract and promissory estoppel.

There would appear to be little doubt that a person who improves a land on the faith of a document from the owner, which document turns out to be void in law, is entitled to be compensated for his improvements, and that the doctrine of unjust enrichment lies at the basis of this right. As Garvin, J. observed in *Nugapitiya* v. *Joseph*, (1926) 28 N.L.R. 140 at 142., in relation to a person who had effected improvements on the strength of a lease void for informality, a claim made in such circumstances is one against the person with whose knowledge and consent these improvements were made and this gives the improver the rights of a *bona fide* possessor though in point of fact he has not the *possessio civilis*, [see also *William Silva* v. *Attadassi Thero* (1962) 65 N.L.R. 181 *Hassanally* v. *Cassim* (1960) 61 N.L.R. 529]. However the only items in the plaintiff's claim which arise out of improvements by him to the land would appear to be the crop of onions and tomatoes and the preparation of the land for these crops and the tobacco crop. The damages claimed for the destruction of the water course and removal of the water lifting machinery, for dispossession and for loss of prospective profits, do not fall within the scope of the principles of retention or compensation. In the result then it is only a small and indefinable portion of the defendant's claim that falls within the scope of these principles. Moreover it is not the plaintiff's position that the defendants have been enriched by their acts complained of, for the plaintiff's own allegation is that the crops have been damaged and the water course destroyed. These facts tend to negative rather than suggest unjust enrichment. It must also be observed that the state of mind of a *bona fide* possessor, to prove which such agreements are called in aid, was not the state of mind of the plaintiff, for the learned Judge himself has fonud

that the plaintiff had been refusing to vacate the land as is evidenced by documents D1, D3 and D4.

It has been suggested that it is open to us at this stage to raise an issue on the existence of a quasi-contractual obligation requiring the defendants to make good to the plaintiffs what they had received in consequence of their action, as was done by Tambiah, J. in *Peiris* v. *Municipal Council, Galle*, (1963) 65 N.L.R. 555. It is true that in that case an issue was formulated in appeal on unjust enrichment and the case remitted to the original court for trial upon this issue, but, as particularly observed by Tambiah, J. all the averments necessary to raise the issue of unjust enrichment were contained in the pleadings already before court. That is not true of the present case. Nor is this a case of the type of *Jayawickrema* v. *Amarasuriya*, (1918) 20 N.L.R. 289 P.C., where again the circumstances of a deliberate promise were so clear as to enable Their Lordships of the Privy Council to raise an issue on the question whether there was a contract at the stage of the hearing before them.

I do not think it necessary for the purpose of the present appeal to go into the scope of those various judgments both of the Privy Council and of this court which take the view that it is within the competence of the court to frame issues even outside the scope of the pleadings. Although in an appropriate case the court may be prepared to go so far as to take the view that "an omission in the plaint or answer may be supplied by raising a relevant issue at the trial and indeed at any time before judgment" [*Niles* v. *Velappa* (1921) 23 N.L.R. 241], and may even on terms allow issues which do not "square with the pleadings as they stand", [*Punchimahatmaya Menike* v. *Ratnayake* (1940) 18 C.L.W. 18; see also *Ratwatte* v. *Owen* (1896) 2 N.L.R. 141; *Bank of Ceylon, Jaffna* v. *Chelliah Pillai* (1962) 64 N.L.R. 25 at 27 P.C.] an examination of those cases would show that adequate and suitable grounds existed in each one of them for such an exercise of the court's undoubted power.

Even apart from consideration of the inadequacy, or rather the total lack, of pleading, the facts of the present case, as already observed, render quite inappropriate any interference by this court on the lines of *Peiris* v. *Municipal Council, Galle*, and we are not disposed to resort to this course to give effect to what is at best a rather nebulous claim.

Learned Counsel for the plaintiff respondent finally argued that whatever be the formalities requisite to give validity to the lease, the defendants were estopped from denying that the plaintiff had a right to possess and cultivate the land. He submitted that upon the basis of this estoppel he was entitled to claim damages from the defendants for their wrongful acts. The question of estoppel raised by learned Counsel is in effect a plea based on the doctrine of promissory estoppel which in its recent development by the courts has travelled beyond the limits of the former common law estoppel [see in particular *Lyle-Mellor* v. *Lewis & Co.* (Westminster) 1956 All E.R. 247 per Lord Denning at page 250]. His contention is in substance a plea that when the defendants by their conduct indicated to the plaintiff that they would permit him to remain on and cultivate the land they were making a representation in regard to the future which was of a promissory nature and operated by way of estoppel. The essence of the doctrine of promissory estoppel is the principle that when one party has by his words or conduct made to the other a promise or assurance which is intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualifications which he himself has so introduced [*Combe* v. *Combe* (1951) 1 All E.R. 767 at 770 per Denning L.J.; Halsbury 3rd ed. vol. 15 p. 175.] Whereas common law estoppel was confined to representations of existing fact, promissory estoppel is not so circumscribed in its scope and may be founded upon a representation in regard to future conduct, [Halsbury 3rd ed. vol. 15 p. 175,] and the estoppel Mr. Arulambalam suggests is based upon the representation that the plaintiff would be permitted to occupy and improve the land for the period of the lease.

There are however two principles which militate against our acceding to Mr. Arulampalam's contention. In the first place estoppel of any variety may afford a defence against the enforcement of otherwise enforceable rights but it cannot create a cause of action. In other words it may only be used as a shield and not as a sword, [see *Combe* v. *Combe* (1951) 1 All E.R. 767 at 772; Spencer Bower Estoppel by Representation 2nd ed. pp. 342-7]. The doctrine cannot therefore create any new cause of action where none existed

before, [Halsbury 3rd ed. vol. 15 p. 175]. In the second place the doctrine of estoppel cannot be invoked in the face of a statute for against a statute no estoppel can prevail, [Phipson on Evidence 10th ed. p. 175,] With special reference to statutory invalidity Viscount Radcliffe has observed in a recent decision, [*Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* (1963) 71 C.L.W. 41 at 47, P.C. See also *In re* a Bankruptcy Notice (1924) 2 Ch. 76 at 96 per Atkin, L.J.], that "there is in most cases no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel." Where therefore the legislature has enacted that a particular transaction shall be invalid, estoppel cannot be called in aid to clothe it with a validity of which the statute denudes it, [see Halsbury 3rd ed. vol. 15, p. 176; *Beesly* v. *Hallwood Estates Ltd.* (1960) 2 All E.R. 314 at 324.] Where the denial of legal validity proceeds, as in the case of the Prevention of Frauds Ordinance, from general social policy, it has been considered that it is not open to the Court "to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands" [per Viscount Radcliffe in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*, supra at 48. See also *In re Stapleford Colliery Co.* (1880) 14 Ch. D. 432 at 441, per Bacon V-C.] The doctrine of estoppel affords no basis therefore on which the plaintiff respondent can build a legal claim.

Whether therefore one looks at this plaint in the light of the principles of contract or of delict, of quasi-contract or of promissory estoppel, it becomes clear that the plaintiff's claim cannot be sustained in law and that there is no legal basis on which he can be awarded damages.

As observed earlier we come to this conclusion with reluctance having regard to the conduct of the defendants as found by the learned Judge. In the result therefore we allow the appeal but award no costs to the appellant, either here or in the court below.

T. S. Fernando, J.

I agree with the order proposed by my brother that this appeal be allowed. He has set out very fully in his judgment his reasons why the plaintiff's action must fail. There was evidence at the trial that the agreement in breach of which the plaintiff alleged he had been dispossessed was only an oral lease and, therefore, in view of section 2 of the Prevention of Frauds Ordinance, was of no force or avail in law. The plaintiff, therefore, had no legal right to possession of the land in question and, for the same reason the dispossession found by the trial judge was not tortious. Nor was there here a sustainable claim based on unjust enrichment.

I would accordingly allow the appeal and direct the dismissal of the plaintiff's action. In view of the facts found by the trial judge and of the circumstances that this appeal is being allowed on a ground not raised in the trial court or in the petition of appeal, I would exercise the discretion this Court has in the matter of costs and deprive the successful defendants of their costs both here and below.

Appeal allowed.

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

G. B. De SILVA *v.* E. L. SENANAYAKE & TWO OTHERS*

S. C. Application No. 185 *of* 1967

Application for a mandate in the nature of a Writ of Mandamus on the Mayor of Kandy and others.

Argued on: October 28 and 29, 1967
Decided on: November, 10, 1967

Municipal Councils Ordinance — Right of a member to bring forward for discussion relevant matters — Power or discretion of Mayor to rule out of order any matter — Writ of Mandamus — Does it lie in regard to local authorities — Availability of an alternative remedy — Municipal Councils Ordinance, sections 17, 18(2), 19, 20 *and* 40(1)(r) — *By-laws* 2(B), 12(1) *and* 12(2) *of the Kandy Municipal Council.*

*** For Sinhala translation, see Sinhala section, Vol. 16, part 5, p. 11**

Section 40(1)(r) of the Municipal Councils Ordinance conferred upon a Municipal Council, for the purpose of the discharge of its duties thereunder, the power to bring forward general questions connected with the Municipal Fund. The applicant, who was a member of the Municipal Council of Kandy, gave due notice of the following motion:

"In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967."

The 1st Respondent, who was the Mayor of the Municipal Council of Kandy, ruled the above motion out of order, and it was consequently not included in the agenda of the first general meeting held after notice of the motion had been given.

On the ground that his motion was not one which the 1st Respondent had power to rule out of order, the applicant applied to the Supreme Court for a mandate in the nature of a Writ of Mandamus to compel the 1st respondent to include the motion in the agenda of the first general meeting of the Council to be held following the determination of his application.

It was urged on behalf of the 1st respondent that:

(*a*) by virtue of the following by-law, he had an absolute discretion to rule any motion out of order —

"12(1) — All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda."

(*b*) the Municipal Council was master of its own house, and the Supreme Court will not seek to review the correctness of what is essentially a domestic question;

(*c*) section 20 of the Municipal Councils Ordinance enabled the applicant to bring up his motion by obtaining the permission of the Council, and therefore provided an alternative remedy available to him but which had not been invoked.

Held: (1) That the motion in question was one raising a general question of financial policy and, therefore fell within the meaning of section 40(1)(r).

(2) That a by-law cannot be construed so as to frustrate the exercise of a power conferred by the statute itself, and that, consequently, By-law 12(2) did not vest in the 1st respondent an absolute power or discretion to rule out of order a motion which was otherwise lawful.

(3) That the 1st respondent had no discretion to rule out of order a motion of which a member had a statutory right to give notice.

(4) That by making the ruling complained of, the 1st respondent had failed or refused to perform his statutory duty, a duty he owed to the application on behalf of the ratepayers of Kandy, and Mandamus was the appropriate remedy. The jurisdiction to compel by Mandamus the performance by local authorities of statutory duties had been exercised by the Supreme Court for a long period of time.

(5) That section 20 did not provide an alternative remedy.

(Observations to the contrary in *Goonesinghe* v. *The Mayor of Colombo* (1944) 46 N.L.R. 85 and *Cooray v. Grero* (1950) 56 N.L.R. 87 not followed.)

Cases considered: *Wijesuriya* v. *Moonesinghe* (1959) 64 N.L.R. 180
Mohamed v. *Gopallawa* (1956) 58 N.L.R. 418
Seenivasagam v. *Kirupamoorthy* (1954) 56 N.L.R. 450
Samaraweera v. *Balasuriya* (1955) 58 N.L.R 118

Per **T. S. Fernando, J.** "No reason is advanced here as a justification for ruling the motion our of order save the plea of absolute power or discretion. A court must surely be slow to recognise the existence of such a power in an officer elected to head local body exercising powers affecting the public and functioning apparently within a democratic framework.'

"It is well to remember that the democratic tradition is better ensured by not denying to the minority the opportunity of ventilating grievances which the majority may regard as but fancied. Argument is still a potent medium capable of converting honest sceptics."

Felix R. Dias Bandaranaike, with *Nihal Jayawickrama*, for the applicant.

H. W. Jayewardene, Q.C. with *N. R. M. Daluwatte* and *N. S. A. Goonetilleke*, for the respondents.

T. S. Fernando, J.

The applicant, a member of the Municipal Council of Kandy elected to represent Ward No. 11 thereof, seeks a mandate in the nature of a writ of mandamus from this Court to compel the inclusion in the agenda of the first statutory monthly general meeting of the Council to be held following the determination of this application of a motion notice of which had been duly given by him, but which he complains was unlawfully excluded from the agenda of the general meeting held in April 1967.

The respondents to this application (filed within a fortnight of the alleged unlawful exclusion) are: (1) The Mayor, (2) The Municipal Commissioner and (3) The Secretary of the said Municipal Council.

The duty of including a motion in the agenda falls in terms of the Council's by-laws on the Municipal Commissioner, but the mandate is sought primarily on the Mayor for reasons which become apparent on an examination of the relevant facts and of the by-laws governing the question in issue. No relief is sought as against the Commissioner and the Secretary who, it has been stated, have been made parties so that they may have notice of the application for this mandate. A previous decision of this Court, *Cooray* v. *Grero*, (1950) 56 N.L.R. 87 at 90, has ruled that in similar circumstances the remedy should be sought against the Mayor and not on an executive officer of the Council who is bound to carry out the Mayor's orders.

Section 17 of the Municipal Councils Ordinance (Cap. 252) enacts that there shall be twelve general meetings of each Municipal Council in every year for the transaction of business. One such meeting of the Kandy Municipal Council was due to be held on April 30, 1967. By-law 12(1) of the Council's By-Laws-proclaimed in Gazette No. 8, 987 of August 14, 1942 — requires notice of motion to be given in writing, signed by the member giving the notice and adressed to the Commissioner. Notice as required by this by-law was duly given by the applicant on April 16, 1967, and the text of his motion is as set out hereunder:—

> " In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967."

It would appear from the affidavits that in the 1967 budget of this Council a sum of Rs. 5,000/- had been allocated for "civic receptions", and a further sum of Rs. 5,000/- as "entertainment allowance" of the Mayor and to meet the cost of receptions and refreshments at meetings. Before these sums were exhausted, the Council had at the general meeting held on March 27, 1967 passed a supplementary estimate sanctioning certain expenditure aggregating some Rs. 6,050/-, apparently already incurred on account of civic receptions, entertainment and attendance of the Mayor at a Conference abroad.

The motion set out above of which notice, as already stated, had been duly given was not included in the agenda for the meeting of April 30, 1967 for the reason that before the agenda was prepared the Mayor had ruled the motion out of order. It is claimed on his behalf that he had an absolute power of ruling any motion out of order. This claim necessitates an examination of the source of the alleged power, which is said to be by-law 12(2), reproduced below:—

> 12(2)—"All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda."

The applicant contends that his motion was not one which the Mayor had power to rule out of order. I agree with the observation of Swan J. in *Cooray* v. *Grero* (*supra*) that, if the motion is one which a councillor had a statutory right to move, there is a duty cast on the Mayor to place such a motion on the agenda unless it is out of order for the reason stated in that case which

need not concern us here on this application. Some attempt was made by Sinnetamby J. in the later case of *Wijesuriya* v. *Moonesinghe* (1959) 64 N.L.R. 180 at 183 to illustrate what kind of motion may be out of order. Illustrations can, of course, never be exhaustive as the circumstances in which the question can arise may be legion. He did, however, point out that even a motion which a councillor ordinarily has a right to move may be out of order for want of the requisite notice or on account of its being couched in improper language or being unintelligible, unlawful or illegal. No reason is advanced here as a justification for ruling the motion out of order save the plea of absolute power or discretion. A court must surely be slow to recognise the existence of such a power in an officer elected to head a local body exercising powers affecting the public and functioning apparently within a democtratic framework.

The applicant points to section 40(1)(r) of the Municipal Councils Ordinance which confers upon the Council for the purpose of the discharge of its duties thereunder the power to bring forward general questions connected with the Municipal Fund. The exercise of this power of the Council can normally be invoked only by some one or more of the councillors bringing forward the question for discussion in the Council. The motion we are concerned with in this case is one raising a general question of financial policy, and ordinarily no question can be more germane to a prudent administration of the revenue of the Council which the councillors are under an implied duty to foster. There is some suggestion in the Mayor's affidavit that the motion has been induced by malice and with a desire to ventilate private grievances, but one fails to see any reason for these suggestions in the text of the motion which on its face appears to be entirely proper. We entrtain no doubt that any chairman of a meeting has inherent power to prevent a speaker making use of an occasion which has lawfully presented itself to him to make some improper or illegal use of it to give vent to his malice. There was, however, no justification for a premature fear which could not fairly have arisen from the text of the motion without more. If, as I hold, the applicant had the right to give notice of this motion, then I agree with the contention on behalf of the applicant that the by-law cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. Correctly interpreted, by-law 12(2) does not, in my opinion, vest in the Mayor an absolute power or discretion to rule out motions. In the instances in which the discretion is available and has been exercised, even where it may have been exercised erroneously, this Court will not ordinarily grant the remedy of *mandamus*. Subject however, to the exceptional cases of which some indication has been given in the judgment of Sinnetamby J. referred to above, I am of opinion that the Mayor has no discretion to rule out of order motions of which a member has a statutory right to give notice. The motion we are concerned with here was one such, and there was neither power nor ordinarily a discretion to rule it out of order. By making the ruling complained of in this case the Mayor has failed or refused to perform his statutory duty, a duty he owed to the applicant on behalf of the ratepayers of Kandy, and *mandamus* is the appropriate remedy. It is pertinent to point out that Basnayake C.J. in *Mohamed* v. *Gopallawa*, (1956) 58 N.L.R. 418 at 424, in ordering by way of *mandamus* that a certain special meeting of a Municipal Council which had been declared closed by its chairman be continued, stated as follows:— "In view of the chairman's wrong decision on the point of order that was raised he failed to discharge his duty to give the meeting an opportunity of deciding whether or not the resolution should be confirmed. The chairman by an erroneous decision on the point of order could not disable himself from performing the duty enjoined by law of transacting the business of the meeting at which he presided."

As a reason against the issue of a writ of *mandamus* in this case, learned counsel for the respondents advanced the argument that the local authority is master of its own house and that this Court will not seek to review the correctness of what is essentially a domestic question. He cited certain University cases, but it is sufficient to point out that the bodies there concerned with were not public bodies in the sense local authorities are and that the jurisdiction to compel by mandamus the performance by local authorities of statutory duties has been exercised in this Country by this Court for long years.

Another ground advanced for a refusal of the remedy sought is that an alternative remedy was

available. The contention is that if the applicant was aggrieved by his motion being ruled out of order *in limine* he could have brought it before the meeting by obtaining the permission of the Council as indicated in section 20 of the Ordinance. Counsel for the applicant referred to the proceedings as indicating that the Mayor who presided at the meeting of the Council held on April 30, 1967 had refused to allow the applicant an opportunity to obtain the permission of the members present at the meeting to move his motion which had been ruled out of order. We did not find it possible to agree with learned counsel that the minutes of the proceedings disclosed that such permission had been sought. We must therefore decide this application on the basis that there was no attempt made to invoke the provisions of section 20 of the Ordinance. It may be mentioned that De Kretser J. in *Goonesinghe* v. *The Mayor of Colombo* (1944) 46 N.L.R. 85 and Swan J. in *Cooray* v. *Grero* (*supra*) have both stated that the procedure indicated in sections similar to section 20 provides an alternative remedy. Sansoni J. in *Seenivasagam* v. *Kirupamoorthy* (1954) 56 N.L.R. 450 at 454 and again in *Sameraweera* v. *Balasuriya*, (1955) 58 N.L.R. 118 at 120, however, did not think that this was a remedy at all because it was conditional on the party aggrieved obtaining the permission of the Council. Sinnetamby J., who considered all the previous views in *Wijesuriya* v. *Moonesinghe* (*supra*) preferred to adopt the view taken by Sansoni J. As he put it, "in respect of a resolution which is not out of order a member has a right, even if the majority of the other members of the council are against it, to have it discussed at a meeting of the Council, but under rule 2(b) he cannot even move it unless the majority permit him to do so". The true construction of the relevant provisions of the Ordinance appears to be that while section 19 which requires the Mayor to cause notice of the business to be transacted at every general or special meeting or adjourned meeting (other than a special meeting convened by the Commissioner under section 18(2)) to be served on each councillor recognises the right of the individual councillor to have his motions discussed, section 20 recognises the right of the Council (which in practice is the majority of the councillors) to discuss business even though not specified in the agenda. I agree with the contention of learned counsel for the applicant that where a councillor has a statutory right to bring forward a question for discussion, he has a duty to give valid notice of it in the form of a motion, and that once that notice has been so given the Mayor is under a duty to have it inscribed on the agenda. When a motion has been thus inscribed on the agenda, the Council has no right to stop a discussion. It is therefore apparent that section 20 does not provide an alternative remedy. In these circumstances it is unnecessary to consider whether, even if there was an alternative remedy, such remedy was "equally convenient, beneficial or effectual". Nor should one fail to take note of current practice in two party assemblies where the chances of obtaining the permission of the majority to bring up for discussion a motion already ruled out by the Mayor before notice of meeting had been served cannot ordinarily survive beyond the realms of theoretical possibility.

I would for the reasons outlined above grant the remedy prayed for by the applicant. As Swan J. said in *Cooray* v. *Grero* (*supra*), a writ of mandamus, if available, could be issued although the date of the meeting has already passed. We were informed that a monthly meeting of this Council is due to be held towards the end of this month, and as the budget year has not yet ended, the motion could still serve some purpose. It is well to remember that the democratic tradition is better ensured by not denying to the minority the opportunity of ventilating grievances which the majority may regard as but fancied. Argument is still a potent medium capable of converting honest sceptics.

Let, therefore, a mandate in the nature of a writ of *mandamus* issue forthwith directing the 1st respondent to include the motion in question on the agenda of the first statutory general meeting of the Municipal Council of Kandy to be held following the date of this judgment. The 1st respondent must pay to the applicant his costs of this application.

Alles, J.
I agree.

Application allowed.

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

ILLEPERUMA SONS LIMITED *v.* GOVERNMENT AGENT, GALLE

S.C. Applications Nos. 394 & 395/67 — *M.C. Galle Nos.* 50170/*B* & 50174/*B*

Argued on: May, 5, 1968
Decided on: May 17, 1968

Heavy Oil Motor Vehicles Taxation Ordinance, sections 2(1) *and* 4(1) — *Amendment of section* 2 *by Finance Act No.* 2 *of* 1963 *by inserting sub-section* 7 — *Power given to Minister to vary rates of taxation by order published in Gazette —Temporary validity of such Order till approval by House of Representatives within a month or as specified in sub-section* 7—*Consequences of long delay in bringing before House for approval.*

Revenue Protection Ordinance (*Cap.* 250).

The Magistrate of Galle made orders in terms of section 4(1) of the Heavy Oil Motor Vehicles Taxation Ordinance for the recovery, as fines from the Petitioner two amounts specified in two Certificates issued by the Government Agent under the same section on 12/8/67 and 14/8/67 in respect of two motor vehicles for certain periods commencing from 1/6/64 and 1/5/63 respectively.

Section 2(1) of the Ordinance provides that such tax shall be paid in accordance with rates prescribed in the First Schedule to the Ordinance.

Finance Act No. 2 of 1963 amended this section by inserting a new sub-section 7

(a) enabling a Minister to vary the rates in the First Schedule from time to time by Order published in the Gazette.

(b) requiring *inter alia* the House of Representatives to pass a motion within one month from the date of publication of such Order in the Gazette or if no meeting is held within that period, at the first meeting of the House held after the expiry of that period.

The order varying the rates of tax under the new sub-section 7 was published in the Gazette in 29/4/64 and the motion for approval of the House was made on 20/8/64.

On an application to the Supreme Court for the revision of the said orders by the Magistrate, it was argued for the petitioner that because the motion for approval was not passed in the House within the time specified in (b) above, the order was fully inoperative or alternatively that it became operative only on the date of the approval of the House.

Held: (1) That it is a fundamental principle of British Constitutional law that the subject cannot be taxed except directly by Statute enacted by Parliament or alternatively by Resolution of the House of Commons passed by virtue of enabling power in a statute.

(2) That the new sub-section 7 aforesaid provides for this alternative method which is prescribed in the Revenue Protection Ordinance (Cap. 250).

(3) That a *sine qua non* for such temporary validity of a taxation Order is that the Minister responsible must perform the obligation which he owes to Parliament to bring the Order before the House of Representatives for approval.

(4) That paragraph (c) of sub-section 7, which provides that even if the House refuses to approve such a taxation Order and it thereby become revoked, the levy of taxes prior to the time of such revocation will be valid, is of no avail, where as in this case it is brought before Parliament long after the prescribed time.

(5) That, therefore, the failure to comply with the provisions of paragraph (b) of sub-section 7 had the consequence that the aforesaid Order published in the Gazette of 27/4/63 had no validity as such.

(6) That the new Schedule of rates became valid and operative only as from the date of the passing of the motion of approval, i.e. as from 20/8/64.

(7) That the Government Agent might yet be entitled to recover by means of the issue of fresh Certificates tax for the period ending 20/8/64 at the rates specified in the original schedule and for the periods subsequent to 20/8/64 at the new rates.

Not followed: *H. R. Podiappuhamy* vs. *V. J. H. Gunasekera, G. A., Kegalle* S.C. 635/67 M.C. Kegalle 59559, S.C. Minutes of 11th November 1967.

C. Ranganathan, Q.C., with *M. T. M. Sivardeeen*, for the petitioner.

N. Tittawella, Crown Counsel, for the respondent.

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

A Certificate under Section 4(1) of the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249) was issued by the Government Agent, Galle, on 12th August 1967 certifying that tax amounting to Rs. 6,192/- was due under the Ordinance, in respect of a motor vehicle (No. 22 Sri 1961) owned by the present petitioner, for certain periods commencing from 1st June 1964 and ending on 31st December 1965. Another certificate so issued and dated 14th August 1967 was in respect of another vehicle (22 Sri 8511) for certain periods between 1st May 1963 and 31st December 1965. In each of these cases the learned Magistrate of Galle made order in terms of section 4(1) of the Ordinance for the recovery of the specified amounts in the same manner as a fine imposed by the Court.

In these two applications the petitioner has challenged the validity of the Certificates on grounds to which I will immediately refer.

Section 2(1) of the Ordinance provides that the tax in respect of Heavy Oil Motor Vehicles shall be paid in accordance with the rates prescribed in the First Schedule to the Ordinance. The Finance Act No. 2 of 1963 amended section 2 of the Ordinance by inserting therein a new Sub-section (7) which reads as follows:—

"(7) (a) The rates prescribed in the First Schedule to this Ordinance may, from time to time, be varied by the Minister of Finance by Order published in the Gazette.

(b) Every Order made under paragraph (a) of this sub-section shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the Order, and shall be brought before the House of Representatives within a period of one month from the date of the publication of such Order in the Gazette, or if no meeting of the House of Representatives is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved. There shall be set out in a schedule to any such motion the text for the Order to which the motion refers.

(c) Any Order made under paragraph (a) of this sub-section which the House of Representatives refuses to approve shall, with effect from the date of such refusal, be deemed to be revoked but without prejudice to the validity of anything done thereunder. Notification of the date on which any such order is deemed to be revoked shall be published in the Gazette."

In pursuance of the provisions of the new sub-section (b) an Order was made by the Minister of Finance setting out a new Schedule of the rates of tax in variation of the rates previously contained in the Schedule to the Ordinance, and this Order was published in Gazette No. 13620 of 29th April 1963. Accordingly the tax due in respect of the two vehicles involved in these applications has been calculated at the rates specified in that Order. But the contention raised on behalf of the petitioner has been that the Order is invalid and of no effect on the ground of non-compliance with the provisions of paragraph (b) of the new Sub-section (7). This paragraph (b) requires that the Order be brought before the House of Representatives "within a period of one month from the date of the publication of such Order in the Gazette, or if no meeting of the House is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved."

In the case of the present Order therefore a motion for approval should have been moved in the House before **29th May 1963** if a meeting took place before that date or else at the first meeting which took place thereafter. Owing however to what must obviously have been gross official negligence, the motion for approval was not moved in the House until **30th August 1964.** Counsel for the petitioner has argued that because a motion for approval was not passed in the House within the time specified in paragraph (b) the Order was fully inoperative, or at the least that the Order became operative only on the date of the approval of the House and not earlier.

Crown Counsel, however, has referred to a judgment of Alles, J. in S.C. 635/67 M.C. Kegalla Case No. 59559 delivered on 11th November 1967, holding that the provisions of the new paragraph (b) of the new sub-section are not mandatory, and that by virtue of the motion passed in the House on 20th August 1964, the Order remains valid as from the date of its first publication in the Gazette.

I regret that I am unable to agree with that judgment. It is a fundamental principle of British Constitutional Law that the subject cannot be taxed except directly by Statute enacted by Parliament, or alternatively by Resolution of the House

of Commons passed by virtue of enabling power in a Statute. The new subsection (7) of Section 2 of Cap. 249 provides for this alternative method which is prescribed in the Revenue Protection Ordinance (Cap. 250) and is often utilised in the case of the imposition or variation by customs duties.

Provision of the nature contained in the new subsection (7), which gives statutory force to a taxation Order prior to its being approved by the House of Representatives, is considered to be expedient only because it is sometimes necessary to prevent speculative dealings and other similar transactions which might take place in the interval between the time when notice of a motion or resolution is given in Parliament and the time when the motion or resolution is actually passed. But a *sine qua non* for such temporary validity of a Taxation Order is that the Minister responsible must perform the obligation which he owes to Parliament to bring the Order before the House of Representatives for approval.

Paragraph (c) of the new subsection no doubt provides that even if the House refuses to approve a Taxation Order and the Order thereby becomes revoked, the levy of the taxes prior to the time of such revocation will be valid. But this validity flows in my opinion from the fact that the law is observed and that Parliament is duly invited to consider whether or not to approve the Order. But in a case where the order is not brought before Parliament at all, or where as in this case the order is brought before Parliament long after the prescribed time, paragraph (c) is of no avail. The simple reason I have for this conclusion is that paragraph (c) does not contemplate either any omission or any delay in moving the requisite motion for approval.

I hold for these reasons that the failure to comply with the provisions of paragraph (b) of the new subsection (7) had the consequence that the Order as published in the Gazette of 19th April 1963 had no validity as such.

Different considerations however arise by reason of the fact that the House of Representatives did approve the new rates of tax by the motion passed on 20th August 1964. The method of taxation provided for in the new subsection is —

(1) that an Order is made by the Minister fixing rates of tax, and

(2) that the House of Representatives passess a motion approving the rates of tax.

The Minister's Order is temporary and provisional. But the motion in the House is intended both to validate the Minister's Order and to approve the new rates of tax permanently. The House of Representatives having thus approved the new rates of tax permanently by the motion passed on 20th August 1964, the constitutional requirement that taxation must be approved in the House has been satisfied. In these circumstances the Court must be slow to hold that the proceedings in the House were a nullity. Accordingly I hold that the new Schedule of rates became valid and operative as from the date of the passing of the motion of approval i.e. as from 20th August 1964.

The orders made by the Magistrates in these two cases for the recovery of these certified amounts as fines and for the issue of distress warrants for the recovery are set aside.

I must note however that the Government Agent may yet be entitled to recover, by means of the issue of fresh Certificates, tax for the period ending on 20th August 1964 at the rates specified in the original Schedule to Cap. 249, and to recover tax for the periods subsequent to 20th August 1964 at the new rates. But even if he is so entitled, such recoveries cannot be made by virtue of the certificates issued on 12th and 14th August 1967, because in these Certificates tax for at least part of the entire period was levied at rates which were not valid prior to 20th August 1964.

Set aside.

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

THE MUNICIPAL COUNCIL OF COLOMBO *v.* GNEI QUARAISH JUNKEER & OTHERS

S.C. No. 233 (*Final*) *of* 1965 — *D.C. Colombo No.* 58345/*M*

Argued on: March 30, 1968
Decided on: May 8, 1968

Civil Procedure Code, section 192—*Interest on money decreed—Does the section permit a Court to give interest in respect of claims for unliquidated damages*

Held: (1) That section 192 of the Civil Procedure Code does not limit the power of the Court to award interest to cases seeking decrees in respect of liquidated debts. The language used must be construed as including a claim in unliquidated damages.

(2) That the court has a discretion to give or refuse interest.

Cases referred to: *Crewdson* v. *Ganesh Das*, (1923) A.I.R. (Cal) 739; 60 I.C. 288
Ratanlal v. *Brijmohan*, (1931) A.I.R. (Bom) 386
Union Government v. *Jackson*, 1956 (2) S.A.L.R. 412
Ramalingam v. *Gokuldas Madavji & Co.*, (1926) A.I.R. (Mad) 1021
Anandram Mangturam v. *Bholaram Tanumal*, (1926) A.I.R. (Bom) 1

H. V. Perera, Q.C., with *H. Wanigatunge*, for the defendant-appellant.

C. Ranganathan, Q.C., with *K. Thevarajah* and *T. Wickremasinghe*, for the plaintiffs-respondents.

T. S. Fernando, J.

The plaintiffs who are the widow and minor children of one Junkeer who had been employed by the appellant, the Municipal Council of Colombo, in the capacity of a motorman/fireman in the Fire Brigade maintained by it have been successful in the District Court in the suit they instituted therein against the Council to obtain a decree for damages in a sum of Rs. 55,000/-. Junkeer died on 5th November 1962 as a result of a fall when he was engaged on duty with the Fire Brigade, the fall itself resulting directly from the snapping of a cable forming part of what has been described as the Davy Fire Escape. The plaintiffs attributed the snapping of the cable to the negligence of the Council in permitting the rusting of the cable ends, a rusting which was visible over the canvas and had indeed been brought to the notice of the proper officer of the Council. The learned District Judge found that the Council had been negligent and we were, properly, not even invited to interfere with that finding. The finding was based on ample evidence and the only surprise we feel is that the Council should have thought it proper or worthwhile to contest the issue of fact in the District Court. Learned Counsel for the appellant intimated to us that he saw no purpose in addressing arguments in the court of appeal on the issue of negligence.

The District Court decree has awarded to the plaintiffs, in addition to the aforesaid sum of Rs. 55,000/-, interest thereon at the rate of five per centum per annum from the date of action till the date of decree, and thereafter on the aggregate sum at the same rate till payment in full. Learned Counsel for the appellant Council has contended that the only provision of law that enables a Court to award interest to a plaintiff, viz. section 192 of the Civil Procedure Code, cannot be availed of in the instant case where the plaintiffs are claiming unliquidated damages. He contrasted the language of section 192, — "when the action is for a sum of money due to the plaintiff" — with the corresponding expression

in section 34 of the Indian Civil Procedure Code — "where and in so far as a decree is for the payment of money", and suggested that the Indian provision which covers a wider range of money decrees than mere decrees for money due have received in India an interpretation that excludes from its scope suits for unliquidated damages. He referred to two decisions of Indian High Courts in support of his argument. In *Crewdson* v. *Ganesh Das*, (1920) A.I.R. (Cal.) at 739, two judges of the Calcutta High Court, in the course of interpreting section 34 said:— "We are of opinion that interest during the pendency of the litigation should not have been decreed. The sum recoverable by the plaintiff is not a debt but unliquidated damages, ... and interest does not run upon unliquidated damages." A similar view was taken in the Bombay High Court in *Ratanlal* v. *Brijmohan*, (1931) A.I.R. (Bom.) 386, where Beaumont C.J. expressed himself in regard to a question that arose upon the same section as follows:— "This being a pure case of damages, I do not think we can give interest before judgment". Mirza, J. in the same case said, "As regards the question of interest, the plaintiff's claim is for damages, and the decree made is in respect of damages. No interest can be allowed on damages." Support for the view taken in the two cases above referred to was sought by learned counsel before us by citing the law that obtains on this question in South Africa. In *Union Government* v. *Jackson* (1956) 2 S.A.L.R. at 412, Fagan, J.A. stated that "the ordinary rule of our law is that liability for interest does not automatically attach to an unliquidated debt — an obligation which has not yet been reduced to a definite sum of money."

The view taken of the limitations of section 34 by the two High Courts referred to above was not shared by the Madras High Court. In *Ramalingam* v. *Gokuldas Madavji and Co.* (1926) A.I.R. (Mad.) at 1021, Spencer, J. declined to adopt the decision in the Calcutta case of *Crewdson* v. *Ganesh Das* (supra) and stated "I see no reason why a successful party should be made to suffer because his claim is not decided soon after the filing of his plaint. When he files his plaint he puts the matter in the hands of the Court for decision. If it be held that the plaintiff cannot get interest from the date of his filing his plaint, it is equivalent to saying that the plaintiff must be deprived of the fruits of his success to the extent of losing interest from day to day during the pendency of his suit on the sum that he was entitled to at the date of his going to Court. The date of instituting the suit is the date upon which the rights of parties are ordinarily determined, and when the decree fixes the amount of damages due, I think they may be taken as fixed as on the date of the suit, and interest allowed on that sum". Venkatasubba Rao J. in the same case, agreeing, stated:— "No distinction is made in the section between an ascertained sum of money and unliquidate damages. As a question of construction, I find it difficult to accept the suggestion that the word "money" in the section should be understood in the limited sense of an ascertained sum. The expression "decree for the payment of money" is very general and to give it due effect it must be construed as including a claim to unliquidated damages. The Court is not bound to give interest; for, it must be noted, that the section gives a discretion to give or refuse interest; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages the Court is bound in every case to exercise a sound discretion. The mere fact that the decree is for payment of damages cannot by itself be a bar to the plaintiff being awarded interest". He also went on to say that the plaintiff's right must not be made to depend upon the mere accident of a speedy disposal or otherwise of a case. "In a court where there is a congestion of work, a plaintiff may obtain a decree only after the lapse of six years, in another court in six months. Why should the plaintiff's right to get interest be made to depend upon circumstances over which he has no control?"

The earlier view of the scope of section 34 that was taken by the Bombay High Court in *Ratanlal* v. *Brijmohan* (supra) was not approved in the later case in the same High Court of *Anandram Mangturam* v. *Bholaram Tanumal* (1946) A.I.R. (Bom.)

1, where Chagla, J. (with Stone C.J. agreeing) referred to a yet earlier decision (1925) 12 A.I.R. Bom. 547) and concluded that "the matter is clear beyond any doubt because under section 34 of the Civil Procedure Code it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money." Notwithstanding the difference in the language employed in section 192 of our Code as compared with section 34 of the Indian Code, we do not consider that our section limits the power of the court to award interest to cases seeking decrees in respect of liquidated debts. We were not referred to any other relevant cases of our Court where section 192 has been construed; we were informed that there is none. In the case we are concerned with here, Junkeer died in November 1962, the suit was instituted in January 1963 and the decree of the court was granted in March 1965. As we have already observed, the case should not have been contested on the facts. In those circumstances where the dependants of Junkeer should have received the money about January 1963 and where the non-receipt at that time was attributable to the decision of the appellant to contest the issue of negligence, it is not possible to maintain any contention that the discretion of the court in respect of the awarding of interest has not been properly exercised. We are unable to uphold learned counsel's argument against the awarding of interest from date of action to date of decree.

Two other points were advanced on behalf of the appellant. One related to a widow's and orphans pension to which it is said the plaintiffs are entitled. This question was not adequately considered in the court of trial. No issue was raised in respect of it. The evidence on record does not enable us to ascertain in what circumstances the plaintiffs became entitled to any such pension. It is not unknown that employees under Government and Local Authorities themselves contribute towards widows and orphans pension fund Schemes. In the absence of relevant evidence we cannot now hold that any sum the plaintiffs may receive under such a Scheme should be deducted in computing the damages payable by the Council. The other point centred round a gratuity paid in two instalments of Rs. 670/- each. We think that the amount of this gratuity, viz. Rs. 1,340/- calls to be deducted from the sum awarded as damages. We would direct that the decree be varied accordingly.

Subject to the variation in the decree which would have the effect of reducing the damages to Rs. 53,660/-, we would dismiss this appeal with costs payable to the respondents.

Samerawickrame, J.

I agree.

Appeal dismissed.

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

Application for conferment of Sole Testamentary Jurisdiction on the District Court of Colombo in respect of the Estate of Katchi Ibrahim Samsudeen, deceased

IN RE THE ESTATE OF KATCHI IBRAHIM SAMSUDEEN

S.C. 208/67

Argued and decided on: 28th September, 1967

Stamp Ordinance, Parts II and III in Schedule A — Application for conferment of sole testamentary Jurisdiction on District Court — Stamp duty leviable on documents filed by Petitioner — How computed — Estate Duty Ordinance, section 21(1).

Held: That in an application for conferment of sole testamentary jurisdiction on a District Court, the stamp duty leviable on the documents filed by the applicant must be determined by reference to the probable market value at the time of the death of the deceased of all the property of the estate of the deceased without any deduction in respect of any liabilities of the estate.

S. Sharvananda, with *M. T. M. Sivardeen*, for the petitioner.

M. Kanagasunderam, Crown Counsel, as *amicus curiae*.

Abeyesundere, J.

The question that arises for consideration in this case is the mode of computing the stamp duty leviable on the documents filed by the applicant in the Supreme Court in connection with application No. 208/67. That application is for the conferment of sole testamentary jurisdiction on the District Court of Colombo in respect of the estate specified in the applicant's petition. The Registrar of this Court has required the applicant to stamp the documents on the basis that the stamp duty is computed by reference to the gross value of all the property of the estate of the deceased. The applicant's contention is that the stamp duty should be computed by reference to the net value of the deceased's estate.

It is setttled law now that Part III of Schedule A of the Stamp Ordinance containing the duties in testamentary proceedings applies to District Courts only. The Part of the Stamp Ordinance that applies to duties in legal proceedings in the Supreme Court is Part II of Schedule A of that Ordinance. In the said Part II the stamp duties are determined by reference to the value of the legal proceedings in the Supreme Court but there is no provision in that Part or in any other provisions of the Ordinance specifying the mode of computing the value of any legal proceedings in the Supreme Court for the purpose of stamp duty. Under the said Part III the value of testamentary proceedings in District Courts for the purpose of stamp duty is now determined in the manner set out in paragraph 5 of that Part. According to paragraph 5, the value of testamentary proceedings in a District Court is determined by reference to the value of the estate and it is provided in that paragraph that the value of the estate shall be taken to be the value as determined for the purpose of estate duty of all property for the administration of which a grant of probate or letters of administration is required. The mode of determining the value of property for the purpose of estate duty is specified in Section 21 of the Estate Duty Ordinance. Sub-section (i) of that Section provides that the value of any property shall be estimated to be the price which, in the opinion of an Assessor, such property would fetch if sold in the open market at the time of the death of the deceased. Therefore in the case of testamentary proceedings in a District Court the value of the estate for the purpose of paragraph 5 of Part III of Schedule A of the Stamp Ordinance is the value which, in the opinion of an Assessor, would be the market value of all property of the estate of the deceased at the time of the death of the deceased.

We are of the view that the principle of determining the value of an estate in testamentary proceedings in a District Court may well be applied to the determination of the value of an estate for the purpose of legal proceedings in the Supreme Court relating to the conferment of sole testamentary jurisdiction on a District Court. In the case before us therefore the stamp duty leviable on the documents filed by the applicant must be determined by reference to the probable market value at the time of the death of the deceased of all the property of the estate of the deceased. In determining that value no deduction shall be made in respect of any liabilities of the estate. We hold that the Registrar of this Court has taken the correct view, namely that the documents filed by the applicant are liable to stamp duty computed by reference to the gross value of all the property of the estate of the deceased.

Samerawickrame, J.

I agree.

Registrar's view upheld.

Present: **Tennekoon, J.**

In the Matter of an Application for Bail in M. C. Colombo Case No. 39121/*B*

D. R. HETTIARACHCHI AND OTHERS *v.* THE QUEEN

S.C. Application No. 195/68

Argued and decided on: 20th May, 1968.
Reasons delivered on: 1st June, 1968.

Courts Ordinance (*Cap.* 6), *section* 31 — *Application for bail — Accused charged with murder, attempted murder and rioting, while being members of an unlawful assembly — Pending trial, attempt made on life of eye-witness by relative of one accused — Material to suggest that accused capable of acting jointly or singly for a common purpose — Whether indirect attempt by one accused to tamper with a witness is relevant in considering whether any of the other accused are to be allowed bail.*

Five accused were charged with murder, attempted murder and rioting, while being members of an unlawful assembly. Pending trial before the Supreme Court, the Attorney-General quashed the committal of the 1st and 4th accused. An application for bail under section 31 was made on behalf of the 2nd, 3rd and 5th accused. It was in evidence, by way of an affidavit by the Police that an attempt had been made on the life of an eye-witness one Wimaladasa, by persons among whom were close relatives of the 2nd accused, and the 4th accused who had now been discharged. Wimaladasa has alleged that the attempt on his life was made with a view to preventing him from giving evidence for the prosecution.

Held: That in view of the fact that there was material which suggested that the accused were capable of acting jointly and singly to serve their common ends, the 2nd accused's alleged indirect attempt to do away with witness Wimaladasa is relevant in considering the cases of the 3rd and 5th accused for bail, and is good reason to apprehend that any of them if released on bail, would be a source of danger to the witnesses for the prosecution.

Anil Obeyesekera, for the petitioners.

T. D. Bandaranaike, Crown Counsel for the Attorney-General.

Tennekoon, J.

This is an application for bail under section 31 of the Courts Ordinance. At the conclusion of the hearing I made order refusing the application. I now state my reasons for that order.

The five petitioners namely (1) D. Rajah Hettiarachchi, (2) A. A. Austin Silva, (3) A. Ariyadasa, (4) M. E. V. A. Winifrieda Perera, and (5) Amarasinghe Senanayake were prosecuted in the Magistrate's Court of Colombo on the following charges:—

"(a) That on or about the 18th day of November 1966 they were members of an unlawful assembly the common object of which was to commit the murder of Ignatius Yogarajah punishable under section 140 of the Penal Code.

(b) Joining an unlawful assembly armed with deadly weapons punishable under section 141 of the Penal Code.

(c) Rioting armed with deadly weapons punishable under section 145 of the Penal Code.

(d) Murder of Vernon Warkuss punishable under section 296 read with section 146 of the Penal Code.

(e) Attempted murder of Ignatius Yogarajah punishable under section 300 read with section 146 of the Penal Code."

After non-summary inquiry they were all committed for trial to the Supreme Court on 6th October 1967, and 21 days have elapsed between that day and the first day of the first Criminal Sessions thereafter. Indictment has not yet been served on the accused. I am informed by the learned Crown Counsel and by the Counsel

who appeared for the petitioner that the Attorney-General has quashed the committal of the 1st and 4th accused, that they are no longer on remand. The present application was therefore confined to 2nd, 3rd, and 5th accused. I am also informed by the learned Crown Counsel that the record has gone back to the Magistrate for compliance with the orders for the discharge of 1st and 4th accused, and that the indictment will be prepared and served on the accused so that they would be brought up for trial at the current or next criminal sessions in Colombo.

The Crown opposed the application for bail and in support of its case has tendered an affidavit from the Inspector of Police who filed report in the Magistrate's Court under section 148(1)(b) of the Criminal Procedure Code. It would appear from that affidavit that at the non-summary inquiry evidence was led to show that whilst the deceased V. Warkus and I. Yogarajah who is a witness for the prosecution were riding a motor bicycle on the Cotta Road — Borella main road at about 7.30 p.m. a hand bomb was thrown at them by the 3rd petitioner resulting in an explosion which caused fatal injuries to V. Warkus and injuries to I. Yogarajah; that at the time the 3rd petitioner threw the hand bomb, the other petitioners were present and that after the explosion some of the petitioners attacked the injured persons with swords; that besides I. Yogarajah, the only other eye-witness who speaks to the participation of the abovenamed petitioners in the unlawful assembly and the murder and attempted murder is one P. Wimaladasa; that on the 29th day of December 1966 a hand bomb was thrown at the said P. Wimaladasa in respect of which offence proceedings have been instituted in M.C. Colombo Case No. 40707 on charges of unlawful assembly with the common object of committing the murder of P. Wimaladasa punishable under section 140 of the Penal Code and the attempted murder of the said P. Wimaladasa punishable under section 300 of the Penal Code. The 2nd accused in M.C. Colombo Case No. 40707 is one Priscilla Amerasinghe, a daughter of the 2nd and 4th Petitioners, whilst the 4th accused in the said case G.M. Boteju Dharmadasa has a sister married to a son of the 2nd and 4th petitioners; the motive alleged by P. Wimaladasa in his statement to the Police for the attempt on his life is that the attempt on his life was made because he is a witness for the prosecution in the case against the abovenamed petitioners; M.C. Colombo Case No. 40707 is pending in the Magistrate's Court of Colombo.

Counsel for the petitioners submits that the facts set out in the affidavit only justify a refusal of bail in respect of the 2nd accused and that neither the 3rd nor the 5th have been involved in incidents tending to show that they are seeking to destroy or disable important witnesses; and that there are no previous convictions in their cases. It is to be noted in this context that one of the charges is that these accused jointly in pursuance of a common intention committed murder of one person, and another is that they also jointly attempted the murder of another person and that they were armed with deadly weapons at the time of the alleged assault on those two persons. While it is true that the nature of the offence for which a person is committed for trial can by itself be no bar to the grant of bail under section 31 of the Courts Ordinance, the existence of material which suggests that the petitioners are capable of acting jointly or singly to serve their common ends makes the 2nd accused's alleged indirect attempt to do away with the witness Wimaladasa highly relevant in considering the cases of the 3rd and 5th accused for bail. I am therefore of the view that there is good reason to apprehend that the release of the 2nd accused or of the 3rd or 5th accused on bail would be a source of danger to the witnesses for the prosecution.

Counsel for the petitioners also urged that as the 1st and 4th petitioners have been discharged, the danger, if any, to prosecution witnesses can be said to exist already from these two and that nothing is to be gained by keeping the 2nd, 3rd and 5th accused on remand. I see no merit in this submission.

Application refused.

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

THE SOLICITOR-GENERAL *v.* AHAMADULEBBE AVA UMMA & FOUR OTHERS

S.C. No. 36 *of* 1966 — *D.C.* (*Crim.*) *Batticaloa* 1287

Argued on: February 8 and 9, 1968
Decided on: 15th May, 1968

Evidence Ordinance, sections 68, 69 *and* 71 — *Applicability in Criminal case where deed impugned as forgery — Indictment for forgery of deed of transfer — Vendee, two attesting witnesses and two of the alleged executants accused—Objection raised by defence counsel when deed shown to first witness at trial, on ground that section* 68 *not complied with—Objection upheld—Prosecuting counsel taken by surprise—Application for date to consult Attorney-General—Refusal—Order discharging and acquitting accused — Appeal by Solicitor-General—Whether refusal by Crown to lead evidence— Notaries Ordinance, section* 31*—Criminal Procedure Code, section* 338 (2).

The five accused were indicted *inter alia* on a charge of conspiracy to commit forgery of a deed of transfer. It was alleged that (*a*) the 1st and 2nd accused were two of the eleven executants,

(*b*) the 3rd & 4th accused, the attesting witnesses,

(*c*) the 5th accused was the vendee.

At the trial when the 1st witness for the prosecution a person claiming to be one of those in truth entitled to the land purported to have been conveyed by the deed was shown the alleged forged deed, counsel for the defence objected to its production on the ground that section 68 of the Evidence Ordinance was not complied with, i.e. that the execution of the deed had not been proved by calling at least one of the attesting witnesses.

The learned District Judge upheld the objection mainly on the ground that the prosecution had not given an opportunity to the witnesses to the deed (3rd and 4th accused) to deny the execution of the document or to say that they cannot recollect its execution.

Thereupon the proctor who was conducting the prosecution applied for a postponement to enable him to consult the Attorney-General for instructions necessitated by the order upholding the objection. This was refused and the trial Judge made order acquitting and discharging the accused.

The Solicitor-General appealed.

On a preliminary objection to the appeal on the ground that what took place after the order upholding the objection was in reality a refusal on the part of the Crown to lead evidence—

Held: That considering the novelty and difficulty of the point of evidence that arose so early at the trial, the trial Judge should have granted a postponement for the purpose indicated by the proctor, even directing the Crown to pay the day's costs, if he thought such a step expedient. Bearing in mind also the provisions of section 338(2) of the Criminal Procedure Code, the preliminary objection should therefore be overruled.

Held further: (1) That section 68 of the Evidence Ordinance has no application to a criminal case where the prosecution has made the attesting witnesses also accused in the case and are not seeking to use a deed as evidence, but to prove it is a forged instrument.

(2) That in such a case the elements of the charges which have to be established by the prosecution may be established in any of the ways permitted by law.

(3) That the trial Judge misdirected himself completely when he held that the execution of the deed could in view of section 71 of the Evidence Ordinance be proved by other evidence only where attesting witnesses deny or do not recollect the execution of the document for he has inadvertently overlooked the important circumstance that being a criminal trial, the 3rd and 4th accused, were not competent witnesses for the prosecution.

(4) That an attesting witness who is not legally not competent to give evidence comes within the expression "if no such attesting witness can be found" occurring in section 69 of the Evidence Ordinance.

(5) That even the words "capable of giving evidence" in section 68 should be interpreted to include legal capacity or competency. Therefore, even on an assumption that section 68 would ordinarily have been applicable the legal incompetency of the 3rd or 4th accused to testify for the prosecution brings this case within the class of cases contemplated in section 69 of the Evidence Ordinance.

Cases referred to: *Velupillai* v. *Sivakamipillai* (1907) 1 A.C.R. 181,
Marian v. *Jesuthasan* (1956) 59 N.L.R. 349.
Burdett v. *Spilsbury* (1843) 10 Cl. & Fin. 340; 8 E.R. 800.
Kiribanda v. *Ukkuwa* (1892) 1 S.C.R. 216.
Somanander v. *Sinnatamby* (1899) 1 Tambyah's Rep. 38; 1 Koch's Rep. 16
Raman Chetty v. *Assen Naina* (1909) 1. Curr. L.R. 257.
Seneviratne v. *Mendis* (1919) 6 C.W.R. 212; 1 Cey. Law Rec. 47
Wijegoonetilleke v. *Wijegoonetilleke* (1956) 60 N.L.R. 560.
Bam Jassa Kunwar v. *Sabu Narain Das* (1946) A.I.R. All. at 183.

V. S. A. Pullenayagam, Crown Counsel, with *R. Gunetilleke*, *Crown Counsel*, for the appellant.

G. E. Chitty, *Q.C.*, with *A. M. Coomaraswamy*, for the accused-respondents.

T. S. Fernando, J.

This is an appeal by the Solicitor-General against an order acquitting in somewhat unusual circumstances the five accused-respondents who had been indicted on a number of charges, the principal one relating to a conspiracy to commit forgery of a valuable security, viz. a deed of transfer of immovable property, in consequence of which conspiracy it was alleged the said forgery was indeed committed.

The 5th accused-respondent is alleged to be the vendee upon the deed in question, the 3rd and 4th accused-respondents are alleged to have attested as witnesses at its execution, while the 1st and 2nd accused-respondents are alleged to have been two of its eleven executants.

As soon as the deed was shown to the first witness called for the prosecution (a woman who claimed to be one of those in truth entitled to the land which the alleged forged deed is said to have purported to convey to the 5th accused,) when that witness was being examined in chief, counsel for the defence objected to its production on the ground of a lack of compliance with section 68 of the Evidence Ordinance. After some argument, the learned District Judge upheld the objection. Thereupon the proctor who was conducting the prosecution on behalf of the Attorney-General applied for a postponement to enable him to consult the latter and obtain certain instructions which he submitted were necessitated by the order upholding the objection to the production of the deed. The trial judge refused this application and made an order "acquitting and discharging the accused".

A preliminary objection to the appeal to this Court was made by counsel for the accused-respondents on the ground that what took place after the order upholding the objection to the reception of the document was in reality a refusal on the part of the Crown to lead evidence. We have considered this objection but, considering the novelty and difficulty of the point of evidence that arose so early at the trial, we think the learned trial judge should have acceded to the application for a postponement for the purpose indicated by the proctor for the prosecution. If he thought such a step expedient, he could even have made an order directing the Crown to pay to the defence a specified sum as the day's costs. The objection that was upheld had not been foreshadowed at the non-summary inquiry, and the proctor was obviously taken by surprise and was not prepared to reply to it adequately or to shape the conduct of his case when the order made turned out to be adverse to the prosecution. In over-ruling the preliminary objection, we bear in mind also the provisions of section 338(2) of the Criminal Procedure Code whereby the legislature, in addition to the right of appeal against an acquittal, conferred on the Attorney-General a right to appeal against any judgment or final order pronounced by a Magistrate's Court or a District Court in any criminal case or matter.

We can now turn to the important question that is raised by this appeal. The deed referred to above bears No. 3915 and purports to have been executed on the 6th January 1961 in the presence of one Mr. Samithamby Kandappan who attested its execution as the notary. In the attestation clause of the said deed, Mr. Kandappan (whose name, I observe, appears on the list of wit-

nesses in the indictment) has certified that the eleven executants were not known to him, but that the two subscribing witnesses were known to him and that they declared that the executants were known to them, and the executants and the witnesses all signed in his presence and in the presence of one another, all being present together at the same time. Clause (12) of section 31 of the Notaries Ordinance (Cap. 107) appears therefore to have been complied with, and, although the executants were not known to the notary, clause (9) of the same section permitted attestation of the deed in these circumstances by the notary. I assume that the prosecution intended to call Mr. Kandappan as its witness. Indeed, a statement to that effect was made by the proctor who appeared for the prosecution in the course of his reply to the objection raised against the reception of the deed at the trial.As the prosecution's contention was that it was not competent for it to call the two attesting witnesses, the proper course it should have adopted would appear to have been to call the notary as a witness even before the alleged owner or owners of the land.

The learned trial judge has held that the prosecution has failed to satisfy section 68 of the Evidence Ordinance. That section prohibits the use *as evidence* of any document required by law to be attested until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. I think it is implicit in this finding of the trial judge that he did not consider the notary to be an attesting witness within the meaning of section 68. Crown Counsel before us himself contended that the notary is not such an attesting witness. The previous cases of this Court which have considered this question have not taken a uniform view thereon, and Mr. Chitty invited us towards the end of his argument to consider whether this was not a question which deserved a reference to a bench of five judges. After giving thought to the matter of such a reference, we do not think that such a reference is called for here, as we are in any event upholding the argument of learned Crown Counsel on another question which, in our opinion, suffices for the decision of the present appeal. We would, however, draw attention to the state of the authorities in regard to the question whether the notary is himself an attesting witness. It may be mentioned that section 2 of the Prevention of Frauds Ordinance which is, after all, the statute that makes validity of a deed depend on notarial attestation, requires the deed to be signed in the presence of *a licensed notary public and two or more witnesses.* This same differentiation between the notary and the witnesses is contained in clauses (8), (9), (10) and (12) of section 31 of the Notaries Ordinance. The Evidence Ordinance is however silent on the question of any such differentiation and contemplates only the calling of an attesting witness. In *Velupillai* v. *Sivakamipillai* (1907) 1 A.C.R. 181, Middleton, J. referred to the Judicial Dictionary meaning of "to attest" which is "to bear witness to a fact", a meaning which Sinnetamby, J. adopted in *Marian* v. *Jesuthasan* (1956) 59 N.L.R. 349. But Crown Counsel referred us to an interpretation of the expression "attesting witness" itself, rendered by the Lord Chancellor in *Burdett* v. *Spilsbury* (1843) 10 Cl. & Fin. 340 (8 Eng. Rep. at 800-1), in the following language:— "The party who sees the will executed is in fact a witness to it: if he subscribes as a witness, he is then an attesting witness".

In the earlier case we have examined, *Kiribanda* v. *Ukkuwa* (1892) 1 S.C.R. 216, decided, however, before the enactment of the Evidence Ordinance, Burnside C.J., (with Withers J. agreeing) held that, in an instrument falling within section 2 of the Prevention of Frauds Ordinance, a notary is an attesting witness in precisely the same sense as are the two witnesses who with him are required to attest the execution thereof. Seven years later, in 1899, in *Somanander* v. *Sinnatamby* (1899) 1 Tambyah's Rep. 38 (or 1 Koch's Rep. 16) Lawrie J. stated that "the later decisions of this Court regard a notary as an attesting witness and (though I am not sure that I quite agree) I am willing to hold that, by proving the signature of the notary, the requirements of the 69th section (of the Evidence Ordinance) have been fulfilled." In *Raman Chetty* v. *Assen Naina* (1909) 1 Curr. L.R. 257, the Court held that, even on the assumption that the notary is an attesting witness within the meaning of section 68, the document cannot be proved without proof of the signature of the executant. This case was referred to by Schneider, A.J. in his *obiter dictum* in *Seneviratne* v. *Mendis* (1919) 6 C.W.R. 212 (or 1 Law Rec. 47) which I reproduce below in full:— "The language of section 2 of Ordinance No. 7 of 1840, and in particular the words "the execution of such writing, deed, or instrument be duly attested by such notary and witnesses" to my mind leave no room for doubt or contention that the notary is an attesting witness in precisely the same sense as the other two witnesses mentioned in that section. This was the view taken in *Kiribanda* v. *Ukkuwa* (*supra*) and in *Somanander*

v. *Sinnatamby* (*supra*). It was argued that when it is enacted in section 68 of the Ceylon Evidence Ordinance 1895 that a document required by law to be attested is not to be used as evidence until one attesting witness at least has been called "for the purpose of proving its execution" the witness meant was not the notary but one of the other attesting witnesses. I do not quite agree with this contention. It would be correct if qualified. The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution. If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68 — if he did not know that person then he is not capable of proving the identity as pointed out in *Raman Chetty* v. *Assen Naina* (*supra*), and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person. It seems to me that it is for this reason that it is required in section 69 that there must be proof not only that "the attestation of one attesting witness at least is in his handwriting" but also "that the signature of the person executing the document is in the handwriting of that person". If the notary knew the person making the instrument he is quite competent to prove both facts— if he did not know the person then there should be other evidence. When the instrument is signed with a mark it is evidence that the language of section 69 must be read to mean that there must be proof that the mark was placed by the person whose mark it purports to be". Fairly recently in *Wijegoonetilleke* v. *Wijegoonetilleke* (1956) 60 N.L.R. 560 it was held that a notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 & 69 of the Evidence Ordinance. A fortnight later, in *Marian* v. *Jesuthasan* (*supra*), this Court held that where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant. If this last mentioned case is to be followed by us, then the notary in the case now before us cannot be regarded as an attesting witness. In all the cases which were brought to our notice or which we have ourselves examined the party seeking to produce the deed desired to use it as evidence of its contents. In the case before us the prosecution does not seek to use deed No. 3915 as evidence; indeed, its contention is that it is not a genuine deed and is, in truth and in fact, a forged instrument. As we have stated already, it does not become necessary for us on this appeal either (a) to choose which of the somewhat varying views on the question where the notary is an attesting witness within the meaning of section 68 we should adopt or (b) express our own view thereon, for the reason that we think that section 68 has no application to a case where the deed is not claimed to be a true document and the claim is that it has indeed been forged.

The principal point made by the trial judge in his order upholding the objection to the showing of the deed to one of the true owners probably with the object of getting her to say that she did not set her thumb mark thereon is that the prosecution has not given an opportunity to the witnesses to the deed (whom the prosecution seeks to identify as the 3rd and 4th accused) to deny the execution of the document or to say that they cannot recollect its execution. It seems to us that the learned judge has here misdirected himself completely when he held that the execution of the deed could be proved in view of section 71 of the Evidence Ordinance only where the attesting witnesses deny or do not recollect the execution of the document. He has, inadvertently perhaps, overlooked the important circumstance that this was a criminal trial and that the 3rd and 4th accused were not competent witnesses for the prosecution. The question of complying with section 71 cannot arise in such a case. Nor can it be the law that in order to prove the complicity of the attesting witnesses in the forgery of a deed it is inevitable that at least one such witness must be made a Crown witness after granting him a conditional pardon. Crown Counsel attempted to derive some support for the contention that an attesting witness who is not legally competent to give evidence is embraced in the expression "if no such attesting witness can be found" occuring in section 69 of the Evidence Ordinance by relying on a decision of the Allahabad High Court in *Bam Jassa Kunwar* v. *Sabu Narain Das* (1946) A.I.R. All. at 183, itself a case where a deed was sought to be used as evidence. Malik J. (with Bennet J. agreeing) there stated:— "If I may, with great diffidence, say so, the words 'can be found' are not very appropriate and, to my mind, they must be interpreted to include not only cases where the witness cannot be produced because he cannot be traced but cases where

the witness for reasons of physical or mental disability or for other reasons, which the Court considers sufficient, is no longer a competent witness for the purpose as is provided in section 68, Evidence Act. The law requires one more formality that a document required by law to be attested shall not be admitted as evidence until one witness at least has been called for proving its execution, provided there be such a witness alive and subject to the process of the court and capable of giving evidence". Learned Counsel for the accused-respondents argued that "capable of giving evidence" here means physical or mental capacity to testify but does not include legal capacity or competency. We do not think there is justification for limiting the meaning of the expression in the manner so suggested. Therefore, even on an assumption that section 68 would ordinarily have been applicable, we think that the legal incompetency of the 3rd and 4th accused to testify for the prosecution brings this case within the class of cases contemplated in section 69 of the Evidence Ordinance. As we understand the position, the prosecution's case is that the notary is available to be called; he is able to say that the 3rd and 4th witnesses signed in his presence as witnesses; there is the evidence of a handwriting expert to corroborate his testimony that the signatures of the persons who have signed as witnesses are in the hand-writing of the 3rd and 4th accused respectively; finger-print evidence can demonstrate that the thumb prints of two of the executants tally with the thumb prints of the 1st and 2nd accused. Thus, it is claimed, if section 69 is applicable the prosecution's case is capable of being proved provided the trial court accepts the evidence proposed to be led.

Although we have set out at some length the nature of some of the arguments addressed to us and our own views thereon, we desire to emphasize that we base our order allowing this appeal on the opinion we hold that section 68 of the Evidence Ordinance has no application to a criminal case where the prosecution has made the attesting witnesses also accused in the case and, far from seeking to use the deed as evidence, is impugning it as a forgery committed as a result of the abetment of the said offence on the part of the witness and the vendee. In such a case the elements of the charges which have to be established by the prosecution may, of course, be established in any of the ways permitted by law.

We reverse the order of acquittal and direct that the accused be retried on the indictment dated 8th April 1965, the retrial to take place before a District Judge other than the Judge who made the order of acquittal.

Alles, J.

I agree.

Appeal allowed.

Present: **Weeramantry, J.**

ABRAHAM SINGHO *vs.* ARIYADASA

S.C. No. 126 (*R.E.*) 1967 — *C.R. Colombo No.* 91889

Argued on: 13th June, 1968
Decided on: 20th June, 1968

Rent Restriction Act (*Cap.* 274) *Section* 13(1)(d) — *Action for ejectment by landlord on ground that tenant convicted of using premises for illegal purpose — Tests applicable — Whether user of premises for illegal purpose essential element.*

Held: (1) That where the question is whether a landlord is entitled to a decree in ejectment against his tenant in terms of Section 13(1)(d) of the Rent Restriction Act, the test applicable would be whether the tenant has taken advantage of the premises and the opportunity they afforded for committing the offence and not whether the user of the premises constitutes an essential element in the offence for which the occupier or his licencee has been convicted.

(2) That therefore in the present case the conviction for the sale of arrack is a conviction of using the premises for an illegal purpose within the meaning of section 13(1)(d).

Not followed: *Asiya Umma* v. *Kachi Mohideen* (1959) 61 N.L.R. 330.

Cases referred to: *Saris Appuhamy* v. *Ceylon Tea Plantations Co. Ltd.* (1953) 55 N.L.R. 447
Schneiders & Sons Ltd. v. *Abrahams* (1925) 132 L.T. 721; (1925) 1 K.B. 301; 41 T.L.R. 24
Waller & Son v. *Thomas* (1921) 1 K.B. 541; 125 L.T. 21; 37 T.L.R. 325

D. R. P. Goonetilleke, with *Nalin Abeysekera*, for defendant-appellant.

B. B. D. Fernando, for plaintiff-respondent.

Weeramantry, J.

The plaintiff in this case claims the ejectment of the defendant from premises No. 58, Sri Kadiregam Street, Pettah, on the ground that a person residing or lodging with the defendant has been convicted of using these premises for an illegal purpose. The premises are governed by the provisions of the Rent Restriction Act Cap. 274, and the standard rent is below Rs. 100/-.

The case proceeded to trial on the basis of the following among other admissions:

(a) that in case No. 26188 of the Magistrate's Court, Colombo, one Kulatunga Aratchige Agnes was convicted of selling on 8th July, 1964, an excisable article to wit arrack, without a licence from the Government Agent, an offence punishable under Section 18 of the Excise Ordinance.

(b) that the sale for which Agnes was convicted took place in the premises in suit

(c) that the said Agnes was permanently residing and lodging with the defendant in the said premises.

In view of these admissions the main issue before the learned Commissioner was whether the plaintiff was entitled to a decree in ejectment in terms of section 13 (1) (d) of the Rent Restriction Act as amended by Act No. 12 of 1966, for having used the premises for an illegal purpose.

The learned Commissioner answered this issue in the affirmative and on this basis entered decree of ejectment against the defendant.

The tenant appeals against this order on the ground that the mere fact of conviction for the single offence referred to does not entitle the plaintiff to a decree based on the use of these premises for an illegal purpose.

It is necessary to note that the Act as it stood prior to the amendment required a conviction as a prerequisite to the operation of Section 13(1)(d). This provision was altered by Act No. 12 of 1966, in terms of which the requisite was merely that the premises should be used by the tenant or by any person residing or lodging with him for an immoral or illegal purpose. The plaintiff came into court however on 2nd October, 1965, and the law applicable to the Plaintiff's claim was therefore the law as it stood prior to the amendment brought about by Act No. 12 of 1966.

It is urged on behalf of the appellant that there has been no conviction for the *use* of premises for an immoral purpose, and that the premises have not in fact been used for the commission of the offence. It is submitted also that "use" connotes something more than a single act, and that notions of continuity or repeated user are implicit in the term.

The matter has received consideration from our Courts in two cases the first being a case of possession, in violation of the Protection of Produce Ordinance, of gunny bags containing manufactured tea dust and tea sweepings, and the second a case of unlawful possession of some bottles of cocaine.

In the first of these cases, *Saris Appuhamy* v. *Ceylon Tea Plantations Co. Ltd.* (1953) 55 N.L.R. 447, Rose C.J. took the view that the offence of possession of the gunny bags involved the use of the premises for the purpose of storing them, as distinct from the premises merely being the scene of commission of the offence.

Rose, C.J. relied on the decision of the Court of Appeal in *Schneiders and Sons Ltd.* v. *Abrahams*, (1925) 132 L.T. 721 a case in which under the similar terms of Section 4 of the Rent and Mortgage Interest Restrictions Act 1923, a single instance of user of premises for the receipt of stolen property was deemed sufficient to satisfy the language of the Statute. The property alleged to have been received in that case was a roll of Italian cloth. In that case the argument that a conviction for using the premises requires the user of the premises as an essential element os the crime was rejected and the Court also rejected the argument that "using" the premises requires

something more than a single act of user and means a continuous, frequent or repeated use. Of the latter argument Bankes L.J. observed that although the mere fact of a crime being committed on the premises may not constitute a user of them for an illegal purpose, still even a single act may in certain cases be quite sufficient to satisfy the language of the Statute. As an instance of a crime, the commission of which did not constitute use for an illegal purpose, reference was made to an assault committed upon the premises and as an instance of an offence the commission of which on a single occasion did satisfy the requirements of the statute, use as a coiners den or as a deposit for stolen goods was cited.

It will be appreciated that in the former type of case the premises are merely the scene at which the offence is committed, whereas in the latter case the premises are in fact used for the criminal purpose.

The second of the Ceylon cases referred to was that of *Asiya Umma* v. *Kachi Mohideen* (1959) 61 N.L.R. 330, where Sinnetamby, J. proceeded on the basis that what the statute contemplates is a conviction for *using* the premises let for an illegal purpose and not the conviction of an occupant for an illegal act. Sinnetamby, J. there took the view that a conviction for possession of three bottles of cocaine was not a conviction in respect of the use for the purpose for which the premises were kept, and drew a distinction between such a case and cases where the use of the premises is itself an offence, as where a house is used for unlawful gaming or kept as a brothel.

It seems to me that the ground on which the landlord in that case was held not entitled to a decree of ejectment rests on a view which in *Schneiders* v. *Abrahams* was expressly ruled against by the Court of Appeal, for as already observed, Bankes L.J. rejected the argument that the section includes only offences in which user of the premises is an essential element.

The more satisfactory test in my view would be not whether the user of the premises constitutes an essential element in the offence for which the occupier or his licensee has been convicted, but rather as Bankes, L.J. proceeded to observe in the same case, whether the tenant has taken advantage of the premises and the opportunity they afforded for committing the offence.

It may also be observed that Scrutton, L.J. and Atkin L.J., the two other judges who were associated with Bankes L.J. in *Schneiders & Sons Ltd* v. *Abrahams*, also lent their very high authority to the view of Bankes, L.J. that a conviction of using the premises does not require user as an element of the offence for which the occupier is convicted. Indeed the use by the legislature of the expression "has been convicted of using" was in that case criticised by Scrutton L.J. in 132 L.T. at 723, as raising difficulties by reason of its defective drafting inasmuch as if the section means conviction for using the premises there could be very few crimes indeed that could be properly so described and brought within its scope [vide also Megarry The Rent Acts 10th ed. p. 272.]

The same remarks would be apposite to our Ordinance as it stood prior to the amendment, and that is what concerns us here.

There is high authority therefore against both contentions urged by learned counsel for the appellant,

It is of interest to refer briefly to an English case in which the sale of liquor was the offence in question. In *Waller & Sons* v. *Thomas* (1921) 1 K.B. 541 an isolated breach of regulations relating to sale within prohibited hours was found insufficient to base a finding that the house was used for an illegal purpose. In that case however the premises were licensed premises, the user was a lawful user, and the judgment makes it clear that it was only by what is described as a slip in the user that the offence was committed through a single sale being effected outside permitted hours. In other words, in that case the sale of liquor in the premises was held to be a user of those premises for such sale, but the user in question was a lawful user except during the prohibited hours.

If any guidance is to be had from this latter case, it would be to point in the direction of such a sale being considered to be a user of the premises.

Consequently, I have little difficulty in holding in this case that the conviction for the sale of arrack is a conviction of using the premises for an illegal purpose inasmuch as advantage has been taken of the tenancy of the premises and of the opportunity they afforded for committing the offence. Such a case cannot be likened to a case of assault where the premises merely afforded the venue or the scene for the commission of the offence. An illegal sale of arrack requires a measure

of cover, and there is no doubt that the building has in this sense been taken advantage of. I may add that in this view of the matter it would make no difference to the decision in this case whether the law applicable be the original statute or the amending Act No. 12 of 1966, for the premises have been used in the sense of being taken advantage of and are not merely the fortuitous scene of commission of a crime.

I must observe that there is no warrant in the material before the learned Commissioner for his observation that the premises would have been used for the storage of a quantity of arrack. There was no such material placed before Court and such a finding cannot be based on surmise or conjecture.

This latter observation does not however result in any difference to the main conclusion I have formed, and the appeal is therefore dismissed with costs.

Appeal dismissed.

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

K. C. C. PERERA *v.* K. M. PERERA

S.C. 617 (*Final*) 1966 — *D.C. Colombo* 21227/*S*

Argued on: May, 6th 1968
Decided on: June, 25th 1968

Cheque, action on — Averment in plaint that notice of dishonour given — No plea that such notice unnecessary — Notice in fact not given — Such notice a condition precedent to right of action on cheque — Can plaintiff obtain judgment on basis that no notice necessary — Words "not arranged for" on cheque — Need to lead evidence as to their meaning— Cheques not presented on date they were due for presentment — Burden on plaintiff to show that no funds in defendant's Bank on that date.

The plaintiff sued the defendant on five cheques marked 'A' to 'E' and this appeal was concerned with two of them, viz. 'D' and 'E'. The trial Judge had given judgment for the plaintiff in a sum of Rs. 11,000/- being the value of the two cheques 'D' and 'E' together with legal interest and costs.

The plaintiff had pleaded in his plaint that he had given notice of dishonour of these cheques. He had not pleaded that although there was no such notice, such notice was not necessary in view of the absence of effects in the defendant's Bank. The defendant denied that notice of dishonour had been given and put the plaintiff to strict proof of that fact.

The defendant raised two issues Numbered 8 and 9 at the trial which reads as follows:—

"8. Was notice of dishonour according to the provisions of the Bills of Exchange Ordinance given in respect of all or any of the cheques marked A, B, C, D, and E.

9. If not can the plaintiff have and maintain this action on all or any of the cheques marked A, B, C, D and E."

The trial Judge answered issue No. 8 in favour of the defendant and issue No. 9 in favour of the plaintiff as far as cheques 'D' & 'E' were concerned. It was submitted on behalf of the appellant that once the learned trial Judge answered issue No. 8 in the defendant-appellant's favour, the plaintiff's action should have been dismissed, as the only question that arose on the pleadings and issues was whether notice of dishonour had been given. It was submitted that such notice was a condition precedent to the right of action on these cheques.

It was submitted on behalf of the plaintiff-respondent that the cheques contained the word "not arranged for" and that this was evidence which would support the learned trial Judge's finding that notice of dishonour was not necessary. It was further submitted that the defendant had not objected to the admission of the said cheques in evidence. In reply, it was submitted on behalf of the defendant-appellant that on the basis of the pleadings and issues the defendant had been entitled to presume that nothing turned on the words "not arranged for" and that the plaintiff should have called evidence to show what they meant. It was also submitted that there was no proof even as to who wrote those words on the cheques.

Held: (1) That this case was one which should be decided in accordance with the pleadings and the issues raised thereon and the evidence led relevant to those issues.

(2) That notice of dishonour was a condition precedent to the right of action on the said cheques. Such notice had not been given in this case.

(3) That the plaintiff should not now be given a further opportunity to prove what the words "not arranged for" meant as this alone would not conclude the matter. The plaintiff would also have to prove that there were no funds to meet the cheques when they were due for presentation, as they had been presented after the due date.

(4) That, further, to give the plaintiff another chance would be to enable him to show that the decision of the learned trial Judge, given on grounds which the plaintiff had then not sought to establish, was in fact correct.

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

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-respondent.

De Kretser, J.

The plaintiff sued the defendant on five cheques marked A to E. This Appeal is concerned with cheques D and E in regard to which the judgment of the Trial Judge states as follows:

"There is no evidence to prove that notice of dishonour was given. Notice however is not necessary where the dishonour is due to absence of effects in the Bank's book. The cheques D and E were returned with the remark 'Not arranged for'. Notice of dishonour is therefore not necessary in respect of the cheques D and E."

He gave judgment for the plaintiff in the sum of Rs. 11,000 — the value of cheques D and E — with legal interest and costs. The defendant has appealed.

In his plaint, the plaintiff has pleaded that there was notice of dishonour of these cheques and accordingly his cause of action was based on that plea. *He did not plead that there was no notice but that notice was not necessary in view of the absence of effects in the Bank.* The defendant denied that there was notice of dishonour and put the plaintiff to strict proof of it. At the Trial, the defendant raised the issues (No. 8) was notice of dishonour according to the provisions of the Bills of Exchange Ordinance given in respect of all or any of the cheques marked A, B, C, D, and E. (No. 9) if not can the plaintiff have and maintain this action on all or any of the cheques marked A, B, C, D and E.

The trial Judge answered Issue 8 in favour of the defendant. Counsel for the defendant submits that in consequence of that answer the plaintiff's action should have been dismissed for in this case, on the pleadings and the issues raised, the one question was whether notice of dishonour, which is a condition precedent to the right of action on these cheques, had been given. Counsel for the plaintiff submitted that there was evidence in the case which would justify the Judge's finding that it was one in which no notice of dishonour was necessary. He pointed to the words *not arranged for* noted on each cheque and claimed that this conclusively showed that when the cheques were presented, there were no funds in the Bank to meet them. He submitted that the defendant could not claim to be taken by surprise in that he did not object to the admission of cheques with these words noted on them. The short answer of the Counsel for the defendant is that the plaintiff should have called evidence to show what exactly the words "not arranged for" mean and that unless that was done the defendant was entitled in view of the pleadings and the issues to presume that nothing turned on these words. He also pointed out that there is no proof as to who wrote them for there is not even the seal of the Bank on these cheques.

Counsel for the plaintiff asked for the opportunity on terms to prove what the words mean. I need hardly point out that that would not conclude the matter for the plaintiff would also have to prove that there were no funds to meet the cheque when it was due for presentation, for it is not contested that it was in fact presented after the due date. There appears to be no good reason why the plaintiff should be given a chance of establishing that the decision of the umpire given on the grounds he did not seek to establish. is in fact correct. This appears to be a case which should be decided in accordance with the pleadings, the issues raised on the pleadings, and the evidence led relevant to those issues.

For these reasons, the Appeal is allowed, and the plaintiff's action is dismissed with costs in both Courts.

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

I agree.

Appeal allowed.

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

R. RAGHAVANPILLAI *v.* ATTORNEY-GENERAL*

S.C. 598/65 (*F*) — *D.C. Vavuniya* 1869

Argued on: 7th and 8th March, 1968
Decided on: 8th March, 1968

Public Servant — Termination of services by Head of Department by virtue of powers delegated by the Public Service Commission — Scope of such powers— Plaintiff's services terminated on ground outside the terms of delegation — Powers of Appeal Court to grant relief under general prayer "for such other and further relief as to the court may deem meet."

In his plaint the plaintiff prayed (a) for damages against the defendant (the Director of Land Development) — for an alleged unlawful termination of his services and (b) for such other and further relief as to the Court may deem meet.

The Attorney-General intervened under section 463 of the Civil Procedure Code and the only issue tried was whether the defendant terminated the services of the plaintiff unlawfully and without just and reasonable cause.

The learned District Judge dismissed the action holding that the plaintiff's services were rightly terminated and that he did not come within the category of persons who have a right to employment under the Government of Ceylon.

The letter terminating the plaintiff's service showed that the reason for such termination was that plaintiff was not authorised to stay in Ceylon because his final visa had expired.

On an appeal by the plaintiff.

Held: (1) That the terms of delegation of powers by the Public Service Commission to the Heads of Departments as published in Gazette No. 10847 of 7.10.1955, for dismissing, or otherwise punishing a public officer working in a department assigned to a Minister, for misconduct on any ground other than the ground of conviction, did not authorise the head of the department to dismiss an officer otherwise than on misconduct.

(2) That therefore, the termination of the plaintiff's services on the ground that he was not authorised to stay in Ceylon is void and inoperative.

(3) That, it is open to a public servant who is aggrieved by the unlawful termination of his services to institute an action for a declaration that the termination of his services were void and inoperative.

(4) That having regard to the prayer of the plaintiff "for such other and further relief" it is open to the Supreme Court to make a declaration that the termination of the plaintiff's services by the Director of Land Development was void and inoperative.

Case referred to: *Silva* v. *The Attorney-General* (1958) 60 N.L.R. 145

C. Suntheralingam, for the plaintiff-appellant.

H. Deheragoda, Senior Crown Counsel, with *P. Naguleswaram*, Crown Counsel, for the defendant-respondent.

Abeyesundere, J.

In this case the plaintiff sued the defendant for an alleged breach of contract of employment stating that the plaintiff's services were terminated by the defendant unlawfully and that such unlawful termination constituted a breach of contract of employment. The defendant in this case is the Director of Land Development. The Attorney-General intervened under section 463 of the Civil Procedure Code for the purpose of defending the Director and was substituted as a party defendant. Although the plaintiff expressly prayed in the plaint for damages in consequence of an alleged breach of contract of employment, he also prayed in the plaint for such other and further relief as to

* For Sinhala translation, see Sinhala section, Vol. 16, part 7, p. 17

the Court may seem meet. Issue No. 5 tried by the learned District Judge in this case was as follows: "Did the defendant terminate the services of the plaintiff unlawfully and without just and reasonable cause on 20.9.67". That issue was answered in the negative by the learned District Judge who held that the plaintiff was not entitled to be reinstated in service as he had been rightly dismissed, and further that the plaintiff did not come under the category of persons who had a right to employment under the Government of Ceylon. The action of the plaintiff was dismissed with costs by the learned District Judge. The plaintiff has appealed from the judgment and decree.

P6 dated 20th September, 1960, is a letter by which the Director of Land Development informed the plaintiff that his services were terminated with immediate effect, and the reason for such termination appears from the letter P6 to be that the plaintiff was not authorised to stay in Ceylon because his final visa had expired on 4.12.56. The Public Service Commission has, by order made under section 61 of the Ceylon (Constitution) Order in Council, 1946, published in Gazette No. 10847 of October 7, 1955, delegated to the head of the department "the power to dismiss or to otherwise punish for misconduct, on any ground other than on the ground of conviction, a public officer (other than an officer of any of the Combined Services or of the Quasi Clerical Service) who is working in a Department assigned to a Minister and —

(a) who is the holder of a pensionable post and who is paid a salary not exceeding Rs. 2,700/- per annum, or

(b) who is the holder of a non-pensionable post and who is paid a salary not exceeding Rs. 3,180/- per annum."

It is clear from the terms of the delegation that the head of the department cannot dismiss an officer otherwise than on the ground of misconduct. In the case before us the Director of Land Development has terminated the services of the plaintiff, not on the ground of misconduct, but on the ground that the plaintiff's visa had expired and that therefore he was not authorised to stay in Ceylon. The termination of the services of the plaintiff is therefore void and inoperative. Accordingly we hold that the learned District Judge was wrong in holding that the defendant did not terminate the services of the plaintiff unlawfully.

Crown Counsel appearing for the Attorney-General submitted that according to the law now in force in Ceylon an officer in the service of the Crown cannot sue the Crown for a breach of contract of employment. He did not however submit that it was not open to a public servant, who is aggrieved by the unlawful termination of his services, to institute an action seeking the relief of a declaration that the termination of his services was void and inoperative. In fact this Court has held in the case of *Silva* v. *The Attorney-General* (60 N.L.R. page 145) that it is open to a servant of the Crown, who has been unlawfully dismissed from the Public Service by the Public Service Commission, to seek to obtain from a competent Court a declaration that he has not been dismissed by the Public Service Commission according to law. The breach of contract of employment alleged by the plaintiff in his plaint is the unlawful termination of his services by the Director of Land Development. The trial Court examined the question whether the termination of the plaintiff's services was according to law or not. We notice that the learned District Judge has also examined the question whether, as held in the case of *Silva* v. *Attorney-General*, it was open to the District Judge to declare that the termination of the plaintiff's services was void and inoperative. The learned District Judge acknowledged that he was bound by the decision in the case of *Silva* v. *Attorney-General*. He has not made the declaration that the termination of the plaintiff's services was void and inoperative because he has taken the view that the Director of Land Development had the power to terminate the plaintiff's services and that such power was lawfully exercised.

For the aforesaid reasons we are of the view that, having regard to the prayer of the plaintiff for such other and further relief as to the Court may seem meet, it is open to this Court to make a declaration that the termination of the plaintiff's services by the Director of Land Development was void and inoperative. Accordingly we make that declaration and set aside the judgment and decree of the learned District Judge.

The plaintiff-appellant is entitled to the costs of appeal and also to the costs of the trial in the District Court.

Samerawickrema, J.

I agree.

Appeal allowed.

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

TOWN COUNCIL, DODANDUWA *v.* WILBERT DE SILVA & OTHERS

S.C. Application No. 43/68

Application for a Mandate in the nature of a Writ of Mandamus on Galbokka Hewage Wilbert de Silva of Greenwood, Dodanduwa and another.

Argued and decided on: April 6th, 1968

Writ of Mandamus — Premises occupied by Conciliation Board — Failure to pay assessment rates for over six years — Unsuccessful attempts by landlord (Town Council) to recover possession of premises — Application for certificate, a pre-requisite to instituting action for declaration of title and ejectment to same Conciliation Board — Unreasonable delay in issuing certificate — Conduct of Board deplorable.

After an unsuccessful attempt to seize and sell a house occupied by the Conciliation Board (constituted under the Conciliation Boards Act) and situated within a Town Council area, for non-payment of assesment rates by the Chairman of the Council for over 6 years, the Council caused it to be vested in itself.

This step too did not enable the Council to obtain possession of the premises and notwithstanding a further two years' time being granted, possession could not be recovered. Thereupon on 11.6.67 the Council applied to the same Conciliation Board of which the first respondent is the Chairman for a certificate which is a pre-requisite under the Conciliation Boards Act for the instituting of an action for declaration of the title and for ejectment.

As there was unreasonable delay in issuing the Certificate asked for, the Town Council applied for a writ of Mandamus on the respondents who are the Chairman and members of the Board.

Held: That it was clear that theConciliation Board was adopting an obstructionist attitude towards this matter and hence the applicant was entitled to a Writ of Mandamus compelling the respondents to take all necessary steps to issue the certificate forthwith.

Per **T. S. Fernando, J.**—"Conciliation Boards should set a better example and should co-operate with the local authorities. We are satisfied that the Conciliation Board is adopting an obstructionist attitude, very probably for the reason that its Chairman is the party affected here. This attitude of the Board is most deplorable and exhibits in its a lack of a sense of public conscience. We are satisfied also that there has been a virtual refusal to grant a certificate which the applicant Council was fully entitled to receive."

Harischandra Mendis, with *Gemunu Seneviratne*, for the petitioner.

1st and 2nd respondents in person.

T. S. Fernando, J.

We have heard Counsel on behalf of the petitioner. The 1st and 2nd respondents are present but are not represented by counsel. The position taken up on behalf of the respondents is that the Conciliation Board of which they are members has not yet concluded the hearing before them.

The proceedings before the Conciliation Board which this application exposes indicate a deplorable state of affairs. The 1st respondent is the Chairman of the Conciliation Board, and he had been in arrears in payment of the assessment rates due in respect of premises within the Town Council area occupied by him for a period in excess of six years. It would appear that in description, the Town Council, on account of non-payment of the rates, had the premises seized and, thereafter, attempted to sell it. There were no bidders at the sale. We can quite understand how in a situation such as this would-be bidders kept away.

* For Sinhala translation, see Sinhala section, Vol. 16 part 7 p. 19

The next step the Town Council did take was to vest the premises in itself for non-payment of rates. This step also did not enable it to take possession of the premises unless possession had been given up peacefully. It would appear that the Council had granted the 1st respondent a further two years' time to give up possession of the premises. Unable to obtain possession even after the lapse of these further two years, in deference to the provisions of the Conciliation Boards Act, the Town Council on the 11th of June 1967 filed proceedings before the Conciliation Board of which the 1st respondent himself is Chairman, prayed for a certificate which is a pre-requisite for the filing of action in the District Court for a declaration of its title and for ejectment of the 1st respondent. The contention of the 1st respondent (the Chairman of the Conciliation Board,) of the 2nd respondent (a member of that Board), and apparently of the other respondents as well is that the proceedings before the Board are not yet concluded and that in these circumstances mandamus does not lie.

Conciliation Boards should set a better example and should co-operate with the local authorities. We are satisfied that the Conciliation Board is adopting an obstructionist attitude, very probably for the reason that its Chairman is the party affected here. This attitude of the Board is most deplorable and exhibits in it a lack of a sense of public conscience. We are satisfied also that there has been a virtual refusal to grant a certificate which the applicant Council was fully entitled to receive.

The applicant is entitled to an order in the nature of a Writ of Mandamus compelling the 1st to the 11th respondents to take all the steps necessary to see that the certificate applied for by the applicant is issued forthwith.

The applicant is entitled to the costs of this application to be paid by the respondents.

Samerawickrame, J.

I agree.

Application allowed.

Present: **Tennekoon, J.**

MRS. CHRISTOBEL VIVIENNE ABEYRATNE *nee* WEERAKOON

v.

MRS. SOMA MARAMBE KUMARIHAMY & OTHERS

S.C. 1/67 — *Appeal to the Supreme Court in terms of section* 29(2) *of the Employees' Provident Fund Act No.* 15 *of* 1958 *in Case No. EPF/TA/2/67*

Argued on: 17th & 20th May, 1968
Decided on: 20th June, 1968

Employees' Provident Fund Act, No. 15 *of* 1958, *sections* 3(1), 3(2), 23, 24, 46(1) — *Employee contributing to Fund as member—Nomination of person to receive all amounts lying to credit of member on his death — Subsequent Last Will made by such member bequeathing the amount to others as well — Claim and counter claim by Executor named in Will and person nominated — Who is entitled to the benefit?*

One W. an Engineer who died on 23/7/66 was a member of the Employees' Provident Fund and in terms of the Employees' Provident Fund Act No. 15 of 1958 made contributions to the said Fund. He had nominated the 1st respondent as the person entitled to be paid all amounts lying to his credit in the Fund in the event of his death.

W. had also left a Last Will in which he had bequeathed his property including the sum lying to his credit in the said Fund to the appellant, and the 1st, 3rd and 4th respondents.

The 2nd respondent as Executor of the said Last Will claimed the amount lying to the credit of W. from the Commissioner of Labour. The 1st respondent counter-claimed as the person nominated by W.

The Commissioner, acting under section 28 of the Act made a determination that the first respondent was entitled to the entirety of the amount, which decision was affirmed by the Tribunal of Appeal on an appeal taken to it.

On an appeal to the Supreme Court from the last decision under section 29(2) of the Act.

Held: (1) That in view of the provisions of section 3(2) of the said Act it could not be argued that the nomination of the 1st respondent was revoked or superseded by the Last Will.

(2) That the argument for the appellants that the 2nd respondent as executor was entitled to the payment of the said benefit under sub-paragraph (a) of section 24 of the Act could not be accepted as:

(*a*) this section was intended to apply only in cases where a member dies and there is no valid or effective nomination.

(*b*) 'nomination' is the only method provided by the Act by which a member of the Fund can control the destination of the amounts standing to his credit in the event of his death.

(*c*) a member of the Fund cannot make a testamentary dispositon of such money.

(3) That the 1st respondent, being nominee was therefore entitled to receive the benefit.

M. T. M. Sivardeen for the appellant.

Ananda de Silva, Crown Counsel, for the Attorney-General.

Tennekoon, J.

One F. L. S. S. Weerakoon who was employed as an Engineer in the Ceylon Mineral Sands Corporation was a member and made contributions to the Employees' Provident Fund in terms of the provisions of the Employees' Provident Fund Act No. 15 of 1958 (hereinafter referred to as the Act). He had nominated the 1st respondent Mrs. S. M. Kumarihamy as the person entitled to be paid all amounts lying to his credit in the Fund in the event of his death. Mr. Weerakoon was above 55 years of age and still employed under the Mineral Sands Corporation when he died on 23rd of July 1966. At the date of his death there was a sum of about six thousand rupees lying to his credit in the fund. Mr. Weerakoon had left a Last Will in which he is said to have bequeathed his property (including the amount lying to his credit in the Fund) to the appellant and the 1st, 3rd and 4th respondents. The 2nd respondent in his capacity as Executor of the said Last Will claimed the amount lying to the credit of Weerakoon from the Commissioner of Labour. The 1st respondent also claimed the said sum of money as the person nominated by Weerakoon to receive the amounts lying to his credit in the event of his death.

The Commissioner acting under section 28 of the Act made a determintaion that the 1st respondent was entitled to the entirety of the benefit the amount of which appears to have been calculated to be Rs. 5,800/60. An appeal was taken to the Tribunal of Appeal under section 29 of the Act, and the Tribunal by its order of 27/6/67 affirmed the Commissioner's decision holding that the 1st respondent was the person entitled to the benefit. The present proceedings are an appeal under section 29(2) of the Act to this Court from the decision of the Tribunal of Appeal.

The 1st ground of appeal viz: that the nomination of the 1st respondent was revoked or superseded by the Will was quite rightly abandoned at the hearing before me by Counsel appearing for the appellant in view of the provisions of section 3(2) of the Act which provides that —

> "Neither a member of the Fund nor any person claiming under him shall have any interest in, or claim to, the moneys of the Fund *otherwise than by virtue of any provision of this Act or of any regulation.*"

The second ground of appeal and the one that was pressed by Counsel for the appellant was that the 2nd respondent as Executor of the Last Will of the deceased member was entitled to payment of the benefit under sub-paragraph (a) of section 24 of the Act.

Crown Counsel appearing for the Commissioner of Labour was equally emphatic that section 24 of the Act the very section on which the appellant relied clearly negatived appellant's contention.

Section 24 reads as follows:—

> "Where a member of the Fund dies before becoming entitled to the amount standing to his credit in his individual account or where he dies after becoming entitled thereto but before receiving such amount or where no nominee has been appointed under regulations made under this Act to whom such amount should be paid in the event of the death of such member or where one

nominee has been appointed and he is dead or where more than one nominee is appointed and any one of them is dead, then such amount shall —

(*a*) if it is not less than two thousand five hundred rupees, be paid to the executor of the last will or the administrator of the estate of such deceased member to be included in that estate; and

(*b*) if it is less than two thousand five hundred rupees, be paid to the person who is, or be apportioned by the Monetary Board among the persons who are certified by the Commissioner to be in his opinion, entitled by law to such amount."

Before examining this section it is necessary to be informed of the meaning of certain words and expressions used therein. A 'member of the Fund' is an employee who has become liable to under section 10 to pay contributions to the Fund: he continues to be a member so long as there is any sum to the credit of his individual account in the Fund (see section 3(1) of the Act).

The expression "before becoming entitled to the amount standing to his credit in his individual account" has reference to section 23 under which provision is made for all the situations in which the amount in the fund standing to the credit of a member will be paid out to *him.*

The word 'nominee' is not defined in the Act; but its meaning is made clear in the section empowering the Minister to make regulations in respect of nominations. Sections 46(1) reads as follows:—

"The Minister may make regulations —

(*g*) in respect of the nomination by a member of the Fund, of a person or persons to whom the amount standing to the credit of that member's individual account in the Fund may be paid in the event of that member's death and the manner of revocation of such nomination;"

It is clear that the word 'nominee' in section 24 refers to a person nominated (in accordance with rules made by the Minister) by a member of the Fund and that such nominee would be the person entitled to be paid the amount standing to the credit of that member in the event of that member's death. To say of a nominee that he is not entitled to be paid the benefit upon the death of the member who nominated him is to deny to the term 'nominee' the very meaning which is attributed to it in the Act. Section 25 makes it quite clear that there are three categories of persons who become entitled to a benefit under the Act viz:

(1) those referred to in section 23,

(2) those referred to in section 24, and

(3) a nominee appointed by a member as the person entitled to be paid the benefit upon his death.

Section 23 deals with the circumstances in which the benefit is paid to the member himself, he being alive; upon death of a member, if there is a nominee or nominees, such nominee or nominees become entitled to the payment. The only area in which provision is further needed is where the member dies without having made a nomination at all or where at the death of a member a nomination has become defective by reason of the supervening event of death of a sole nominee or of the death of any one of several nominees. One would have expected section 24 (the only provision relating to entitlement to benefits other than section 23 and those relating to nominees) to deal with this aspect. But it *ex facie* deals with situations already covered by other provisions of the Act and in a manner which drains the word 'nominee' of the meaning attributed to it in other parts of the Act. For convenience of analysis this section can be split up into five parts:—

(1) where a member of the Fund dies before becoming entitled to the amount standing to his credit in his individual account, or

(2) where a member dies after becoming entitled thereto but before receiving such amount, or

(3) where no nominee has been appointed under regulations made under this Act to whom such amount should be paid in the event of the death of such member or

(4) where one nominee has been appointed and he is dead, or

(5) where more than one nominee is appointed and any one of them is dead,

then such amount shall etc.

Now, looking at the plain meaning of words, the only condition postulated to bring limb 1 or 2 into operation is the death of the member—and this, irrespective of the existence of a valid and operative nomination. If this is the result

intended by the legislature it is inconceivable why limbs (3), (4) and (5) were at all incorporated. It would have been sufficient, without the waste of so much legislative breath in repetition and tautology to enact that "where any member of the Fund dies" then payment shall be made in accordance with sub-paragraphs (a) and (b) of the section. Further, limbs (3), (4) and (5) are pregnant with meaning; they imply very clearly that the section has no application where there is a valid and operative nomination at the time of the death of the member. Are then limbs (1) and (2) to be confined to cases where there is no valid and operative nomination? It is not possible to reach this result because that is the very kind of case dealt with in limbs (3), (4) and (5). It is also obvious although there is no express postulation of 'the death of a member' for limbs (3), (4) or (5) to operate, the death of a member as contemplated in limb (1) or as contemplated in limb (2) is a condition precedent for limbs (3) or (4) or (5) to operate. There is thus a defect in the section as it stands. The absurd results to which it can lead are revealed when one tries to apply the section to the facts of the present case. As contended by Counsel for the appellant, the application of the 1st limb can only result in the executor being declared entitled to receive payment. As contended by Counsel for the 5th respondent, the clear and necessary implication of the 3rd and 4th limbs of the section is that the deceased member having made a nomination (of the 1st respondent) and that nominee being alive, the section has no application. Thus the application of section 24 as it stands yields the absurd answer that both the executor, representing the estate of the deceased member and the nominee, are each entitled to be paid the whole sum standing to the credit of the deceased member, and they should both be successful in these proceedings — a situation very reminiscent of the Caucus-Race in Alice in Wonderland, where everybody wins and there is no loser. That being the case, rather than say that the section is beyond interpretation, I would make use of the principle that a court, in interpreting a statutory provision is permitted, occasionally, in order to prevent manifest absurdity, and *ut res magis quam pereat*, to read '*and*' for 'or'. (See Maxwell, Interpretation of Statutes 11th Edition page 229). It seems to me that if the word '*or*' that appears after the 2nd limb is read as '*and*' one gets a perfectly sensible provision that accords with the scheme of the Act and avoids the internal inconsistencies and absurdities in the section as it stands at present. In my opinion, the section should be read as follows:—

> Where a member of the Fund dies before becoming entitled to the amount standing to his credit in his individual account, or
>
> where a member dies after becoming entitled thereto but before receiving, such amount, *and*
>
> where no nominee has been appointed under regulations made under this Act to whom such amount should be paid in the event of the death of such member or
>
> where one nominee has been appointed and he is dead, or
>
> where more than one nominee is appointed and any one of them is dead,
>
> then such amount shall etc.

The section it seems to me was intended to apply only in cases where a member dies *and* there is no valid or effective nomination. 'Nomination' is the only method provided by the Act by which a member of the Fund can control the destination of the amount standing to his credit in the event of his death. As observed earlier a member cannot make a testamentary disposition of such moneys. The content of sub-paragraphs (a) and (b) of section 24 are clearly directed towards a situation of 'intestacy' in regard to the amount in the Fund; and intestacy in this context can only refer to the absence of a valid or fully effective nomination.

Applying the section in this way I hold that having regard to the fact that in the present case there was a valid and effective nomination of a person who remained alive at the time of the death of Weerakoon, section 24 has no application; and no right for the executor to receive the money in question can be founded on that section. The 1st respondent being nominee is entitled to receive the benefit.

In the result the appeal fails and is dismissed. There will be no order for costs.

Appeal dismissed.

Present: **Weeramantry, J.**

RAM BANDA *v.* THE RIVER VALLEYS DEVELOPMENT BOARD

S.C. 31/1966 — *Labour Tribunal Case No.* 8/24713

Argued on: 28th February, 1968, 14th, 15th, 16th, 17th, 18th & 19th March, 1968
Decided on: 10th July, 1968.

Industrial Disputes Act No. 43 *of* 1950 — *Creation of Labour Tribunals by Amending Act No.* 62 *of* 1957 — *Rule making powers conferred on Minister by sections* 31A(2) *and* 39(1) *thereof — Regulation* 16 *enacted by Minister specifying time limit for making applications to a Labour Tribunal — Validity of such Regulation — Whether such Regulation belongs to field of substantive law or procedure — Whether necessary for giving effect to principles of Act — Power of Courts to declare it ultra vires even though approved by Parliament — Industrial Disputes Act, sections* 31*A*(2), 31*B*(1), 31*D*(3), 39(1) *and* (2) — *Interpretation Ordinance* (*Cap.* 2), *section* 17(1)(*e*).

Statutes — Retrospective operation — Presumption against interference with vested rights — Distinction between vested rights and existing rights — Whether Amending Act No. 62 *of* 1957 *applicable retrospectively to a termination which occurred prior to the introduction of the Act — No right to relief under Act in such a case.*

In terms of Regulation 16 of the Regulations made by the Minister of Labour under section 39 of the Industrial Disputes Act (No. 43 of 1950 as amended by Act No. 62 of 1957) an application by a workman to a Labour Tribunal for relief or redress must be made within 3 months of the termination of the workman's services.

The appellant in the present case had made an application to a Labour Tribunal on 14th August 1965. There was a finding of fact by the President of the Tribunal that the actual date of the termination of his services was in the year 1957. In terms of Regulation 16 the application was therefore out of time and it was rejected by the Tribunal as the date of dismissal was held to be more than three months anterior to the application.

The only point taken in appeal for the appellant was that Regulation 16 was *ultra vires* the powers conferred on the Minister by the Industrial Disputes Act. While contending that this Regulation was *intra vires*, counsel for the respondent took the further point that the appeal could not in any event succeed as at the date of the termination there was no Tribunal in existence to which an application for relief could have been made. Part IV A of the Act (brought in by Act No. 62 of 1957), which created the Labour Tribunals, was enacted in its entirety only on 31st December 1957 which was a date subsequent to the termination of the workman's services.

Held: (1) That Regulation 16 made by the Minister was *ultra vires*. This Regulation enacted a rule that was one of substantive law rather than procedure and would not, therefore, come within the scope of the rule-making powers conferred on the Minister by sections 31 A (2) and 39(1) of the Industrial Disputes Act, as amended; nor was such a rule necessary in terms of section 39(1)(h) for carrying out the provisions of the Act or giving effect to its principles.

(2) That the requirement of approval by Parliament found in section 39(2) of the Act, which made every regulation so approved "as valid and effectual as though it were herein enacted", did not have the effect of removing such regulations from the purview of the Courts once Parliamentary approval had been obtained.

(3) That although the regulation in question was *ultra vires*, the Act did not apply retroactively to a termination which had occurred prior to its introduction as this would involve an interference with vested rights for which there was neither express provision nor necessary implication in the Act. The workman in the present case had no right of access to the Labour Tribunal since his services had been terminated prior to the statute creating the Tribunals coming into operation.

Per **Weeramantry, J.**— (*A*)"The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone. It is a principle that has often been asserted, and bears reassertion, that just as the making of the laws is exclusively the province and function of Parliament, so is their interpretation the province and function exclusively of the courts. In the total and exclusive commitment of this function to the

care of the courts, tradition, law and reason all combine; nor is any organ of the State so well equipped in fact (see S.A. de Smith, Judicial Review of Adm. Action, p. 7.) or so amply authorised by law to discharge this function. It is self-evident that Parliament is not nor ever can be the authority for the interpretation of the laws which it enacts.

In the view stated above, the courts as the sole interpreters of the law are committed to the duty, despite section 39(2), to consider whether a regulation travels beyond the powers conferred on its maker. Any other view of the law seems fraught with danger to the subject for it would free the acts of creatures of the legislature from the checks and scrutinies which alone are effective in ensuring that the delegated authority while operating to the uttermost limits of its powers does not travel beyond."

(*B*) "But this does not justify us in reading into the plain terms of section 31B, provisions which are not in fact contained therein. It seems to me upon a plain reading of that section, that the peg upon which the workman must hang his claim to approach the Tribunal is not an industrial dispute but whatever is specified in the respective sub-sections of section 31B(1). In so far as sub-sections (a) and (b) are concerned, this peg would appear to be the termination of services; and immediately upon such termination there would accrue to the workman a right of access to the Tribunal. The section does not upon any reading require that the termination should as a condition of access to the Tribunal mature into an industrial dispute if indeed that were possible in law."

(*C*) "The word 'vested' would appear to have a legal meaning which is primarily understood as being 'free from all contingencies' (*Re Edmondson's Estates* 1868, L.R. 5 Eq. 389 at 396-7.) and the distinction between such a right and an existing right has been well explained by Buckley, L.J. in *West* v. *Gwynne*, (1911) 2 Ch. 1at 12, in these terms 'Suppose that by contract between A and B there is in an event to arise a debt from B to A, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager or the case of an insurance against a risk which an Act subsequently declares to be one in respect, of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective .... but if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B'. It was held that there was nothing in the language of the new enactment excluding from its scope contracts entered into prior to its date of operation. The rights affected were merely existing rights and there was no presumption against interference with existing rights."

Cases referred to: *United Engineering Workers' Union* v. *Devanayagam*, (1967) 69 N.L.R. 289; LXXII C.L.W. 35.
Abdul Cader v. *Sittinisa* (1951) 52 N.L.R. 536.
Institute of Patent Agents v. *Lockwood*, (1894) A.C. 347; 71 L.T. 205; 10 T.L.R. 527.
Minister of Health v. *The King* (*ex parte Yaffe*), (1931) A.C. 494; (1931) A.E.R. Rep. 343; 47 T.L.R. 337.
The Pinikahana Kahaduwa Co-operative Society Ltd. v. *Herath*, (1957) 59 N.L.R. 145.
Akilandanayaki v. *Sothinagaratnam*, (1952) 53 N.L.R. 385; XLVI C.L.W. 67 (D.B.)
Re Edmondson's Estates (1868) L.R. 5 Eq. 389.
West v. *Gwynne*, (1911) 2 Ch. 1

Dr. Colvin R. de Silva, with *R. Weerakoon*, *M. de S. Boralessa* and *M. B. Jayasinghe*, for the applicant-appellant.

C. Ranganathan, *Q.C.*, with *S. J. Kadirgamar*, *Q.C.*, and *S. Sharvananda*, for the employer-respondent.

Weeramantry, J.

The appellant in this case filed an application before a Labour Tribunal on August 14th 1965 seeking relief against his dismissal by the respondent. He averred that his services were terminated in 1965, inasmuch as a final appeal made by him to his employer was rejected in that year.

It was admitted however that the employee had not been working for the employer after 1957 and upon the material placed before him the President of the Tribunal has found that the actual date of termination was in the year 1957 and not in the year 1965. The workman's application was hence rejected by the Labour Tribunal by its order dated 20th September 1966 for the reason that the date of dismissal was more than three months anterior to the application, which was therefore out of time. The time within which applications for relief or redress must be made to Labour Tribunals is fixed by Regulation 16 made by the

Minister of Labour under section 39 of the Industrial Disputes Act as amended by Act 62 of 1957, and appearing in Gazette 11688 of 2nd March 1959. From this order the workman appeals.

The only point taken in appeal by the appellant is that Regulation 16 already referred to is *ultra vires* the powers conferred on the Minister, the appellant's contention being that this regulation in effect takes away from the workman a right given to him by the legislature, and to that extent nullifies or repeals the principal enactment. It is urged that inasmuch as the workman is on the expiry of the stated period deprived by this rule of his right of access to the tribunal, the rule falls outside the limited ambit of the Minister's rule making authority. Argument on this question of law was very exhaustive, extending over several days, and I must record my appreciation of the assistance I have derived from both Counsel on this most important question.

Learned Counsel for the respondent while strenuously maintaining that the rule is in fact *intra vires* has taken the further point, not taken before the Tribunal, that at the date of termination there was no tribunal in existence to which application could be made for relief.

I shall deal first with the question of *ultra vires* and thereafter consider the effect on this application of the circumstance that the Tribunal came into existence after the termination of the appellant's services.

In dealing with the question of *ultra vires*, we must first examine the terms in which the parent Act invests the Minister with his rule-making power.

The sections conferring these powers are sections 31A(2) and 39 (1) of the Act. Section 31A(2) states that regulations may be made prescribing the manner in which applications under section 31B may be made to a Labour Tribunal. Section 39(1) enables the Minister to make regulations in respect of the several matters enumerated in its various sub-sections, those relevant for our consideration being the matters specified in sections 39(1)(a), 39(1)(b), 39(1)(ff) and 39(1)(h).

It is submitted for the appellant that a regulation specifying a time limit for access to the Tribunal does not come within the scope of any of these enabling provisions, while the respondent contends that more than one of these enabling provisions would clothe the Minister with authority to make such a rule.

It would appear that sections 39(1)(a) and (b) do not amplify the area within which rules may be made but merely state that where matters are required by the Act to be prescribed or regulations are required or authorised to be made, the Minister may make them. The matters on which such regulations may be made must therefore be sought in other provisions of the Act. These are section 31(A)(2) on the one hand, and, on the other, the relevant subsections of section 39(1), which are subsections 39(1)(ff) and 39(1)(h). These provisions may be divided into two broad groups — 31A(2) and 39(1)(ff) which deal with questions of 'manner' or 'procedure' and 39(1)(h) which deals with matters necessary for carrying out the provisions of the Act or giving effect to its principles.

I shall deal first with the question whether the rule we are now considering is one relating to 'manner' or 'procedure' and so falling within the scope of sections 31A(2) or 39(1)(ff).

This phraseology necessitates an examination of the distinction between matters procedural and matters substantive, a distinction which must first be examined in the light of legal theory.

The distinction between substantive and procedural law is one of the traditional classifications of jurisprudence but it is well recognised that a given rule may, depending on its context and its application, move over from one department to the other or stand somewhat uncertainly on the border between them. Indeed legal history shows that important rules of purely substantive law have taken their origin in matters procedural.

There is no general principle which affords a test for deciding whether a given rule belongs to the realm of substantive law or to the realm of procedure, but it is important to look to substance and real effect rather than to form in determining this question. The fact that a rule appears in form to be procedural does not necessarily make it so, for what may be procedural in appearance may well be substantive in effect. Thus Salmond (Jurisprudence, 12th ed. p. 462) observes that "although the distinction between substantive law and procedure is sharply drawn in theory, there

are many rules of procedure, which, in their practical operation, are wholly or substantially equivalent to rules of substantive law." Rules relating to limitation are among the categories cited by the same authority as being wholly or substantially equivalent to rules of substantive law.

We must therefore examine this particular rule in its actual operation with a view to determining its true nature and whether even if it should appear to be procedural as contended for by the appellant, it is in fact substantive.

It must be observed preliminarily that limitation in respect of a workman's rights of access to Labour Tribunals for relief or redress is somewhat different in its juristic nature from limitation operating in bar of a litigant's right to approach a court of law for a remedy. A litigant who is barred by a rule of limitation from seeking redress in a court of law is not left merely with an empty shell of right in his hands. Though debarred from his normal remedy in a court of law there is real content in the residue of his rights and these can assume substance in a variety of ways as for example when a prescribed debt is looked upon as good consideration for a fresh contract in English Law or when under Roman-Dutch Law a prescribed debt which is paid cannot be claimed back on the ground of unjust enrichment.

On the other hand the imposition of a time bar upon the workman's right of access to a tribunal operates so as to strike at the foundation of the statutory benefits accruing to him from that portion of the Industrial Disputes Act relating to Labour Tribunals. In other words, unlike the litigant barred by limitation from an ordinary court of law, he retains not even the empty shell of those special rights which the Legislature has given him but sees them vanish away in their totality the moment the time bar springs into effect. Left with no access to the special tribunal created for him, he is destitute of all benefits conferred on him by the statute and is thrown back simply upon the common law contract as administered by the common law courts — that self-same subjection to the letter of his covenant which these legislative provisions were designed to mitigate and soften.

The total deprivation of right which results bears more resemblance to the operation of a rule of acquisitive prescription than of extinctive prescription or limitation, for what is destroyed is the right itself and not the remedy alone. In this sense the workman denuded of his right to relief stands in much the same position as a person against whom a rule of acquisitive prescription has run. It would ill accord with reality to describe such a rule destroying the total content of a right as one of 'manner' or 'procedure'.

In support of the contention that these rules are procedural, the analogy of the Civil Appellate Rules has been called in aid. The Civil Appellate Rules were made by the judges under a rule making power conferred on them by section 49(1) of the Courts Ordinance. This provision empowered the judges of the Supreme Court to frame, constitute and establish such general rules and orders of Court as to them should seem meet for regulating *inter alia* the form and manner of proceedings to be observed in the Supreme Court, the pleading practice and procedure not specially provided for by the Civil Procedure Code, and in particular the mode of prosecuting appeals.

In terms of this rule making power the Civil Appellate Rules were framed containing certain provisions specifying limits of time, as for example Rule 2 specifying the time for application for typewritten copies and Rule 4(b) specifying the time within which additional fees should be paid for typewritten copies. Such limitations of time imposed under the authority of enabling provisions relating to procedure are cited in support of the time limit imposed by the Minister under his enabling powers relating to procedure.

I consider that the analogy of the Civll Appellate Rules does not hold for the reason that there is no taking away thereby of any right given to an appellant but only the imposition of certain procedural requisites to be complied with by a person choosing to assert the right of appeal given to him. This right of appeal, it must be remembered, is itself not an unqualified right but is limited as to time and hedged in by various requisites laid down by the legislature itself. Such a right will by the terms of its creation automatically die if not asserted within the life-span set for it by the legislature. A regulation in regard to the manner of its assertion, in default of compliance with which it will not have been properly asserted, is a notion far removed from that of the imposition of a guillotine by Ministerial act upon the very right itself. There is no question therefore in regard to the Civil Appellate Rules, as there is in the present case, of the total deprivation of a right — far less of one so unlimited in time and so original in content as that we are now considering.

It is also pertinent to observe in regard to the right to appeal that although the legislature itself has specified a limit of time for its exercise, it has also provided safeguards in the form of leave to appeal notwithstanding lapse of time and relief by way of revision, to avoid hardship in its operation. Safeguards of this type are totally denied to a workman deprived by the Minister of access to the Tribunal. There is unmistakably in the latter case the extinction of a right and not a regulation of the manner of its exercise.

All these considerations point conclusively to the rule being one of substantive law rather than of procedure.

It is also possible to examine these provisions in a narrower way. Thus when section 31A(2) prescribes the manner in which an application may be made to a tribunal, this provision may perhaps be interpreted in the narrower sense that the manner therein referred to is the actual way in which rather than the time within which the application should be made. Again when section 39(1)(ff) speaks of procedure to be observed by a Labour Tribunal in proceedings *before that tribunal* it can be construed to exclude procedure relating to those 'pre-trial' stages when the matter is not yet before the Tribunal.

These constructions are of course not the only possible ones and it is perhaps permissible to read each of these sub sections more liberally so as to avoid the restricted meaning indicated in the preceding paragraph, and contended for by the appellant.

However in case of doubt that construction should prevail which will conserve rather than take away the rights which the legislature has conferred in terms of the Act, and the restricted meaning referred to above should be favoured, limiting as it does the scope of the power to whittle down those rights by regulation. It is also desirable in the interpretation of the terms in which delegated powers are conferred, to lean in favour of that construction which lessens rather than widens the ambit of the delegated law making power.

It is not of course necessary in the present case to rest the exclusion of these rules from those which the Minister is empowered to make, on the basis merely of such rules of construction, for the larger consideration that the rule appears to be substantive rather than adjectival in its effect would appear to exclude it from the ambit of the subsections we are now considering.

If, for the foregoing reasons, the rule we are considering pertains to substantive law rather than procedure, there would be difficulty in bringing it within the scope of sections 31 A (2) and 39(1)(ff).

Furthermore, a practical view of the scope of such a rule of limitation points strongly to the necessity for its enactment by the legislature itself. If, in the language of Viscount Dilhorne in *United Engineering Workers' Union* v. *Devanayagam*, (1967) 69 N.L.R. 289 at 298, the circumstances set out in section 31B(1) of the Act, form "the gateway through which a workman must pass to get his application before a tribunal", the Minister would by mere regulation be narrowing the gateway which the legislature has so created, or, to be more apposite, be closing it altogether, within such time as he may specify. A closure of the gateway so opened should be by act of the Legislature itself, and cannot be effected under the guise of a rule relating to mere procedure.

It may further be observed that the group of sections relating to Labour Tribunals is not altogether silent on questions of limitation of time for the performance of particular acts, as where section 31 D (3) lays down a time limit of fourteen days for the purpose of an appeal. Had it been the intention of the Legislature to limit the time within which a workman should apply to the Tribunal for relief or redress, the Legislature may well be expected in this context to have imposed such a time limit as well. Indeed the latter type of time limit is, as is observed in the next succeeding paragraphs, of a more fundamental nature than the mere specification of a time limit for appeal and if the one were deserving of regulation by the Legislature itself so would appear to be the other.

We must next consider whether the rule is necessary in terms of section 39(1)(h) for carrying out the provisions of the Act or giving effect to its principles. It may perhaps in this as in other fields of law be desirable to have rules of limitation but it is doubtful that the imposition of such a rule is a *sine qua non* for carrying out such provisions or giving effect to such principles. There is in regard to the right of access to a tribunal no such compelling necessity for limiting time, as there is, for example, in regard to the performance

of procedural steps in prosecuting a time-limited right of appeal. Rules regarding the latter have their justification both in good sense and in practical necessity for it is essential to the proper functioning of any tribunal however humble or exalted its place in the hierarchy of courts, that finality should attach to its orders. If these are sought to be questioned the steps involved in so doing must be expeditiously taken, lest the authority and effectiveness of such orders should suffer from lack of finality.

Different considerations apply in regard to the limitation of access to a Tribunal for its authority remains unaffected by the absence of such a rule. Tribunals are in no way disabled from carrying out the provisions of the Act and giving effect to its principles if employees are not debarred in this way, and in no view will these objects be rendered impossible of attainment. Stale claims must of course under any system be discouraged but the Act is not devoid of means within itself for giving effect to this desirable principle for it may well be that lapse of time would be a factor taken into account by the President in deciding what is 'just and equitable' in the circumstances of a particular case.

Indeed the legislature has thought it fit not to curtail the discretion of the Tribunal in any way in making an award which it considers just and equitable. There is no compelling need against this background to tie the hands of the Tribunal in regard to a matter which it is at liberty to take into account in its overall assessment of that which is just and equitable in the circumstances of the particular case.

The concession once made that the power exists to impose such a time bar, must lead also to a concession to the Minister of a wide and in effect uncontrolled discretion to determine the length of time which he considers most appropriate for this purpose. If a situation should ensue of the right being taken away from the workman after the lapse of a period such as a month or a week, the workman may well be without a means of redress against what is in effect his deprivation by mere Ministerial decree of a right which the supreme law-making authority has thought fit to give him.

It is not indeed the province of this Court, nor is it necessary for the determination of the legal question I am now considering, to express any view on the adequacy of the three-month period the Minister has chosen to impose. It may however well be contended that this period is all too short having regard in particular to the involved nature of the negotiation that often ensues upon termination of services, a process in which the workman and the employer are by no means the only parties involved. In the context of a tribunal freed to so large an extent of the shackles of ordinary law and procedure there is room for a plea that so stringent a rule of limitation seems strangely out of place. On the other hand, justification for such a rule may be sought in the very amplitude of the Tribunal's powers, from subjection to which the employer should be free after the lapse of a period of time. This result should however ensue from an Act of the legislature and not from the will of the Minister.

The provisions of section 39 (1) (h) do not therefore in my view bring the rule within the scope of the authority delegated to the Minister.

It has been sought to attract validity to these regulations through an application of the provisions of the Interpretation Ordinance. Section 17(1)(e) of that Statute states that where any enactment confers power on any authority to make rules, unless the contrary intention appears, all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in an Ordinance or Act of Parliament. This provision cannot however confer validity on rules not made within the rule making power.

I must now deal with the submission that, even if the regulation lie outside the scope of sections 31A(2), 39 (1)(a), 39(1)(b), 39(1)(ff) or 39(1)(h), it becomes clothed with legal validity through the operation of section 39(1). This subsection provides that any regulation made by the Minister shall not have effect until it has been approved by the Senate and the House of Representatives and notification of such approval is published in the Gazette, and that every regulation so approved shall be 'as valid and effectual as though it were herein enacted'.

It is submitted on behalf of the respondent that the requirement of approval by Parliament renders the regulations so approved tantamount to an Act of Parliament itself, the validity of which is not justiciable by the Courts. Learned Counsel for the respondent submits that such regulations are law because Parliament says they are law and that they draw their validity not from the law making power of the authority which

made them but from the fact of Parliamentary approval. I shall now proceed to deal with these submissions.

A provision similar to section 39(2) appears in section 49(2) of the Courts Ordinance which requires rules made by the Judges to be laid before the Senate and the House of Representatives. If within 40 days of being so laid, any such rules are objected to by either House this subsection provides that they may be annulled. If however they are not so annulled and are published in the Gazette, they are to come into force on publication in the Gazette, by virtue of subsection 3. The case of *Abdul Cader* v. *Sittinisa* (1951) 52 N.L.R. 536, would at first sight appear to lend support to the view that in terms of the Interpretation Ordinance submission to the Legislature would afford a sufficient answer to the challenge of *ultra vires*. In that case the Court observed (at p. 546) in regard to the argument of *ultra vires* which was there put forward, that the "provisions of section 14(1)(e) of the Interpretation Ordinance that all rules that have been submitted to the Legislature and have not been annulled have upon publication in the Gazette 'the force of law as fully as if they had been enacted in the Ordinance' under which they are made is a sufficient answer to the argument of *ultra vires*."

It will be seen that the reason there given based on the Interpretation Ordinance is incorrect. Reference to submission to the legislature and the absence of annulment would appear to have been taken not from the section therein referred to of the Interpretation Ordinance but from section 49 of the Courts Ordinance. The Interpretation Ordinance by itself does not therefore clothe such rules validity and does not carry any further the proposition that approval by Parliament renders the regulations valid and effectual. In the present case therefore the provisions of the Interpretation Ordinance do not stand in the way of an argument of *ultra vires*, and such an argument must turn on the construction to be placed on section 39(2) of the Industrial Disputes Act read by itself.

It is submitted for the respondent that in any event the word 'regulation' in section 39(2) refers to any regulation made in the purported exercise of powers under the Act whether such regulation be in fact within or without the terms of the power under which it is made. It seems to me however that the word 'regulation' in section 39 (2) necessarily refers back to the regulations already mentioned in section 39(1).

Another reason urged for contending that Parliamentary approval confers validity even on regulations outside the scope of the enabling powers was that Parliament, in so conferring its approval, would be interpreting such regulation as being within the enabling powers which it had conferred. However, I have elsewhere in this judgment referred to a principles which militates against this submission, namely that interpretation of the law is exclusively the province and function of the Courts and never that of Parliament, whose proper province and function is not the interpretation of the laws but the making of them. Furthermore, even if it be permissible in case of ambiguity in the construction of the statute, to look at rules made under its provisions, as an aid to an understanding of the statute, still, as Craies observes (Statute Law 6th ed. p. 158) too much stress cannot be rested upon the rules, inasmuch as they may be questioned as being in excess of the powers of the subordinate body to which Parliament has delegated authority to make them. Indeed it is doubtful whether such legislation can be referred to at all for the purpose of construing an expression in the Statute even in case of ambiguity. (Halsbury, 3rd ed. vol. 36 p. 401).

Reverting now to the main argument that the regulation is "as valid and effectual" as though contained in the main Act, because the Legislature says so, we must turn at the very outset to the observations of the House of Lords in the celebrated case of *Institute of Patent Agents* v. *Lockwood*, 1894 A.C.347.

There were in this case certain very strong expressions of opinion by Lord Herschell on the question whether such a provision rendered a Regulation so passed not subject to the scrutiny of the courts. Lord Herschell observed (at p. 359)

> "They are to be 'of the same effect as if they were contained in this Act'. My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the courts ... I own I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act', any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same

> Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

This strong expression of opinion gives such words in the Act their literal meaning and endeavours to reconcile any inconsistency between regulations and the parent Act on the basis of a conflict which must be resolved in favour of the parent Act, a notion quite apart from the notion of *ultra vires*.

Lord Herschell's view was shared by Lord Watson and Lord Russell of Killowen. Lord Morris however differed so strongly as to express the view that it was not merely within the competence of courts of justice to consider whether the rules were *ultra vires* but that it was also their duty to do so. He considered the question of the rules being laid before both Houses to be a matter of mere precaution, not conferring any imprimatur upon them. It was only a provision affording an opportunity to a person choosing to take advantage of it, of moving that they be annulled.

Whether the expressions of opinion by Lord Herschell and those who concurred in his view were necessary to the decision in Lockwood's case is questionable, for the decision in fact rested on a point of procedure. Moreover, the case is one where the rules sought to be imposed were in fact held not only by Lord Herschell but also by Lord Morris, who dissented, to be *intra vires* the general rules made by the Board of Trade. It cannot therefore be authority for the proposition — and indeed no authority was in fact cited for the proposition — that a rule which is in fact *ultra vires* the parent statute is given validity by the fact of a clause in the Act giving it the same efficacy "as if contained in the Act", nor has a single instance been cited of a refusal by the Courts to apply the vires test to rules made in such circumstances and falling outside the scope of the enabling power.

A clause to the effect that "the order of the Minister when made shall have effect as if enacted in this Act" was indeed held in *Minister of Health* v. *the King* (*on the prosecution of Yaffe*) (1931) A.C. 494 H.L., not to preclude the courts from calling in question an order of the Minister inconsistent with the provisions of the Act. It must of course be observed that the *Yaffe* case does not in principle contradict the rule enunciated in Lockwood's case for the reason that the statute in the *Yaffe* case did not require the order of the Minister to be placed before Parliament. In *Yaffe's* case there was no parliamentary manner of dealing with the confirmation of a scheme proposed by the Minister while in *Lockwood's* case Parliament itself was in control of the rules for forty days after they were passed and could have annulled them by motion to that effect. There has hence been no decisive rejection of the dicta in *Lockwood's case*, while at the same time it has never been held that such a clause would prevail over a rule which is in fact *ultra vires*.

It is somewhat strange that so important a question should have passed without affirmative judicial decision but this would indeed appear to be the position. To quote Halsbury "it was not uncommon in the past for a statute conferring legislative powers to provide that legislation made under those powers should have effect or be of the same force or effect, as if enacted in the Statute itself; and it was much canvassed though never decided whether such a provision precluded the courts from inquiring into the validity of legislation purporting to be made under the powers in question" (Halsbury, 3rd ed. Vol. 36, p. 492). So also Craies (Statute Law, 6th ed. pp. 309-10) describes the actual position as being uncertain.

The case of *The Pinikahana Kahaduwa Co-operative Society Ltd.* v. *Herath* (1957) 59 N.L.R. p. 145, presented an opportunity for the examination by court of a rule made by the Minister of Food and Co-operative Undertakings in terms of section 46(3) of the Co-operative Societies Ordinance.

That statute too provided by section 46(3) that no rule shall have effect unless approved by the Senate and the House of Representatives and notification of such approval was published in the Gazette, and it further provided that every rule shall upon publication in the Gazette "be as valid and effectual as though it were herein enacted."

In this case the majority of the Court held that the rule in question was *intra vires* the rule making powers granted by section 46(3). Basnayake C.J., however in a dissenting judgment took the view that the rule in question was *ultra vires* and proceeded to consider the applicability to an *ultra vires* rule of the subsection giving rules

the same force as if they had been contained in the Act, upon their passage through Parliament and the necessary publication in the Gazette. He observed, after referring to *Lockwood's case* and the *Yaffe's case* that *Lockwood's case* cannot be regarded as deciding that rules which are outside the scope of the rule making power cannot be questioned in a court of law merely because the enabling statute has words to the effect that such rules shall be valid and effectual. He also drew attention to the absence of any decision of the English Courts holding that a rule outside the scope of the enabling power gains validity when the Act declares that they shall be as valid and effectual as if contained in the Act, and expressed the view that the court had power to declare a rule *ultra vires* despite such a clause. The view of Basnayake, C.J., has much to commend it both for its logical approach and for its clear assertion of judicial power in a sphere appropriate to its exercise.

In the absence then of authority on the subject, we must turn for guidance to the general principles and considerations governing judicial review of administrative legislation, a problem which in modern times has assumed much importance in the context of the growing danger both here and elsewhere of an exercise by administrative authorities of powers in excess of those specifically conferred on them by Parliament.

It becomes necessary to see firstly what practical considerations necessitate judicial vigilance in this matter, and secondly what juridical basis exists for the exercise by the courts of such a power of scrutiny.

There has in Ceylon been, in particular during the period subsequent to the 1938 Revision of the Legislative Enactments, a large increase in the volume of subsidiary legislation, the bulk of which has during the period 1938 to 1956 alone, exceeded the total volume of such legislation in the years before. The three volumes which sufficed in 1938 to contain such legislation have had in 1956 to be replaced by seven of greater bulk; and these will assuredly prove insufficient in volume to accommodate what has been formulated since.

Maitland's observation nearly a hundred years ago (*Constitutional History of England*, p. 412.) that England was "becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes" seems therefore apposite also to this country and to this time; and in this context all inroads made by such delegated authorities upon the province of the supreme law making authority must be most closely watched. Any trespass on this preserve is fraught with attendant danger to the doctrine of parliamentary supremacy, however well intentioned in its origin and well regulated in its exercise.

It is true parliamentary control is sought to be retained over this type of legislation through a variety of means which include both negative regulation (subjecting them to annulment by Parliament within a specified period) and affirmative resolution (requiring the instrument to be laid before the House for a stated period and delaying its operation until expressly approved by resolution). But it becomes pertinent to inquire, if this be the sole ground of validity alleged, how effective such clauses are as an instrument of control in cases where the authority granted by the enabling statute is exceeded by the functionary who so acts.

Parliament can scarcely be expected to have the time or the inclination to give its detailed attention to the mass of rules so placed before it, and even in cases where affirmative approval is required, parliamentary scrutiny of such provisions cannot in any way be likened to the attention a bill receives from both Houses.

It is indeed the undoubted right of a member to voice his opposition to any regulation proposed, but it is doubtful that such a regulation can obtain the same full consideration as that given to a bill. Hence while in theory Parliament still reigns the supreme law giver, a large volume of the law by which the subject is governed can well be pressed into form not by the power of Parliament's considered will but by the drive of executive urgency.

Against such a background, to view section 39(2) as a cloak of validity which may be thrown around rules which in fact are *ultra vires* would be to erode rather than protect the supreme authority of Parliament. Regulations clearly outside the scope of the enabling powers and passing unnoticed in the heat and pressure of parliamentary business may then survive unquestioned and unquestionable; and functionaries manifestly exceeding their powers would thereby be able to arrogate to themselves a *de facto* legislative authority which *de jure* belongs to parliament alone.

For the foregoing reasons I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the *imprimatur* of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39(2).

The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone. It is a principle that has often been asserted, and bears reassertion, that just as the making of the laws is exclusively the province and function of Parliament, so is their interpretation the province and function exclusively of the courts. In the total and exclusive commitment of this function to the care of the courts, tradition, law and reason all combine ; nor is any organ of the State so well equipped in fact (see S. A. de Smith, *Judicial Review of Adm. Action*, p.7) or so amply authorised by law to discharge this function. It is self-evident that Parliament is not nor ever can be the authority for the interpretation of the laws which it enacts.

In the view stated above, the courts as the sole interpreters of the law are committed to the duty, despite section 39(2), to consider whether a regulation travels beyond the powers conferred on its maker, Any other view of the law seems fraught with danger to the subject for it would free the acts of creatures of the legislature from the checks and scrutinies which alone are effective in ensuring that the delegated authority while operating to the uttermost limits of its powers does not travel beyond.

I thus reach the conclusion that it is within the competence of this court to subject such regulations to the *ultra vires* test despite section 39(2) and for the reasons earlier set out, I hold the rule in question to be *ultra vires*.

I turn now to the question whether despite the rule being *ultra vires* and the workman therefore having a right of access to the Tribunal even after the lapse of three months, he has no right to relief inasmuch as the termination of his services was prior in point of time to the date on which the Act came into operation. The termination was in the year 1957 whereas part IV A of the Statute was enacted in its entirety on 31st December 1957, that is in any event after the termination of the workman's services.

Mr. Ranganathan for the respondent submits that this is an alternative ground on which the President of the Tribunal could have rejected the application, for the Statute cannot be given a retrospective effect enabling workmen whose services were terminated prior to 31st December 1957, to have recourse to Labour Tribunals. Inasmuch as all legislation must be presumed to be prospective rather than retrospective in its operation, part IV A of the Industrial Disputes Act cannot, in the respondent's submission, compel an employer whose liability at the time of termination was confined within the four corners of the contract to submit to a new tribunal exercising a new jurisdiction and using a new yardstick of liability — that which is "just and equitable" as opposed to that which the contract determines.

The question for consideration, then, is whether on a termination of a workman's services there is a vesting of the rights of parties upon the basis of the contract in such a sense that no questions connected with or flowing from the contract can thereafter except by express enactment or necessary implication be made justiciable by other Tribunals than the courts or by other standards than those afforded by the contract itself.

The appellant submits that questions of retrospective operation do not arise in the present case on the basis that the requisite for access to the Tribunal is an industrial dispute and not termination simpliciter and it is submitted that although the termination may have preceded the Act the industrial dispute resulting from it arose subsequently.

I shall deal first with this submission and in the light of my conclusions on this matter consider the applicability to this case of the principles relating to retrospective operation of statutes.

If termination simpliciter be the requisite for access to the tribunal then such requisite would on the facts of this case, have occurred prior to the enactment of section 31 A (2) and could therefore only be caught up restrospectively whereas if an Industrial Dispute be the requsite, such industrial dispute may well have occurred subsequent to 31st December 1957, the day on which part IV A came into operation, although the actual date of termination preceded this date. In the latter event these provisions could, operating prospectively, take in such a dispute.

As already observed, the provision of law under which the workmen has sought relief in this case is section 31 B (2). This section provides that

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

Sub-section (c) is inappliable to the present application and in any event no matters have been prescribed in terms of this sub-section. The application therefore hinges on the interpretation to be given to sub-sections (a) and (b).

Both these sub-sections appear to require or presuppose a termination of services. Is that, however, the only requisite, or should there further be an industrial dispute in existence in order to open the doors of the tribunal to a workman?

Dr. de Silva's submission is that although the word "termination" occurs in sections 31 B(1) (a) and (b), it is nevertheless only a dispute, that is to say an industrial dispute, which can bring a workman before the tribunal for redress. He contends that a dispute may emerge even years after the termination, for a continuous process of negotiation ensues between employer and employee, the latter perhaps acting in consultation with his trade union.

In other words it is submitted that such a dispute is a live and continuous thing ever altering in scope and content till it comes to a head at the moment of making an application to the tribunal. Inasmuch as one cannot therefore fix the point of time at which a matter crystallises into a dispute, termination does not, to summarise this submission, furnish a test of the time of accrual of the right to invoke the powers of a Labour Tribunal. So long as such dispute is established it matters little that the factual basis on which it rests stretches out into the past.

In support of this view reliance is placed on the explanation by the Privy Council of the scope and functions of Labour Tribunals in the recent case of *United Engineering Workers' Union* v. *Devanayagam*, (1967) 69 N.L.R. 289. It was there observed that it would be wrong to search for a cause of action before a Labour Tribunal in the sense in which one looks for such a pre-requisite to action in a Court of Law. No doubt, one does not have to search for a cause of action in the sense in which such a requirement exists as a pre-requisite to access to a Court of Law; and no doubt also these tribunals operate as the appellant points out in a setting entirely different from that in which courts of law function, for the tribunal's powers are not confined within the framework of the contract. But this does not justify us in reading into the plain terms of section 31 B, provisions which are not in fact contained therein. It seems to me upon a plain reading of that section, that the peg upon which the workman must hang his claim to approach the Tribunal is not an industrial dispute but whatever is specified in the respective sub-sections of section 31 B (1). In so far as sub-sections (a) and (b) are concerned, this peg would appear to be the termination of services; and immediately upon such termination there would accrue to the workman a right of access to the Tribunal. The section does not upon any reading require that the termination should as a condition of access to the Tribunal mature into an industrial dispute if indeed that were possible in law.

I am unable therefore to read into section 31 B(1) anything more than the legislature has put into it and nowhere do I find either in the scheme of the Act or in the terms of that section, any requirement of the existence of an industrial dispute as a pre-requisite to a workman's application. Having thus reached the conclusion that the event entitling the workman to approach the Tribunal has on the facts of the present case occurred prior to the creation of Labour Tribunals, I must next examine whether the Statute can operate retrospectively in regard to this termination without violence to the principle that vested rights should not be interfered with by later legislation.

Before I do so I must deal with a preliminary submission by learned counsel for the appellant who contends that we are here not concerned with the question whether rights are prospective or retrospective but only with the conciliatory functions of a settling or mediating institution. The

functions of these institutions, according to the preamble to the Statute, are the prevention, investigation and settlement of industrial disputes and the decision of disputes is not among these functions. This mediating institution it is submitted is not circumscribed in its powers of mediation by the circumstance that at the time of termination it was not in being. It is its duty, unfettered by traditional concepts of legal rights and liabilities, to give effect to those concepts of social justice which must weigh in equity and fairness, though not in strict law, in all decisions between employer and employee. Legal rights and duties in the strict sense are according to this submission left unaffected.

It would seem however that whatever be the true conception of the functions of these tribunals, the relief or redress which they may grant takes the shape of orders binding on the employer. The Labour Tribunal is empowered by section 31C (1) to make an order which appears to it to be just and equitable and this order becomes final and not questionable by any court in terms of section 31 D (1). Furthermore, there is a duty of compliance with this order imposed upon the employer in terms *inter alia* of section 40(1)(q) which makes it a punishable offence for an employer to fail to comply with any order made in respect of him by a Labour Tribunal. Such orders may in the result affect adversely that legal position stemming from the contract alone, in which the employer would but for these provisions have found himself at the date of termination. It would be incorrect to say therefore that legal rights and duties as between employers and employees are left unaffected. The matter cannot be more clearly put than to refer to the phraseology of section 31 B (4) which expressly permits a tribunal to grant relief or redress to an applicant "notwithstanding anything to the contrary in any contract of service between him and the employer."

The extent to which the creation of Labour Tribunals makes an impact on the legal position of the employer is best understood in the light of the legislation which had till then been enacted in respect of disputes between employers and employees.

The forerunner of the present legislation relating to the conciliation between employer and employee was the Industrial Disputes Ordinance No. 3 of 1931, an Ordinance providing for the investigation and settlement of industrial disputes. This Ordinance provided for the appointment by the Governor of commissions to inquire into matters relating to industry which might be referred to it by the Governor. The Controller of Labour could also take certain steps towards effecting a settlement and it was the duty of Conciliation Boards to bring about a settlement of disputes referred to them. Where settlements were so arrived at, the settlements were binding, but if not arrived at, the proposals for settlement recommended by the Board were published in the Gazette and any party failing to make a statement rejecting the settlement was deemed to have accepted such settlement. However a right of repudiation was expressly conferred, and there was thus no imposition of such terms upon an unwilling party.

There thereafter came upon the statute book the Industrial Disputes Act No. 43 of 1950 which was "an Act to provide for the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto." This Act provided for voluntary and compulsory arbitration in regard to industrial disputes. Reference to an Industrial Court was not a right given to an aggrieved workman but an act performable by the Minister in the exercise of a discretion expressly conferred on him. Reference to arbitration was entirely dependent on the consent of parties. [Section 3 (1) (d).]

The resulting position then was that subject only to the Minister's right, in his discretion, to refer a matter to an Industrial Court the employer was entitled to stand upon the terms of the contract.

His right so to insist upon the common law incidents of the contract remained unaffected until the amending Act No. 62 of 1957 brought about the creation of Labour Tribunals. Section 31 B (1) of this Act for the first time entitled an individual workman to approach a tribunal other than the normal courts of law for relief or redress. These tribunals were, as already observed, empowered to make orders binding upon the employer and exercised a power over him irrespective of his consent, thus subjecting him even against his will to liabilities not taking their origin in the contract.

We must therefore approach the problem of retrospective operation on the basis that the provision of law we are considering is one which had a real impact on legal rights and duties. Could this legislation which confers now rights on a workman upon the termination of his services operate retrospectively in respect of a past termination?

In *Akilandanayaki* v. *Sothinagaratnam*, (1952) 53 N.L.R. 385 D.B., the court was considering an amendment of the Matrimonial Rights and Inheritance Ordinance changing the definition of *thediathettam* prevailing under Ordinance No. 9 of 1911. It was held that no retrospective effect could in the absence of express words or necessary implication be given to new laws which affect rights acquired under the former law. These latter were held therefore to remain undisturbed by the amendment.

Section 6(3) of the Interpretation Ordinance was there described by Gratiaen, J. as giving statutory recognition to the rule of judicial interpretation adopted in all civilised countries that the courts should not lightly assume an intent on the part of Parliament to introduce legislation prejudicially affecting vested rights which have already been acquired.

This and other judgments of this court were cited in support of the principle that there is a presumption against an interference with vested rights, but I would prefer not to base this judgment on them as they are cases of amending legislation and thus fall within the scope of section 6(3) of the Interpretation Ordinance.

Part IV A of the Industrial Disputes Act, though nominally an amendment, in fact brought in for the first time a new scheme of tribunals empowered to grant relief of a kind not envisaged before. It would therefore be preferable to rest a discussion of this matter on the general principles of interpretation rather than on Section 6(3) of the Interpretation Ordinance.

The general principle is of course that statutes are presumed not to operate retrospectively so as to affect vested rights, and that courts would always lean in favour of that interpretation which leaves vested rights unaffected (Craies, Statute Law 6th edition p. 397).

While this proposition is not disputed on behalf of the appellant the point is taken that a distinction must be drawn between vested rights and existing rights. It is only in respect of vested rights that there is no presumption that statutes are not retrospective (Craies, Statute Law, 6th ed. pp. 397-8; Halsbury, 3rd ed., vol. 36 p. 423). It is correctly submitted that most pieces of legislation in fact do interfere with existing rights and that it is not the policy of the law to lean against such interference.

This submission necessitates an examination of the distinction between existing rights and vested rights for the purpose of the rule against retrospective operation.

The word 'vested' would appear to have a legal meaning which is primarily understood as being "free from all contingencies" (Re Edmondson's Estates 1868 L.R. 5 Eq. 389 at 396-7) and the distinction between such a right and an existing right has been well explained by Buckley, L.J. in *West* v. *Gwynne* (1911) 2 Ch. 1 at 12, in these terms "Suppose that by contract between A and B there is in an event to arise a debt from B to A, and suppose that an Act is passed which provides

that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective.....but if at the date of the passing of the Act the event has not happened then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B." It was held that there was nothing in the language of the new enactment excluding from its scope contracts entered into prior to its date of operation. The rights affected were merely existing rights and there was no presumption against interference with existing rights.

Where then prior to the enactment of the statute the transaction is done with and finished, where the contract no longer subsists, can it be said that the Statute merely affects existing rights or does it not rather strike at vested rights which have crystallised on the basis that the contractual nexus is no more? In other words, where the termination of the contract has already taken place, is an employer whose rights against and liabilites towards his employee are at that moment of time justiciable purely upon the basis of the contract, to be subjected to further claims upon him arising from that self-same employer-employee relationship which has come to an end?

I think not, for his rights are vested in him at the moment of termination, as are those of the employee, and in regard to such rights an Act is always presumed to speak as to the future. In the absence of express provision or necessary implication rights and obligations in any sense cannot be engrafted upon this dead relationship any more than the Rent Restriction Act or the Debt Conciliation Ordinance can without express provision or necessary implication apply to contracts terminated and done with when they came into operation.

There would appear to be no provision in the Act which expressly, or by necessary implication leads to the conclusion that the Act is retrospective in its operation. It is true that the definition of "workman" in section 48 expressly includes any person whose services have been terminated but this is only for the purposes of proceedings under the Act in relation to any industrial dispute. It is not therefore applicable to part IV A of the Act which is what concerns us here. Moreover, even in regard to industrial disputes there is room for a difference of view on the question whether a workman includes a past workman (See the dissenting judgments in S.C. 232 of 1967 ID. LT. 2/121/67 — S.C. Min. of 29th Feb. 1968).

The person given the right to ask a Labour Tribunal for relief or redress is a workman and in the absence of any necessary indication to the contrary I read this term as referring to a person who is a workman under the relevant contract of employment at or after the coming into operation of part IV A.

We thus arrive at the conclusion that although the rule in question is *ultra vires*, the Statute does not apply retroactively to a termination which has occured prior to the introduction of the Act inasmuch as this would involve an interference with vested rights for which there is neither express provision nor necessary implication in the Act.

The President has arrived at a finding of fact in the present case that the termination was prior in time to the statute creating Labour Tribunals and in the light of this finding I hold that the workman in the present case has no right of access to a Labour Tribunal.

This appeal cannot therefore succeed and is dismissed with costs.

Appeal dismissed.

Present: **Weeramantry, J.**

NAGANATHAN *vs.* DE SILVA, S.I. Police, Pettah*

S.C. 391/67

Application for Revision in M.M.C. Colombo case No. 42723

Argued and decided on: 27th February, 1968

Criminal Procedure Code, section 413—*Accused charged with possession of 'Jackpot' machines—Offence under sub-section* 3(*B*)(1) *of the Gaming Ordinance as amended by Acts No.* 26 *of* 1927 *and* 48 *of* 1961—*Acquittal of accused —Application by accused for return of the 'Jackpots' produced at trial—Refusal by Magistrate — Revision.*

The accused petitioner sought the revision of an order made by the learned Magistrate refusing an application made for the return of two '*Jackpot*' machines which were productions in proceedings in whichhe was charged with their possession in contravention of sub-section 3 (B)(1) of the Gaming Ordinance as amended by Acts No. 26 of 1957 and 48 of 1961 and acquitted.

It was contended for the petitioner that the learned Magistrate had in his order assumed (*a*) that inasmuch as the prosecution failed to prove its charge, the petitioner would also fail in establishing possession for the purpose of his application for return of the production;

(*b*) that upon the return of these implements and appliances, the petitioner would automatically be committing a fresh offence of possession to which he would be able to plead in defence the Courts' order returning the productions.

Held: (1) That the Magistrate was in error when he applied to the question before him the high standard of proo f required in a criminal prosecution.

(2) That it was the Magistrate's duty to address his mind to the powers vested in him under section 413 of the Criminal Procedure Code independent of any decision he may have arrived at in the criminal trial.

(3) That possession *per se* of these articles is not illegal as there may be circumstances though in very rare cases in which their possession would not amount to a criminal offence. This, therefore, was a fit case for a fresh inquiry.

Dr. Colvin R. de Silva, with *Ananda Wijesekera*, for the petitioner.

Lalith Rodrigo, Crown Counsel, for the respondent.

Weeramantry, J.

In this case the accused-petitioner seeks the revision of an order of the learned Magistrate relating to the disposal of two "jackpot machines." These machines were productions by the prosecution at a trial in which the accused was charged with possession of these machines in contravention of sub-section 3B(1) of the Gaming Ordinance as amended by Acts No. 26 of 1957 and 48 of 1961. The accused was acquitted at this trial.

Dr. de Silva for the petitioner submits that the learned Magistrate has in his order assumed that inasmuch as the charge of possession has not been proved by the prosecution, the petitioner would fail in establishing possession for the purpose of his application for the return of the productions. He argues that the standard of proof in regard to the criminal charge is the high standard of proof of conscious and exclusive possession beyond reasonable doubt and that it would be wrong for the Magistrate to apply this standard of proof to the matter before him on this application. It seems evident that the burden of proof of possession for the latter purpose is of a different order from the burden of proof which lies on the prosecution of proving conscious and exclusive possession beyond reasonable doubt, and that the Magistrate was in error in applying to the question

* For Sinhala translation, see Sinhala section, Vol. 16, Part 8 p. 21

before him the high standard of proof required in a criminal prosecution.

In terms of section 413 of the Criminal Procedure Code the Magistrate is empowered to make such order as he thinks fit for the disposal of any document or other property produced before him regarding which any offence appears to have been committed or which has been used for the commission of any offence. The Magistrate would ordinarily return such production to the person from whose possession it has been taken. This was therefore the matter which was before the Magistrate on this application, and it was the Magistrate's duty to address his mind to this question independent of any decision which he may have arrived at in the criminal trial.

This first submission of Dr. de Silva is thus entitled to succeed.

Dr. de Silva also attacks the Magistrate's view that the possession of these implements or appliances would in any event be an offence. The Magistrate reasons from this assumption that upon the return of these articles to the applicant, the applicant would automatically be committing a fresh offence of possession but would nevertheless be in the position of being able to rely in his defence upon the Court's order returning the productions to him. Dr. de Silva's submission is that there are circumstances in which the possession of these articles would not amount to a criminal offence. He draws attention in particular to section 21 of the Gaming Ordinance by which large categories of exemptions are created to all the offences set out in the Gaming Ordinance. This section states that nothing in the Ordinance shall apply to or in any way affect any resthouse in charge of an Urban Council or Town Council, or any proprietary club, or any duly licensed hotel, so long as certain conditions are satisfied.

Dr. de Silva submits that this provision is applicable to the entirety of the Ordinance as it stands today including the amendments which are engrafted on the original Act. He submits therefore that in the offence created by Section 3B(1) of the Act as amended by Amending Act No. 48 of 1961, the offence of possession of any implements or appliances, the importation of which is prohibited, is subject to the exemptions created by section 21 of the original Ordinance.

In support of his contention that possession *per se* is not necessarily illegal, learned counsel submits also that there is no evidence as to the date of importation of the articles in question, and that if those productions were imported before importation was prohibited, then possession ma conceivably not constitute an offence. An added argument on behalf of the appellant is that even though the possession of the implements as a whole may in certain circumstances constitute an offence, it is always possible for the person to whom the article is returned to dismantle the implements, seeing that they contain a number of constituent parts which are valuable in themselves. Possession of such constituent parts would constitute no offence.

It may be that possession does not constitute an offence only in a very rare class of case but it would appear that the necessary illegality of mere possession is an incorrect assumption underlying the Magistrate's order.

I think this is a fit case to be remitted to the Magistrate for a fresh inquiry into the question of the application for the return of the productions. The Magistrate will no doubt give his mind to such evidence in relation to possession as may be placed before him and he will also bear in mind and consider the question whether possession of these articles necessarily constitutes an offence under this Act as it stands amended today. The order of the Magistrate in regard to the destruction of the productions is set aside and the case sent back to the Magistrate for an inquiry into the question of possession with due regard also to the question whether an order for return must necessarily result in an illegality.

Set aside and sent back.

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

DE ALWIS *v.* DE SILVA*

S.C. Application No. 265/67

In the matter of an Application for the issue of a Mandate in the nature of a Writ of Mandamus.

Argued on: 19th & 27th September, 1967
Reasons delivered on: 22nd October, 1967

Mandamus, Writ of — Two petitions by public servant addressed to Public Service Commission and Secretary to the Treasury forwarded through respondent as Head of Department— Delay in receiving replies to petitions — Application for Writ of Mandamus praying for directions to respondent to forward petitions to respective addressees — Is the respondent under a statutory duty to do so?— Administrative Regulations laid down in Manual of Procedure — Do they have the force of law?

Ceylon (Constitution) Order in Council, Articles 72, 87(1), 87(2), 88 — *Interpretation Ordinance, section* 17(1).

Held: (1) That the Administrative Regulations laid down in the Manual of Procedure do not have the force of 'law' and that non-compliance with these rules cannot be enforced by mandamus. They only regulate a course of conduct for the guidance of public officers and are intended primarily to ensure the smooth functioning of work in Government Departments.

(2) That the duty to comply with the regulations is one which the respondent as a public servant himself owes to the Crown, whose servant he is, and not to the petitioner who is a subordinate officer in his department.

(3) That section 17(1)(e) of the Interpretation Ordinance contemplates only such rules, regulations or by-laws as are made under any enactment, which has been defined to include an Ordinance as well as an Act of Ceylon. An Order in Council does not fall within the definition of an enactment.

Cases referred to: *De Zoysa* v. *The Public Service Commission* 62 N.L.R. 493.
Venkata Rao v. *Secretary of State* (1937) A.I.R. (P.C.) 41.
The Queen v. *The Secretary of State for War* (1891) 2 Q.B. 326
Perera v. *Municipal Council of Colombo* 48 N.L.R. 66
Perera v. *Ceylon Government Railway Uniform Staff Benevolent Fund* 67 N.L.R. 191.

N. Sivagnanasunderam, with *L. S. Bartlet* and *K. Kanag-Iswaran*, for the petitioner.

H. L. de Silva, Crown Counsel for the respondent.

Alles, J.

At the conclusion of the argument we dismissed this application with costs and stated that we would give our reasons later. We now set down the reasons for our order.

The petitioner, while holding the post of Senior Deputy Director of Public Works in the Public Works Department, was interdicted from duty on 1st October 1960 on an allegation that he had accepted an illegal gratification. An inquiry into the allegation was held by a Tribunal appointed by the Public Services Commission which by its report held that the charge against the petitioner was not proved. The Public Services Commission however altered the findings of the Tribunal, found the petitioner guilty and directed that he be compulsorily retired for inefficiency as a merciful alternative to dismissal. Thereafter all pension rights and emoluments to which he was entitled during the period of his interdiction were paid to him. In March 1965, the petitioner addressed a newly constituted Public Services Commission

* For Sinhala translation, see Sinhala section, Vol. 16, Part 8 p. 23

which offered him re-employment in the public service from 1st March, 1966 in a post in the Department on a lower scale to that which he held previously, which offer the petitioner accepted.

On 20th November 1966 and 16th February 1967, the petitioner forwarded two petitions marked 'A' and 'B' on matters affecting his personal interests and his position in the Department to the Public Services Commission and the Secretary to the Treasury respectively, through the respondent who was the head of his Department. Copies of the petition marked 'B' had been sent direct to the Secretary to the Treasury and the Chairman and Members of the Public Services Commission, and the Secretary to the Treasury has replied on 13th September 1967 that he was unable to grant the petitioner any relief. The petition marked 'A' was forwarded by the respondent without any comments by him on 18th December 1966 to the Public Services Commission and the Commission has replied in the same terms as the Secretary to the Treasury.

The present application for the issue of a mandate in the nature of a Writ of Mandamus against the respondent was filed on 18th July 1967 and prayed that the respondent be directed to forward the two aforesaid petitions to their respective addressees. Since the addressees have considered the petitions and replied to them, the necessity for the issue of a Writ at the present juncture hardly arises. Counsel for the petitioner however submits that the petitioner should be awarded the costs of this application on the ground that he was constrained to come into Court at the time he did, and that there was at that time an unfulfilled duty owed to him by the respondents. We accordingly invited Counsel for the petitioner to satisfy us that a statutory duty of a public nature was owed by the respondent to the petitioner to forward the aforesaid petitions to their respective addressees; we now give our reasons why we are unable to accede to the submission of Counsel for the petitioner that a writ lies in this case.

The main complaint of the petitioner is that the respondent has failed to comply with the provisions laid down in the Manual of Procedure regarding correspondence and departmental procedure and in particular sections 46 and 47 (relating to the reports by Heads of Departments regarding petitions forwarded through them) and the rules made thereunder. These are Administrative Regulations contained in the Ceylon Government Manual of Procedure and it was the submission of Counsel that these Regulations had the force of law, a non-compliance with which attracted the Writ of Mandamus.

An examination of the history of these Regulations is necessary in order to consider whether Counsel's submissions are entitled to succeed.

Under Articles 39(1) and 39(2) of the Ceylon (State Council) Order in Council, 1931, the administrative procedure relating to the control and transaction of governmental business through the Executive Committees and Officers of State was regulated by rules made by the Governor. In pursuance of these Articles, the Governor prescribed the rules of procedure for the transaction of business concerning subjects or functions with which the Executive Committee and the Officers of State had to deal. These rules are contained in Government Gazette No. 7858 of 5th June 1931 and continued to be operative until 1946. In 1946 the Governor under Article 87(1) of the Ceylon (Constitution) Order in Council 1946 was empowered to modify, add to or adapt 'the provisions of any general order, financial regulation, public service regulation or other administrative regulation or order, or otherwise for bringing the provision of any such administrative regulation or order into accord with the provisions of this Order or for giving effect thereto.' In pursuance of these powers the Governor notified that 'the Administrative Regulations of the Government of Ceylon are by this Regulation modified, added to and adapted with effect from the date of the first meeting of the House of Representatives, to read as set out in the Schedule' '(vide Government Gazette No. 9769 of 22.9.1947). The Schedule contained the old Administrative Regulations suitably modified and adapted to the new constitutional arrangements. It is these regulations that have been published by the Government under the title of "Manual of Procedure" referred to earlier and they include provisions in regard to petitions by public officers. Under section 7(c) of the Ceylon Independence Order in Council, the validity of these Regulations was not affected and they were continued in operation until they were revoked or replaced by new Regulations. The Regulations therefore continue to be in operation up to the present day. It is however not every regulation made under the Order in Council of 1946 that has the force of law. Section 87(2) states that every regulation made under sub-section (1) of section 87 '*shall have effect* until it is amended, revoked or replaced by the appropriate Minister

or authority under this Order.' This language contrasts strongly with other sections of the Order in Council where it has been laid down that regulations made under such other sections shall *have the force of law* (vide sections 72 and 88(2)). It is not strange that the Order in Council while setting up an exclusive law making authority viz., Parliament, when it gave power to any other authority to make rules or regulations in a limited field or context, was careful to say which of such rules or regulations shall have the force of law and which not. The Order in Council clearly denied to regulations made under section 87 the force and character of law.

It was also submitted for the petitioner that the Interpretation Ordinance in section 17(1)(e) gave the force of law to rules published in the Gazette (which includes regulations and by-laws); but this provision contemplates only such rules, regulations or by-laws as are made under any 'enactment.' An enactment has been defined to 'include an Ordinance as well as an Act of Ceylon.' An Order in Council does not fall within the definition of an 'enactment.' This is perhaps another reason why the Order in Council states categorically that only certain regulations made under an Order in Council have the force of law.

In *De Zoysa* v. *The Public Service Commission* 62 N.L.R. 492, the present Chief Justice had occasion to consider whether the rules made under the Public Service Regulations had the force of law and after a consideration of a history of these regulations (which is similar to the history of the Administrative Regulations) held that the rules in relation to the retirement of public officers did not have the same legal effect as a statutory provision. Unlike the Administrative Regulations these Regulations seriously affect the tenure of office of public servants dealing as they do with the appointment, transfer and dismissal of public officers and the disciplinary procedure by which they should be governed. The Administrative Regulations only regulate a course of conduct for the guidance of public officers and are intended primarily to ensure the smooth functioning of work in Government Departments. The very nomenclature given to these Administrative Regulations — 'Ceylon Government Manual of Procedure' — indicates that these are a set of administrative rules necessary to regulate the transaction of business in Government offices. To apply the language of the Privy Council in *Venkata Rao* v. *Secretary of State* (1957) A.I.R. 31, 'the rules are manifold in number and most minute in particularity and are all capable of change.' To give the effect of law to such regulations is bound to hamper the efficient functioning of government business. That is probably the reason why in Regulation 20 all questions regarding the interpretation or application of any of these regulations were vested in the Secretary to the Treasury.

It seems to me therefore abundantly clear that the Administrative Regulations laid down in the Manual of Procedure do not have the status of 'law' and that non-compliance with these rules cannot be enforced by Mandamus. The above reasons would be sufficient to dispose of this application but Crown Counsel submitted two further grounds why Mandamus was not available in this case. The first was that the duty, if any, which arose under the regulations in question was one owed not to the petitioner but to the Crown. In support of this proposition Crown Counsel cited the observations of Charles, J. in *The Queen* v. *The Secretary of State for War* (1891) 2 Q.B. 326 at 335, 336. I entirely agree. The duty to comply with the regulation is one which the respondent, as a public servant himself owes to the Crown whose servant he is and not to the petitioner who is a subordinate officer in his Department. Crown Counsel's further submission was that for Mandamus to lie the applicant must have a legal right to the performance of some duty of a public and not of a private character (*Perera* v. *Municipal Council of Colombo*, 48 N. L. R. 66) and that even a duty arising under a statute may be a duty of a private kind (*Perera* v. *Ceylon Government Railway Uniform Staff Benevolent Fund*, 67 N.L.R. 191). In the instant case the duty arises, if at all, under a set of rules designed for the internal regulation of the duties and conduct of servants of the Crown and is devoid of any characteristic which would make it of a public nature.

There are no merits in this application either in law or on the facts and it must, therefore, be dismissed.

Tennekoon, J.

I agree.

Application dismissed.

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

L. P. R. PODIAPPUHAMY *v.* FOOD & PRICE CONTROL INSPECTOR, KANDY

S.C. 676/66 — *M.C. Madugoda* 2877

Argued on: October 1, 1967
Decided on: May 17, 1968

Price Control Act — Emergency Regulation making section 325 *of the Criminal Procedure Code inapplicable to offences under the Act — Does the Regulation apply to offences committed before Regulation became law — Is such Regulation desirable?*

Held : That the Regulation made on 27/11/67 by the Governor-General under section 5 of the Public Security Ordinance to the effect that section 325 of the Criminal Procedure Code shall not apply in the case of persons charged with an offence under the Control of Prices Act as amended by Act No. 16 of 1966 does not exclude the application of the said section 325 in the case of offences committed before the Regulation became law.

Approved: *E. A. Don Edirisinghe* v. *W. S. C. de Alwis, Food Control Inspector, Kalutara,* (1967) 74 C.L.W. 101.

Per **H. N. G. Fernando, C.J.** " I must take this opportunity to point out that section 325 of the Criminal Procedure Code gives expression to the fundamental principle of Justice that contraventions of the law, which are purely technical and not substantial, do not call for the exercise of the punitive powers of the Courts. The principle *de minimis non curat lex* receives practical application through the discretion vested in the Courts by section 325. I am fully conscious of the need to check profiteering in foodstuffs, and our Courts have not in recent months hesitated to impose severe sentences in profiteering cases. Thus the fetter on the discretion in regard to punishment, which the Emergency Regulation of November 1957 imposes for offences which occur after its enactment, is not in my opinion prudent or necessary. I have rarely come across any case in which the discretion of leniency conferred on the Courts by section 325 has been unreasonably exercised. If the Courts have that discretion even in cases of homicide, why not also in cases of profiteering?"

J. W. Subasinghe, with *T. Wickremasinghe*, for the accused-appellant.

A. N. Ratnayake, Crown Counsel, for the Attorney-General.

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

The accused in this case is shown by the evidence to have sold two loaves of bread for -/64 cents. The loaves were immediately weighed by a Price Control Inspector who found that the two loaves together weighed 30 1/2 ounces.

The controlled price of a 16 oz. loaf is -/32 cents and the Price Order provides that the controlled price of a loaf of a different weight must be calculated proportionately.

The position for the accused was that he is not a manufacturer of bread but that he buys about 15 loaves of bread every day from a Bakery. On each purchase all the loaves are weighed together in the scales at the Bakery, and the accused is therefore not aware of the actual weight of any particular loaf. Because the loaves are sold to him from the Bakery as 1 lb. loaves, he sells them as such and charges the controlled price of -/32 cents for each loaf.

The circumstances are certainly mitigatory, there being no proof of actual intention to sell bread at a price over the controlled price.

There are conflicting judgments of this Court on the question whether there is power to act under section 325 of the Criminal Procedure Code in the case of contraventions of Price Control Orders. The latest of these judgments was that of Samerawickreme, J. in S.C. Appeal No. 163/67 with application No. 186/67 decided on 6th December 1967.* In my opinion, it correctly sets out the legal position.

A Regulation was made on 20th November, 1967 under section 5 of the Public Security Ordinance to the effect that section 325 shall not apply in the case of persons charged with an offence

* See 74 C.L.W. 101.

under the Control of Prices Act as amended byAct No. 16 of 1966. This regulation removes any doubt as to the question whether section 325 was applicable despite the enactment of Act No. 16 of 1966. In the present case the offence was committed and the trial concluded prior to 27th November, 1967, and even the petition of appeal was filed on 3rd May 1967, long before the Emergency Regulation was enacted. The Regulation does not exclude the application of section 325 in the case of offences committed before the Regulation became law.

I must take this opportunity to point out that section 325 of the Criminal Procedure Code gives expression to the fundamental principle of Justice that contraventions of the law, which are purely technical and not substantial, do not call for the exercise of the punitive powers of the Courts. The principle *de minimis non curat lex* receives practical application through the discretion vested in the Courts by section 325. I am fully conscious of the need to check profiteering in foodstuffs, and our Courts have not in recent months hesitated to impose severe sentences in profiteering cases. Thus the fetter on the discretion in regard to punishment, which the Emergency Regulation of November 1967 imposes for offences which occur after its enactment, is not in my opinion prudent or necessary. I have rarely come across any case in which the discretion of leniency conferred on the Courts by section 325 has been unreasonably exercised. If the Courts have that discretion even in cases of homicide, why not also in cases of profiteering?

Acting in revision, I set aside the conviction and sentence passed on the accused, and without proceeding to conviction I warn and discharge him.

Set aside.

Present: **Samerawickrame, J.**

E. A. DON EDIRISINGHE *v.* W. S. C. DE ALWIS, FOOD CONTROL INSPECTOR, KALUTARA

S.C. 163/67 *with Application No.* 186/67 — *M.C. Matugama No.* 6149

Argued on: 16th July, 1967.
Decided on: 6th December, 1967

George Perera, for the accused-appellant/petitioner.

Aloy Ratnayake, Crown Counsel for the Attorney-General.

Samerawickrame, J.

There is an appeal as well as an application in revision in respect of the conviction and sentence in this case. On his own plea, the appellant has been convicted of selling one-eighth pound of dry chillies at a price in excess of the maximum controlled retail price and has been sentenced to serve a period of rigorous imprisonment for one month and to pay a fine of Rs. 50/-.

The appellant is a young man who was studying for the University Entrance Examination. He has committed this offence while he was in temporary charge of his brother's boutique. He has passed the Senior School Certificate Examination with a distinction in Arithmetic and a credit pass in Buddhism. The Rev. Principal of the Amara Vidyalaya, where he is studying, has certified that he "has a high sense of respect for tutors, is clever in studies and well behaved and obedient". He is President of the Students' Association and teaches at the Dhamma School attached to the Sri Gangarama Viharaya. The Appellant appears to be a young man of promise and the conviction and sentence of imprisonment will have the effect of blasting his future prospects. He has no previous convictions.

I think that this is a fit case for the application of Section 325 of the Criminal Procedure Code. A regulation made on 27th November, 1967, by the Governor-General under section 5 of the Public Security Ordinance provides as follows:—

> "The provisions of Section 325 of the Criminal Procedure Code shall not apply in the case of any person who is charged before a Magistrate with an offence under the Control of Prices Act as last amended by Act No. 16 of 1966."

It is unnecessary, for the purposes of this case, to consider whether the Regulation will apply to a person charged in proceedings commenced before its enactment. It is sufficient that on the date the appeal and application were argued and order was reserved, Section 325 was applicable and that a party is not to be prejudiced by delay by reason of the Court reserving its order. I think Section 325 of the Criminal Procedure Code may be applied in this case.

Acting in revision, I set aside the conviction and sentence passed on the accused and without proceeding to conviction, I warn and discharge him. I also order him, under Section 325(3) of the Criminal Procedure Code, to pay a sum of Rs. 400/- as costs of the proceedings. The appeal is formally dismissed.

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

MARIKKAR MOHAMED JALALDEEN

v.

P. A. S. JAYAWARDANE, FOOD & PRICE CONTROL INSPECTOR

S.C. No. 1163/67 — *M.C. Kegalle Case* 68375

Argued on: April 2, 1968
Decided on: April 22, 1968

Control of Prices (Food) Act — Price Control Order fixing wholesale and retail prices of Condensed Milk — Sale of "Farm Brand" Condensed Milk 14 oz. tin in excess of controlled price of 90 cts. — Charge and conviction for contravening price order — Is the statement in the label of the tin as to weight of contents, hearsay?—Evidence Ordinance, section 114—Presumption to be drawn thereunder.

Held: (1) That when a retailer sells an article bearing a label which specifies the quantity of its contents e.g. "14 oz. condensed milk", "1/2 lb. butter" or "20 Cigarettes" he adopts the specification in the label and admits by his conduct that the weight or number of the contents without further proof.

(2) That in such circumstances the presumption under section 114 of the Evidence Ordinance as to "the existence of any fact which the court thinks likely to have happened regard being had to the common course of human conduct ..... and public and private business" must be applied.

Disapproved: *Yapatillake* v. *Piyadasa* (1968) LXXIV C.L.W. 33.

Colvin R. de Silva, with *P. D. W. de Silva* and *I. S. de Silva*, for the accused-appellant.

L. D. Gurusamy, Crown Counsel, for the Attorney-General.

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

The charge in this case, of which the appellant was convicted, was that he sold a 14 oz. tin of Farm Brand Condensed Milk for Rs. 1/-, a price in excess of the maximum retail price of -/90 cents for the said tin fixed by a Price Control Order published in Gazette No. 14 752/2 of June 9, 1967. I would ordinarily have dismissed the appeal without stating reasons, but for the statement of Counsel that the point of law which Counsel raised has been recently upheld by this Court in S.C. 1132/67 (S.C. Minutes of 31st March, 1968)*. The point, briefly stated, is that there was no evidence tendered by the prosecution to prove that the tin of milk sold by the appellant contained 14 oz. of condensed milk, and that in the absence of such evidence the appellant could not have been lawfully convicted of the offence charged. It is necessary first to refer to the relevant part of the Order alleged to have been contravened in this case:—

"By virtue of the powers vested in the Controller of Prices (Food) by section 4 of the Control of Prices Act (Chapter 173) I, Pinnaduwage Arthur Silva, Control of Prices (Food) do by this Order —

(*i*) fix with immediate effect the prices specified in Columns 2 and 3 of the Schedule hereto to be the maximum retail prices per tin (or bottle) respectively, above which the brand of Milk food specified in the corresponding entry in Column 1 of the Schedule shall not be sold within the Island of Ceylon;

(ii) Direct that for the purpose of this Order —

(*a*) Any sale of any quantity of an article specified in Column 1 of the Schedule for the purposes of resale or any sale of an article specified in Column 1 of the Schedule in a quantity of one dozen tins (or bottles) or more at a time shall be deemed to be a sale by wholesale;

(*b*) Any sale of any quantity of an article specified in Column 1 of the schedule less than one dozen tins (or bottles) at a time for the purpose of consumption or use shall be deemed to be a sale by retail:"

The Schedule to the Order contains a list of milk foods, and of the corresponding wholesale prices and retail prices fixed by the Order, and a part of the Schedule is here re-produced:—

* See 74 C.L.W. 33

SCHEDULE

Column DESCRIPTION	*Column 2 Maximum wholesale price per dozen Tins (or bottles)* Rs. Cts.	*Column 3 Maximum Retail price per tin (or bottles)* Rs. Cts.
Condensed Milk:		
Milk Maid Condensed Milk	14 oz tin 11.35	1 0
Tea Pot Condensed Milk	14 oz tin 10.85	0 95
Red Ruby Condensed Milk	14 oz tin 10.35	0 90
Ideal Evaporated Milk	14½ oz tin 11.75	1 05
Farm Brand Condensed Milk	14 oz tin 10.20	0 90

The Order fixes, in respect of each brand of milk, a wholesale price, and a retail price; and we are here concerned only with the fixation of retail prices. Paragraph (1) of the Order fixes the prices specified in column 3 of the Schedule as the maximum retail prices per tin for the different brands of condensed milk specified in column 1, and paragraph (ii) (b) of the Order provides that the sale of any quantity of an article specified in Column 1 of the schedule less than one dozen tins ..... shall be deemed to be a sale by retail.

There is thus no reference in the body of the Order to the *quantity* of condensed milk sold in any case, and the Order fixes retail prices only for **tins** of milk. The description of the "controlled" tins is contained in column 1 of the Schedule, the appropriate description for present purposes being the last in the part of the Schedule which has been re-produced above, namely "*Farm Brand Condensed Milk* 14 *oz. tin*" ,and the retail price fixed in column 3 for such a tin is -/ 90 cents.

Legal considerations apart, what then was the intention of the Controller of Prices when he made the Order, and what should and did a retailer and members of the public understand by this Order? Common-sense can furnish only one answer, namely that -/90 cents is the maximum price for a 14 oz. tin of Farm Brand Condensed Milk. Thus the "controlled article" for present purposes is simply the 14 *oz. tin of Farm Brand Condensed Milk*.

The Schedule to this Price Control Order specifies 16 Brands of Condensed Milk, and refers in all cases but one to 14 oz. tins. On any common-sense view, why did the Controller in 15 of the 16 cases refer to 14 oz. tins? Was it because the Controller knew that each and every tin available for sale in Ceylon had been actually weighed by some appropriate authority and found to contain 14 oz.? Was it because every retailer of condensed milk is supposed to weigh each tin before he exposes it for sale, and because he was to be free to sell a tin *at any price* if he found on weighing that in fact the tin contained, not exactly 14 oz. of condensed milk, but something less or something more than 14 oz. ? Or was it because all 15 brands of condensed milk are in fact marketted in tins bearing labels stating that the nett weight of the contents, or the gross wieght of the tin is 14 oz.? It seems to me that common-sense affords only the answer that the Controller, the dealer and the public must know that the order fixed prices for tins labelled 14 *oz. tins.*

The judgment in the recent case proceeds on the basis that the statement in the label of a tin, as to the weight of the contents, is hearsay, and therefore is not evidence of the actual weight. If that be so, then the statements on the label "Farm Brand", and "Condensed Milk", are equally hearsay, and there is thus no proof either that the accused sold Condensed Milk or that what he sold was the brand referred to in the Schedule to the Price Order as "Farm Brand". Accordingly a prosecution cannot succeed unless there is other evidence to prove a (*a*) that the tin contained condensed milk, (*b*) that it is of the Farm Brand and (*c*) that the contents weigh 14 oz. I myself cannot think of any means by which there can be proof that milk is of a particular brand; for all we know, the composition of different brands may be identical.

It is perfectly clear in my opinion that the Order was intended to apply to the sale of tins identifiable by the labels which they bear, and that references in the Order to the three matters mentioned at (*a*), (*b*) and (*c*) above were intended to distinguish, though the labelling, the different varieties of condensed milk ordinarily on sale. Particularly with regard to weight, it is absurd to suppose that the Controller of Prices knew the actual weight of all tins exposed for sale, or that he expected a dealer to know for himself the weight of every tin he sells. As to the actual weight of the contents of a tin, there are three possibilities:—

(1) that the weight is 14 oz;

(2) that the weight is less than 14 oz;

(3) that the weight is more than 14 oz.

In the case (1), there is a clear contravention if the tin is sold at more than the controlled price.

In the case (2), the Order surely intended this to be a contravention: if the tin contains less than 14 oz. the sale of the tin at a price higher than the controlled price is a more serious contravention than is the first case, The third possibility, that the tin might contain *more than* 14 *oz.*, is contrary to common-sense. The presumption in section 114 of the Evidence Ordinance, as to "the existence of any fact which the Court thinks likely to have happened, regard being had to the common course of human conduct ..... and public and private business" must be applied in this context. I myself have never enjoyed the pleasant surprise of finding that the quantity of any article sold in a tin or bottle or packet is greater than the quantity stated in the label. It would be absurd to suppose that manufacturers of condensed milk adopt any uncommon course of conduct or business practice, and that they under-state in their labels the weight of milk which they sell. The only result therefore, which actual weighing in these cases could achieve is to establish, either that the contents weigh 14 oz., or that they weigh less than 14 oz. But each such result would mean that the seller contravened the Order. That being so, any actual weighing would serve no purpose.

I hold also that when a retailer sells an article bearing a label which specifies the quantity of its contents, e.g. "14 oz. condensed milk", "1/3 lb. butter" or "20 cigarettes", he adopts the specification in the label, and admits by his conduct that the weight or number stated on the label is the weight or number of that which he sells. That admission is *prima facie* evidence of the weight or number of the contents without further proof. If it is the seller's case that the weight or number was in fact different, the burden lies on him to prove the actual weight or number of the contents.

For these reasons, I must express firm disagreement with the judgment to which I have referred. The appeal is dismissed.

Appeal dismissed.

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

GIRAN APPUHAMY *v.* ARIYASINGHE & 26 OTHERS

S.C. 195/66 (*Inty*) — *D.C. Gampaha* 8207/*P*

Argued on: January 31, 1968
Decided on: March 3, 1968

Partition Action — Exclusion of a portion of land as a separate land the title to which is in some other person — Transfer of such excluded portion pending partition — Is it rendered void by section 67 *of the Ordinance*?

Res judicata — Point of contest allowed by trial Judge to remain as a guide for him, not for enabling any parties to obtain adjudication on it — Effect of a finding on such point of contest.

Held: (1) That where a particular portion of land is excluded from a partition on the ground that some person or persons have title to it as a separate land, section 67 of the Partition Ordinance does not render void dealings with that portion during the pendency of that action.

(2) That if a party to an action set out a claim of title, and if a finding as to his title has to be reached and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion or inclination to the contrary which the trial Judge might entertain.

Case referred to: *Perera* v. *Attale* (1944) 45 N.L.R. 210.

E. S. Amerasinghe, for the plaintiff-appellant.

No appearance for the respondents.

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

The corpus of this action for partition is described in the plaint as Lots 5 and 6 depicted in Plan No. 543 dated 15th May 1952. That plan was prepared for the purposes of an earlier partition action, No. 2612/P D.C. Gampaha. One of the two persons who were plaintiffs in that action is the 8th defendant in the present action. The present plaintiff and one Siman Appu intervened

in that action and filed a statement of claim asking for the exclusion of Lots Nos. 5 and 6 of the land depicted in the Survey Plan No. 543. In so doing, they pleaded also that they had acquired prescriptive title to those two lots. These claims were disputed in that action, and judgment was delivered in 1958, the District Judge upholding the claim of prescription and excluding these 2 Lots 5 and 6 from the partition.

Although the present plaintiff and Siman Appu jointly intervened in the earlier action, it would appear that the major interests in Lots 5 and 6 had belonged to Siman Appu, and that at the time when their statement of claim was filed the present plaintiff had a claim only to a small share in these Lots. But in January 1952 and April 1952, while the earlier action was pending, Siman Appu executed two deeds of Gift in favour of the present plaintiff, and the latter's claim of title in the present action is based largely on these two deeds.

One of the substantial points of contest in the present action is that these two deeds, having been executed during the pendency of action No. 2612/P ,were void by reason of the provisions of section 67 of the Partition Act. On this point the learned Judge who tried the present action has held that the deeds were void, and that is the principal reason why this action has been dismissed

A similar point was considered by this Court in the case of *Perera* v. *Attale* (45 N.L.R. 210). In that case an action for partition had been dismissed on the ground that the land had been possessed dividedly and not in common. During the pendency of the action, the owner of one of the Lots transferred her interests and the transferee also thereafter executed another transfer. In subsequent proceedings these transfers were challenged on the ground that they were void because they were executed during the pendency of a partition action, but this Court held in appeal that section 17 of the old Partition Ordinance did not render the transfers void. De Kretser, J. made the following observations in the judgment of this Court:—

> "The present is a case of many separate lands being included in a partition action and the action was dismissed on the ground that the land was not held in common. Each owner of each lot was not therefore affected by the abortive partition action and was free to dispose of his land as he chose. As Wood-Renton J. remarked in *Abeysekera* v. *Silva* (1 C.A.C. 37) "undivided" in section 17 means undivided in the eyes of the law. Here the larger land had long ceased to be undivided in the eyes of the law."

The facts of the present case are not on all fours with those of the case just cited, because in the present case the partition action 2612/P was not dismissed, but it seems to me that the ratio decidendi of the cited case is applicable to the present facts. Although a partition decree was entered in action No. 2612/P, Lots 5 and 6 were excluded from that decree on the ground that the present plaintiff and Siman Appu had, at the time when action was filed, already acquired a title by prescription to these Lots. To use the language of Wood-Renton, J. which was quoted in the cited case, Lots 5 and 6 were thus not "undivided in the eyes of the law," because by reason of the acquisition of prescriptive title to these Lots, they had ceased to be an undivided part of the larger land.

De Kretser, J. also referred to a situation in which the plaintiff in a partition action includes another's separate property in the corpus of the action, and pointed out the injustice of preventing the true owner from dealing with his property merely because of a false allegation concerning the property made in a partition action.

The learned District Judge in the present action thought that the decision in 45 N.L.R. is no longer applicable because the provision of law which now applies is Section 67 of the new Partition Act. Section 17 of the old Ordinance prohibited alienations of an undivided share or interest in any "property as aforesaid', that is to say, in any property which "shall belong in common to two or more owners", and the decision in 45 N.L.R. was in effect that the alienation of property pending a partition action is not void if in law it does not belong in common to the co-owners of the land which is the subject of the partition action.

Section 67 of the Partition Act prohibits the alienation pending a partition action of an undivided share or interest in the land to which the action relates; and the expression 'partition action' is defined as an action for the partition or sale "of land or lands belonging in common to two or more owners". Hence, if a land, which is included by a plaintiff in the corpus of a partition action, is in law is a separate land, and is excluded from the partition on that ground, it is not a land belonging in common to the owners of the land ultimately partitioned. It seems to me therefore that the construction placed by de Kretser, J. on the former section 17, namely that it rendered void only the alienation of shares of a land which is

properly the subject of a partition action, must be placed also on section 67 of the new Act.

The partition action which was referred to in the case of *Perera* v. *Attale* had been instituted in 1928 and was ultimately dismissed in 1937 or 1938; and unfortunately it is not uncommon that partition actions may be pending for very long periods. If then it turns out at the final determination of a partition action that some portion of the corpus described in the plaint did not in law properly form part of the subject of the action, section 67 of the Partition Act, if construed according to the opinion of the trial Judge in this case, can have extremely harsh consequences. If that construction be correct, the true owner of that portion of land would be unreasonably deprived of the liberty of selling or donating his property. The ordinary principle, that section 67 does not prevent dealings in the interest to be ultimately allotted in a partition decree, would be of no avail to such an owner; for his right is, not that any interest will be allotted to him in the decree, but that his property cannot be the subject of partition. Accordingly, even if there be any slight doubt on the question, I much prefer to lean towards the construction that the Legislature, in enacting section 67, had no intention of rendering the decision in that case inapplicable in connection with actions under the new Partition Act.

I would hold for these reasons that where a particular portion of land is excluded from a partition on the ground that some person or persons have title to it as a separate land, section 67 does not render void dealings with that portion during the pendency of that action. The learned District Judge therefore erred in holding to be void the deeds of 1952 under which the present plaintiff claimed title to Lots 5 and 6.

The case for the plaintiff was that he is entitled to the entirety of Lots 5 and 6, less an undivided half acre, and that the 1st defendant is entitled to that undivided half acre. Although a number of persons intervened and filed statements of claim, the only claims which were pressed were those of the 3rd, 4th and the 7th defendants. The 3rd defendant claimed a title by prescription to Lot A of the land depicted in Plan No. 1990 prepared in this action. That claim was rejected by the learned trial Judge. The 7th defendant claimed interests under a deed No. 33091 of 3rd January, 1952 alleged to have been executed by Siman Appu. The learned trial Judge however held that the 7th defendant failed to prove the due execution of this deed. The 4th defendant, a man by the name of W. A. Jan Singho claimed certain interests under a person referred to in plaintiff's pedigree. This 4th defendant was a party to action No. 2612/P. having been the 19th defendant in that action. Counsel for the plaintiff has argued in appeal that the 4th defendant, as well as all other persons who were parties to action No. 2612/P, can now have no claims because the finding that the present plaintiff and Siman Appu had title by prescription to Lots 5 and 6 binds those parties as *res judicata*. This argument was rejected by the trial Judge owing to a quite unusual circumstance.

When the points of contest were framed in action No. 2612/P the learned Judge who tried that action referred *inter alia* to the point raised as to the prescriptive rights of the present plaintiff and Siman Appu to Lots 5 and 6, and he observed that he was "averse in a partition action to adjudicate upon points of contest which may be used as *res judicata* in some other action," and he proceeded to state that he was allowing this point of contest to remain" not for the purpose of any parties obtaining an adjudication, but purely as a guide for me." These observations have influenced the trial Judge in the present action to hold that the earlier finding on prescription is not *res judicata*.

It is clear however from the judgment in action No. 2612/P that the question of the prescriptive rights to Lots 5 and 6 was actively contested, and that the finding in favour of the present plaintiff and Siman Appu was based on convincing evidence of their exclusive possession. In fact therefore, despite those earlier observations, the point of contest No. 5 was not merely used or regarded as a guide for the Judge. In any event, if a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion or inclination to the contrary which the trial Judge might entertain. On this ground, the claim of the 4th defendant in the present action should have been rejected.

The 26th defendant made no statement of claim prior to commencement of the trial. He was called on behalf of the 3rd defendant as a witness at the trial, presumably in an attempt

to support the case of the 3rd defendant. In the course of his cross-examination he stated as follows:

"I was not a party to that case No. 2612/P. I had rights in this land from my mother Punchihamy. I sold those rights to Siman.

Q. After that you had no rights in this land
A. Still I own another 1/64 share.

Q. But you have not intervened in this action and claimed that share?
A. There is no proper case for this land.

Q. You haven't up to date claimed this 1/64 share?
A. I have intervened as a party in this case.

I have not filed any answer."

At this stage he was permitted to file a statement of claim, which at the most upon his own deeds is that he is entitled to a 1/64 share. It is clear however, from the document P6, that the 26th Defendant had in 1942 sold to Siman Appu (the predecessor of the present plaintiff) the interests which, as stated in P6, he had derived from his mother Punchihamy. There being no reservation whatsoever in this deed of any portion of the land thereby conveyed, his claim that he still owned a 1/64 share is very nearly absurd. There is nothing in the evidence to explain how he retained a right to this particular share. He admitted that he had been served with summons and that he had not intervened in this action prior to the very late stage at which he was permitted to file a statement of claim. That circumstance alone casts grave doubt on the validity of his claim. I hold that the learned trial Judge should have rejected this claim.

It is unfortunate that there was no appearance at this appeal for any of the defendants, but I am satisfied on an examination of the evidence that the claims of the contesting defendants would have been rejected by the trial Judge but for his erroneous decisions on the two questions of law which I have discussed.

I would accordingly allow this appeal and set aside the decree dismissing the plaintiff's action. The 3rd, 4th and 7th defendants must pay to the plaintiff the taxed costs of contest in the District Court and of this appeal. The case is remitted to the District Court for interlocutory decree for partition to be entered as prayed for in the plaint, and for further proceedings to be taken as provided in the Partition Act.

Abeyesundere, J.

I agree.

Appeal allowed.

Present: **De Kretser, J.**

EPIN SINGHO *v.* THIRUNAWAKARASU, S.I. POLICE, KIRIELLA

Appeal No. 134/1968 — *M.C. Ratnapura* 25314

Argued on: 27th May, 1968
Decided on: 1st June, 1968

Penal Code, section 311 — *Grievous hurt — Requirement that there must be severe bodily pain for twenty days.*

Held: (1) That where a medical report merely states that "the injuries caused the sufferer to be in bodily pain for thirty days," this would not be sufficient to establish the charge of grievous hurt. It is the fact that there must be *severe* bodily pain for twenty days that makes the difference as to whether the hurt complained of was grievous or not.

F. N. D. Jayasuriya, for the accused-appellant.

Ranjith Gunatilake, Crown Counsel, for the Crown.

De Kretser, J.

The Magistrate of Ratnapura assuming Jurisdiction as a District Judge on the 9th of August 1967 found the accused appellant G. Epin Singho guilty on the two counts of grievous hurt set out in the charge sheet filed of record dated 15.3.67. The accused was sentenced to nine months R.I. on each count, the seteneces to run concurrently. The Counsel for the appellant urged three points at the Appeal:—

(1) That the charge sheet sets out the penal provision as Section 316 of the Penal Code and therefore the Magistrate should not have assumed jurisdiction as District Judge in that a charge under Section 316 is triable summarily by a Magistrate.

(2) That the medical report led in evidence did not establish that the hurt in question was grievous.

(3) That the Magistrate had wrongly placed the burden of proof of *alibi*.

A perusal of the proceedings and judgment shows that the reference in the charge sheet to "the offence being punishable under Section 316 of the Penal Code" is clearly a clerical error and should correctly read "punishable under Section 317 of the Penal Code." Both the plaint of 29.12.66. and the amended plaint of 15.3.67 refer to the charges as being under Section 317 and the Magistrate in his statement of reasons dated 15.8.67. refers to the charges as being punishable under Section 317. Each charge avers that the grievous hurt was caused by means of a corrosive substance: to wit, acid and that again points to the correct penal section being Section 317. It appears to me therefore that the conviction on count (1) should be altered to one under Section 317 of the Code. I shall deal with count (2) when I consider the second point urged by counsel for the appellant. Before I part with count (1) I think I should say that I hope that the Magistrate will in future see that there is no room for such points to be taken by perusing the charge sheets a little more carefully.

Mr. Jayasuriya's next point was that in as much as the grievous hurt complained of was such as comes under Head 8 of Section 311 of the Penal Code there should be evidence that the sufferer was in severe bodily pain during the space of twenty days. He pointed to the fact that the medical report referred only to bodily pain and not to its severity. In regard to count (1) the submission appears to be without merit for the report says "The injuries caused to the sufferer to be in bodily pain and unable to follow her ordinary pursuits for a period of thirty days" and Head 8 of Section 311 clearly states that it is grievous hurt if the sufferer is unable to follow his ordinary pursuits for twenty days as a consequence of the hurt received. In regard to count (2) the report merely says "the injuries caused the sufferer to be in bodily pain for thirty days." As it is the fact that the bodily pain is severe during the twenty days that makes the difference as to whether the hurt was grievous or not, the absence of evidence of the nature of the bodily pain set out in the report results in the charge of grievous hurt not being established. In the result the sentence on count (2) should be such as a Magistrate could impose under Section 315 of the Penal Code and I order that the sentence on this count should be altered to one of 6 months R.I. and it should be concurrent with the sentence of 9 months R.I. which the Magistrate has imposed on count (1).

The passage in the judgment with reference to the defence of *alibi* reads as follows:

> "The accused in his evidence stated that he did not know about this incident and he was nowhere close to the house of his wife that night. He denied the charge against him. The Accused who purported to establish an *alibi* did not go beyond a mere denial and assertion that he was no where near the spot. He did not state where in fact he was. Thus I cannot accept the *alibi* as being proved."

In my view all the Magistrate intends to convey is that as he did not accept the bare assertion of the accused, who did not even trouble to say where in fact he was, that he was not at the scene of incident the attempted defence of *alibi* fails.

In the result the appeal is dismissed subject to the variation of sentence in count (2) and the variation of the Penal Section on both counts (1) and (2).

Appeal dismissed.
Sentence varied.

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

TENNAKOON *v.* KOIN MENIKE*

S.C. 578/66 (*F*) — *D.C. Kandy* 5996/*L.*

Argued and decided on: 9th April, 1968

Co-owners — Prescription among — Enmity between the co-owners from time each acquired title to half share — Possession of entire land over ten years by one of them — Unreasonableness in applying presumption that one co-owner possessed on behalf of the other.

P and K were co-owners of a land in its entirety. K by deed D1 of 1929 purported to transfer the entire land to his son H. through whom the defendants claimed the land.

U, another son of K purchased P's 1/2 share within a week from that day, obviously with a view to contest D1.

There was evidence that in 1930 U instituted action against H in respect of other lands and there was consequent enmity between them.

The evidence also established the fact that H was in occupation of the land from 1929 and took all the produce without giving any portion of it to U.

Held: That in view of the special circumstance that there had been enmity between brothers from and after the time when each of them acquired title to this land it would be unreasonable to apply the presumption that one co-owner was possessing on behalf of the other.

D. R. P. Goonetilleke, for the defendants-appellants.

T. B. Dissanayake, for the plaintiff-respondent.

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

The learned District Judge has held against the defendants on the question of prescription because the land in dispute had been owned in common by the predecessors in title of the parties. The learned Judge apparently thought that the well known rules regarding prescription among co-owners precluded the success of the defendants in their claim. Nevertheless a close examination of the facts in this case reveals much justification for an inference that the plaintiff and their predecessors had been ousted by the defendants' predecessors. As far as the title goes, the position in 1929 was that one Punchirala owned a half share of the land which was the subject of this action and that the other half share was owned by Kiri Banda. Kiri Banda on 19*th July*, 1929 by D1 purported to transfer the entire land to his son Heen Appuhamy, and the defendants are the successors of this Heen Appuhamy.

On 25*th July*, 1929 Ukku Banda, himself another son of Kiri Banda, purchased the remaining half share from Punchi Rala. One sees immediately that at the very stage when Ukku Banda acquired a title he was doing so for the purpose of contesting the deed D1 under which his own father purported to convey the entirety of the land to Heen Appuhamy.

There is then evidence that in 1930 Ukku Banda instituted an action against his brother Heen Appuhamy in connection with several lands. There is no proof of the actual nature of the dispute between the brothers, but it is clear that at this stage there must have been enmity between them.

The evidence establishes quite clearly that Heen Appuhamy was in actual occupation of the land from 1929 and took all the produce of the land thereafter without giving any portion of it to Ukku Banda. Because of the existence of co-ownership, this failure or omission to give a share to Ukku Banda could have been explained on the basis that Heen Appuhamy was in fact possessing on behalf of both his brother and himself. But in view of the special circumstance, that there had been enmity between the brothers from and after the time when each of them acquired

* For Sinhala translation, see Sinhala section, Vol. 16, part 9, p. 27

title to this land, it would be unreasonable to apply in this case the ordinary presumption that one co-owner was possessing on behalf of the other.

For these reasons we hold that the defendants succeeded in their claim that they prescribed to the subject of this action. The appeal is allowed and the plaintiff's action is dismissed with costs in both Courts.

Alles, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President), T. S. Fernando, J. and Abeyesundere, J.**

THE QUEEN *v.* S. A. D. A. DISSANAYAKE & SIX OTHERS

Appeal Nos. 136 — 141 *of* 1967
S.C. No. 286/1966 — *M.C. Gampaha No.* 8216/*A*

Argued and decided on: 20th January, 1968

Court of Criminal Appeal — Unlawful Assembly and Rape — Double hearsay on material point capable of corroborating evidence of virtual complainant — Inadmissible — May have influenced verdict of Jury — Re-trial.

The six accused-appellants were convicted of being members of an unlawful assembly, the common object of which was to commit rape on the virtual complainant. The 1st, 2nd and 3rd accused were convicted of rape.

The evidence as to the actual rape was only that of the virtual complainant. Her husband had been away from the village on the night of the incident. On the next day the virtual complainant went to a distant place in search of her husband, and explained that she did so because on the evening of the day of the incident, she had sent her servant girl to "the junction", and the servant girl had returned and informed her that the mudalali at junction had told the servant girl that the husband had gone away in a car, because the 1st accused had sent him to that place.

Though the servant girl gave similar evidence, neither the mudalali nor the husband was called to speak to this matter.

Held: (1) That the evidence amounted to double hearsay and was inadmissible.

(2) That since proper evidence as to this matter would have afforded strong corroboration of the virtual complainant's evidence of the rape, it was impossible to be sure that the Jury were not influenced by the knowledge of this fact, and the convictions should be set aside.

E. R. S. R. Coomaraswamy, with *Eardley Perera*, *Anil Obeysekera*, *Kumar Amerasekera*, *H. Devasagayam* and *S. Gunasekera*, for the accused-appellants.

T. A. de S. Wijesundera, Senior Crown Counsel, for the Attorney-General.

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

The 6 accused in this case have been convicted on the 1st count of the indictment (as amended) on a charge of unlawful assembly, the common object of which was that rape be committed on the virtual complainant. The 1st, 2nd and 5th accused have been convicted on the 3rd count of the indictment of the offence of rape committed by them in the course of the same transaction.

There was, apart from official testimony, only the evidence of the virtual complainant and a servant girl employed in her house. The evidence of the servant girl was only to the effect that people had broken into the house about midnight and that the virtual complainant had been carried out of the house. The evidence as to the actual rape was only that of the virtual complainant herself.

It would appear according to the evidence that the husband of the virtual complainant had been away from the village during the day preceding this incident. The day after the alleged rape the virtual complainant, according to her version, went to a distant place in search of her husband presumably in order to report to him this alleged

rape. Her explanation for going to such a place was that on the evening of the day on which she was raped she had sent the servant girl to look for her husband at what has been described as "the junction". According to this version the servant girl returned and informed the virtual complainant that the mudalali at the junction had informed the servant girl that the virtual complainant's husband had gone away that day in a car and that the husband had done so because the 1st accused has sent him to that place.

The servant girl gave similar evidence as to what she had been told by the mudalali, but the prosecution did not call either the mudalali or the husband to speak to this matter about the husband being sent away at the instance of the 1st accused. If there was any truth in this suggestion that the husband had been sent away at the instance of the 1st accused, proper evidence as to the matter would have afforded strong corroboration of the virtual complainant's evidence that on the same night in her husband's absence her house was broke open and she was raped by the 1st accused and a number of other people. We must express our surprise that at the stage when the indictment was framed there appears to have been no appreciation of the value of testimony which should have been available in support of the prosecution case.

As it turns out, however, evidence which perhaps can properly be described as double-hearsay was led at the trial and it is impossible for us at this stage to be sure that the jury were not influenced by the knowledge they had that the 1st accused had apparently taken steps to have the virtual complainant's husband out of the way before he raided her house.

We are compelled to set aside the convictions of all the accused. But as there is evidence in which the jury might reasonably convict, we direct that there be a new trial of all the accused on the first count as amended at the trial and of the 1st, 2nd and 5th accused on counts 4, 5 and 7 respectively of the original indictment.

We understand from learned Senior Crown Counsel that the prosecution will not make an application at the fresh trial to lead the evidence which the prosecution failed to lead at the first trial.

Re-trial ordered.

Present: **Samerawickrame, J.**

DADALLAGE PEMASIRI *v.* S.I. POLICE, DICKWELLA

S.C. 1/67 (*Special*) — *M.C. Matara No.* 14557

Argued on 21*st* August, 1967
Decided on: 30th July, 1968

Criminal Procedure Code, section 353 — *Case stated by Magistrate for opinion of Supreme Court — Is it open to a Magistrate to state such a case when without proceeding to conviction he orders the accused to enter into a Probation order to be of good behaviour*?

Penal Code, section 311—*Accused charged for grievous hurt—Medical evidence that blow inflicted on complainant caused partial loss of hearing but would become permanent—Does this injury come within the definition of grievous hurt*?

Voluntarily causing grievous hurt—Absence of intention.

Held: (1) That section 353 of the Criminal Procedure Code only applies when a person has been convicted and sentenced to some penalty or punishment. When a Magistrate did not proceed to conviction it is strictly not open to him to have stated a case for the opinion of the Supreme Court.

(2) That where the Magistrate held that the accused did not have the intention to cause grievous hurt, he could be convicted only of simple hurt.

(3) That the ear is a 'member' within the meaning of section 311 of the Ceylon Penal Code and tha permanent impairment of an ear falls within the 5th category of hurt set out in it, and is therefore grievous hurt.

J. Muttiah, for accused-appellant.

V. S. A. Pullenayagam, Senior Crown Counsel with *R. Gunatilake*, Crown Counsel, for Attorney-General.

Samerawickrame, J.

This is a case stated by the learned Magistrate of Matara under section 353 of the Criminal Procedure Code. It appears that the injured person has suffered partial loss of hearing by reason of the blow inflicted on her by the 1st accused. The medical expert stated that this partial loss of hearing would be permanent. The question that arises is whether the injury suffered by the virtual complainant falls within the definition of grievous hurt.

The learned Magistrate has, following the judgment of Clarence, J. in 1 Ceylon Law Reports at page 67, held that the injury caused amounted to simple hurt and without proceeding to conviction, he has ordered the 1st accused to enter into a Probation Order to be on good behaviour for a period of two years.

Learned senior Crown Counsel submitted that the injury caused amounted to grievous hurt. He submitted first that it fell within the third category of hurt set out in section 311 of the Penal Code, viz:— "permanent privation of the hearing of either ear". He urged that privation need not be a total loss of hearing and that even a partial impairment of hearing fell within it. I think the words 'privation of hearing' is inappropriate if used with reference to anything other than a total loss of hearing. Learned senior Crown Counsel also submitted that the injury fell within the 5th category set out in section 311, viz:— "Destruction or permanent impairing of the power of any member or joint."

The ordinary dictionary meanings of 'member' is an organ or part of the body and of 'ear', the organ of hearing. Gour, Penal Law of India, 7th Edition at page 1616, dealing with the corresponding provision in the Indian Penal Code, which is identical, states, "The term 'member', as used here, means nothing more than an organ or limb, being a part of a man capable of performing a distinct office. As such it includes both the eyes, the ears, the nose, the mouth and feet and in fact all distinct parts of the human body designed to perform a distinct office.

In the case of *Dissanayake* v. *Bastian and Others*, 1 Ceylon Law Reports p. 67 — Clarence, J. considered a case of permanent impairment of the sight of an eye and held that it did not constitute grievous hurt. The learned Solicitor-General who appeared for the respondent in that case, appears to have submitted that the injury fell within the 5th clause of Section 311 of the Code. Clarence, J. stated, "It was argued on behalf of the Crown that the permanent impairment of the sight of the eye, which Dr. Huybertsz anticipated, satisfied the definition of grievous hurt and Mr. Solicitor relied on the 5th clause of Section 311 of the Code. I do not think that the eye is a 'member or joint' within the meaning of clause 5." Clarence, J. has given no reasons for his view that the eye is not a 'member or joint' within the meaning of clause 5.

I hold that the ear is a member within the meaning of the section 311 and that permanent impairment of the hearing of an ear falls within the 5th category of hurt set out in it and is, therefore, grievous hurt.

There are, however, two reasons in this case why there should be no alteration of order made by the Magistrate finding the 1st accused guilty of simple hurt and admitting him to probation. A person is said to voluntarily cause grievous hurt only if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt. The learned Magistrate has taken the view that as the 1st accused merely assaulted with hands, he did not have the intention to cause grievous hurt. The reason given by him also suggests that he did not know that it was likely that he would cause grievous hurt. Secondly, Section 353 of the Criminal Procedure Code only applies where a person has been convicted and sentenced to some penalty or punishment. As the learned Magistrate did not proceed to conviction in respect of the 1st accused, strictly it was not open to him to have stated a case for the opinion of this Court.

I, accordingly, affirm the order made by the Magistrate in respect of the 1st accused.

Order affirmed.

END OF VOLUME LXXIV

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දයකම්ල – කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) රු. 17/50 පසුගිය කාණ්ඩයක මිල රු. 17/50.
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අපරාධ විධිවිධාන සංග්‍රහය

අපරාධ විධිවිධාන සංග්‍රහය 413 ඡේදය — ජැක්-පොට් යන්ත්‍රයක් ළඟ තබා ගැනීමේ චෝදනාවක් — 1961 අංක 48 සහ 1957 අංක 26 දරණ ආඥා පනත්වලින් සංශෝධිත සුදු ආඥා පනතේ 3 බී (1) ඡේදය යටතේ වරදක් — චිත්තිකරු නිදහස් වීම — නඩු විභාගයේ දී ඉදිරිපත් කරන ලද ජැක්පොට් යන්ත්‍ර ආපසු ලබා ගැනීමට චිත්තිකරු ඉල්ලීමක් කිරීම — මහේස්ත්‍රාත්වරයා එය ප්‍රතික්ෂේප කිරීම — එම නියෝගය පුනරීක්ෂණය කිරීමට චිත්තිකරු ඉල්ලීම.

1957 අංක 26 හා 1961 අංක 48 දරණ ආඥා පනත්වලින් සංශෝධිත සුදු ආඥා පනතේ 3 බී (1) අනු ඡේදය උල්ලංඝණය කරමින් ජැක්පොට් යන්ත්‍රයක් ළඟ තබා ගැනීමේ වරදට චිත්තිකරුට විරුද්ධව නඩු පවරන ලදුව චෝදනාවෙන් නිදහස ලැබීමෙන් ඉක්බිනිව චිත්තිකරු නඩු විභාගයේ දී ඉදිරිපත් කරන ලද ජැක්පොට් යන්ත්‍රය ආපසු දෙන ලෙස කළ ඉල්ලීම මහේස්ත්‍රාත්වරයා ප්‍රතික්-ෂේප කිරීමෙන් පසුව එකී නියෝගය පුනරීක්ෂණය කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ආයාචනයක් කළේ ය.

ස්වකීය නියෝගය දීමේ දී (අ) චෝදනාව ඔප්පු කිරීමෙහි ලා පැමිණිලි පක්ෂය විසින් ළඟ තබා ගැනීම ඔප්පු කළ නොහැකි වූ තාක් දුරට පෙත්සම් කරු ද මෙම ඉල්ලීමේ අවශ්‍යතාවයන් සඳහා ළඟ තබා ගැනීම ඔප්පු කිරීමට අසමත් වන බවත්,

(අ) එම උපකරණ හා මෙවලම් පෙත්සම්-කරුට ආපසු දුනහොත් පෙත්සම්කරු අනායාස-යෙන් ම ඒවා ළඟ තබා ගැනීමේ වරදට හසුවන බවත්, එසේ වූ කල මෙම උපකරණ ආපසු දීමට උසාවිය කරන නියෝගය ඔහුට නිදහසට හේතු-වක් වශයෙන් දැක්විය හැකි බවත්

මහේස්ත්‍රාත්වරයා පූර්ව නිගමනයක් ලෙස ගෙන ඇති බවත් පෙත්සම්කරු වෙනුවෙන් තර්ක කරන ලදී.

තීන්දුව: (1) අපරාධ නඩුවක් සඳහා අවශ්‍ය වන ඉහළ මට්ටමේ ඔප්පු කිරීමේ අවශ්‍යතාවය තමා ඉදිරියේ තිබුනු ප්‍රශ්නය සම්බන්ධයෙන් යොදා ගැනීමෙන් මහේස්ත්‍රාත්වරයා වැරදි ලෙස ක්‍රියාකොට ඇත.

(2) අපරාධ විධිවිධාන සංග්‍රහයේ 413 වන ඡේදයෙන් තමා වෙත පිරිනැමෙන බලතල කෙරෙහි සිය මනස යොමු කිරීම මහේස්ත්‍රාත්-වරයාගේ යුතුකමක්ව තිබින.

(3) ඉතා කලාතුරකින් වුව ද මෙවැනි උප-කරණ ළඟ තබා ගැනීම වරදක් නොවන අවස්ථා ඇති නිසා, හුදෙක් ඒවා ළඟ තබා ගැනීම ම, වරදක් නොවන හෙයින් මෙය නැවත විභාග කිරීමට සුදුසු නඩුවකි.

නාගනාදන් එ. ද සිල්වා, පිටකොටුවේ උප පොලිස් පරීක්ෂක ... ...

අපරාධ නඩු සංවිධාන සංග්‍රහයේ 19, 159, 160, 160(1), 163, 164, 337, 356, 391 යන වගන්ති.

ඇටෝර්නි ජනරාල්වරයා එ. ඩබ්ලිව්. කේ. දෙන් සිරිසේන සහ තවත් අය 1

අපීකථන ආඥා පණත, 17(1) වෙනි ඡේදය.

ජස්ටින් විල්ප්‍රඩ් ද අල්විස් එ. වික්ටර් සිරිල් ද සිල්වා නඩුව බලනු. 23

අලාභ ඉල්ලීමක්

මහා නගර සභාවක්—එහි සේවකයින්ගේ නොසැකිලිමත් කම නිසා සිදුවූ හානියකට අලාභය ඉල්ලා දැමූ නඩුවක්—යථා පරිදි මහා නගර සභා ආඥා පනතේ 307 වන ඡේදය යටතේ දිය යුතු නිවේදනය දෙනලද්දැයි මතු කළ ප්‍රශ්නයක්—307 වන ඡේදයෙහි(1) වන උප-ඡේදය යටතේ යථා පරිදි දියයුතු නිවේදනය පිළිබඳව සහ අනිකුත් සියලු කරුණු පිළිබඳව ප්‍රශ්න විනිසකරු විසින් පැමිණිලිකරුගේ වාසියට තීන්දුකර එම ඡේදයෙහි (2) වන උප ඡේදය යටතේ ප්‍රශ්නයක් මතු වී නැතත් ඔහුට විරුද්ධව තීන්දුව දීම — එහි ප්‍රතිඵලය කුමක්ද යන්න.

තම සේවකයන්ගේ නොසැලකිල්ලෙන් වූ සිද්-ධියකින් පැන නැගුණු (මේ නිසා බාලවයස්කාර පැමිණිලිකරුවන්ගේ මවුගේ මරණය සිදුවිය) අලාභය ඉල්ලා නගර සභාවකට විරුද්ධව දැමූ නඩුවක විසඳිය යුතු ප්‍රශ්න එකක් හැර අනිත් සියල්ල ම උගත් විනිසකරු විසින් පැමිණිලිකරු-ගේ වාසියට තීන්දු කරන ලදී. පැමිණිලිකරුගේ වාසියට තීන්දු නොවූ ප්‍රශ්නය මහ නගර සභා ආඥාපනතේ 307 වන ඡේදයට අනුව එම නගර සභාවට දිය යුතු නඩුව ගැන නිවේදනය යථාපරිදි

දෙන ලදද යන්න විය. 307 වන ඡෙදයේ (1) වන උප-ඡෙදය යටතේ මෙම නිවේදනය දී ඇති බව නිගමනය කළ උගත් විනිසකරුවා පැමිණිලි කරු විසින් නඩු නිමිත්ත උද්ගත වී නෙමයක් ගත වන තුරු මේ සඳහා ක්‍රියාත්මක නොවීමේ හේතුවෙන් 307 වන ඡෙදයෙහි (2) වන උප-ඡෙදය යටතේ කටයුතු නොකළ නිසා ඔහුට විරුද්ධව තීන්දුව දුන්නේය.

පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කළ ප්‍රධාන කරුණ වූයේ නඩුවෙහි විසඳිය යුතු ප්‍රශ්නයක් ලෙස මතු කොට නොතිබුනු ප්‍රශ්නයක් පිළිබඳව ඔහුට විරුද්ධව නිගමනය කිරීම නිසා උගත් විනිසකරු කරුණු වරදවා ගෙන ඇති බව ය.

තීන්දුව: (1) මේ පිළිබඳව විසඳිය යුතු ප්‍රශ්නයක් නඩුවෙහි දී මතු කරන ලද නම් එම මහා නගර සභාවේ අධිකාරීන් විසින් කරන ලද කර්තව්‍යය මහා නගර සභා ආඥා පනතට අනුකූලව කරන ලද්දක් ද යන්න ගැන පැමිණිලිකරුට අදාල වන සාක්ෂි ඉදිරිපත් කළ හැකිව තිබිණි.

(2) පැමිණිලිකරු විසින් අලාභය ඉල්ලා සිටීමට හේතු වූ නොසැලකිලිමත් කටයුත්ත විදුලි බල පනතේ 16 වන ඡෙදය යටතේ කළ දෙයක් බවත් මහා නගර සභා ආඥා පනතේ පැණවීම් කිසිවකට අනුව එය කිරීමට මහා නගර සභාවට බලතල නොමැති බව බැලූ බැල්මට පෙනී යන නිසා ඉහත සඳහන් 307 වන ඡෙදය මීට පිළිසරණ පිණිස ගත නොහේ.

වික්‍රමසූරිය ආරච්චි සහ තවත් කෙනෙක් (බාල-වයස්කාරයෝ) එ. විශේෂ කොමසාරිස්වරයා, ගාල්ලේ මහ නගර සභාව ... ...

ඇටෝර්නි-ජනරාල්වරයාගේ අභිමත හා බලතල

ඇටෝර්නි-ජනරාල්ගේ අභිමත හා බලතල — ප්‍රාථමික නඩු විභාගය — පී නමැත්තෙකුට හා වගඋත්තරකරුවන්ට විරුද්ධව ඉදිරිපත්වුණු මිනීමැරුම් චෝදනාව පිළිබඳ විභාගය — පී යන අය සුප්‍රීම් උසාවියේ නඩු විභාගයකට නියම කරන ලද නමුත් අපරාධ නඩු විධිවිධාන සංග්‍රහයේ 159, 160 හා 161 වගන්ති යටතේ ක්‍රියා නොකොට වගඋත්තරකරුවන් නිදහස් කරනු ලැබීම.

වගඋත්තරකරුවන් නඩු විභාගයකට කැප කිරීමේ බලාපොරොත්තුව ඇතිව ඇටෝර්නි-ජනරාල් විසින් අපරාධ නඩු සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ වැඩිදුර පියවර ගන්නා ලෙස මහේස්ත්‍රාත්තුමාට කරනු ලැබූ විධානය — මහේස්ත්‍රාත්වරයා ඇතැම් උපදෙස් පිළිපැද්ද නමුදු නැවතත් වගඋත්තරකරු නිදහස් කිරීම — ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට වගඋත්තරකරු නියෝග කරන ලෙස විධාන කරමින් ඇටෝර්නි-ජනරාල් විසින් නඩු වාර්තාව ආපසු එවීම — මුල් නිදහස් කිරීමේ නියෝගය නෛසර්ගික බලය යටතේ කරන ලදැයි ද, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ විධානවල යෙදීමට ඇටෝර්නි-ජනරාල්ට බලයක් නැතැයි ද යන හේතූන් පිට එය පිළිපැදීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම.

ඇටෝර්නි-ජනරාල් විසින් සංශෝධනය සඳහා ඉල්ලීමක් ඉදිරිපත් කිරීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 19, 159, 160, 160(1), 161, 163, 164, 337, 356, 391 යන වගන්ති — 162(1) වගන්තිය යටතේ නියෝගයක් කරනු ලබන්නේ නෛසර්ගික බලය යටතේද නැත්නම් ව්‍යවස්ථිත බලය යටතේ ද යන වග — නඩු විභාගයකට කැප කරන මහේස්ත්‍රාත්වරයාගේ යුතුකම්වල ස්වභාවය — ශ්‍රේෂ්ඨාධිකරණයේ සංශෝධන බලතල — ඒවා ඇටෝර්නි ජනරාල්ගේ විධානය පිළිපැදීම ප්‍රතික්ෂේප කරන්නාවූ නියෝගයකට අදාළ ද යන්න —

සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ ඇටෝර්නි-ජනරාල්ගේ නියෝගයන් අධිකරණ බලයට ඇතිලි ගැසීම් බවට පත් වන්නේද යන්න — උසාවි ආඥා පනත, 19 හා 37 වැනි වගන්ති.

ඉහත කී පී නමැත්තාට හා වගඋත්තරකරුවන් තිදෙනාට විරුද්ධව ඉදිරිපත්වුණු මිනීමැරීමේ චෝදනාව සම්බන්ධයෙන් ප්‍රාථමික නඩු විභාගයක යෙදීමෙන් පසුව, පී නඩු විභාගයකට නියම කරමිනිදු වගඋත්තරකරුවන් තිදෙනා සම්බන්ධයෙන් 159, 160 හා 161 වගන්ති යටතේ ක්‍රියා නොකොට ඔවුන් පහත සඳහන් හේතූන් උඩ නිදහස් කරමිනිදු නියෝගයක් උගත් මහේස්ත්‍රාත්වරයා විසින් කරන ලද්දේ ය. එම හේතු මෙසේය:

(1) පැමිණිල්ලේ සාක්ෂිකරුවන් එකිනෙකා පරස්පර විරෝධී වුණු අතර, ඔවුන්ගේ සාක්ෂි එක්තරා ප්‍රමාණයකට ඔවුන් කලින් දුන් සාක්ෂි වලින් පරස්පර විරෝධී බවට පත්කරන ලද්දේය.

(ii) වගඋත්තරකරුවන් වරදට අසු කරන ප්‍රකාශවල යෙදීම සාක්ෂිකරුවන් විසින් පැහැර හරිනු ලැබ, නැත්නම් ප්‍රමාද කරනු ලැබ ඇත; හා

(iii) ලැබුණු සාක්ෂි අනුව වගඋත්තරකරුවන් නඩු විභාගයකට කැප කිරීම යුක්තිසහගත නොවන්නේය.

එයිනික්බිනිව 391 වැනි වගන්තියෙන් පැවරී ඇති බලතල ක්‍රියාවේ යෙදවීම අරමුණු කොට ගෙන ඇටෝර්නි ජනරාල් පහත සඳහන් විධාන නිකුත් කළේය.

(ඒ) පැමිණිල්ල විසින් ඉදිරිපත් කරනු ලබන තවදුරටත් සාක්ෂි සටහන් කිරීම:

(බී) වගඋත්තරකරුවන් වෙත චෝදනාව කියවා, සාක්ෂිකරුවන් කැඳවීමටත් තමන් අභිමත නම් තමන් වෙනුවෙන් සාක්ෂි දීමටත් අයිතියක් ඔවුන් සතු බැව් ඔවුන් වෙත දන්වා සිටීම;

(සී) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 160 හා 161 වැනි වගන්තිවලට අනුකූලව ක්‍රියා කිරීම; හා

(ඩී) නීතියට අනුකූලව විභාගය පවත්වා අවසන් කිරීම ය.

මේ කාර්යය සඳහා පැවැත්වුණු විභාගයේදී තවත් වැඩිදුර සාක්ෂි තමන් කැඳවන්නේ නැති බැව් රජයේ අධිනීතිඥවරයා කියා සිටි කල්හි, ඉහත (බී) හා (සී) අනුව ක්‍රියා කළ උගත් මහේස්ත්‍රාත්වරයා යළිදු වගඋත්තරකරුවන් නිදහස් කරමින් නියෝගයක් නිකුත් කෙළේය.

ශ්‍රේෂ්ඨාධිකරණය ඉදිරියේ නඩු විභාගයකට වගඋත්තරකරුවන් කැප කරන්නැයි විධානයක් කරමින් ඇටෝර්නි ජනරාල්වරයා යළිත් නඩු වාර්තාව මහේස්ත්‍රාත්වරයා වෙත ආපසු යැව්වේය. ස්වකීය මුල් නිදහස් කිරීමේ නියෝගය නෛසර්ගික බලය යටතේ කරන ලද බවත්, එහෙයින්ම අපරාධ නඩු සංවිධාන සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ විධානවල යෙදීමට බලයක් ඇටෝර්නි ජනරාල්වරයා සතුව නොපවත්නා බවත් හේතු වශයෙන් දක්වා සිටිමින් මහේස්ත්‍රාත්වරයා ඇටෝර්නි ජනරාල්ගේ ඉහත කී විධානය පිළිපැදීම ප්‍රතික්ෂේප කළේය.

මෙම නියෝගය සංශෝධනය කිරීම සඳහා ඇටෝර්නි ජනරාල් ඉල්ලීමක් ඉදිරිපත්කොට ඇත.

තීන්දුව: (1) ප්‍රාථමික නඩු විභාගයකදී පැමිණිල්ලේ නඩුව නිමාවට පත්වුණු අවස්ථාවකදී මහේස්ත්‍රාත්වරයෙක් ඉදිරිපත්වුණු සාක්ෂි විත්ති කරුවා නඩු විභාගයකට කැප කිරීම සඳහා ප්‍රමාණවත් නොවේයයි කල්පනා කරන්නේ නම් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 162(1) වගන්තිය යටතේ නිදහස් කිරීමේ නියෝගයක් යෙදීමට ඔහුට පිළිවන. එවිට එබඳු නිදහස් කිරීමේ නියෝගයක් උපවගන්තියෙන් පැවරී ඇති ව්‍යවස්ථිත බලය පාවිච්චි කිරීමෙන් කෙරෙන්නක් මිස සංග්‍රහයේ 162 වැනි වගන්තියේ 2 වැනි උපවගන්තියේ සඳහන් වන නෛසර්ගික හෝ වෙනත් බලයක් පාවිච්චි කිරීමෙන් කෙරෙන්නක් නොවේ.

(2) මෙම කාරණයෙහිදී ඉහත කී (i), (ii) හේතූන් දෙකෙන් කවරක් නිසා හෝ මුල් නිදහස් කිරීමේ නියෝගයෙහි යෙදීමට ලැබෙන එකම බලය පැවරී ඇත්තේ 162 වැනි වගන්තියේ 1 වැනි උපවගන්තියෙනි. 162(2) වගන්තියේ සඳහන් නෛසර්ගික බලය යටතේ තමන් පළමුවන නියෝගය කළ බවට මහේස්ත්‍රාත්වරයා තමාගේ අවසාන නියෝගයෙහි දක්වන අදහස තහවුරු කළ නොහැක්කේය.

(3) නිදහස් කිරීම සඳහා සිය අභිමතය පාවිච්චි කරන මහේස්ත්‍රාත්වරයකුට සටිටනයකදී ''විත්ති කරුගේ වාසියට'' ඇති සාක්ෂ්‍ය මත පිහිටීමට අවසර ලැබෙන අතර, අදහස අනුව එය එක් අතෙකින් පැමිණිල්ලේ සාක්ෂ්‍යයනුත් අනෙක් අතින් විත්තියේ සාක්ෂ්‍ය හෝ විත්තිකරු වෙනුවෙන් සාක්ෂ්‍ය අතර පරස්පර විරෝධී භාවයකට පමණක් සීමා නොවේ.

(4) 162 වැනි වගන්තියේ (1) වැනි උපවගන්තියේ ක්‍රියාත්මකවීම ප්‍රාථමික විභාගය නිමාවට පත්වුණු සිද්ධියකට සීමාවී නැත. විත්තිකරු නඩු විභාගයකට කැප කිරීම උදෙසා පැමිණිල්ලේ සාක්ෂ්‍ය ප්‍රමාණවත් නොවූ අවස්ථාවකටද එය අදාළය.

(6) ඉහත කී ප්‍රතික්ෂේප කිරීමේ නියෝගය අපරාධ නඩු සංවිධාන සංග්‍රහයේ 356 වැනි වගන්තිය හා උසාවි ආඥා පනතේ 37 වැනි වගන්තියේ අර්ථය ඇතුළතට වැටෙන නියෝගයක් වන අතර, එය කෙරෙහි ශ්‍රේෂ්ඨාධිකරණයේ බලතල පාවිච්චි කළ හැක්කේය.

(7) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 5 වැනි වගන්තිය සමග කියැවිය යුතු උසාවි ආඥා පනතේ 19 වැනි වගන්තිය ප්‍රාථමික නඩු විභාග

සම්බන්ධයෙන් ද සංශෝධන බලතල ශ්‍රේෂ්‍යාධිකරණයට පැවරීමට තරම් පුළුල්ය.

(8) උසාවියක් ඉදිරියේ ප්‍රාථමික විභාගයෙන් පසු නඩු විභාගයකට කැප කරන්නාවූ නැත්නම් නඩු විභාගයකට යටත් කිරීමෙන් ඔහු නිදහස් කරන්නාවූ නියෝගයක් සම්බන්ධයෙන් (ග්‍රිෆිත් අග්‍රවිනිශ්චයකාරතුමා විසින් ඇපල්ටන් එ. මුවර්හෙඩ් (1908) 8 පොදු රාජ්‍ය මණ්ඩල වාර්තා 330 නඩුවේදී දෙන ලද ''අධිකරණ බලය'' යන්නෙහි අර්ථය පිළිගනිමින්) පුරවැසියකුගේ හෝ රජයේ හෝ අයිතිවාසිකමක් පිළිබඳ නිගමනයක් සිදු නොකෙරේ. එහෙයින් ඇටෝර්නි ජනරාල් විසින් අරමුණු කරන ලද 391 වැනි වගන්තිය යටතේ බලය පාවිච්චි කිරීම උසාවියක බලතලවලට ඇඟිලි ගසන්නාවූ නීතිවිරෝධී ක්‍රියාවක්ද නොවන්නේය.

එච්. ඇන්. ජී. ප්‍රනාන්දු. අග්‍ර විනිශ්චයකාරතුමා විසිනි: (ඒ) ''නඩු විභාගයකට කැප කිරීමකින් පසුව නීතියෙන් රිමාන්ඩ් කිරීමක් අවශ්‍ය නැත. එසේ වුවද, චිත්තිකාර පුද්ගලයාගෙන් ඔහුගේ නිදහස ඉවත් කළ යුතුද නැද්ද යන කාරණය පිළිබඳව කිසිම තීරණයක් මහේස්ත්‍රාත්වරයා එබඳුවූ තම තත්වයේ සිටිමින් නොකරන්නේය. වැසියන්ගේ අයිතිවාසිකම් ඉවත් කරන නමුත්, ඒ සමගම එබඳු අයිතිවාසිකම් පිළිබඳ විවාද නිශ්චය හෝ තීරණය නොකරන්නාවූ පොදු පාලන නියෝග දිනපතාම පැනවේ. වන්දි ගෙවීම් සහිතව හෝ විරහිතව, බලයෙන් ඉඩම් හෝ නිශ්චල දේපොළ පවරා ගැනීමේ නියෝගය වූ කලී මේ පිළිබඳව සුලභ හා සරල උදාහරණයකි.''

''(බී) අර්ධ අධිකරණ යනුවෙන් සාමාන්‍යයෙන් හඳුන්වා ඇති ඇටෝර්නි-ජනරාල්වරයාගේ බලතල, අපේ මෙම අපරාධ නඩු සංවිධානයේ විරාගත වැදගත් කොටසක් බවට පත්වී ඇති අතර, මෙම බලතල දිගටම ව්‍යවහාර කිරීම අවලංගු බවට හෝ නීති විරෝධී බවට පත් කිරීම සඳහා කිසියම් චේතනාවක් අපේ ආණ්ඩු ක්‍රමයේ නිබිණුයි පිළිගැනීම ඇත්ත වශයෙන්ම අනාත්විකය.''

''(සී) තමා ඉදිරියේ පැවැත්වෙන ප්‍රාථමික නඩු විභාගයේදී මහේස්ත්‍රාත්වරයකු වෙත අපරාධ නඩු සංවිධාන සංග්‍රහයේ xvi වන පරිච්ඡේදයෙන් එක්තරා ප්‍රමාණයක අභිමතයක් පැවරෙන්නාක් මෙන්ම, ඇටෝර්නි ජනරාල්වරයා වෙතද සංග්‍රහයේ වෙනත් විධිවිධාන මගින් එක් ප්‍රමාණයක අභිමතයක් පැවරී ඇති බැව් මතක තබා ගැනීම යෙහෙකි. මෙම අභිමතය සංසිද්ධියට පත්වන්නේ, xvi වන පරිච්ඡේදය යටතේ පැවැත්වෙන විභාග මෙම අභිමතය විසින් විනිශ්චය කෙරෙන අන්දමකින් අවසානයකට පත් කරවීම සඳහා තමන් සතුව පවත්වන ව්‍යවස්ථිත බලයක් මාර්ගයෙනි.''

ඇටෝර්නි-ජනරාල්වරයා එ. ඩබ්ලිව්. ඩී. කේ. දොන් සිරිසේන සහ තවත් දෙදෙනෙක් ... 1

මහ නගර සභා ආඥා පණත

මහ නගර සභා ආඥා පනත — සාකච්ඡා සඳහා අදාළ කරුණු ඉදිරිපත් කිරීමට සාමාජිකයකු සතුව ඇති අයිතිය — කිසියම් කාරණයක් රීති විරෝධියයි න්‍යාය පත්‍රයෙන් ඉවත් කිරීමට නගරාධිපති සතුව ඇති බලය හෝ අභිමතය — මැන්ඩාමුස් ආඥාව— ප්‍රාදේශීය සභා— විකල්පයෙන් සහනයක් ඇද්ද යන වග — මහ නගර සභා ආඥා පනත 17, 18(2), 19, 20 හා 40(1)(ආර්) වගන්ති-මහ නගර සභාවේ 2(බී), 12(1) හා 12(2) අනුරු ව්‍යවස්ථා.

පැවරී ඇති ස්වකීය බලතල ක්‍රියාවේ යෙදවීම සඳහා මහ නගර සභා අරමුදල හා සම්බන්ධවූ සාමාන්‍ය ප්‍රශ්න ඉදිරිපත් කිරීමේ බලයක් මහ නගර සභා ආඥා පනතේ 40(1)(ආර්) වගන්තියෙන් මහ නගර සභාවකට පැවරී ඇත. මහනුවර මහ නගර සභාවේ සාමාජිකයකු වන ඉල්ලුම්කරු පහත සඳහන් යෝජනාව ගැන යථා පරිදි කල් දී ඇත.

''මෙම සභාවේ මුදල් තත්වයේ ඇති සැක කටයුතු ස්වභාවය නිසාම, පිළිගැනීමේ උත්සව, භෝජන සංග්‍රහ, තේ පැන් සංග්‍රහ හා රාත්‍රී භෝජන උදෙසා, 1967 අය-වැයෙන් එබඳු වියදම් සඳහා වෙන් වී ඇති මුදලින් කිසියම් මුදල් ප්‍රමාණ වැය නොකළ යුතුයයි මෙම නගර සභාව යෝජනා කරයි.

මහනුවර මහ නගර සභාවේ නගරාධිපති වන 1 වන වගඋත්තරකරු ඉහත කී යෝජනාව රීති විරෝධියයි න්‍යාය පත්‍රයෙන් ඉවත් කෙළේය. එහෙයින්ම යෝජනාව ගැන දැනුම් දීමෙන් පසුව පැවැත්වුණු පළමුවන සාමාන්‍ය රැස්වීමේ න්‍යාය පත්‍රයට එය ඇතුළත් නොකරන ලදී.

මෙම යෝජනාව වූ කලී රීති විරෝධියයි 1 වන වගඋත්තරකරු විසින් නිගමනය කළ හැකි යෝජ-

නාවක් නොවේ යයි යන හේතුව උඩ, මෙම ඉල්ලුම් පත්‍රය ගැන තීරණයක් නිකුත් කිරීමෙන් පසුව එළඹෙන පළමුවන මාසික සාමාන්‍ය රැස්වීමේ න්‍යාය පත්‍රයෙහි එම යෝජනාව ඇතුළත් කිරීමට 1 වන වගඋත්තරකරුට බල කිරීම සඳහා මැන්ඩාමුස් ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් සඳහා ඉල්ලුම්කරු ශ්‍රේෂ්ඨාධිකරණයට ඉල්ලීමක් ඉදිරිපත් කෙළේය.

1 වන වගඋත්තරකරු වෙනුවෙන් පහත සඳහන් කරුණු ඉදිරිපත් කෙරිණි:

(ඒ) පහත දැක්වෙන අතුරු ව්‍යවස්ථා අනුව කවර හෝ යෝජනාවක් රීති විරෝධියයි නිශ්චය කිරීමේ නියත බලයක් ඔහුට ඇත —

"12(2)—රැස්වීමකට දින තුනකට (ඉරිදා හා රජයේ නිවාඩු දින අත් හැරයි) නොඅඩු කාලයකට කලින් කොමසාරිස් වෙත දැනුම් දෙන ලද සියලුම ප්‍රශ්න හෝ යෝජනා, එම ප්‍රශ්න හෝ යෝජනා රීති විරෝධී යයි නගරාධිපති නිගමනය කළහොත් මිස, නැත්නම් න්‍යාය පත්‍රයෙහි ඇතුළත් කළ යුත්තේ ය."

(බී) ස්වකීය කටයුතු අතින් ස්වාමිත්වයක් මහ නගර සභාවක් සතුව ඇත. අවශ්‍යයෙන්ම අභ්‍යන්තර වූ ප්‍රශ්නයක ඇති නිරවද්‍යතාව ශ්‍රේෂ්ඨාධිකරණය විසින් සමාලෝචනයට පත් නො කෙරෙන්නේය.

(සී) සභාවේ අවසරය ලබාගෙන යෝජනාව ඉදිරිපත් කිරීමට ඉල්ලුම්කරුට මහ නගර සභා ආඥා පනතේ 20 වන වගන්තියෙන් ඉඩක් ලැබී ඇත. ඒ නිසා, විකල්පයෙන් සහනයක් ඔහුට නිබියදීත් ඔහු එයින් ප්‍රයෝජනය ගෙන නැත.

තීන්දුව: (1) මෙම යෝජනාව මුදල් ප්‍රතිපත්තිය පිළිබඳ සාමාන්‍ය ප්‍රශ්නයක් මතු කරන්නකි. එහෙයින්ම එය 40(1) (ආර්) වගන්තියේ අර්ථය ඇතුළතට වැටේ.

(2) ව්‍යවස්ථාව විසින්ම පවරා ඇති බලය ක්‍රියාවේ යෙදවීම අහෝසි වන අන්දමින් අතුරු ව්‍යවස්ථාවක් අර්ථකථනයට භාජන කළ නොහැක්කේය. ඒ නිසා, වෙනත් අයුරින් නීත්‍යානුකූල වන්නා වූ යෝජනාවක් රීති විරෝධියයි තීරණය කිරීම සඳහා නියත බලයක් හෝ අභිමතයක් 12(2) අතුරු ව්‍යවස්ථාව මගින් 1 වන වගඋත්තරකරු වෙත පවරා දී නැත.

(3) ඇතුම් දීමේ ව්‍යවස්ථිත අයිතියක් සාමාජිකයකු සතුව ඇති යෝජනාවක් රීති විරෝධී යයි නිශ්චය කිරීමට 1 වන වගඋත්තරකරුට අභිමතයක් නැත.

(4) පැමිණිලිකර සිටින තීරණයෙහි යෙදීමේ හේතුවෙන් නගරාධිපති තම ව්‍යවස්ථිත යුතුකම පැහැරහැර හෝ ප්‍රතික්ෂේප කොට ඇත. මෙය මහනුවර බදු ගෙවන්නන් වෙනුවෙන් ඉල්ලුම්කරු වෙත ඔහුගෙන් ඉටුවිය යුතුව තිබුණු යුතුකමකි. මෙයට ප්‍රතිකර්මය මැන්ඩාමුස්ය.

(5) ප්‍රාදේශීය මණ්ඩල විසින් ව්‍යවස්ථිත යුතුකම් ඉටු කරනු ලැබීමට මැන්ඩාමුස් මාර්ගයෙන් බල කිරීම සඳහා දිගු කලක් තිස්සේ ම ශ්‍රේෂ්ඨාධිකරණය විසින් බලතල පාවිච්චි කර නැත.

(6) 20 වන වගන්තියෙන් වෙකල්පික සහනයක් යෙදී නැත.

ජී. බී. ද සිල්වා එ. ඊ. ඇල්. සේනානායක සහ තවත් දෙදෙනෙක් 00

අලාභ ඉල්ලීමේ නඩුවක් මහා නගර සභා ආඥා පනතේ 307 වෙනි ඡේදය යටතේ නිවේදනයක්.

අලාභ ඉල්ලීම යටතේ බලනු 9

මැන්ඩාමුස් ආඥා

මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමේ ඉල්ලීමක් සාම මණ්ඩලයක් විසින් නඩුවක් උසාවියකට ඉදිරිපත් කිරීමට අවශ්‍ය සහතිකය නොදී පැහැර හැරීමේ ක්‍රියා පිළිවෙලක් — මැන්ඩාමුස් ආඥාව නිකුත් කිරීම — සමාදාන මණ්ඩල ආදර්ශමත් වියයුතු බව.

සාම මණ්ඩලයක් විසින් නගර සභාව බල සීමාවට අයත් ගෘහයක් අවුරුදු හයකට වැඩි කාලයක් වරිපනම් නොගෙවා බුක්ති විඳගෙන ආ බැවින් එකී සභාව විසින් නගර සභා ආඥා පනත යටතේ එය නහනම් කොට විකිණීමට ප්‍රයත්නයක් දරන ලදී. මේ පියවර අසාර්ථක වූ පසු නගර සභාවට එය පවරා ගෙන සමාදානයෙන් අවුරුදු දෙකක් තව වැඩිදුර බුක්ති විඳීමට ඉඩ දුන් නමුත් ඒ අවුරුදු දෙක තුළ දී සාම මණ්ඩලයේ සාමාජිකයින් ඉන් ඉවත්ව නොගිය බැවින් සාම මණ්ඩල ආඥා පනත

අනුව ඔවුන් ඉන් ඉවත් කිරීමට උසාවියේ නඩුවක් පැවරීම සඳහා අවශ්‍ය වූ සහතිකයක් සාම මණ්ඩලයෙන් (මෙහි පළමුවැනි වගඋත්තරකරුගේ සභාපතිත්වයෙන් යුතු) ලබා ගැනීමට 1967 ජූනි 11 වැනි දින ඉල්ලුම් කරන ලද නමුත් අසාධාරණ ලෙස පමා කරන ලද හෙයින් සභාපති හා අනෙක් සාමාජිකයන් වගඋත්තරකරුවන් කර නගර සභාව මැන්ඩාමුස් ආඥාවක් ඉල්ලන ලදී. වගඋත්තරකරුවන් කියා සිටියේ සාම මණ්ඩලයේ විභාගය අවසන් වී නැති බවයි.

තීන්දුව: ඉහත සඳහන් කරුණු උඩ පෙනී යන්නේ සාම මණ්ඩලය විසින් ඉල්ලුම්කරුට දිය යුතු සහතිකය දීම පැහැර හැරීමේ ප්‍රයත්නයක් දරණ බවයි. එම නිසා වහාම සහතිකය දීමට අවශ්‍ය පියවර ගන්නා ලෙස වගඋත්තකරුවන්ට අණ කෙරෙන මැන්ඩාමුස් ආඥාවක් ලබාගැනීමට ඉල්ලුම්කරුට සුදුසුකම් තිබේ.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා: ''සාම මණ්ඩල මීට වඩා හොඳ ආදර්ශයක් දිය යුතු අතර පළාත් පාලන සභා සමග සහයෝගයෙන් ක්‍රියා කළ යුතුය. මීට සම්බන්ධ පක්ෂය එහි සභාපතිවරයා වීම නිසාදෝ සාම මණ්ඩලය බාධාකාරී ක්‍රියා මාර්ගයක් අනුගමනය කර ඇති බවට අපට ඒත්තු ගොස් තිබේ. සාම මණ්ඩලයේ මෙම ක්‍රියාපටිපාටිය ඉතා කණගාටුදායක වන අතර පොදු යහපත පිළිබඳ හැඟීමෙන් තොර බවද පෙනෙයි. එමෙන්ම පෙත්සම්කාර නගර සභාව හැම අතින්ම ලැබිය යුතුව තිබූ සහතිකය දීම ප්‍රතික්ෂේප කොට ඇති බවද අපට ඒත්තු ගොස් තිබේ.

දොඩන්දුවේ නගර සභාව එ. විල්බට් ද සිල්වා සහ තවත් අය ... ...

මැන්ඩාමුස් ආඥාවක් — රාජ්‍ය සේවා කොමිසම හා භාණ්ඩාගාරයේ ලේකම් ද අමතා ලියනු ලැබ, දෙපාර්තමේන්තුවේ අධිපති නැනගේ මාර්ගයෙන් රාජ්‍ය සේවකයකු විසින් යවන ලද පෙත්සම් දෙකක් — පෙත්සම්වලට පමා වී පිළිතුරු ලැබීම — පෙත්සම්වලින් අමතනු ලැබූ අයට ඒවා පිළිවෙලින් යවන ලෙස වගඋත්තරකරුට නිර්දේශ කරන ලෙස මැන්ඩාමුස් ආඥාවක් ඉල්ලීම — වගඋත්තරකරු එසේ කිරීමට ලිඛිත නීතියක අනුසාරයෙන් බැඳී සිටී ද යන්න — රජයේ කායිකාංශ පාලන නීති සංග්‍රහයේ සඳහන් කොට ඇති පරිපාලන රෙගුලාසි — මේවායේ නීතිමය බලයක් ගැබ් වී තිබේ ද යන්න.

ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 72, 87(1), 87 (2) 88 වන ඡේද — අර්ථ කථන ආඥා පණතේ 17(1) වන ඡේදය.

තීන්දුව: (1) රජයේ කායිකාංශ පාලන නීති සංග්‍රහයේ (The Manual of Procedure) සඳහන් පරිපාලන රෙගුලාසිවල නීතිමය බලය ගැබ් වී නැත. එම නිසා එබඳු රෙගුලාසි උල්ලංඝනය වූ විට මැන්ඩාමුස් ආඥාවකින් ඒවා ක්‍රියාත්මක කළ නොහැක.

(2) තමා ම රජයේ සේවකයකු වූ වගඋත්තරකරු එබඳු රෙගුලාසිවලට අවනතව ක්‍රියා කිරීමේ රාජකාරිය තමා සේවකයකු ලෙස පත්ව සිටින රජයට ඉටු කිරීමට බැඳී සිටිනු විනා තමාගේ දෙපාර්තමේන්තුවේ උප නිලධාරියකු වූ පෙත්සම්කරුට පක්ෂව ඉටු කිරීමට බැඳී නැත.

(3) අර්ථ කථන ආඥා පණතේ 17(1) සි දරණ ඡේදයෙන් සැලකෙන්නේ ආඥා පණතක් ලෙස හෝ ලංකාවේ පණතක් ලෙස විග්‍රහ කරන ලද පැනවීමකට ඇතුළත් රීති, රෙගුලාසි හා අතුරු ව්‍යවස්ථා පමණකි.

ජස්ටින් විල්ප්‍රඩ් ද අල්විස් එ. වික්ටර් සිරිල් ද සිල්වා ... ...

මහ නගර සභා ආඥා පණත යටතේ බලනු.

රජයේ සේවකයා

රජයේ සේවකයා — රාජ්‍ය සේවා කොමිෂන් සභාව මගින් පවරන ලද බලතල ප්‍රකාර දෙපාර්තමේන්තු ප්‍රධානියකු විසින් සේවය අවසන් කිරීම — එබඳු බලතලවල විෂය ප්‍රමාණය — පැවරීමේ කොන්දේසිවලට බාහිර වූ හේතුවක් උඩ පෙත්සම්කරුගේ සේවය අවසාන කිරීම — ''උසාවිය සුදුසු යයි සලකන අන්දමේ වෙනත් එබඳු හා තවදුර සහන සඳහා'' යන සාමාන්‍ය ආයාචනය යටතේ සහනය සැලසීමට ඇපැල් උසාවියකට ඇති බලය.

ස්වකීය පැමිණිල්ලෙන් පැමිණිලිකරු පහත සඳහන් කරුණු සඳහා ආයාචන ඉදිරිපත් කෙළේය.

(ඒ) නීති විරෝධී ලෙස තමාගේ සේවය අවසන් කරන ලදැයි යන්න සම්බන්ධයෙන් ඉඩම් සංවර්ධන දෙපාර්තමේන්තුවේ අධ්‍යක්ෂකට විරුද්ධව අලාභ සඳහා.

(බී) උසාවිය සුදුසුයයි සලකන අන්දමේ වෙනත් එබඳු හා තවදුර සහන සඳහා.

සිවිල් නඩු සංවිධාන සංග්‍රහයේ 463 වන වගන්තිය යටතේ ඇටෝර්නි-ජනරාල් මැදිහත් වුණේ ය. මෙහි එකම හබ ප්‍රශ්නය, චීත්තිකරු විසින් පැමිණිලිකරුගේ සේවය නීත්‍යානුකූල නොවන අන්දමින් හා යුක්තිසහගත හා සාධාරණ හේතුවක් රහිතව අවසානයකට පත් කරන ලද්දේ ද යන වග ය.

පැමිණිලිකරුගේ සේවය යථා පරිදි අවසානයකට පත් කොට ඇති බවත්, ලංකා ආණ්ඩුව යටතේ සේවයෙහි යෙදීමට අයිතියක් ඇති පුද්ගලයන්ගේ ගණයට ඔහු නොවැටෙන බවත් නිගමනය කරමින් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා නඩුව නිෂ්ප්‍රභා කෙළේ ය.

තමාගේ අවසාන ''වීසා'' බලපත්‍රයේ කාලය අවසානවීම හේතු කොට ගෙන පැමිණිලිකරුට ලංකාවේ සිටීමට බලයක් නැතැයි යන හේතුව පැමිණිලිකරුගේ සේවය අවසන් කරන්නා වූ ලිපියෙහි දකින්නට ලැබිණ.

පැමිණිලිකරු විසින් ඉදිරිපත් කරන ලද ඇපෑලේ දී පහත සඳහන් අන්දමින් තීරණය විණි.

තීන්දුව: (1) අංක 10847 හා 1955.10.7 දින දරන ගැසට් පත්‍රයෙහි ප්‍රකාශ කරන ලද අන්දමින් රාජ්‍ය සේවා කොමිසමෙන් බලතල පවරා දීමේ කොන්දේසිවලින්, ඇමතිවරයකුට පැවරී ඇති දෙපාර්තමේන්තුවක වැඩ කරන්නා වූ රජයේ නිලධාරියකු නීතියෙන් වරදකරුවකු වීමේ හේතුව හැර වෙනත් හේතුවක් හා සම්බන්ධ වූ විෂමාචාරයක් නිසා අස් කිරීම හෝ නැත්නම් දඬුවම් කිරීම සඳහා දෙනු ලබන බලය විසින්, විෂමාචාරය හැර වෙනත් කරුණක් උඩ නිලධාරියා අස් කිරීම සඳහා බලයක් දෙපාර්තමේන්තු ප්‍රධානියකුට පවරා නැත.

(2) එහෙයින් පැමිණිලිකරුට ලංකාවේ සිටීමට බලයක් නැතැයි ඔහුගේ සේවා අවසන් කිරීම අවලංගු හා ක්‍රියා විරහිත වෙයි.

(3) නීත්‍යානුකූල නොවන අන්දමින් සිය සේවය අවසන් කරනු ලැබීම නිසා පීඩාවට පත් රජයේ සේවකයකුට, තම සේවය අවසන් කිරීම අවලංගු හා ක්‍රියා විරහිත බවට ප්‍රකාශයක් නිකුත් කිරීම සඳහා නඩුවක් පැවරිය හැකි ය.

(4) ''වෙනත් එබඳු හා තවදුර සහන'' යන පැමිණිලිකරුගේ ආයාචනය සැලකීමෙන්, පෙත්සම්කරුගේ සේවය ඉඩම් සංවර්ධන අධ්‍යක්ෂ විසින් අවසානයකට පත් කිරීම අවලංගු හා ක්‍රියා විරහිත බැව් ප්‍රකාශ කිරීම සඳහා ශ්‍රේෂ්ඨාධිකරණයට ඉඩක් ඇත.

ආර්. රසවන් පිල්ලේ එ. ඇටෝර්නි-ජනරාල්තුමා

රාජ්‍ය සේවා කොමිෂන් සභාව විසින් පවරන බලතලවල විෂය ප්‍රමාණය.

රජයේ කායිකාංශ පාලන නීති සංග්‍රහය — එහි රෙගුලාසිවල නීතිමය බලය.

හවුල් අයිතිකරුවන් අතර බුක්තිය

හවුල් අයිතිකරුවන් අතර බුක්තියට සවිවීම — හවුල් අයිතිකරුවන් දෙදෙනෙකු ඉඩමෙන් බාගය බැගින් ලබා ගැනීමෙන් පසු ඔවුන් අතර වෛරයක් ඇතිවීම — ඉන් එක් කෙනෙකු දහ අවුරුද්දකට වැඩි කාලයක් මුළු ඉඩම තනිව භුක්ති විඳීම — එකෙකු අනෙකා වෙනුවෙන් භුක්ති විඳින ලදැයි පිළිගැනීමේ අසාධාරණකම.

පුංචිරාළ සහ කිරිබණ්ඩා ඉඩමක හවුල් අයිතිකරුවෝ වූහ. වර්ෂ 1929 දී ඩී1 දරණ ඔප්පුව පිට කිරිබණ්ඩා මුළු ඉඩම ම තමාගේ පුත්‍ර හින්අප්පුහාමිට පැවරී ය. මේ නඩුවේ වගඋත්තරකරු ඉඩමට අයිතිය දක්වන්නේ ඔහුගෙන් ලැබුන හිමිකම් අනුවය.

කිරිබණ්ඩාගේ තවත් පුත්‍රයෙකු වූ උක්කුබණ්ඩා, පුංචිරාළගේ කොටස සතියක් තුලදී ම මීලයට ගත්තේය. පැහැදිලි වශයෙන් ම එසේ කරන ලද්දේ ඩී1 දරණ ඔප්පුව අභියෝගයට ලක් කිරීමටය. 1930 දී හීන්අප්පුහාමීට විරුද්ධව උක්කුබණ්ඩා වෙනත් ඉඩම් සම්බන්ධයෙන් නඩු පැවරූ බවත් එහි ප්‍රතිඵලයක් වශයෙන් දෙපාර්ශ්වය අතර වෛරයක් පැවති බවට සාක්ෂි තිබේ.

1929 සිට හීන්අප්පුහාමී මේ ඉඩම භුක්ති විඳගෙන ආ බවත් එහි මුළු පලදාව ම උක්කුබණ්ඩාට කිසිවක් නොදී තනිව ම පරිභෝග කළ බවත් සාක්ෂිවලින් තහවුරු වේ.

තීන්දුව: සහෝදරයින් දෙදෙනා ඉඩමට අයිතිය ලැබීමේ පටන් ම දෙදෙනා අතර වෛරයක් පැවතීමේ විශේෂ කාරණය නිසා එක් හවුල් අයිතිකරුවෙකු අනිකා වෙනුවෙන් භුක්ති වින්දේ ය යන්න පූර්ව නිගමනයක් ලෙස සැලකීම අසාධාරණ වන්නේ ය.

කෙන්නකෝන් එ. කොයින් මැණිකේ ...

ලංකා (පාලක සංස්ථා) රාජාඥා පණත—72, 87(2), 88 වන ජෙද.

මැන්ඩාමුස් ආඥා යටතේ බලනු .. 23

එව්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍රවිනිශ්චයකාරතුමා, අබේසුන්දර විනිශ්චයකාරතුමා සහ ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා
ඉදිරිපිටදිය

ඇටෝර්නි-ජනරාල්වරයා එ. ඩබ්ලිව්. ඩී. කේ. දෙන් සිරිසේන සහ තවත් දෙදෙනෙක්*

ශ්‍රේෂ්ඨාධිකරණ ඉල්ලීම අංක 327/67

කොළඹ මහේස්ත්‍රාත් උසාවියේ අංක 37693/සී දරණ නඩුවේ නියෝගය සංශෝධනය කිරීමට ඉල්ලීම පිළිබඳවයි

වාද කළේ 1967 දෙසැම්බර්, 18, 19, 20 සහ 21 යන දිනවල
තීන්දුව දුන්නේ: 1968 ජනවාරි, 27 වැනි දා

ඇටෝර්නි-ජනරාල්ගේ අභිමත හා බලතල — ප්‍රාථමික නඩු විභාගය — පී නමැත්තෙකුට හා වගඋත්තරකරුවන්ට විරුඬව ඉදිරිපත්වුණු මිනීමැරුම් චෝදනාව පිළිබඳ විභාගය — පී සුප්‍රීම් උසාවියේ නඩු විභාගයකට නියම කරන ලද නමුත්, අපරාධ නඩු විධිවිධාන සංග්‍රහයේ 159, 160 හා 161 වගන්ති යටතේ ක්‍රියා නොකොට වගඋත්තරකරුවන් නිදහස් කරනු ලැබීම.

වගඋත්තරකරුවන් නඩු විභාගයකට කැප කිරීමේ බලාපොරොත්තුව ඇතිව ඇටෝර්නි-ජනරාල් විසින් අපරාධ නඩු සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ වැඩිදුර පියවර ගන්නා ලෙස මහේස්ත්‍රාත් තුමාට කරනු ලැබූ විධානය — මහේස්ත්‍රාත්වරයා ඇතැම් උපදෙස් පිළිපැද්ද නමුදු නැවතත් වගඋත්තරකරු නිදහස් කිරීම — ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට වගඋත්තරකරු නියෝග කරන ලෙස විධාන කරමින් ඇටෝර්නි-ජනරාල් විසින් නඩු වාර්තාව ආපසු එවීම — මුල් නිදහස් කිරීමේ නියෝගය නෛසර්ගික බලය යටතේ කරන ලදැයි ද, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ විධානවල යෙදීමට ඇටෝර්නි-ජනරාල්ට බලයක් නැතැයි ද යන හේතූන් පිට එය පිළිපැදීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කිරීම.

ඇටෝර්නි-ජනරාල් විසින් සංශෝධනය සඳහා ඉල්ලීමක් ඉදිරිපත් කිරීම — අපරාධ නඩු සංවිධාන සංග්‍රහයේ 19, 159, 160, 160(1), 161, 163, 164, 337, 356, 391 යන වගන්ති — 162(1) වගන්තිය යටතේ නියෝගයක් කරනු ලබන්නේ නෛසර්ගික බලය යටතේද නැත්නම් ව්‍යවස්ථිත බලය යටතේද යන වග — නඩු විභාගයකට කැප කරන මහේස්ත්‍රාත්වරයාගේ යුතුකම්වල ස්වභාවය — ශ්‍රේෂ්ඨාධිකරණයේ සංශෝධන බලතල — ඒවා ඇටෝර්නි ජනරාල්ගේ විධානය පිළිපැදීම ප්‍රතික්ෂේප කරන්නාවූ නියෝගයකට අදාළ ද යන්න—

සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ ඇටෝර්නි-ජනරාල්ගේ නියෝගයන් අධිකරණ බලයට ඇහිලි ගැසීම් බවට පත් වන්නේද යන්න — උසාවි ආඥා පනත, 19 හා 37 වැනි වගන්ති.

ඉහත කී පී. නමැත්තාට හා වගඋත්තරකරුවන් තිදෙනාට විරුඬව ඉදිරිපත්වුණු මිනීමැරීමේ චෝදනාව සම්බන්ධයෙන් ප්‍රාථමික නඩු විභාගයක යෙදීමෙන් පසුව, පී නඩු විභාගයකට නියම කරමිනුදු වගඋත්තරකරුවන් තිදෙනා සම්බන්ධයෙන් 159, 160 හා 161 වගන්ති යටතේ ක්‍රියා නොකොට ඔවුන් පහත සඳහන් හේතූන් උඩ නිදහස්කරමිනිදු නියෝගයක් උගත් මහේස්ත්‍රාත්වරයා විසින් කරන ලද්දේය. එම හේතු මෙසේය:

(i) පැමිණිල්ලේ සාක්ෂිකරුවන් එකිනෙකා පරස්පර විරෝධි වුණු අතර, ඔවුන්ගේ සාක්ෂි එක්තරා ප්‍රමාණයකට ඔවුන් කලින් දුන් සාක්ෂිවලින් පරස්පර විරෝධි බවට පත් කරන ලද්දේය.

(ii) වගඋත්තරකරුවන් වරදට අසු කරන ප්‍රකාශවල යෙදීම සාක්ෂිකරුවන් විසින් පැහැර හරිනු ලැබ, නැත්නම් ප්‍රමාද කරනු ලැබ ඇත; හා

(iii) ලැබුණු සාක්ෂි අනුව වගඋත්තරකරුවන් නඩු විභාගයකට කැප කිරීම යුක්තිසහගත නොවන්නේය.

එයිනික්බිතිව 391 වැනි වගන්තියෙන් පැවරී ඇති බලතල ක්‍රියාවේ යෙදවීම අරමුණු කොට ගෙන ඇටෝර්නි ජනරාල් පහත සඳහන් විධාන නිකුත් කළේය.

(ඒ) පැමිණිල්ල විසින් ඉදිරිපත් කරනු ලබන තවදුරටත් සාක්ෂි සටහන් කිරීම:

(බී) වගඋත්තරකරුවන් වෙත චෝදනාව කියවා, සාක්ෂිකරුවන් කැඳවීමටත් තමන් අභිමත නම් තමන් වෙනුවෙන් සාක්ෂි දීමටත් අයිතියක් ඔවුන් සතු බැව් ඔවුන් වෙත දන්වා සිටීම;

(සී) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 160 හා 161 වැනි වගන්තිවලට අනුකූලව ක්‍රියා කිරීම; හා

(ඩී) නීතියට අනුකූලව විභාගය පවත්වා අවසන් කිරීම ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කා., 1 වෙනි පිට බලනු.

මේ කාර්‍යය සඳහා පැවැත්වුණු විභාගයේදී තවත් වැඩිදුර සාක්ෂ්‍ය තමන් කැඳවන්නේ නැති බැව් රජයේ අධිනීතිඥවරයා කියා සිටි කල්හි, ඉහත (බී) හා (සී) අනුව ක්‍රියා කළ උගත් මහේස්ත්‍රාත්වරයා යළිදු වගඋත්තරකරුවන් නිදහස් කරමින් නියෝගයක් නිකුත් කෙළේය.

ශ්‍රේෂ්ඨාධිකරණය ඉදිරියේ නඩු විභාගයකට වගඋත්තරකරුවන් කැප කරන්නැයි විධානයක් කරමින් ඇටෝර්නි ජනරාල්වරයා යළිත් නඩු වාර්තාව මහේස්ත්‍රාත්වරයා වෙත ආපසු යැවිවේය. ස්වකීය මුල් නිදහස් කිරීමේ නියෝගය නෛසර්ගික බලය යටතේ කරන ලද බවත්, එහෙයින්ම අපරාධ නඩු සංවිධාන සංග්‍රහයේ 391 වැනි වගන්තිය යටතේ විධානවල යෙදීමට බලයක් ඇටෝර්නි ජනරාල්වරයා සතුව නොපවත්නා බවත් හේතු වශයෙන් දක්වා සිටිමින් මහේස්ත්‍රාත්වරයා ඇටෝර්නි ජනරාල්ගේ ඉහත කී විධානය පිළිපැදීම ප්‍රතික්ෂේප කළේය.

මෙම නියෝගය සංශෝධනය කිරීම සඳහා ඇටෝර්නි ජනරාල් ඉල්ලීමක් ඉදිරිපත් කොට ඇත.

තීන්දුව: (1) ප්‍රාථමික නඩු විභාගයකදී පැමිණිල්ලේ නඩුව නිමාවට පත්වුණු අවස්ථාවකදී මහේස්ත්‍රාත්වරයෙක් ඉදිරිපත්වුණු සාක්ෂි විත්තිකරුවා නඩු විභාගයකට කැප කිරීම සඳහා ප්‍රමාණවත් නොවේයයි කල්පනා කරන්නේ නම් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 162(1) වගන්තිය යටතේ නිදහස් කිරීමේ නියෝගයක් යෙදීමට ඔහුට පිළිවන. එවිට එබඳු නිදහස් කිරීමේ නියෝගයක් උපවගන්තියෙන් පැවරී ඇති ව්‍යවස්ථිත බලය පාවිච්චි කිරීමෙන් කෙරෙන්නක් මිස සංග්‍රහයේ 162 වැනි වගන්තියේ 2 වැනි උපවගන්තියේ සඳහන් වන නෛසර්ගික හෝ වෙනත් බලයක් පාවිච්චි කිරීමෙන් කෙරෙන්නක් නොවේ.

(2) මෙම කාරණයෙහිදී ඉහත කී (i), (ii) හේතූන් දෙකෙන් කවරක් නිසා හෝ මුල් නිදහස් කිරීමේ නියෝගයෙහි යෙදීමට ලැබෙන එකම බලය පැවරී ඇත්තේ 162 වැනි වගන්තියේ 1 වැනි උපවගන්තියෙනි. 162(2) වගන්තියේ සඳහන් නෛසර්ගික බලය යටතේ තමන් පළමුවන නියෝගය කළ බවට මහේස්ත්‍රාත්වරයා තමාගේ අවසාන නියෝගයෙහි දක්වන අදහස තහවුරු කළ නොහැක්කේය.

(3) නිදහස් කිරීම සඳහා සිය අභිමතය පාවිච්චි කරන මහේස්ත්‍රාත්වරයකුට සටිටනයකදී "විත්තිකරුගේ වාසියට" ඇති සාක්ෂ්‍ය මත පිහිටීමට අවසර ලැබෙන අතර, අදහස අනුව එය එක් අතෙකින් පැමිණිල්ලේ සාක්ෂ්‍යයනුත් අනෙක් අතින් විත්තියේ සාක්ෂ්‍ය හෝ විත්තිකරු වෙනුවෙන් සාක්ෂ්‍ය අතර පරස්පර විරෝධී භාවයකට පමණක් සීමා නොවේ.

(4) 162 වැනි වගන්තියේ (1) වැනි උපවගන්තියේ ක්‍රියාත්මකවීම ප්‍රාථමික විභාගය නිමාවට පත්වුණු සිද්ධියකට පමණක් සීමා වී නැත. විත්තිකරු නඩු විභාගයකට කැප කිරීම උදෙසා පැමිණිල්ලේ සාක්ෂ්‍ය ප්‍රමාණවත් නොවූ අවස්ථාවකටද එය අදාළය.

(6) ඉහත කී ප්‍රතික්ෂේප කිරීමේ නියෝගය අපරාධ නඩු සංවිධාන සංග්‍රහයේ 356 වැනි වගන්තිය හා උසාවි ආඥා පනතේ 37 වැනි වගන්තියේ අර්ථය ඇතුළතට වැටෙන නියෝගයක් වන අතර, එය කෙරෙහි ශ්‍රේෂ්ඨාධිකරණයේ බලතල පාවිච්චි කළ හැක්කේය.

(7) අපරාධ නඩු සංවිධාන සංග්‍රහයේ 5 වැනි වගන්තිය සමග කියැවිය යුතු උසාවි ආඥා පනතේ 19 වැනි වගන්තිය ප්‍රාථමික නඩු විභාග සම්බන්ධයෙන් ද සංශෝධන බලතල ශ්‍රේෂ්ඨාධිකරණයට පැවරීමට තරම් පුළුල්ය.

(8) උසාවියක් ඉදිරියේ ප්‍රාථමික විභාගයෙන් පසු නඩු විභාගයකට කැප කරන්නාවූ නැත්නම් නඩු විභාගයකට යටත් කිරීමෙන් ඔහු නිදහස් කරන්නාවූ නියෝගයක් සම්බන්ධයෙන් (ශ්‍රීපිත් අග්‍රවිනිශ්චයකාරතුමා විසින් ඇපල්ටන් එ. මුවර්හෙඩ් (1908) 8 පොදු රාජ්‍ය මණ්ඩල වාර්තා 330 නඩුවේදී දෙන ලද "අධිකරණ බලය" යන්නෙහි අර්ථය පිළිගනිමින්) පුරවැසියකුගේ හෝ රජයේ හෝ අයිති වාසිකමක් පිළිබඳ නිගමනයක් සිදු නොකෙරේ. එහෙයින් ඇටෝර්නිජනරාල් විසින් අරමුණු කරනලද 391 වැනි වගන්තිය යටතේ බලය පාවිච්චි කිරීම උසාවියක බලතලවලට ඇඟිලි ගසන්නාවූ නීතිවිරෝධී ක්‍රියාවක් නොවන්නේය.

එච්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍ර විනිශ්චයකාරතුමා විසිනි: (ඒ) "නඩු විභාගයකට කැප කිරීමකින් පසුව නීතියෙන් රිමාන්ඩ් කිරීමක් අවශ්‍ය නැත. එසේ වුවද, විත්තිකාර පුද්ගලයාගෙන් ඔහුගේ නිදහස ඉවත් කළ යුතුද නැද්ද යන කාරණය පිළිබඳව කිසිම තීරණයක් මහේස්ත්‍රාත්වරයා එබඳුවූ තම තත්ත්වයේ සිටිමින් නොකරන්නේය. වැසියන්ගේ අයිතිවාසිකම් ඉවත් කරන නමුදු, ඒ සමගම එබඳු අයිතිවාසිකම් පිළිබඳ විවාද නිශ්චය හෝ තීරණය නොකරන්නාවූ පොදු පාලන නියෝග දිනපතාම පැනවේ. වන්දි ගෙවීම් සහිතව හෝ විරහිතව, බලයෙන් ඉඩම් හෝ නිශ්චල දේපොළ පවරා ගැනීමේ නියෝගය වූ කලී මේ පිළිබඳව සුලභ හා සරල උදාහරණයකි."

"(බී) අර්ධ අධිකරණ යනුවෙන් සාමාන්‍යයෙන් හඳුන්වා ඇති ඇටෝර්නි-ජනරාල්වරයාගේ බලතල, මෙම අපේ අපරාධ නඩු සංවිධානයේ විරාගත වැදගත් කොටසක් බවට පත්වී ඇති අතර, මෙම බලතල දිගටම ව්‍යවහාර කිරීම අවලංගු බවට හෝ නීති විරෝධී බවට පත් කිරීම සඳහා කිසියම් චේතනාවක් අපේ ආණ්ඩු ක්‍රමයේ තිබිණැයි පිළිගැනීම ඇත්ත වශයෙන්ම අත්‍යාවශ්‍යකය."

"(සී) තමා ඉදිරියේ පැවැත්වෙන ප්‍රාථමික නඩු විභාගයේදී මහේස්ත්‍රාත්වරයකු වෙත අපරාධ නඩු සංවිධාන සංග්‍රහයේ xvi වන පරිච්ඡේදයෙන් එක්තරා ප්‍රමාණයක අභිමතයක් පැවරෙන්නාක් මෙන්ම, ඇටෝර්නිජනරාල්-යෙහෙකි. මෙම අභිමතය සංසිඳියට පත්වන්නේ, xvi වන පරිච්ඡේදය යටතේ පැවැත්වෙන විභාග මෙම අභිමතය මාර්ගයෙනි."

වී. ඇස්. ඒ. පුල්ලෙනායගම් රජයේ අධිනීතිඥ මහතා සමග, ආර්. අබේසූරිය රජයේ අධිනීතිඥ මහතා සහ ආර්. ගුණතිලක රජයේ අධිනීතිඥ මහතා, ඇටෝර්නි-ජනරාල්වරයා වෙනුවෙන්.

රාජනීතිඥ ජී. ඊ. විටිටි මහතා සමග, ඒ. ඇස්. වණිගසූරියර් මහතා සහ නිහාල් ජයවික්‍රම මහතා, 1 වැනි වග-උත්තරකරු වෙනුවෙන්.

කොල්වින් ආර්. ද සිල්වා මහතා සමග, නිහාල් ජයවික්‍රම මහතා සහ පී. ඉලේපෙරුම මහතා, 2 වැනි වග-උත්තරකරු වෙනුවෙන්.

කේ. සී. නඩරාජා මහතා සමග, ඩී. ටී. පී. රාජපක්ෂ මහතා, 3 වැනි වගඋත්තරකරු වෙනුවෙන්.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා:

වෙඩි තබා මිනීමැරුමක් සිදු කරන ලදැයි යන චෝදනාවක් සම්බන්ධයෙන් ප්‍රේමසිරි නමැත්තකුටත් මෙම ඉල්ලුම් පත්‍රයේ වග-උත්තරකරුවන් තිදෙනාටත් විරුඬව වර්ෂ 1966 ඔක්තෝබර් මස 26 වන දින දී කොළඹ මහේස්ත්‍රාත් උසාවියේ දී නඩු පවරනු ලැබිණි. අපරාධ නඩු සංවිධාන සංග්‍රහයේ 16 වන පරිච්ඡේදය යටතේ පැවැත්වුණු විභාගයේ දී, උගත් මහේස්ත්‍රාත්වරයා ප්‍රේමසිරි නඩු විභාගයට කැපකළ අතර, 1967 පෙබරවාරි 18 වන දින, ඔහු එමසංග්‍රහයේ 159, 160 සහ 161 යන වගන්ති යටතේ ක්‍රියා නොකොට ම වග-උත්තරකරුවන් තිදෙනා නිදහස් කරමින් නියෝගයක් කෙළේ ය. එයිනික්බිතිව, 391 වැනි වගන්තියෙන් පැවරී ඇති බලතල ක්‍රියාවේ යොදවන බවක් හඟවමින් ඇටෝර්නි-ජනරාල්වරයා 1967 අප්‍රෙල් 8 වැනි දින දී මහේස්ත්‍රාත්වරයා වෙත පහත දැක්වෙන අන්දමින් නියෝගයක් කෙළේ ය:

(ඒ) පැමිණිල්ල වෙනුවෙන් ඉදිරිපත් කරනු ලබන තවදුරටත් සාක්ෂි සටහන් කර ගැනීම;

(බී) 2 වැනි 3 වැනි හා 4 වැනි චිත්තිකරුවන් වෙත චෝදනාව කියවා සාක්ෂිකරුවන් කැඳවීමේ අයිතියක් ඔවුන්හට ඇති බවත්, තමන් කැමැති නම් තමන් වෙනුවෙන් සාක්ෂිදීම කළ හැකි බවත් ඔවුන්හට දැන්වීම;

(සී) එකී චිත්තිකරුවන් සම්බන්ධයෙන් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 160 හා 161 යන වගන්ති අනුව ක්‍රියා කිරීම;

(ඩී) එකී චෝදනා මත එකී චිත්තිකරුවන් ශ්‍රේෂ්ඨාධිකරණ නඩු විභාගයකට කැප කිරීම හා නීතියෙන් අවශ්‍ය කරවන්නා වූ නැත්නම් බලය පවරා ඇත්තා වූ වෙනත් හා තවදුර පියවර ගැනීම ය.

ඉන් පසුව, උපදෙස්වල ඩී ඡේදය කපා දමා, ඒ වෙනුවට "විභාගය නීතියට අනුකූලව පවත්වා නිම කරන" ලෙස ඇටෝර්නි-ජනරාල්වරයා මහේස්ත්‍රාත්වරයාට නියම කෙළේ ය. 1967 ජූනි මස 4 වැනි දින, රජයේ අධිනීතිඥ තැන උසාවියට ප්‍රකාශයක් කරමින්, තවදුර සාක්ෂි තමා නොකැඳවන බවක් දන්වා සිටි හෙයින්, උපදෙස්වල (ඒ) ඡේදයට අනුව මහේස්ත්‍රාත්වරයා ක්‍රියා කිරීම අවශ්‍ය නො වූයේ ය. එයිනික්බිතිව, 159 වැනි වගන්තිය යටතේ වග-උත්තරකරුවන් තුන් දෙනා වෙත චෝදනාව කියා සිටි මහේස්ත්‍රාත්වරයා, 160 හා 161 වැනි වගන්ති අනුව ක්‍රියා කිරීම ආරඹුවේ ය. එහෙත් එයට පසුව, යළිත් වග-උත්තරකරුවන් තුන්දෙනා නිදහස් කරමින් නියෝගයක් කෙළේය.

1967 ජූනි මස 18 වැනි දින දී ඇටෝර්නි-ජනරාල් වරයා නඩු වාර්තාව ආපසු මහේස්ත්‍රාත්වරයා වෙත යැව්වේ ය. මෙවර එය යවන ලද්දේ ශ්‍රේෂ්ඨාධිකරණ නඩු විභාගය සඳහා වග-උත්තරකරුවන් කැප කරන ලෙස නියෝග කරමිනි. 1967 අගෝස්තු 14 වන දින දී, උගත් මහේස්ත්‍රාත්වරයා මෙම නියෝගය පිළිපැදීම ප්‍රතික්ෂේප කෙළේ ය. ප්‍රතික්ෂේප කිරීමේ හේතුව වශයෙන් ඔහු සඳහන් කෙළේ, තමා නෛසර්ගික බලතල අනුව මුල් නියෝගය කළ බවත්, එබඳු බලතල යටතේ නිදහස් කිරීමේ නියෝගයක් කළ විටෙක 391 වැනි වගන්තිය යටතේ නියෝග කිරීමට බලයක් ඇටෝර්නි-ජනරාල්වරයාට නැති බවත් ය. ඇටෝර්නි-ජනරාල් වරයාගේ වර්තමාන ඉල්ලීම වූකලී 1964 අගෝස්තු 14 වැනි දින දරන මහේස්ත්‍රාත්වරයාගේ නියෝගය සංශෝධනය කිරීම සඳහා ඉදිරිපත් කරන ලද්දකි.

උගත් රජයේ අධිනීතිඥවරයාගේ තර්කයේ දී අපරාධ නඩු විධාන සංග්‍රහයේ 191 වැනි වගන්තියේ දැක්වෙන නිදහස් කිරීමේ බලය උසාවියේ නෛසර්ගික බලයෙකැයි මතයක් පළකරමින් **ද සිල්වා එ. ජයතිලක** (67 න.නී.ස. 169) නඩුවේ දී ශ්‍රේෂ්ඨාධිකරණාංසයකින් නිකුත් වුණු නඩු තීන්දුව සඳහන් කෙරිණි. 191 වැනි වගන්තියේත් 162 වැනි වගන්තියේ (2) වන උප වගන්තියේත් යෙදී ඇති භාෂාවෙහි සමානකම ගැන සලකා බලන කල්හි, දෙවැනුව කී වගන්තියටත් ඇතැම් විට එම මතය අදාළ වේ. වර්තමාන කාර්‍යයන් සඳහා 162 වැනි වගන්තියේ (2) උප වගන්ති සහ සඳහන් නිදහස් කිරීමේ බලය නෛසර්ගික බලයකැයි අප විශ්වාස කරන බවද, විරුඬ තර්කයක් අප අසා සිටින්නේ එබඳු ක්‍රියා මාර්ගයක් නොවැළැක්විය හැකි වුවහොත් පමණකැයි ද අපි අධිනීතිඥවරුන් වෙත දන්වා සිටියෙමු. 162(2) වැනි

වගන්තියෙන් නෛසර්ගික බලයක් සඳහන් වීම හෝ නොවීම පිළිබඳ ප්‍රශ්නය පිළිබඳ තීරණයක නොයෙදී වර්තමාන නඩුව තීරණය කළ නො හැකි ය.

වග-උත්තරකරුවන් තිදෙනා නිදහස් කරමින් මහේස්ත්‍රාත්වරයා විසින් 1967 පෙබරවාරි 18 වැනි දින කරන ලද නියෝගය, නිදහස් කිරීමට තම හේතූන් දක්වන අතර, එම නියෝගය වග-උත්තරකරුවන් තුන් දෙනා පිළිවෙලින් 2 වන, 3 වන හා 4 වන චිත්තිකරුවන් වශයෙන් සඳහන් කර ඇත. විජේසූරිය නමැති සාක්ෂි කරුවකු සාක්ෂි දෙමින් උක්ත සිඩිය සිදුවුණු අවස්ථාවේ දී 2 වන, 3 වන හා 4 වන චිත්තිකරුවන් 1 වන චිත්තිකරු සමග සිටි බවත්, 2 වන චිත්තිකරු 1 වන චිත්තිකරුට තුවක්කුවක් දී මියගිය අයට වෙඩි තබන ලෙස ඔහු පොළඹවන ලද බවත්, 3 වන හා 4 වන චිත්තිකරුවන් පොලු රැගෙන සිටි බවත් සහතික කොට ඇත. තවත් සාක්ෂිකරුවකු වන වික්‍රමපාල, 2 වන චිත්තිකරු 1 වන චිත්තිකරුට තුවක්කුවක් දෙන හැටිත් දෙවනු කී අය සමූපකාර සමාගම් ගබඩාව දෙසට වෙඩි තබන හැටිත් තමා දුටු බවත්, ඉක්බිතිව තමාට වෙඩි තබන ලදැයි හඬ නගමින් මියගිය අය එම ගබඩාවේ පඩි පෙළින් දිව ගිය හැටි තමා දුටු බවත් සහතික කර ඇත. 2 වැනි චිත්තිකරුගෙන් පෙළඹවීමක් තමාට නැසුණු බවත්, සිද්ධිය සිදුවුණු ස්ථානයේ 3 වැනි හා 4 වැනි වග-උත්තරකරුවන් සිටින බැව් තමා නුදුටු බවත් මෙම සාක්ෂිකරු විසින් පවසා ඇත. මේ සාක්ෂිකරුවන් දෙදෙනා ''නිරපේක්ෂක අන්දමින් ඔවුනොවුනට පරස්පර විරෝධී'' වුණු බැව් උගත් මහේස්ත්‍රාත්වරයාගේ මතය විය. 3 වන හා 4 වන චිත්තිකරුවන් අතේ කිසිවක් නොතිබිණැයි විජේසූරිය පොලිසියට කරන ලද ප්‍රකාශයෙහි කියා තිබීමත් වැඩිදුරටත්, සාහසිකයන්ගේ නම් පොලිසියට දන්වා සිටීම පැමිණිල්ලේ සාක්ෂිකරුවන් සියලු දෙනා විසින් ප්‍රකට අන්දමින් ම, පැහැර හැරීම හෝ ප්‍රමාද කිරීමක් යන කරුණු ඔහු විසින් පිහිට කොට ගන්නා ලද්දේ ය. මහේස්ත්‍රාත්වරයා තවදුරටත් තම මතය ප්‍රකාශ කරමින්, අක්‍රමිකවූත් අනිසිවූත් ආකාරයකින් පොලිසිය ස්වකීය විමර්ෂණ සිදු කර ඇති බවත්, 2 වන, 3 වන හා 4 වන වග-උත්තරකරුවන් පටලවමින් අසත්‍ය නඩුවක් සකස් කර ගෙන තිබෙන බවත් ප්‍රකාශ කෙළේ ය. මේ හා වෙනත් හේතූන් නිසා පැමිණිල්ලේ ප්‍රධාන සාක්ෂිකරුවන්ගේ සාක්ෂිය කෙරෙහි කිසිසේත් විශ්වාසය නොතැබිය හැකි යයි ද ''2 වන, 3 වන හා 4 වන චිත්තිකරුවන් නඩු විභාගයට කැප කිරීම සාක්ෂි අනුව සාධාරණ නොවන්නේය'' යි ද උගත් මහේස්ත්‍රාත් වරයා තීරණයකට එළඹුණේ ය.

''චිත්තිකරුට විරුද්ධව ඉදිරිපත් වී ඇති සාක්ෂි ඔහු නඩු විභාගයකට කැප කිරීමට තරම් ප්‍රමාණවත් නොවේ ය'' යි මහේස්ත්‍රාත්වරයා කල්පනා කරනොත්, වහා ම ඔහු නිදහස් කරන ලෙස මහේස්ත්‍රාත්වරයා නියෝග කළ යුතුය'' යි සංග්‍රහයේ 162 වන වගන්තියේ (1) උප වගන්තියේ විධිවිධාන යෙදී ඇත. ''චිත්තිකරුට නඩු විභාගයකට කැප කිරීමට සාක්ෂි ප්‍රමාණවත් බැව් මහේස්ත්‍රාත්වරයා සලකනොත්, මහේස්ත්‍රාත්වරයා ඔහු නඩු විභාගයකට කැප කළ යුතු ය'' යි 163 වන වගන්තියෙන් විධිවිධාන යෙදී ඇත. වග-උත්තරකරුවන් වෙනුවෙන් ඉදිරිපත් කරනු ලැබූ තර්කවලින් ප්‍රධාන තර්කයක් නම්, සංග්‍රහයේ මෙම විධිවිධාන දෙක ම ක්‍රියාත්මක වන්නේ 159 වැනි වගන්තිය යටතේ චිත්තිකරුට චෝදනා නැගීමෙන් පසුව හා, 160 හා 161 වැනි වගන්ති අනුව ක්‍රියා කළායින් ඉසුව පමණක් බව ය. 160 හා 161 වැනි වගන්ති පිළිපැදීමෙන් පසුව පමණක් මහේස්ත්‍රාත්වරයකුට නඩු විභාගයට කැප කිරීමක් කළ හැකිව ඇති බැවින් 163 වැනි වගන්තිය සම්බන්ධයෙන් මෙම තර්කය ප්‍රකට පරිද්දෙන් ම නිවැරැදි ය. එහෙත් මා දක්වන්නට අදහස් කරන්නා වූ හේතූන් නිසා, 159, 160 හා 161 වැනි වගන්තිවලට අනුව ක්‍රියා කිරීමේ අවධියට පෙරාතුව, 162 වැනි වගන්තියේ (1) උප-වගන්තියට අදාළ විය හැකි ය.

පැමිණිල්ල විසින් සිය සාක්ෂි සියල්ල ම ඉදිරිපත් කිරීමෙන් පසුව, මහේස්ත්‍රාත්වරයා විසින් විශේෂ මෙහෙවරක් ඉටු කළ යුතුව ඇති අවස්ථාවේ දී 159 වැනි වගන්තිය ඉතා පැහැදිලි අන්දමින් අදාළ වන්නේ ය. මෙම මෙහෙවර වූකලී, ''නඩුව පිළිබඳව 162 වැනි වගන්තියේ විධිවිධාන අනුව ක්‍රියාවේ යෙදිය '' යුතු ද යන්න සලකා බැලීම ය. මහේස්ත්‍රාත්වරයා මෙසේ සැලකිය යුතුයයි තමන්හට නියම වී ඇති ප්‍රශ්නයට අස්ත්‍යර්ථයෙන් පිළිතුරු දුනහොත්, ඔහු චිත්තිකරු නිදහස් කළ යුතු ය. එහෙයින් ම, 159 වැනි වගන්තිය විසින්, පැමිණිල්ල නිමාවට පත් කළ අවස්ථාවේ දී මහේස්ත්‍රාත්වරයාගේ අවධානය 162 වැනි වගන්තිය කෙරෙහි යොමු කරවනු ලැබේ. ලැබුණු සාක්ෂි චිත්තිකරුවා නඩු විභාගයට යොමු කිරීමට ප්‍රමාණවත් නොවේ නම්, නිදහස සඳහා 162 වැනි වගන්තියේ (1) වැනි උප වගන්තියෙන් විධිවිධාන යෙදී ඇත. තවද, ප්‍රාථමික නඩු විභාගයක දී නිදහස් කිරීම සඳහා ඉතා පොදු හේතුව මෙම උප වගන්තියෙහි සඳහන් වී ඇත. පැමිණිල්ල සිය සාක්ෂි සියල්ල ඉදිරිපත් කර ඇති අවස්ථාවක දී එය අදාළ වීම වැළැක්වීම සඳහා උප වගන්තිය අනුව වචනාර්ථයෙන් කිසිවක් නැති අතර, ප්‍රති විරුද්ධ තර්කයක් වෙනුවෙන් නීතියට හෝ ව්‍යවහාර බුද්ධියට හෝ අයත් කවර හේතුවක් හෝ දක්වා නැත. ඇත්ත වශයෙන් ම, මතයව පැවතුණේ, මෙම අවධියේ දී නිදහසක් වෙනොත් එය 162 වන වගන්තියේ (2) වන උප වගන්තිය කෙරෙහි පමණක් යොමු විය යුතු බව ය. මෙයින් අදහස් කෙරෙන්නේ, ''162 වන වගන්තියේ විධිවිධානවලට අනුකූලව'' නඩුව පිළිබඳව ක්‍රියා කළ යුතුද යන වග මහේස්ත්‍රාත්වරයාට ව්‍යවස්ථාදායක මණ්ඩලය 159 වන වගන්තියෙන් නියම කිරීමේ දී හුදෙක් 162 වන වගන්තියේ (2) වන උප වගන්තියට පමණක් ඔහු යොමු කිරීමට අදහස් කළ බව ය. තවද, මෙම නඩුවේ කරුණු සඳහා අප ක්‍රියාවේ යොදවන මතය නිවැරැදි නම්, එනම්, 162 වන වගන්තියේ (2) වන උප වගන්තියෙන් නිදහස් කිරීමේ නෛසර්ගික බලයක් පමණක් සඳහන් කෙරේ නම්, ඉදිරිපත් කරන ලද තර්කයෙන් අදහස් කෙරෙන්නේ, චිත්තිකරු නඩු විභාගයකට කැප කිරීම සඳහා පැමිණිල්ලේ සාක්ෂි ප්‍රමාණවත් නො වන්නා වූ පැහැදිලි පරම යෝග්‍ය අවස්ථාවක් දී වුවත් නිදහස් කිරීම සඳහා ව්‍යවස්ථාපිත බලයක් යෙදීම ව්‍යවස්ථාදායක මණ්ඩලය විසින් කර නැති බවකි.

උගත් රජයේ අධිනීතිඥවරයා ද මෙම තර්කයට අනුබල දෙන බවක් පෙනී ගිය බැව් මෙහි දී මවිසින් සැලකිය යුතුව ඇත. එම අනුබලය වූ කලී, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 1938 සංශෝධනවලට පෙර තීරණය වුණු **සම්සුදීන් එ. මරික්කාර්** (36 න.නී.ස. 89) නඩුවේ නීන්දුව මත පිහිටා සිදුවුණු බවක් පෙනී යන්නේ ය. ප්‍රාථමික විභාගවල දී නිදහස් කිරීම් සම්බන්ධයෙන් කියැවෙන විධිවිධාන තුනක් කලින් සංග්‍රහයේ තිබිණ: 1. සියලුම පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් කළ කල්හි, සාක්ෂිවලින් චිත්තිකරුගේ වැරැදිකාර බව ගැන බැලූ බැල්මට චෝදනාවක් පිහිටුවන්නේ නැත්නම් මහේස්ත්‍රාත්වරයා චිත්තිකරු නිදහස් කළ යුතුයයි 156(2) වන වගන්තියේ විධිවිධාන යෙදී තිබුණි; 2. ''විභාගය හමාර කළ කල්හි, චිත්තිකරු නඩු විභාගයක් සඳහා කැප කිරීමට තරම් හේතූන් නැතිවුවහොත් මහේස්ත්‍රාත්වරයා විසින් චිත්තිකරු නිදහස් කළ යුතුයයි 157(1) වන වගන්තියෙන් විධිවිධාන යෙදී තිබුණි; හා 3. 157(3) වන වගන්තිය වර්තමාන 162(2) වන වගන්තියට සම වුනේ ය. මෙම අර්ථයෙන්, 157(1) වගන්තිය අදාළ වුණේ මුළු විභාගය ම අවසානයකට පත්වුණු අවස්ථාවක දී පමණක් ම බැව් පරිපූර්ණව පැහැදිළි ය. එහෙත් කලින් තිබුණු 156(2) වන වගන්තියට සම වන වගන්තියක් වර්තමාන සංග්‍රහයෙහි අඩංගු නැත. එම වගන්තියක් 157(1) වගන්තියත් වෙනුවට, සාක්ෂි ප්‍රමාණවත් නොවන බැව් මහේස්ත්‍රාත්වරයාට හැඟුණු විටෙක නිදහසක් සඳහා විධිවිධාන සලසන්නා වූ වර්තමාන 162(1) වන වගන්තිය එහි යොදා ඇත. කලින් තිබුණු 157(1) වන වගන්තිය මෙන් නොව, මෙම වර්තමාන 162(1) වන වගන්තිය මුලට ''විභාගය නිම කළ කල්හි'' යන වචන යොදා නැත; මෙම වචන අත්හැරීම ඕනෑකමින් කළ බැව් පැහැදිළි ය. එයින් පෙනී යන එක ම හේතුව වූ කලී, පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් කළ අවස්ථාවක දී හෝ චිත්තිකරු තම ප්‍රකාශය කර ඇති හා/හෝ සාක්ෂි ආපසු ඉදිරිපත් කළා වූ පසු අවස්ථාවේ දී හෝ, සාක්ෂි ප්‍රමාණවත් නොවන බැව් සලකන අවස්ථාවක දී ව්‍යවස්ථිත බලය හෝ නිදහස් කිරීමේ යුතුකම පාවිච්චි කළ යුතුය යන විධිවිධානයක් යෙදීම ය.

162 වන වගන්තියේ (1) වන උප වගන්තිය ක්‍රියාවේ යෙදීම ප්‍රාථමික විභාගයක් අවසාන කළ සිඩියකට සීමා කළ යුතුය යන තර්කය, මේ නඩුවේ වගඋත්තර කරුවන් වෙනුවෙන් ඉදිරිපත් කළ නමුදු, චිත්තිකරුවනට එය පැහැදිළිව ම අවාසිය ගෙන දෙන්නකි; එයින් අදහස් කෙරෙන්නේ, පැමිණිල්ල හමාර කළ අවධියක දී මහේස්ත්‍රාත්වරයා සාක්ෂි ප්‍රමාණවත් නොවේ යයි අදහස් කළ නමුදු, එබඳු අවස්ථාවක දී නිර්දෝෂත්වයේ පූර්ව නිගමනය ක්‍රියාවේ යෙදීමෙන් අවශ්‍ය කරවන්නා වූ ප්‍රකට නිදහස් කිරීමේ නියෝගය කිරීමට ඔහුට ව්‍යවස්ථිත බලයක් නැති බව ය.

තවද, ''සාක්ෂ්‍ය පරස්පර විරෝධවීම'' ගැන සඳහන් කරන්නා වූ 164 වන වගන්තිය චිත්තිකරුවකු වෙනුවෙන් සාක්ෂ්‍ය ඉදිරිපත් කර ඇති අවස්ථාවක දී පමණක් අදාළ වන බවක්, පැමිණිල්ල වෙනුවෙන් ඉදිරිපත් කර ඇති සාක්ෂිවල දී සිටිනයක් (මේ නඩුවේ දී මහේස්ත්‍රාත්වරයාගේ නියෝගයේ සඳහන් පරිදි) පැන නැගේ යයි සලකන අවස්ථාවක දී ද එය අදාළ නොවන බවත් අදහස් කරන්නා වූ මතයක් හා මෙම තර්කය ගැටී පවතී. එහෙත් 164 වන වගන්තියේ භාෂාව චිත්තිකාර පුද්ගලයන්හට එතරම් අවාසිකර වූ අර්ථ නිරූපණයකට ඉඩ නොදේ. සිටිනයක් ඇති අවස්ථාවක දී ''චිත්තිකරුට වාසිවන සාක්ෂි'' සැලකිල්ලට ගැනීමට මෙම වගන්තියෙන් මහේස්ත්‍රාත්වරයකුට අවසර ලැබී ඇති අතර, එක් අතෙකින් පැමිණිල්ලේ සාක්ෂි හා අනෙක් අතින් චිත්තියේ සාක්ෂි හෝ චිත්තිය වෙනුවෙන් සාක්ෂි අතර පරස්පර විරෝධී බවකට පමණක් සීමා නොකෙරේ.

පිහියෙන් ඇනීමක් ගැන මෙහි දී සලකා බලමි. එහි පැමිණිල්ල මගින් කැඳවනු ලබන සාක්ෂිකරුවකු පැමිණිලිකරුට පිහියෙන් අනිනු ලබන බවක්, චිත්තිකරුවා විසින් නොව, වෙනත් පුද්ගලයකු විසින් අනිනු ලබන බවක් තමා දුටු බැව් සාක්ෂි දෙන්නා වූ පිහියෙන් ඇනීමක් ගැන සලකා බලමි. ඇත්ත වශයෙන් ම, එබඳු සාක්ෂි වූ කලි, වැදගත් කරුණක් ගැන පැමිණිල්ලේ අනෙක් සාක්ෂි පරස්පර විරෝධී බවට පමුණුවන්නා වූ ''චිත්තිකරුට වාසි වූ'' සාක්ෂියකි. ඒ නිසා ම, මේ සාක්ෂි මේ පදනම උඩ ''චිත්තිකරු නඩු විභාගයකට කැප කිරීම සඳහා ප්‍රමාණවත්'' නොවන බැව් සැලකීමට 164 වන වගන්තිය මගින් මහේස්ත්‍රාත්වරයාට ඉඩක් ලැබේ. පැමිණිල්ල හමාර කළ කල්හි මහේස්ත්‍රාත්වරයාගේ මතය එබඳු නම්, එම අවධියේ දී එකී මතය ක්‍රියාවේ යෙදවීමට නොහැකි වීමටත් ඒ වෙනුවට නිදහස් කිරීමේ නියෝගය ඔහු පමා කළ යුතු වීමත් භාග්‍ය ජනක ය.

''චිත්තිකරු නඩු විභාගයකට කැප කිරීමට සාක්ෂි ප්‍රමාණවත් යයි කල්පනා කරතොත්'' යන වචන 164 වන වගන්තියේ යෙදීමෙන් 162(1) වන වගන්තියේ භාෂාවට සමානතත්වයක් පත් කෙරේ. එහෙයින් ම, හුදෙක් පැමිණිල්ලේ සාක්ෂි පමණක් පිළිබඳව හෝ වේවයි, ඒ සාක්ෂි හා චිත්තියේ සාක්ෂි අතර හෝ වේවයි වැදගත් කරුණු සම්බන්ධයෙන් සිටිනයක් පහළ වන අවස්ථාවක දී නිදහස් කිරීමට ඇති අභිමතය ව්‍යවස්ථිත (164 වන වගන්තිය) වන අතර, නිදහස් කිරීමේ නියෝගය කිරීමට ඇති බලය ද ව්‍යවස්ථිත (162(1) වගන්තිය) වන්නේ ය.

මේ හේතූන් නිසා පැමිණිල්ලේ සාක්ෂි සම්පූර්ණ වූ අවස්ථාවේ දී චිත්තිකරු නඩු විභාගයකට කැප කිරීම සඳහා සාක්ෂි ප්‍රමාණවත් නොවේ යයි මහේස්ත්‍රාත්වරයා කල්පනා කරතොත් 162 වන වගන්තියේ (1) වන උප වගන්තිය අදාළ වන බැව් මම පිළිගනිමි. උප වගන්තියේ සඳහන් හේතූන් නිසා එවිට නිදහස් කිරීමේ නියෝගයක් කළහොත්, එය උප වගන්තියෙන් පැවරී ඇති ව්‍යවස්ථිත බලතල ක්‍රියාවේ යොදවමින් කෙරෙන්නක් මිස 162(2) වගන්තියේ සඳහන් වන නෛසර්ගික බලය හෝ වෙනයම් බලයක් ප්‍රකාර කෙරෙන්නක් නොවේ.

උගත් මහේස්ත්‍රාත්වරයාගේ 1967 පෙබරවාරි 18 වන දින දරන නියෝගයෙන් මා ඉහතින් සකස් කළ සාරාංශයෙන් පෙනී යන්නේ වග උත්තරකරුවන් තුන් දෙනා නිදහස් කිරීමට තීරණය කිරීම සම්බන්ධයෙ

ප්‍රධාන හේතූන් දෙකක් ඔහුට තිබුණු බව ය: පළමුවනුව පැමිණිල්ලේ සාක්ෂිකරුවන් එකිනෙකාට පරස්පර විරෝධීවුණු අතර ඔවුන්ගේ සාක්ෂි, එක්තරා ප්‍රමාණයකට, ඔවුන් කලින් කළා වූ ප්‍රකාශවලින් පරස්පර විරෝධී බවට පත් කරනු ලැබිණි. දෙවනුව, චිත්තිකරුවන් වරදට අසු කරන්නා වූ ප්‍රකාශයන් කිරීමට සාක්ෂිකරුවන් විසින් පැහැර හැර හෝ පමා කොට ඇත. පළමුවන හේතුව 164 වන වගන්තියෙහි නිශ්චිතව සඳහන් කොට ඇති හේතුව වන අතර, එම හේතුව නිසා කරනු ලබන නිදහස් කිරීමක් වනාහි 162(1) වන වගන්තියෙන් ලැබී ඇති ව්‍යවස්ථිත බලය ක්‍රියාවේ යොදවමින් කරනු ලබන්නක් බැව් මවිසින් දැනටමත් පෙන්වා දී ඇත. දෙවන හේතුව ගැන සැලකිල්ලට ගැනීම මහේස්ත්‍රාත්වරයකුට නීත්‍යානුකූල වේ ද යන්න සලකා බැලීමට මම අදහස් නොකරමි; එහෙත් එම හේතුව උඩ කරනු ලබන නිදහස් කිරීමක් නීත්‍යානුකූල වුවද, නිදහස් කිරීමේ නියෝගයක යෙදීම සඳහා ඇති බලය 162 වන වගන්තියේ (1) උප වගන්තියෙන් පැවරී ඇති බලතලය ම බැව් මම පිළිගනිමි. එබඳු වූ අවස්ථාවක දී, සාක්ෂි සැලකිල්ලට ගැනීමකුත් ජූරි සභාවක් එය විශ්වාස නොකරන බැව් සිතිය හැකි තත්ත්වයකුත් මත්තෙහි මහේස්ත්‍රාත්වරයාගේ මතය පිහිටා ඇති කලෙක, නිදහස් කිරීමේ නියෝගය (නීත්‍යානුකූල නම්) වෙනුවෙන් හේතුව වූ කලී සාක්ෂි ප්‍රමාණවත් නොවීම ය. එබඳු වූ හේතුවක් නිසා අදහස් කිරීමකට අවසර දීම ව්‍යවස්ථාදායක මණ්ඩලය විසින් අදහස් කරන ලද්දේ නම්, නිදහස් කිරීමේ වලංගුකම නෛසර්ගික බලයක් මත රඳා පැවතීම එම මණ්ඩලය විසින් අදහස් කරන ලදැයි ඉදිරිපත් කෙරෙන මතය පිළිගැනීමට මට කිසිසේත් පුළුවන්කමක් නැත.

ඒ අනුව, 1967 පෙබරවාරි 18 වැනි දින දරන මහේස්ත්‍රාත්වරයාගේ නියෝගය සඳහා ඔහුට තිබුණු එක ම බලය වනාහි, 162 වන වගන්තියේ (1) වන උප වගන්තියෙන් පැවරී ඇති බලය යයි මම පිළිගනිමි. ඒකාන්තයෙන් ම, ඔහුගේ නියෝගය ම කියැවීමෙන් සැකයක් නැතිව පෙනී යන්නේ එම උප වගන්තියේත් 164 වන වගන්තියේත් විධිවිධානයන් උගත් මහේස්ත්‍රාත්වරයාගේ මනසෙහි රැඳී තිබුණු බව ය. 1964 ජූනි මස 4 වන දින දරන නියෝගයෙහි පවා උගත් මහේස්ත්‍රාත්වරයා ''2 වන, 3 වන හා 4 වන චිත්තිකරුවන්හට විරුඬව බැලූ බැල්මට පෙනෙන නඩුවක් නැතැයි මවිසින් තීරණය කරන ලදැ'' යි සඳහන් කෙළේ ය. 162(1) වන වගන්තියේ නියම භාෂාව මෙය නොවුව ද, එය එම අදහස ම ගෙන දෙයි; සාක්ෂි ප්‍රමාණවත් නොවේ නම්, බැලූ බැල්මට නඩුවක් නැත. මහේස්ත්‍රාත්වරයා ජූනි 4 වන දින දරන තම නියෝගයේ අවසානයේ දී ''නඩු විභාගයකට කැප කිරීම සඳහා සාක්ෂ්‍ය ප්‍රමාණවත් නොවේය යන මනාව කල්පනාවට භාජනය කරනු ලැබූ තම මතය පළ කෙළේ ය; මෙහි දී ඔහු වැදගත් නොවන වෙනසකට පමණක් භාජනය කරන ලද 162(1) වගන්තියේ භාෂාව ඇත්ත වශයෙන් ම යොදා ගත්තේ ය. මුදෙක් 1967 අගෝස්තු 14 වන දින දරන අවසාන නියෝගයෙහි පමණක් මහේස්ත්‍රාත්වරයා, 162 වන වගන්තියේ (2) වන උප වගන්තියේ සඳහන් වන්නා වූ නෛසර්ගික බලය යටතේ තමා පළමුවන නිදහස් කිරීමේ නියෝගය කළ බැව් කියා සිටින්නේය. කලින් නියෝග දෙකෙහි සඳහන් කරන ලද හේතූන් හමුවේ, එම කීම පිළිගත නොහැකි බැව් පළකිරීමට මට සිදුවීම ගැන කණගාටු වෙමි.

මෙහි ප්‍රතිඵලය වශයෙන් පළමුවන නිදහස් කිරීම, 162(1) වගන්තියෙන් පැවරී ඇති බලතල ක්‍රියාවේ යෙදවීමෙන් හෝ යෙදවීමේ අරමුණින් කෙරිණැයි මම පිළිගනිමි. මේ නිසාම, 391 වන වගන්තිය යටතේ පසුව තම විධානයෙහි යෙදීමට පැහැදිලිව ම බලයක් ඇටෝර්නි-ජනරාල්වරයා සතුව තිබුණේ ය. කවර අවස්ථාවන් උඩ දී වුව ද එබඳු නියෝගයන් පිළිපැදීම ප්‍රතික්ෂේප කිරීම මහේස්ත්‍රාත්වරයකු විසින් කළ හැකි යයි තර්ක නො කරන ලද්දේ ය. එසේ තර්ක කළ නොහැකි ය. එසේ පිළිපැදීමට මහේස්ත්‍රාත්වරයා ප්‍රතික්ෂේප කිරීම නීත්‍යානුකූල නොවේ යයි නිගමනය කිරීමට මට සිදු වී ඇත.

මෙම සිඩියේ දී ඇටෝර්නි-ජනරාල්වරයා විසින් කරන ලද නියමයන්, අපරාධ නඩු විධාන සංග්‍රහයේ 391 වන වගන්තියේ පැවරී ඇති බලතල යථා පරිදි ක්‍රියාවේ යෙදවීමෙන් කරන ලදැයි යන පදනමෙහි පිහිටා වුව ද, මෙම උසාවියට, මෙම වර්තමාන අයැදුමෙහි දී ඇටෝර්නි-ජනරාල්වරයාගේ නියමයන් පිළිපැදිය යුතුයයි මහේස්ත්‍රාත්වරයාට නියම කිරීමට බලයක් නැතැයි චිත්තිකරුවන් වෙනුවෙන් පෙනී සිටින අධිනීතිඥවරයා තර්ක කෙළේ ය.

දැන් මේ උසාවියෙන් පිරික්සා බැලිය හැකි, සංග්‍රහයේ 356 වන වගන්තියේ අර්ථය ඇතුළත කිසියම් දණ්ඩන නියමයක් හෝ නියෝගයක් නොපවත්නා හෙයින්, මේ කාරණයෙහි දී මෙම උසාවියෙන් සංශෝධන බලතල ක්‍රියාවේ යෙදවිය නොහැකි යයි තර්ක කරන ලද්දේ ය. නඩු විභාගයකට කැප කරන ලෙස මහේස්ත්‍රාත්වරයාට නියම කරනු ලැබිණ. (එසේ මෙහි දී කරුණු ඉදිරිපත් කරන ලදි); එහෙත් ඔහු එබඳු නියෝගයක් නොකෙළේ ය. එහෙයින්, උසාවි ආඥා පනතේ 37 වන වගන්තිය යටතේ අප විසින් වෙනසට හෝ සංශෝධනයට හෝ භාජන කළ හැකි වන්නා වූ කිසියම් නියෝගයක් නැත්තේය. මෙම තර්කයට, මට පෙනෙන පරිද්දෙන්, ඇති සරල පිළිතුර වූ කලී, ඇටෝර්නි-ජනරාල් වරයා තමාට කරන ලෙස නියෝග කළ නඩු විභාගයට කැප කිරීමේ නියෝගය ප්‍රතික්ෂේප කරමින් මහේස්ත්‍රාත්වරයා නීතියෙන් නියෝගයක් කර තිබීමත්, එබඳු ප්‍රතික්ෂේප කිරීමේ නියෝගයක් සංග්‍රහයේ 356 වන වගන්තියේ උසාවි ආඥා පනතේ 37 වන වගන්තියේත් අර්ථයට ඇතුළත් වන නියෝගයක් බවත් ය. විකල්පයෙන් ඇටෝර්නි-ජනරාල්වරයා විසින් දෙන ලද නියමයන් දීමට ඔහුට බලයක් නැතැයි භාවාර්ථයක් දෙන්නා වූ නියෝගයක් මහේස්ත්‍රාත්වරයා විසින් කර තිබේ. එය වූ කලී මෙම උසාවිය විසින් වෙනසට හෝ සංශෝධනයට හෝ භාජනය කළ හැකි වන්නා වූ නියෝගයකි.

391 වන වගන්තිය යටතේ නියමයන් නොකර හැරීම හෝ ප්‍රතික්ෂේප කිරීමත් කැඳවීමේ නියෝග නිකුත් කිරීම ප්‍රතික්ෂේප කිරීමත් අතර සාදෘශ්‍යතාවක් 1 වන චගඋත්තරකරුගේ අධිනීතිඥවරයා විසින් පෙන්වා දෙන ලද්දේය. කාරණා සාදෘශ්‍යය නම්, එක් එක් කාරණයෙහි දී ඇටෝර්නි-ජනරාල්වරයාට ලැබිය හැකි එක ම පිළියම ඇත්තේ මැන්ඩාමුස් ක්‍රමයෙනැයි ඔහු කියා සිටියේ ය. මෙම තර්කයේ දුර්වලතාව නඩු විධාන සංග්‍රහයේ 337 වන වගන්තියෙන් ප්‍රදර්ශනය කෙරේ; කැඳවීමේ නියෝග නිකුත් කරන ලෙස උසාවියකට බල කිරීම සඳහා මැන්ඩාමුස් තිබේ යයි වගන්තිය විධිවිධාන යොදන නමුත්, කැඳවීමේ නියෝග නිකුත් කිරීම ප්‍රතික්ෂේප කිරීම වෙනුවෙන්, ඇටෝර්නි-ජනරාල්වරයාගේ මූලිකත්වය හෝ අනුමැතිය සහිතව පමණක් වුවද, ඇපැලක් ඇතැයි ද එයින් නිශ්චිතව අදහස්කර ඇත. එසේ හෙයින්, කාරණා සත්‍ය වශයෙන්ම සාදෘශ්‍යවේ නම්, වර්තමාන සිඩියේ දී ඇටෝර්නි-ජනරාල්වරයාට ඇපැල් අයිතියක් ඇතැයි යන තර්කයට වුව ද පදනමක් 337 වන වගන්තිය විසින් ඇතැම් විට සැලැස්විය හැක්කේ ය.

365 වන වගන්තිය, දැනට විභාග කරන ලද්දා වූ නැත්නම් විභාග වෙමින් පවතින්නා වූ කාරණාවලට සිමා වී ඇති බැව් ද, සංග්‍රහයේ xvi වන පරිච්ඡේදය යටතේ විභාගයන් කිසියම් නඩුවක් විසඳීම හා ගැටී නොපවත්නා බැව් ද තර්ක කරනු ලැබිණ. ඉදිරිපත් කෙරුණු මෙම කාරණය ම **ඇටෝර්නි-ජනරාල්** එ. **කනගරත්නම්** (1950) 53 න.නී.ස. නඩුවේ දී, පැරණි තීරණයක් අනුව යමින්, ප්‍රතික්ෂේප කරන ලද්දේ ය. අපරාධ නඩු සංවිධාන සංග්‍රහයේ 5 වන වගන්තිය හා කියැවිය යුතු උසාවි ආඥා පනතේ 19 වන වගන්තිය, ප්‍රාථමික විභාග සම්බන්ධයෙන් සංශෝධන බලතල පැවරීමට තරම් පුළුල් යයි එම නඩුවෙන් කරන ලද තීරණයට මම එකඟ වෙමි.

මා අදහස් කරන හැටියට අපේ උසාවිවලට පමණ ඉක්මවා නිතර ම ඉදිරිපත් කරන ස්වභාවයේ තවත් තර්කයක් ද ඇත්තේ ය. ලංකා ආණ්ඩු ක්‍රමය විසින් බලතල වෙන් කිරීමේ සිද්ධාන්තය පිළිගෙන ඇතැයි යන මතය පිළිගනිමින් මෑත දී කෙරුණු තීරණයන් මත පිහිටා, ප්‍රාථමික නඩු විභාගයක දී කෙරෙන්නා වූ නිදහස් කිරීමේ නියෝගයක් අධිකරණ නියෝගයකැයි ද, 391 වගන්තිය යටතේ ඇටෝර්නි-ජනරාල් වරයා විසින් අදහස් කරන ලද බැව් පෙනෙන බලය පාවිච්චිය වූ කලී උසාවියක බලයකට අත ගැසීමකැ යි ද, එහෙයින් ම එය නීති විරෝධියයි ද තර්කයක් ඉදිරිපත් වුණේ ය. 1 වන වගඋත්තරකරු වෙනුවෙන් පෙනී සිටින අධිනීතිඥවරයා, නඩු විභාගයකට කැප කිරීම සඳහා හෝ නිදහස් කිරීම මහේස්ත්‍රාත් වරයකු විසින් කරනු ලබන නියෝගය, අධිකරණ නියෝගයක් බවට පිළිගැනීම සඳහා අවශ්‍ය ''හැම පරීක්ෂණයක ම අවශ්‍යතා සම්පූර්ණ කරන'' බැව් තදින් ම කියා සිටියේ ය. මෙම තර්කයේ ඇති සාවද්‍යතාව අග්‍ර විනිශ්චයකාර ග්‍රිfපිත්ගේ **ඇපල්ටන්** එ. **මුවර්හෙඩ්** (1908) 9 පොදු රාජ්‍ය මණ්ඩල නීති වාර්තාවේ, 330, නඩු තීන්දුවෙන් අනාවරණය වන්නේ ය. ''අධිකරණ බලය'' යන වචන ඉතාමත් ම පිළිගත හැකියයි වෙනත් පොදු රාජ්‍ය මණ්ඩල රටවල් බොහෝ ගණනක අධිකරණ විසින් එය පිළිගෙන ඇත. ''අධිකරණ බලය'' නමැති වචනවල අර්ථය නම් ''ස්වකීය වැසියන් අතර හෝ තමා හා තම වැසියන් අතර හෝ විවාදයන් එම අයිතිවාසිකම් ජීවිතය, නිදහස හෝ දේපළ හෝ පිළිබඳ වුව ද, තීරණය කිරීම සඳහා හැම පරම බලධාරියා තුළ ම අවශ්‍යයෙන් ම තිබිය යුතු බලය යයි'' උගත් අග්‍ර විනිශ්චයකාරතුමන් විසින් දෙනු ලැබූ අර්ථය යි. ග්‍රිfපිත් අග්‍රවිනිශ්චයකාරතුමන්ගේ කියමන පිළිගැනීමේ යෙදෙන ලංකාව ඇතුළු වෙනත් අධිකරණ බලයයන් විසින්, අධිකරණ බලය ක්‍රියාවේ යෙදවීමේ වැදගත් අංගය වශයෙන් සඳහන් කොට ඇත්තේ වැසියා හා වැසියා අතර හෝ වැසියා හා රාජ්‍යය අතර හෝ අයිතිවාසිකම් නිශ්චය කිරීමක් තිබිය යුතු බව ය. පුද්ගලයකු උසාවියක් ඉදිරිපිට විභාගයකට කැප කිරීමේ හෝ නඩු විභාගයකට බැඳී සිටීමෙන් ඔහු නිදහස් කිරීමේ දී, වැසියකුගේ හෝ රාජ්‍යයේ හෝ අයිතිවාසිකම් නිශ්චය කිරීමක් සිදු නොවේ.

විනිශ්චයකාරයකු විසින් නියෝගය කරන ලද්දේ නම් හෝ, කරන ලද හේතුව උඩ හෝ කිසියම් නියෝගයකට ''අධිකරණ නියෝගය'' කැයි කීමට ඉඩක් ඇති වුව ද, එම රාජ්‍යයේ අධිකරණ බලය ක්‍රියාවේ යොදවමින් කරනු ලබන නියෝගයකැයි එයින් අදහස් නොකෙරේ. සංග්‍රහයේ xvi වන පරිච්ඡේදය යටතේ විභාගයක් පවත්වන්නා වූ මහේස්ත්‍රාත්වරයා, චිත්තිකරු වරදක් කළ හෝ නොකළ වගක් තීරණය නොකරයි. ඔහු කරනු ලබන එක ම තීරණය නම් චිත්තිකරු නඩු විභාගයකට යොමු කිරීම සඳහා සාක්ෂි ප්‍රමාණවත් ද? නැද්ද? යන්න නිගමනය කිරීම පමණකි. නඩු විභාගයකට කැප කිරීමත් සමග ම රිමාන්ඩ් භාරයට යැවෙන නිසා, නඩු විභාගයකට කැප කිරීම පුද්ගලයකුගේ නිදහස පිළිබඳ අයිතියකට අත ගැසීමක් වන හෙයින් එය අධිකරණ බලය යෙදවීමෙකැයි ඉදිරිපත් කරනු ලබන මතයෙහි පිළිගත හැකි කිසිවක් මට නො පෙනේ. නඩු විභාගයකට කැප කිරීමකින් පසුව නීතියෙන් රිමාන්ඩ් කිරීමක් පහළවීම අවශ්‍ය නැත. එසේ පහළ වුව ද, චිත්තිකාර පුද්ගලයාගෙන් ඔහුගේ නිදහස ඉවත්

කළ යුතු ද නැද්ද යන කාරණය පිළිබඳව කිසි ම තීරණයක් මහේස්ත්‍රාත්වරයා එබඳු වූ තම තත්ත්වයේ සිටිමින් නොකරන්නේ ය. වැසියන්ගේ අයිතිවාසිකම් ඉවත් කරන නමුදු, ඒ සමග ම එබඳු අයිතිවාසිකම් පිළිබඳ විවාද නිශ්චය හෝ තීරණය නො කරන්නා වූ හුදු පාලන නියෝග දිනපතා ම පැනවේ. වන්දි ගෙවීම් සහිතව හෝ විරහිතව, බලයෙන් ඉඩම් හෝ නිශ්චල දේපළ පවරා ගැනීමේ නියෝගය වූ කලී මේ පිළිබඳව සුලභ හා සරල උදාහරණයකි.

ග්‍රිෆිත් අග්‍ර විනිශ්චයකාරතුමාගේ නඩු තීන්දුවෙන් ම මහේස්ත්‍රාත්වරුන් සතුව ඇති, නඩු විභාගයකට කැප කිරීමේ හෝ නඩු විභාග පූර්ව අවධියේ විභාගවල දී නිදහස් කිරීමේ හෝ බලය ගැන තරමක් දීර්ඝව ඇළලී ඇත. පුද්ගලයකු නඩු විභාගයකට කැප කළ යුතු ද නැද්ද යන්න තීරණය කිරීම සඳහා ප්‍රාථමික විභාගයක යෙදෙන්නා වූ මහේස්ත්‍රාත්වරයකු අධිකරණ ක්‍රියාවක නොයෙදෙන්නා යයි යන නිගමනය පිළිබඳව එම නඩු තීන්දුවේ ඇති සාධකවලට එකඟ නොවීම සඳහා කිසිදු හේතුවක් මට නොපෙනේ.

මෙම කාරණයෙහි දී බලතල වෙන් කිරීමේ ධර්මය යදින්නා වූ තර්කය උදෙසා තවත් පිළිතුරක් ඇතැයි ද මම අදහස් කරමි.

චෝදිත වරදකරුවකු උසාවියක් හමුවට කෙළින් ම පැමිණවීමටත්, චෝදිත වරදකරුවකු නිදහස් කරන්නාවූ මහේස්ත්‍රාත්වරයකුට ඔහු නඩු විභාගයකට කැප කරන ලෙස නියම කිරීමටත්, නඩු විභාගයකට තමන් විසින් කැප කරනු ලැබූ වරදකරුවකු නිදහස් කරන ලෙස මහේස්ත්‍රාත්වරයකුට නියම කිරීමටත් බලතල, කලින් නොවේ නම්, 1883 දී පටන් ම, අපේ නීතිය විසින් ඇටෝර්නි-ජනරාල්වරයා වෙත පවරා දී ඇත. අර්ධ-අධිකරණ යනුවෙන් සාමාන්‍යයෙන් හඳුන්වා ඇති ඇටෝර්නි-ජනරාල්වරයාගේ මෙම බලතල, අපේ අපරාධ නඩු සංවිධානයේ විරාගත වැදගත් කොටසක් බවට පත් වී ඇති අතර, මෙම බලතල දිගට ම ව්‍යවහාර කිරීම අවලංගු බවට හෝ නීති විරෝධී බවට හෝ පත් කිරීම සඳහා කිසියම් චේතනාවක් අපේ ආණ්ඩු ක්‍රමයේ තිබිණැයි පිළිගැනීම ඇත්ත වශයෙන් ම අත්‍යාවශ්‍ය ය. සමාන කරුණු සලකා මෙම උසාවිය විසින්, යුඩාධිකරණය වෙත අපරාධ අධිකරණ බලය පවරන්නා වූ ව්‍යවස්ථාවන්, ආදායම් තහනම් කඩකිරීම් උදෙසා ආදායම් බලධාරීන් වෙත දණ්ඩන බලය පවරන්නා වූ ව්‍යවස්ථාවන් පිළිබඳ වලංගුකම් පිළිගෙන ඇත.

ඇටෝර්නි-ජනරාල්වරයා අයුතු අන්දමින් අධිකරණ විභාගයට අත ගැසීමට තැත් කරන බවටත්, ඇටෝර්නි-ජනරාල්වරයා විසින් කරන ලද නියමයන් මහේස්ත්‍රාත්වරයා සාක්ෂි අනුව පහළ කරගත් මතයන්ගේ නිරවද්‍යතාවය ප්‍රශ්න කරන්නක් බවටත් හුදෙක් මහේස්ත්‍රාත්වරයාගේ සිත් තුළ හටගත් කිසියම් අදහසක් නිසා ම මෙම නඩුව මෙබඳු නැමීමක් ගෙන ඇතැයි මෙහි දී මවිසින් සඳහන් කළ යුතුව ඇත. තමා ඉදිරියේ පැවැත්වෙන ප්‍රාථමික නඩු විභාගයේ දී මහේස්ත්‍රාත්වරයකු වෙත සංග්‍රහයේ xvi වන පරිච්ඡේදයෙන් එක්තරා ප්‍රමාණයක් අභිමතයක් පැවරෙන්නාක් මෙන් ම, ඇටෝර්නි-ජනරාල්වරයා වෙත ද සංග්‍රහයේ වෙනත් විධිවිධාන මගින් එක් ප්‍රමාණයක අභිමතයක් පැවරී ඇති බැව් මතක තබා ගැනීම යෙහෙකි. මෙම අභිමතය සංසිද්ධියට පත්වන්නේ, xvi වන පරිච්ඡේදය යටතේ පැවැත්වෙන විභාග මෙම අභිමතය විසින් නිශ්චය කෙරෙන අන්දමකින් අවසානයකට පත් කරවීම සඳහා තමන් සතුව පවත්නා ව්‍යවස්ථිත බලයක් මාඕයෙනි. ඇත්ත වශයෙන් ම, වගඋත්තරකරුවන් වෙනුවෙන් මෙම නඩුවේ පෙනී සිටි අධිනීතිඥවරුන් ඉදිරිපත් කළ තර්ක, මහේස්ත්‍රාත්වරයකු විසින් නඩු විභාගයකට කැප කළ පුද්ගලයකු නීත්‍යානුකූලව නිදහස් කරන්නා වූ නියෝගයක් ඇටෝර්නි-ජනරාල්වරයා විසින් කළ නොහැක්කේ යයි යන බිහිසුණු සිද්ධාන්තයක් (වෙනත් අවස්ථාවලට ඔවුන් කවරකු විසිනුදු පිළිගනු නොලබන බැව් මට ඒකාන්තයෙන් ම සිතෙන) හා ගැටී පවතී.

මේ හේතූන් නිසා, මම, මෙම උසාවිය සතු සංශෝධන බලතල ක්‍රියාවේ යොදවමින්, 1967 අගෝස්තු 14 වන දින මහේස්ත්‍රාත්වරයා විසින් කරනු ලැබූ නිදහස් කිරීමේ නියෝගය ඉවත් කොට, එහි සඳහන් චෝදනාව වෙනුවෙන් ශ්‍රේෂ්ඨාධිකරණය ඉදිරියේ නඩු විභාගයකට වගඋත්තරකරුවන් තිදෙන කැප කිරීමටත් නීතියට අනුකූලව තවදුර පියවර ගැනීමටත් ඇටෝර්නි-ජනරාල්වරයා විසින් 1967 ජූනි 18 දින දී කරන ලද නිගමනයට එකඟවීම සඳහා නඩු වාර්තාව මහේස්ත්‍රාත් උසාවිය වෙත යවමි.

අබේසුන්දර, විනිශ්චයකාරතුමා:
මම එකඟවෙමි.

සිල්වා, විනිශ්චයකාරතුමා:
මම එකඟ වෙමි.

නිදහස් කිරීමේ නියෝගය ඉවත් කොට ඇටෝර්නි ජනරාල් වරයාගේ නිගමනයට එකඟව තවදුර පියවර ගැනීමට මහේස්ත්‍රාත් උසාවියට යවන ලදී.

(පරිවර්තනය: ඇල්. ඇම්. ඒ. සිල්වා විසිනි.)

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා සහ සිව සුබ්‍රමනියම් විනිශ්චයකාරතුමා ඉදිරිපිට දී ය

වික්‍රමසූරිය ආරච්චි සහ තවත් කෙනෙක් බාලවයස්කාරයෝ

(සහයක වශයෙන් කේ. ආර්. තෝමස්)

එ.

විශෙෂ කොමසාරිස්වරයා—ගාල්ලෙ නගර සභාව*

ශ්‍රේ: අ: අංක 435/64 — දි: උ: ගාල්ල අංක 3110/ඇම්

විවාද කොට තීන්දු කළේ: 1967 මැයි, 20 වැනි දා

මහා නගර සභාවක් — එහි සේවකයින් නොසැලකිලිමත් වීම නිසා අලාභය ඉල්ලා දැමූ නඩුවක් — යථා පරිදි මහා නගර සභා ආඥා පනතේ 307 වන ඡෙදය යටතේ දිය යුතු නිවේදනය දෙන ලදැයි මතු කළ ප්‍රශ්නයක් — 307 වන ඡෙදයෙහි (1) වන උප-ඡෙදය යටතේ යථා පරිදි දියයුතු නිවේදනය පිළිබඳව සහ අනිකුත් සියලු කරුණු පිළිබඳව ප්‍රශ්න විනිසකරු විසින් පැමිණිලිකරුගේ වාසියට තීන්දුකර එම ඡෙදයෙහි (2) වන උප ඡෙදය යටතේ ප්‍රශ්නයක් මතු වී නැතත් ඔහුට විරුඩව තීන්දුව දීම — එහි ප්‍රතිඵලය කුමක්ද යන්න.

තම සේවකයන්ගේ නොසැලකිල්ලෙන් වූ සිද්ධියකින් පැන නැගුණු (මේ නිසා බාලවයස්කාර පැමිණිලි කරුවන්ගේ මවුගේ මරණය සිදුවිය) අලාභය ඉල්ලා නගර සභාවකට විරුඩව දැමූ නඩුවක විසඳිය යුතු ප්‍රශ්න එකක් හැර අනිත් සියල්ල ම උගත් විනිසකරු විසින් පැමිණිලිකරුගේ වාසියට තීන්දු කරන ලදී. පැමිණිලි කරුගේ වාසියට තීන්දු නොවූ ප්‍රශ්නය මහ නගර සභා ආඥාපනතේ 307 වන ඡෙදයට අනුව එම නගර සභාවට දිය යුතු නඩුව ගැන නිවේදනය යථාපරිදි දෙන ලදද යන්න විය. 307 වන ඡෙදයේ (1) වන උප-ඡෙදය යටතේ මෙම නිවේදනය දී ඇති බව නිගමනය කළ උගත් විනිසකරුවා පැමිණිලිකරු විසින් නඩු නිමිත්ත උද්ගතවී තෙමසක් ගත වන තුරු මේ සඳහා ක්‍රියාත්මක නොවීමේ හේතුවෙන් 307 වන ඡෙදයෙහි (2) වන උප-ඡෙදය යටතේ කටයුතු නොකළ නිසා ඔහුට විරුඩව තීන්දුව දුන්නේය.

පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කළ ප්‍රධාන කරුණ වූයේ නඩුවෙහි විසඳිය යුතු ප්‍රශ්නයක් ලෙස මතු කොට නොතිබුනු ප්‍රශ්නයක් පිළිබඳව ඔහුට විරුඩව නිගමනය කිරීම නිසා උගත් විනිසකරු කරුණු වරදවා ගෙන ඇති බව ය.

තීන්දුව: (1) මේ පිළිබඳව විසඳිය යුතු ප්‍රශ්නයක් නඩුවෙහි දී මතු කරන ලද නම් එම මහා නගර සභාවේ අධිකාරීන් විසින් කරන ලද කර්තව්‍යය මහා නගර සභා ආඥා පනතට අනුකූලව කරන ලද්දක්ද යන්න ගැන පැමිණිලි කරුට කරුණට අදාල වන සාක්ෂි ඉදිරිපත් කළ හැකිව තිබිණි.

(2) පැමිණිලිකරු විසින් අලාභය ඉල්ලා සිටීමට හේතු වූ නොසැලකිලිමත් කටයුත්ත විදුලි බල පනතේ 16 වන ඡෙදය යටතේ කළ දෙයක් බවත් මහා නගර සභා ආඥා පනතේ පැණවීම් කිසිවකට අනුව එය කිරීමට මහා නගර සභාවට බලතල නොමැති බව බැලූ බැල්මට පෙනී යන නිසා ඉහත සඳහන් 307 වන ඡෙදය මීට පිළිසරණ පිණිස ගත නොහේ.

ඩී. ආර්. පී. ගුණතිලක මහතා, පැමිණිලිකාර-ඇපැල්කරුවන් වෙනුවෙන්.

රාජනීතිඥ සී. රංගනාදන් මහතා, පී. නාගේන්ද්‍ර මහතා සමග චිත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වේනි කා., 39 වෙනි පිට බලනු.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා:

බාල වයස්කාර ළමයින් දෙදෙනකුගේ සහායක වශයෙන් මෙම නඩුවේ පැමිණිලිකරු ගාල්ලේ මහ නගර සභාවට විරුද්ධව නඩු පවරා ඇත්තේ එම නගර සභාවේ සේවකයකුගේ නොසැලකිලිමත් හේතුවෙන් එම ළමයින් දෙදෙනාගේ මවගේ මරණය සිදුවීම නිසා ඊට අලාභ යක් ලබා ගැනීම පිණිස ය. අංක 14 දරණ විසඳියයුතු ප්‍රශ්නය හැර අනික් සියලුම විසඳිය යුතු ප්‍රශ්නයනට උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා තීන්දුව දී ඇත්තේ පැමිණිලිකරුවන්ගේ වාසියට හේතුවන ලෙස ය. අංක 14 දරණ ප්‍රශ්නය මහ නගර සභා ආඥා පනතේ 307 වැනි ඡෙදයට අනුව නඩුව ගැන දියයුතු නියම නිවේදනය දී තිබේද නැද්ද යන්නය.

නඩුදැමීම පිළිබඳ නියම නිවේදනයක් දීම පිළිබඳ පැනවීම ඇත්තේ 307 වන ඡෙදයේ 1 වන උපඡෙදයේ ය. මේ අනුව ඇත්ත වශයෙන්ම උගත් විනිශ්චයකාරවරයා එම උප-ඡෙදයේ ගැබ් වී ඇති පැනවීම අනුව නියම නිවේදනයක් පැමිණිලිකරු විසින් දෙන ලද බව පිළිගත්තේ ය. නමුත් එම නඩුවේ එයට අදාල නඩු නිමිත්ත උදාවීමෙන් තෙමසක් ඇතුළත ආරම්භ නොකිරීමේ හේතුව උඩ උගත් විනිශ්චයකාරවරයා ඔහුට විරුද්ධව කරුණු ඒත්තු ගෙන ඇති අතර 307 වැනි ඡෙදයේ 2 වන උප-ඡෙදයට එකඟව පැමිණිලිකරු කටයුතු නොකළ බැව් තීන්දු කළේ ය.

පැමිණිලිකරුගේ අභියාචනයේ දී ඔහු වෙනුවෙන් පෙනී සිටි නීතිවේදියා තමාට පිළිසරණ සෙවූ ප්‍රධාන කරුණ 307 වැනි ඡෙදයේ 2 වන උප-ඡෙදයට අනුව පිලිවිද තිබේද යන්න ගැන ප්‍රශ්නයක් විසඳීම පිණිස නඩුවේ දී මතුකර නොතිබීමයි. මෙම කරුණ නීති ප්‍රශ්නයක් පමණක් හැටියට සළකා තීරණයක් දිය හැකිව තිබිණි නම් මෙසේ එය විසඳිය යුතු ප්‍රශ්නයක් හැටියට මතු කිරීම වැදගත් නොවන දෙයක් හැටියට සලකා ගැනීමට ඉඩ තිබිණ. නමුත් මහ නගර සභා අධිකාරීන් විසින් ගන්නා ලදුව මෙම මත භෙදයට හේතු වූ ප්‍රශ්නය මහ නගර සභා ආඥාපනතේ පැණවීම් අනුව කරන ලද්දක්ද යන්න සළකා බැලීමේ දී ඒ පිළිබඳව විසඳිය යුතු ප්‍රශ්නයක් හැටියට ඒ මතු කරන ලද්දේ නම් පැමිණිලිකරුට ඒ සම්බන්ධයෙන් එයට අදාල වන යම්කිසි සාක්ෂි ඉදිරිපත් කිරීමේ ප්‍රස්ථාවක් ලැබීමට අවකාශ තිබුණ බැව් අපට පෙනිගියේය. එම නිසා මෙම කරුණ යටතේ නඩුවට දෙපක්ෂයෙන් ඉදිරිපත් කළ ලියකියවිලි හෝ විසඳිය යුතු ප්‍රශ්න සටහන් කිරීමේ දී හෝ විශේෂයෙන් මතු නොකරන ලද ප්‍රශ්නයක් පැමිණිලිකරුට විරුද්ධව තීරණය කිරීමේ දී මෙම නඩුව විසඳූ උගත් විනිශ්චයකාරවරයා වරදවා කටයුතු කර ඇති බව අපි ඒත්තු ගැනීමට කැමැත්තෙමු.

මෙම බාල වයස්කාරයන්ගේ මවගේ මරණයට හේතු වූ ක්‍රියාව බැලු බැල්මට විදුලි බල පනතේ 16 වන ඡෙදය යටතේ කළදෙයක් බවත් එය මහ නගර සභා ආඥා පනතට අනුව මහ නගර සභාවකට කිරීමට එම පනතේ කිසිම පැණවීමකින් බලයක් නැති බැව් වැඩිදුරටත් පෙනියයි. එම නිසා මෙම නඩුව මහ නගර සභා ආඥා පනතේ පැණවීම්වලට අනුව මහ නගර සභාවට විරුද්ධව දැමූ නඩුවක් නොවේය යන පැත්තට නැඹුරුවීමට අපට සිදු වේ. මේ කරුණට ආඥාපනතේ 307 වැනි ඡෙදය අදාල නොවේ. මෙම අභියාචනයට ඉඩ දෙන අපි චිත්තිකරුට එක් එක් පැමිණිලිකරුවාට රු: 6,000/- බැගින් ගෙවීම හෝ මුලු මුදල වශයෙන් රු: 12,000 ගෙවීම සඳහා තීන්දු ප්‍රකාශයක් නිකුත් කිරීමට උපදෙස් දෙන්නෙමු. මෙම මුදල මෙම නඩුවේ ගෙවීමක් හැටියට මෙම අධිකරණයේ තැන්පත් කළ යුතු ය.

උසාවි දෙකෙහිම නඩු ගාස්තුව පැමිණිලිකරුට ලැබෙන සේ සටහනක් ද එම තීන්දු ප්‍රකාශයේ ම අන්තර්ගත වනු ඇත.

සිව සුබ්‍රමනියම් විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

ටී. ඇස්. ප්‍රනාන්දු, වැඩබලන අග්‍රවිනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිට

ජී. බී. ද සිල්වා එ. ඊ. ඇල්. සේනානායක සහ තවත් දෙදෙනෙක් *

ශ්‍රේෂ්ඨාධිකරණ 1967 ඉල්ලුම් පත්‍ර අංකය 185.

මහනුවර නගරාධිපති හා තවත් අය කෙරෙහි මැන්ඩේමස් ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් උදෙසා ඉල්ලුම් පත්‍රයකි.

විවාද කළේ: 1967 ඔක්තෝබර් 28 සහ 29 යන දිනවල
තීන්දු කළේ: 1967 නොවැම්බර්, 10 වැනි දින.

මහ නගර සභා ආඥා පනත — සාකච්ඡා සඳහා අදාළ කරුණු ඉදිරිපත් කිරීමට සාමාජිකයකු සතුව ඇති අයිතිය — කිසියම් කාරණයක් රීති විරෝධියයි න්‍යාය පත්‍රයෙන් ඉවත් කිරීමට නගරාධිපති සතුව ඇති බලය හෝ අභිමතය — මැන්ඩේමස් ආඥාව — ප්‍රාදේශීය සභා — විකල්පයෙන් සහනයක් ඇද්ද යන වග — මහ නගර සභා ආඥා පනත 17, 18(2), 19, 20 හා 40 (1) (ආර්) වගන්ති — මහනුවර මහ නගර සභාවේ 2 (බී), 12(1) හා 12(2) අතුරු ව්‍යවස්ථා.

පැවරී ඇති ස්වකීය බලතල ක්‍රියාවේ යෙදවීම සඳහා මහ නගර සභා අරමුදල හා සම්බන්ධ වූ සාමාන්‍ය ප්‍රශ්න ඉදිරිපත් කිරීමට බලයක් මහ නගර සභා ආඥා පනතේ 40(1)(ආර්) වගන්තියෙන් මහ නගර සභාවකට පැවරී ඇත. මහනුවර මහ නගර සභාවේ සාමාජිකයකු වන ඉල්ලුම්කරු පහත සඳහන් යෝජනාව ගැන යථා පරිදි කල් දී ඇත.

"මෙම සභාවේ මුදල් තත්ත්වයේ ඇති සැක කටයුතු ස්වභාවය නිසා ම, පිළිගැනීමේ උත්සව, භෝජන සංග්‍රහ, තේ පැන් සංග්‍රහ හා රාත්‍රී භෝජන උදෙසා, 1967 තේ අය-වැයෙන් එබඳු වියදම් සඳහා වෙන් වී ඇති මුදලින් කිසියම් මුදල් ප්‍රමාණ වැය නොකළ යුතුයයි මෙම නගර සභාව යෝජනා කරපි."

මහනුවර මහ නගර සභාවේ නගරාධිපති වන 1 වන වගඋත්තරකරු ඉහත කී යෝජනාව රීති විරෝධියයි න්‍යාය පත්‍රයෙන් ඉවත් කෙළේ ය. එහෙයින් ම යෝජනාව ගැන දැනුම් දීමෙන් පසුව පැවැත්වුණු පළමුවන සාමාන්‍ය රැස්වීමේ න්‍යාය පත්‍රයට එය ඇතුළත් නොකරන ලදී.

මෙම යෝජනාව වූ කලි රීති විරෝධියයි 1 වන වගඋත්තරකරු විසින් නිගමනය කළ හැකි යෝජනාවක් නොවේ යයි යන හේතුව උඩ, මෙම ඉල්ලුම් පත්‍රය ගැන තීරණයක් නිකුත් කිරීමෙන් පසුව එළඹෙන පළමුවන මාසික සාමාන්‍ය රැස්වීමේ න්‍යාය පත්‍රයෙහි එම යෝජනාව ඇතුළත් කිරීමට 1 වන වගඋත්තරකරුට බල කිරීම සඳහා මැන්ඩේමස් ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් සඳහා ඉල්ලුම්කරු ශ්‍රේෂ්ඨාධිකරණයට ඉල්ලීමක් ඉදිරිපත් කෙළේ ය.

1 වන වගඋත්තරකරු වෙනුවෙන් පහත සඳහන් කරුණු ඉදිරිපත් කෙරිණි:

(ඒ) පහත දැක්වෙන අතුරු ව්‍යවස්ථා අනුව කවර හෝ යෝජනාවක් රීති විරෝධියයි නිශ්චය කිරීමේ නියත බලයක් ඔහුට ඇත —

"12(2)— රැස්වීමකට දින තුනකට (ඉරිදා හා රජයේ නිවාඩු දින අත් හැරයි) නොඅඩු කාලයකට කලින් කොමසාරිස් වෙත දැනුම් දෙන ලද සියලු ම ප්‍රශ්න හෝ යෝජනා, එම ප්‍රශ්න හෝ යෝජනා රීති විරෝධී යයි නගරාධිපති නිගමනය කළහොත් මිස, නැත්නම් න්‍යාය පත්‍රයෙහි ඇතුළත් කළ යුත්තේ ය."

(බී) ස්වකීය කටයුතු අතින් ස්වාමිත්වයක් මහ නගර සභාවක් සතුව ඇත. අවශ්‍යයෙන් ම අභ්‍යන්තර වූ ප්‍රශ්නයක ඇති නිරවද්‍යතාව ශ්‍රේෂ්ඨාධිකරණය විසින් සමාලෝචනයට පත් නො කෙරෙන්නේ ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කා., 51 වෙනි පිට බලනු.

(සී) සභාවේ අවසරය ලබාගෙන යෝජනාව ඉදිරිපත් කිරීමට ඉල්ලුම්කරුට මහ නගර සභා ආඥා පනතේ 20 වන වගන්තියෙන් ඉඩක් ලැබී ඇත. ඒ නිසා, විකල්පයෙන් සහනයක් ඔහුට තිබියදීත් ඔහු එයින් ප්‍රයෝජනය ගෙන නැත.

තීන්දුව: (1) මෙම යෝජනාව මුදල් ප්‍රතිපත්තිය පිළිබඳ සාමාන්‍ය ප්‍රශ්නයක් මතු කරන්නකි. එහෙයින් ම එය 40(1)(ආර්) වගන්තියේ අර්ථය ඇතුළතට වැටේ.

(2) ව්‍යවස්ථාව විසින් ම පවරා ඇති බලය ක්‍රියාවේ යෙදවීම අහෝසි වන අන්දමින් අතුරු ව්‍යවස්ථාවක් අර්ථකථනයට භාජන කළ නොහැක්කේ ය. ඒ නිසා, වෙනත් අයුරින් නීත්‍යානුකූල වන්නා වූ යෝජනාවක් රීති විරෝධියයි තීරණය කිරීම සඳහා නියත බලයක් හෝ අභිමතයක් 12(2) අතුරු ව්‍යවස්ථාව මගින් 1 වන වගඋත්තරකරු වෙත පවරා දී නැත.

(3) දැනුම් දීමේ ව්‍යවස්ථිත අයිතියක් සාමාජිකයකු සතුව ඇති යෝජනාවක් රීති විරෝධියයි නිශ්චය කිරීමට 1 වන වගඋත්තරකරුට අභිමතයක් නැත.

(4) පැමිණිලිකර සිටින තීරණයෙහි යෙදීමේ හේතුවෙන් නගරාධිපති තම ව්‍යවස්ථිත යුතුකම් පැහැර හැර හෝ ප්‍රතික්ෂේප කොට ඇත. මෙය මහනුවර බදු ගෙවන්නන් වෙනුවෙන් ඉල්ලුම්කරු වෙත ඔහුගෙන් ඉටුවිය යුතුව තිබුණු යුතුකමකි. මෙයට ප්‍රතිකර්මය මැන්ඩේමස් ය.

(5) ප්‍රාදේශීය මණ්ඩල විසින් ව්‍යවස්ථිත යුතුකම් ඉටු කරනු ලැබීමට මැන්ඩේමස් මාර්ගයෙන් බල කිරීම සඳහා දිගු කලක් තිස්සේ ම ශ්‍රේෂ්ඨාධිකරණය විසින් බලතල පාවිච්චි කර නැත.

(6) 20 වන වගන්තියෙන් වෛකල්පික සහනයක් යෙදී නැත.

ගුණසිංහ එ. කොළඹ නගරාධිපති (46 න.නී.වා. 85)
කුරේ එ. ග්‍රෙරෝ (56 න.නී.වා. 87) (අනුගමනය නොකෙරිණි.)

සලකා බැලූ නඩු: විජේසූරිය එ. මුණසිංහ (64 න.නී.වා. 180)
මොහමඩ් එ. ගොපල්ලව (58 න.නී.වා. 418)
සීනිවාසගම් එ. කිරුපමූර්ති (56 න.නී.වා. 450)
සමරවීර එ. බාලසූරිය (58 න.නී.වා. 118)

ටී. ඇස්. ප්‍රනාන්දු, විනිශ්චයකාරතුමා: "නියත බලය හෝ අභිමතය හැරුණු විට, එම යෝජනාව රීති විරෝධී බැව් නිගමනය කිරීම යුක්තිසහගතයයි දැක්වීම සඳහා කවර හෝ හේතුවක් දක්වා නැත. මහජනයා වෙත බලපාන බලතල ක්‍රියාවේ යොදවමින් ප්‍රජාතන්ත්‍රවාදී රාමුවක් තුළ කාර්යයෙහි යෙදෙන බැව් පෙනෙන ප්‍රාදේශීය මණ්ඩලයකට තෝරා පත් කරනු ලබන නිලධාරියකු තුළ එබඳු බලයක් ඇතැයි පිළිගැනීමට ඒකාන්තයෙන් ම උසාවියක් විසින් මැලි විය යුතු ය."

"බහුතර පක්ෂය විසින් හුදෙක් මනඃකල්පිතයයි සලකනු ලබන මැසිවිලි වුව ද ප්‍රකාශයට පත් කිරීමේ අවකාශයක් සුළු කොට්ඨාශය වෙත ලැබීම පැහැර නොහැරීමෙන් ප්‍රජාතන්ත්‍රවාදී සම්ප්‍රදාය වඩාත් හොඳින් ආරක්ෂා වන බැව් සිහිපත් කිරීම යෝග්‍ය ය. විවාදය වූ කලී තවමත්, ශංකාවෙන් යුක්ත අවංක පුද්ගලයන් හරවා ගැනීමේ ප්‍රබල මාධ්‍යයකි."

පීලික්ස් ආර්. ඩයස් බණ්ඩාරනායක මහතා, නිහල් ජයවික්‍රම මහතා සමග, ඉල්ලුම්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇන්. ආර්. ඇම්. දළුවත්ත මහතා සහ ඇන්. ඇස්. ඒ. ගුණතිලක මහතා සමග, වග-උත්තරකරුවන් වෙනුවෙන්.

ටී. ඇස්. ප්‍රනාන්දු, වැඩ බලන අග්‍රවිනිශ්චයකාරතුමා

නිසි පරිදි තමන් විසින් යෝජනාවක් පිළිබඳ දැනුම් දුන් නමුදු, 1967 අප්‍රෙල් මාසයේ පැවති සාමාන්‍ය රැස්වීමේ න්‍යාය පත්‍රයෙන් නීත්‍යානුකූල නොවන අන්දමින් එය බැහැර කර බැව් තමා විසින් පැමිණිලි කරමින් මෙම ඉල්ලුම් පත්‍රය ගැන තීරණයක් නිකුත් කිරීමෙන් පසුව එළඹෙන පළමුවන මාසික ව්‍යවස්ථිත සාමාන්‍ය රැස්වීම් වාරයේ න්‍යාය පත්‍රයට ඇතුළත් කරවා ගැනීම සඳහා, අංක 11 දරන කොට්ඨාශය වෙනුවෙන් නියෝජනය කිරීම සඳහා තෝරා පත් වී ඇති මහනුවර නගර සභාවේ නියෝජිතයා වන ඉල්ලුම්කරු තෙමේ මෙම උසාවියෙන් මැන්ඩේමස් ස්වභාවයේ අධිකරණ විධානයක් අපේක්ෂා කරන්නේය.

නීත්‍යානුකූල නොවන අන්දමින් ඉවත් කරන ලද අවස්ථාවේ පටන් දෙසතියක් ඇතුළත අමුණන ලද මෙම ඉල්ලුම් පත්‍රයෙහි වගඋත්තරකරුවෝ වූ කලි: (1) නගරාධිපති, (2) නගර සභා කොමසාරිස් හා (3) ඉහත කී මහ නගර සභාවේ ලේකම්, යන අයයි.

සභාවේ අතුරු ව්‍යවස්ථා අනුව න්‍යාය පත්‍රයෙහි යෝජනාවක් ඇතුළත් කිරීමේ කාර්‍යය නගර සභා කොමසාරිස් වෙත පැවරී ඇතත්, අදාළ කරුණුත් හබ ප්‍රශ්නයට සම්බන්ධ වූ අතුරු ව්‍යවස්ථාත් පිරික්සා බැලීමේ දී පෙනී යන හේතූන් නිසා අධිකරණ විධානය මූලික වශයෙන් නගරාධිපති කෙරෙහි අපේක්ෂා කෙරේ. කොමසාරිස්ට හා ලේකම්ට විරුද්ධව සහනයක් ඉල්ලා නැත. ඔවුන් පර්ශකාරයන් හැටියට යොදා ගෙන ඇත්තේ මෙම අධිකරණ විධානය ගැන දැනුවුමක් ඔවුන්ගට ලැබීම සඳහායයි කියනු ලැබේ. මේ සමාන අවස්ථාවල දී නගරාධිපතිගේ නියමයන් පිළිපැදීමට බැඳී සිටින විධායක නිලධාරියකුට විරුද්ධව නොව නගරාධිපතිට විරුද්ධව නිසි පිළියම් ඉල්ලා සිටිය යුතුයයි මෙම උසාවිය කලින් දුන් කුරේ එ. ග්‍රෙරෝ (56 න.නී.වා. 87) තීන්දුවෙන් තීරණය වී ඇත.

වැඩකටයුතු ඉටු කිරීම සඳහා එක් එක් මහ නගර සභාවක හැම වසරෙහි දී ම සාමාන්‍ය රැස්වීම් දොළහක් තිබිය යුතුයයි (252 පරිච්ඡේදය වන) මහ නගර සභා ආඥා පනතේ 17 වන වගන්තියෙන් පැනවී ඇත. මහනුවර මහ නගර සභාවේ එබඳු එක් රැස්වීමක් 1967 අප්‍රෙල් 30 වැනි දින පැවැත්වීමට නියමිත වී තිබිණ. අංක 8987 හා 1942 අගෝස්තු 14 වැනි දින දරන ගැසට්ටුවෙහි නිවේදිත සභාවේ අතුරු ව්‍යවස්ථාවල 12(1) දරන ව්‍යවස්ථාව විසින් යෝජනාවක් පිළිබඳ දැන්වීම ලියවිල්ලකින් දිය යුතු අතර, එය සාමාජිකයා විසින් අත්සන් කොට කොමසාරිස් වෙත අමතා තිබිය යුතුව ඇත. මෙම අතුරු ව්‍යවස්ථාවෙන් අවශ්‍ය කරවා ඇති පරිදි ඉල්ලුම්කරු විසින් 1967 අප්‍රෙල් 16 වන දින යථා පරිදි දැනුම් දීම කළ අතර, ඔහුගේ යෝජනාව මෙසේ කියැවේ:

> ''මෙම සභාවේ මුදල් තත්වයේ ඇති සැක සහිත ස්වභාවය නිසාම, පිළිගැනීමේ උත්සව, භෝජන සංග්‍රහ, තේ පැන් සංග්‍රහ හා රාත්‍රී භෝජන උදෙසා, 1967 තේ අය-වැයෙන් එබඳු වියදම් සඳහා වෙන් වී ඇති මුදලින් හැර, නගර සභා අරමුදලින් කිසියම් මුදල් ප්‍රමාණයක් වැය නොකළ යුතුයයි මෙම සභාව යෝජනා කරයි''

දිවරුම් පත්‍ර අනුව, 1967 අය-වැයෙහි 'පිළිගැනීමේ උත්සව' වෙනුවෙන් රු: 5,000/- ක මුදලකුත්, නගරාධිපතිගේ 'සංග්‍රහ දීමනා' හා පිළිගැනීමේ උත්සව හා රැස්වීම්වලදී කැවිලි-පෙවිලි සඳහා වියදම වෙනුවෙන් තවදුරටත් රු: 5,000/- ක මුදලකුත් වෙන්කොට ඇති බැව් පෙනී යන්නේ ය. මෙම මුදල් ප්‍රමාණ අවසන්වන්නට ප්‍රථමයෙන් 1967 මාර්තු 27 වන දින පැවැත් වූ සභාවේ සාමාන්‍ය රැස්වීමේ දී, පිළිගැනීමේ උත්සව, සංග්‍රහ හා නගරාධිපති විදේශ සම්මේලනයකට සහභාගි වීම සඳහා ඒ වන විට වියදම් කර ඇති බැව් පෙනෙන එකතුව ගත් කල්හි රු: 6,050/- ක් වන ඇතැම් වැය කිරීමක් අනුමත කරන්නා වූ අතිරේක ඇස්තමේන්තුවක් අනුමත කරන ලද්දේ ය.

ඉහත සඳහන් කරන ලද පරිද්දෙන් ම යථා පරිදි දැනුම් දීම කරන ලද ඉහත කී යෝජනාව 1967 අප්‍රෙල් 30 වන දිනයේ රැස්වීමේ න්‍යාය පත්‍රයට ඇතුළත් නොකරන ලදී. එයට හේතුව න්‍යාය පත්‍රය පිළියෙළ කිරීමට ප්‍රථමයෙන් එම යෝජනාව රීති විරෝධියයි නිගමනය කිරීම ය. ඔහු වෙනුවෙන් දක්වා සිටින්නේ කවර හෝ යෝජනාවක් රීති විරෝධියයි නිශ්චය කිරීමේ නියත බලයක් ඔහු කෙරෙහි රැඳී තිබෙන බවය. 12(2) අතුරු ව්‍යවස්ථාවයයි කියනු ලබන එම බලයේ සම්භවය පරීක්ෂා කර බැලීම අවශ්‍ය වන අතර, එම අතුරු ව්‍යවස්ථාව මෙසේ යළිදු පිටපත් කරනු ලැබේ.

> 12(2) ''රැස්වීමකට දින තුනකට (ඉරිදා හා රජයේ නිවාඩු දින අත්හැරයි) නො අඩු කාලයකට කලින් කොමසාරිස් වෙත දැනුම් දෙන ලද සියලුම ප්‍රශ්න හෝ යෝජනා, එම ප්‍රශ්න හෝ යෝජනා රීති විරෝධියයි නගරාධිපති නිගමනය කළහොත් මිස, නැත්නම් න්‍යාය පත්‍රයෙහි ඇතුළත් කළ යුත්තේ ය.''

මෙය වූ කලී, රීති විරෝධී යයි නගරාධිපති විසින් නිගමනය කිරීමට බලයක් ඇති යෝජනාවක් නොවේ යයි ඉල්ලුම්කරු කියා සිටී. යෝජනාව සභාවේ සාමාජිකයකුහට යෝජනා කිරීමට ව්‍යවස්ථිත අයිතියක් ඇති යෝජනාවක් නම්, එම කාරණයෙහි දී සඳහන් වුණු හේතුව නිසා එය රීති විරෝධී වෙතොත් මිස, නොඑසේ නම් එම යෝජනාව න්‍යාය පත්‍රයෙහි අඩංගු කිරීමේ යුතුකමක් නගරාධිපති වෙත පැවරී ඇතැයි යනුවෙන් කුරේ එ. ග්‍රෙරෝ (ඉහත සඳහන්) නඩුවෙහි දී ස්වෝන් විනිශ්චයකාරතුමන් පළ කළ මතයට මම එකඟ වෙමි. එම කාරණයෙහි දී සඳහන් කළ හේතුව මෙම ඉල්ලුම් පත්‍රයෙහි දී තැකීම අපට අනවශ්‍ය ය. කවර වර්ගයේ යෝජනාවක් රීති විරෝධී විය හැකි ද යන්න උදාහරණ මගින් ප්‍රදර්ශනය කිරීම සඳහා පසුව ඇතිවූ විජේසූරිය එ. මුණසිංහ (64 න.නී.වා. 180) නඩුවෙහි දී සින්නතම්බි විනිශ්චයකාර තුමන් විසින් ප්‍රයත්නයක් දරන ලද්දේ ය. ප්‍රශ්නය පැන නැගීමට ඇති අවස්ථා අනන්ත නිසා උදාහරණ කිසිසේත් සාකල්‍ය විය නොහැක්කේ ය. කෙසේ වුවද උවමනා දැන්වීම නොමැති වීම, විධිමත් නොවන භාෂාවෙන් සැකැසී තිබීම, තේරුම් ගත නොහැකිවීම, නීත්‍යානුකූල නොවීම හෝ නීති විරෝධිවීම යන කරුණු නිසා, සාමාන්‍යයෙන් සභිකයකුට යෝජනා කිරීමට අයිතියක් ඇති යෝජනාවක් වුව ද රීති විරෝධී විය හැකි බැව් ඔහු විසින් පෙන්වා දෙන ලදී. නියත බලය හෝ අභිමතය හැරුණු විට එම යෝජනාව රීති විරෝධී බැව් නිගමනය කිරීම යුක්ති සහගතයයි දැක්වීම සඳහා කවර හෝ හේතුවක් දක්වා නැත. මහාජනයා වෙත බලපාන බලතල ක්‍රියාවේ යොදවමින් ප්‍රජාතන්ත්‍රවාදී රාමුවක් තුළ කාර්යයෙහි යෙදෙන බැව් පෙනෙන ප්‍රාදේශීය මණ්ඩලයකට තෝරා පත් කරනු ලබන නිලධාරියකු තුළ එබඳු බලයක් ඇතැයි පිළිගැනීමට ඒකාන්තයෙන් ම අධිකරණය මැලි විය යුතු ය.

පැවරී ඇති ස්වකීය බලතල ක්‍රියාවේ යෙදවීමේ කාර්යය සඳහා මහ නගර සභා අරමුදල හා සම්බන්ධ වූ සාමාන්‍ය ප්‍රශ්න ඉදිරිපත් කිරීමට බලයක් මහ නගර සභාවට පවරන්නා වූ මහ නගර සභා ආඥා පනතේ 40(1) (ආර්) වගන්තිය ඉල්ලුම්කරු විසින් පෙන්වා දී ඇත. සභාවේ දී සාකච්ඡා කිරීම සඳහා ප්‍රශ්නය ඉදිරිපත් කරන්නා වූ සභිකයින් කෙනකු හෝ වැඩි දෙනකු විසින් පමණක් සාමාන්‍යයෙන් මෙම බලය ක්‍රියාවේ යෙදවීම ඉල්ලා සිටිය හැකි ය. මෙම කාරණයෙහි දී අපේ සැලකිල්ලට භාජන වන යෝජනාව වූ කලී මුදල් ප්‍රතිපත්තිය පිළිබඳ සාමාන්‍ය ප්‍රශ්නයක් මතු කරන්නා වූ යෝජනාවකි.

සාමාන්‍යයෙන්, අධ්‍යභාරයෙන් ආරක්ෂා කිරීම සඳහා සභිකයින් බැඳී ඇති සභාවේ බුද්ධිමත් ආදායම් පාලනයකට වෙනත් ප්‍රශ්නයක් මේ තරම් ප්‍රස්තුත නොවේ. යෝජනාව ද්වේෂයෙනුත් පෞද්ගලික මැසිවිලි පළ කිරීම සඳහාත් මෙහෙයවුණු එකක් බවට කිසියම් ඉඟියක් නගරාධිපතිගේ දිවුරුම් පත්‍රයෙහි සඳහන් වී ඇත. එහෙත් මෙම ඉඟිවලට කිසිදු හේතුවක් යෝජනාවේ පිටපතෙහි අඩංගු බවක් කෙනකුට නොපෙනෙන අතර, බැලූ බැල්මට එම යෝජනාව සම්පූර්ණයෙන් ම විධිමත් ය. නීත්‍යානුකූල ව තමන් වෙත ලැබුණු ප්‍රස්ථාවක් ස්වකීය ද්වේෂය පළ කිරීම සඳහා අයෝග්‍ය, නීති විරෝධී ලෙස කවීකයකු විසින් යොදා ගැනීම වළක්වාලීම සඳහා රැස්වීමක කවර සභාපති කෙනකුට වුව ද නෛසර්ගික බලයක් ඇතැයි යන්න පිළිබඳව අපට කිසිදු සැකයක් නැත. එසේ වුව ද, වැඩි දුර යමක් නැතිව යෝජනාවේ පිටපතෙන් සාමාන්‍යයෙන් පැන නැගිය නොහැකි අස්ථාන බියක් ඇතිවීමට කරුණු නොපෙනේ. මා පිළිගන්නා අන්දමින් ම, මෙම යෝජනාව වෙනුවෙන් දැනුම් දීමේ අයිතියක් ඉල්ලුම්කරු වෙත තිබුණි නම්, ව්‍යවස්ථාව විසින් ම පවරා ඇති බලය ක්‍රියාවේ යෙදවීම අහෝසි වන අන්දමින් අතුරු ව්‍යවස්ථාව අර්ථකථනයට භාජන කළ නොහැක්කේ ය යනුවෙන් ඉල්ලුම්කරු වෙනුවෙන් ඉදිරිපත් කරන ලද තර්කයට මම ද එකඟ වෙමි. හරියට අර්ථ කථනය කරන කල්හි, මා හිතන අන්දමට, යෝජනා ඉවත් කරමින් තීරණයක යෙදීම සඳහා නියත බලයක් හෝ අභිමතයක් 12(2) දරන අතුරු ව්‍යවස්ථාව විසින් නගරාධිපති කෙරෙහි පවරා දී නැත. පවත්නා අභිමතය පාවිච්චි කර ඇති අවස්ථාවල දී. එය සාවද්‍ය අන්දමින් පාවිච්චිකර ඇතත්, මැන්ඩේමස් පිළියම මෙම උසාවිය විසින් සාමාන්‍යයෙන් ප්‍රදානය නොකෙරේ. ඉහත නම් කළ සින්නතම්බි විනිශ්චයකාරතුමන්ගේ තීන්දුවෙහි කිසියම් සඳහනක් කර ඇති විශේෂ අවස්ථාවලට ද යටත්ව, මගේ මතය නම්, දැනුම් දීම උදෙසා ව්‍යවස්ථිත

අයිතියක් සාමාජිකයකු සතුව ඇති යෝජනාව රීති විරෝධියයි ඉවත් කිරීමේ තීරණයක් කිරීමට නගරාධිපතිට අයිතියක් නැති බව ය. මෙහි දී අපේ සැලකිල්ලට භාජන වී ඇති යෝජනාව එබන්දකි. එය රීති විරෝධියයි තීරණය කිරීමට බලයක් හෝ සාමාන්‍යයෙන් අභිමතයක් නොතිබුණේ ය. මෙම කාරණයෙහි දී පැමිණිලිකර සිටින තීරණයෙහි යෙදීමේ හේතුවෙන් නගරාධිපති තම ව්‍යවස්ථිත යුතුකම ඉටු කිරීම පැහැර හැර හෝ ප්‍රතික්ෂේප කොට ඇත. මෙය මහනුවර බදු ගෙවන්නන් වෙනුවෙන් ඉල්ලුම්කරු වෙත ඔහුගෙන් ඉටුවිය යුතුව තිබුණු යුතුකමකි. මෙයට ප්‍රතිකර්මය වූ කලි මැන්ඩේමස්ය. සභාපති විසින් වසන ලදැයි ප්‍රකාශයට පත් කෙරුණු මහ නගර සභාවක කිසියම් විශේෂ රැස්වීමක් පවත්වා ගෙන යන ලෙස මැන්ඩේමස් මාර්ගයෙන් ආඥාවක් කරමින් මොහමඩ් එ. ගොපල්ලව (58 න.නී.ස. 418) නඩුවෙහි දී බස්නායක අග්‍ර විනිශ්චයකාරතුමන් විසින් පහත සඳහන් අන්දමට කියා ඇති බැව් පෙන්වා දීම මෙහි දී උචිත ය:— ''නගන ලද රීති ප්‍රශ්නය පිළිබඳව සභාපතිගේ වැරදි තීරණය නිසා, යෝජනාව ස්ථිර කළ යුතු ද නැද්ද යන වග තීරණය කිරීමේ ප්‍රස්ථාවක් රැස්වීමට ලබා දීමේ යුතුකම ඉෂ්ට කිරීම ඔහු විසින් පැහැර හැර ඇත. රීති ප්‍රශ්නයක දී දෙනු ලබන වැරදි තීරණයක් මගින්, තමා සභාපතිත්වය උසුලන රැස්වීමේ වැඩ කටයුතු ඉෂ්ට කිරීම් සඳහා නීතියෙන් පැවරී ඇති යුතුකම ඉටු කිරීමට නොපුළුවන් තත්ත්වයකට තමා පත් කිරීමට සභාපතිට ඉඩක් නොතිබිණ.''

මෙම කාරණයෙහි දී, මැන්ඩේමස් ආඥාව නිකුත් කිරීමට විරුද්ධව හේතුවක් වශයෙන්, ප්‍රාදේශීය බල මණ්ඩලයකට ස්වකීය කටයුතු අතින් ස්වාමිත්වයක් ඇති බවත්, අවශ්‍යයෙන් ම අභ්‍යන්තර ප්‍රශ්නයක ඇති නිරවද්‍යතාව මෙම උසාවිය විසින් සමාලෝචනය කරන්නට තැත් නොකළ යුතු බවත්, වගඋත්තරකරුවන් වෙනුවෙන් පෙනී සිටින උගත් අධිනීතිඥවරයා තර්ක ඉංකළේ ය. විශ්ව විද්‍යාල නඩු සමහරක් ඔහු විසින් සඳහන් කළ නමුදු, ඒවාට සම්බන්ධවූ මණ්ඩල ප්‍රාදේශීය මණ්ඩල අර්ථයෙන් පොදු මණ්ඩල නොවන බවත්, ව්‍යවස්ථිත යුතුකම් ප්‍රාදේශීය මණ්ඩල විසින් ඉෂ්ට කිරීම මැන්ඩේමස් බල කිරීම සඳහා කාලාන්තරයක් තිස්සේ මේ උසාවිය විසින් මේ රටේ අධිකරණ බලය ක්‍රියාවේ යොදවා ඇති බවත් පෙන්වා දීමට මෙහි දී ප්‍රමාණවත් ය.

ඉල්ලා සිටින පිළියම ප්‍රතික්ෂේප කිරීම සඳහා ඉදිරිපත් කරන ලද තවත් තර්කයක් නම්, විකල්පයෙන් තවත් සහනයක් තිබීම ය. තමාගේ යෝජනාව ආරම්භයේදී ම රීති විරෝධියයි ඉවත් කරනු ලැබීමෙන් ඉල්ලුම්කරු පීඩාවට පත් වූයේ නම්, ආඥා පනතේ 20 වන වගන්තියෙන් දක්වා ඇති පරිද්දෙන් සභාවේ අවසර ලබාගෙන එය රැස්වීමට ඉදිරිපත් කිරීමට ඔහුට ඉඩකඩක් තිබුණේ යයි යනුවෙනි. 1967 අප්‍රේල් 30 වන දින පැවැත්වුණු සභාවේ රැස්වීමේ දී සභාපතිත්වය දැරූ නගරාධිපති, රීති විරෝධියයි ඉවත් කරනු ලැබූ ඉල්ලුම්කරුගේ යෝජනාව ඉදිරිපත් කිරීම සඳහා රැස්වීමට සහභාගි වී සිටි සභිකයන්ගෙන්, ඉල්ලුමකරුට අවසර ලබා ගැනීමට අවකාශයක් දීම, ප්‍රතික්ෂේප කෙළේ යයි වාර්තාවෙන් හැඟවෙන බවක් ඉල්ලුම්කරු වෙනුවෙන් පෙනී සිටින අධිනීතිඥවරයා සඳහන් කෙළේ ය. එබඳු අවසරයක් පතා ඇතැයි වාර්තාව අනුව පෙනී යන බවට උගත් අධිනීතිඥවරයා සමග අපට එකඟවීමට නොහැකි විය. එහෙයින් ම, ආඥා පනතේ 20 වන වගන්තියේ විධිවිධාන උපයෝගී කර ගැනීම සඳහා කවර හෝ ප්‍රයත්නයක යෙදී නැතැයි යන පදනමෙහි පිහිටා මෙම ඉල්ලුම් පත්‍රය අප විසින් තීරණය කළ යුතුව ඇත. ද ක්‍රෙට්සර් විනිශ්චයකාරතුමන් විසින් ගුණසිංහ එ. කොළඹ නගරාධිපති (46 න.නී.වා. 85) නඩුවෙහි දී ද, ස්වෝන් විනිශ්චයකාරතුමන් විසින් කුරේ එ. ග්‍රෙරෝ (ඉහත සඳහන්) නඩුවෙහි දී ද 20 වන වගන්තියට සමාන වගන්තිවලින් දැක්වෙන ක්‍රියා මාර්ග විකල්ප සහනයකට විධිවිධාන යොදන්නේ යයි පවසා ඇති බව මෙහි දී සඳහන් කළ යුතු ය. සන්සෝනි විනිශ්චයකාරතුමන් සිනිවාසගම් එ. කිරුපමූර්ති (56 න.නී.වා. 450) නඩුවෙහි දී ද, යළින් සමරවීර එ. බාලසූරිය (58 න.නී.වා. 118) නඩුවෙහි දී ද, පීඩාවට පත් පක්ෂය සභාවේ අවසරය ලැබීමේ කොන්දේසියට යටත්වන නිසා කිසිසේත්ම මෙය සහනයක් හැටියට සැලකුවේ නැත. විජේසූරිය එ. මුණසිංහ (ඉහත සඳහන්)

නඩුවෙහි දී සියලු ම පුරාණ මත සලකා බැලූ සින්නතම්බි චිනිශ්චයකාරතුමා, සන්සෝනි චිනිශ්චයකාරතුමන් දැරූ අදහස පිළිගත යුතුයයි නිගමනය කෙළේ ය. ඔහු පළකර ඇති පරිදි, ''සභාවේ අනෙක් සභිකයන්ගෙන් බහුතර සංඛ්‍යාවක් විරුද්ධ වෙතත් , රීති විරෝධී නොවන යෝජනාවක් සම්බන්ධයෙන් සභාවේ රැස්වීමක දී එය සාකච්ඡාවට භාජන කරවා ගැනීමේ අයිතියක් සභිකයකුට ඇති නමුත්, 2(බී) නියෝගය අනුව බහුතර සංඛ්‍යාව අවසර දෙතොත් මිස ඔහුට එය යෝජනා කිරීම පවා කළ නොහැක්කේ ය.'' පෙනී යන ආකාරයට ආඥා පනතේ අදාළ විධිවිධානවල සත්‍යමය අර්ථ නිරූපණය වූ කලී, හැම සාමාන්‍ය හෝ විශේෂ හෝ කල් දමන ලද රැස්වීමක ම (18(2) වගන්තිය යටතේ කොමසාරිස් විසින් කැඳවනු ලබන විශේෂ රැස්වීමක් හැරයි) ඉටු කරන්නට නියමිත වැඩකටයුතු පිළිබඳ දැන්වීම එක් එක් සභිකයා වෙත දිය යුතුයයි අවශ්‍ය කරවන්නා වූ 19 වන වගන්තිය විසින් ස්වකීය යෝජනාව සාකච්ඡාවට භාජනය කරවා ගැනීම සඳහා එක් එක් සභිකයා සතුව ඇති අයිතිය පිළිගන්නා අතර, න්‍යාය පත්‍රයේ විශේෂයෙන් අඩංගු නො වූ කටයුත්තක් වුව ද සාකච්ඡා කිරීමට සභාව (ක්‍රියාවෙන් සභිකයන්ගේ බහුතර සංඛ්‍යාව) සතුව පවත්නා අයිතිය 20 වන වගන්තිය විසින් පිළිගන්නා බව ය. සාකච්ඡා කිරීම සඳහා ප්‍රශ්නයක් ඉදිරිපත් කිරීමට සභිකයකුට ව්‍යවස්ථිත අයිතියක් ඇති අවස්ථාවක දී, යෝජනාවක ස්වරූපයෙන් වලංගු දැන්වීමක් කිරීමේ යුතුකමක් ඔහුට ඇති බවත්, එබඳු දැන්වීම එසේ දීමෙන් පසුව එය න්‍යාය පත්‍රයේ ඇතුළත් කිරීමේ යුතුකමට නගරාධිපති යටත්වන බවත් ඉල්ලුම්කරුගේ අධිනීතිඥ වරයා විසින් කරනු ලබන තර්කයට මම එකඟ වෙමි. මේ නයින් යෝජනාවක් න්‍යාය පත්‍රයේ සටහන් කළ කල්හි, සාකච්ඡාවක් නවතා දැමීමට සභාවට අයිතියක් නැත. විකල්ප සහනයක් 20 වන වගන්තියෙන් සැලසී නැති බැව් එහෙයින් ම පෙනී යන්නේ ය. යම් විධියකින් විකල්ප සහනයක් ද තිබිණි නම් එය ''සමානව ම පහසු, යහපත් හෝ සඵල '' වේද යන වග, මෙබඳු තත්ත්වයක් නිසා සලකා බැලීම අවශ්‍ය නොවන්නේ ය. රැස්වීම පිළිබඳ දැන්වීම දීමට පෙරාතුව ම නගරාධිපති විසින් රීති විරෝධියයි නිශ්චය කරන ලද යෝජනාවක් සාකච්ඡා කිරීම සඳහා ඉදිරිපත් කිරීමට වැඩිදෙනෙකුගේ අවසරය ලබා ගැනීමේ ප්‍රස්ථා න්‍යායානුකූලව සිදු විය හැකි මුත් ද්විපාක්ෂික සභාවල පවත්නා වර්තමාන ව්‍යවහාරය අනුව එය සාමාන්‍යයෙන් සිදු නොවන්නක් බවද පිළිගැනීම කෙනෙකු විසින් පැහැර හැරිය යුතු නොවේ.

සංක්ෂේපයෙන් ඉහතින් දක්වන ලද හේතූන් නිසා ඉල්ලුම්කරු ඉල්ලා සිටින සහනය දීමට මම කැමැත්තෙමි. කුරේ එ. ග්‍රෙරෝ (ඉහත) නඩුවෙහි දී ස්වෝන් විනිශ්චයකාරතුමා කී පරිද්දෙන් ම, මැන්ඩේමස් ආඥාවක්, ලැබේ නම්, ඒ වන විට රැස්වීමේ දිනය ඉක්මවා ඇති නමුදු එය නිකුත් කළ හැක්කේ ය. මේ මාසයේ අවසානය වන විට සභාවේ මාසික රැස්වීමක් පවත්වන්නට නියමිත බැව් අපට දන්වන ලද්දේ ය. තවද, අය-වැය වසර තවමත් අවසාන වී නැති හෙයින්, යෝජනාවෙන් තවමත් කිසියම් ප්‍රයෝජනයක් ලැබිය හැකි ය. බහුතර පක්ෂය විසින් හුදෙක් මනඃකල්පිතයයි සලකනු ලබන මැසිවිලි වුව ද ප්‍රකාශයට පත් කිරීමේ අවකාශයක් සුළු කොටස්ගය වෙත ලැබීම පැහැර නොහැරීමෙන් ප්‍රජාතන්ත්‍රවාදී සම්ප්‍රදාය වඩාත් හොඳින් ආරක්ෂා වන බැව් සිහිපත් කිරීම යෝග්‍ය ය. විවාදය වූ කලී තවමත්, ශංකාවෙන් යුක්ත අවංක පුද්ගලයන් හරවා ගැනීමේ ප්‍රබල මාධ්‍යයකි.

එහෙයින් ම, මෙම නඩු තීන්දුවෙන් පසුව මහනුවර නගර සභාව පවත්වන පළමුවන සාමාන්‍ය ව්‍යවස්ථිත රැස්වීමේ න්‍යාය පත්‍රයට මෙකී යෝජනාව ඇතුළත් කරන ලෙස 1 වන වගඋත්තරකරුට නියම කෙරෙන්නා වූ මැන්ඩේමස් ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් යවනු ලැබේවා. 1 වන වගඋත්තරකරු විසින් ඉල්ලුම්කරුගේ ඉල්ලීමේ නඩු ගාස්තුව ඔහුට ගෙවිය යුත්තේ ය.

අලස් විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඉල්ලීමට ඉඩදෙන ලදී.

(පරිවර්තනය ඇල්. ඇම්. ඒ. සිල්වා විසිනි)

ගරු අබේසුන්දර සහ සමරවික්‍රම විනිශ්චයකාරතුමන් ඉදිරිපිට

ආර්. රඝවන් පිල්ලෙ එ. ඇටෝර්නිජනරාල් තුමා*

ශ්‍රේ: අ. අංක 598/65(ඇෆිජ්) — දි: උ: වව්නියාව 1869

විවාද කළේ: 1968 මාර්තු 7 සහ 8 වැනි දිනවල
තීන්දුව දුන්නේ: 1968 මාර්තු 8 වැනි දින

රජයේ සේවකයා — රාජ්‍ය සේවා කොමිෂන් සභාව මගින් පවරන ලද බලතල ප්‍රකාර දෙපාර්තමේන්තු ප්‍රධානියකු විසින් සේවය අවසන් කිරීම — එබඳු බලතලවල විෂය ප්‍රමාණය — පැවරීමේ කොන්දේසිවලට බාහිර වූ හේතුවක් උඩ පෙත්සම්කරුගේ සේවය අවසාන කිරීම — ''උසාවිය සුදුසු යයි සලකන අන්දමේ වෙනත් එබඳු හා තවදුර සහන සඳහා'' යන සාමාන්‍ය ආයාචනය යටතේ සහනය සැලසීමට ඇපැල් උසාවියකට ඇති බලය.

ස්වකීය පැමිණිල්ලෙන් පැමිණිලිකරු පහත සඳහන් කරුණු සඳහා ආයාචන ඉදිරිපත් කෙළේ ය.

(ඒ) නීති විරෝධී ලෙස තමාගේ සේවය අවසන් කරන ලදැයි යන්න සම්බන්ධයෙන් ඉඩම් සංවර්ධන දෙපාර්තමේන්තුවේ අධ්‍යක්ෂකට විරුද්ධව අලාභ සඳහා.

(බී) උසාවිය සුදුසුයයි සලකන අන්දමේ වෙනත් එබඳු හා තවදුර සහන සඳහා.

සිවිල් නඩු සංවිධාන සංග්‍රහයේ 463 වන වගන්තිය යටතේ ඇටෝර්නි-ජනරාල් මැදිහත් වුණේ ය. මෙහි එකම හබ ප්‍රශ්නය, චිත්තිකරු විසින් පැමිණිලිකරුගේ සේවය නීත්‍යානුකූල නොවන අන්දමින් හා යුක්තිසහගත හා සාධාරණ හේතුවක් රහිතව අවසානයකට පත් කරන ලද්දේ ද යන වගය.

පැමිණිලිකරුගේ සේවය යථා පරිදි අවසානයකට පත් කොට ඇති බවත්, ලංකා ආණ්ඩුව යටතේ සේවයෙහි යෙදීමට අයිතියක් ඇති පුද්ගලයන්ගේ ගණයට ඔහු නොවැටෙන බවත් නිගමනය කරමින් උගත් දිස්ත්‍රික් විනිශ්චය කාරවරයා නඩුව නිෂ්ප්‍රභා කෙළේ ය.

තමාගේ අවසාන '' වීසා '' බලපත්‍රයේ කාලය අවසානවීම හේතු කොට ගෙන පැමිණිලිකරුට ලංකාවේ සිටීමට බලයක් නැතැයි යන හේතුව පැමිණිලිකරුගේ සේවය අවසන් කරන්නා වූ ලිපියෙහි දකින්නට ලැබිණ.

පැමිණිලිකරු විසින් කරන ලද ඇපැලේ දී පහත සඳහන් අන්දමින් තීරණය විණි:

තීන්දුව: (1) අංක 10847 හා 1955.10.7 දින දරන ගැසට් පත්‍රයෙහි ප්‍රකාශ කරන ලද අන්දමින් රාජ්‍ය සේවා කොමිසමෙන් බලතල පවරා දීමේ කොන්දේසිවලින්, ඇමතිවරයකුට පැවරී ඇති දෙපාර්තමේන්තුවක වැඩ කරන්නා වූ රජයේ නිලධාරියකු නීතියෙන් වරදකරුවකු වීමේ හේතුව හැර වෙනත් හේතුවක් හා සම්බන්ධ වූ විෂමාචාරයක් නිසා අස් කිරීම හෝ නැත්නම් දඩුවම් කිරීම සඳහා දෙනු ලබන බලය විසින්, විෂමාචාරය හැර වෙනත් කරුණක් උඩ නිලධාරියා අස් කිරීම සඳහා බලයක් දෙපාර්තමේන්තු ප්‍රධානියකුට පවරා නැත.

(2) එහෙයින් පැමිණිලිකරුට ලංකාවේ සිටීමට බලයක් නැතැයි ඔහුගේ සේවා අවසන් කිරීම අවලංගු හා ක්‍රියා විරහිත වෙයි.

(3) නීත්‍යානුකූල නොවන අන්දමින් සිය සේවය අවසන් කරනු ලැබීම නිසා පීඩාවට පත් රජයේ සේවකයකුට, තම සේවය අවසන් කිරීම අවලංගු හා ක්‍රියා විරහිත බවට ප්‍රකාශයක් නිකුත් කිරීම සඳහා නඩුවක් පැවරිය හැකි ය.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කාණ්ඩයෙහි 74 වන පිට බලනු.

(4) "වෙනත් එබඳු හා තවදුර සහන" යන පැමිණිලිකරුගේ ආයාචනය සැලකීමෙන්, පෙත්සම්කරුගේ සේවය ඉඩම් සංවර්ධන අධ්‍යක්ෂ විසින් අවසානයකට පත් කිරීම අවලංගු හා ක්‍රියා විරහිත බැව් ප්‍රකාශ කිරීම සඳහා ශ්‍රේෂ්ඨාධිකරණයට ඉඩක් ඇත.

සඳහන් කළ නඩුව: සිල්වා එ. ඇටෝර්නි-ජනරාල්වරයා (60 න.නී.වා. පිටුව 145)

සී සුන්දරලිංගම් මහතා, පැමිණිලිකාර- ඇපැල්කරු වෙනුවෙන්.

රජයේ ජ්‍යෙෂ්ඨ නීතිඥ එච්. දෙහෙරගොඩ මහතා, රජයේ නීතිඥ පී. නගුලේස්වරම් මහතා සමග, විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු අබයසුන්දර විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි පැමිණිලිකරු විසින් විත්තිකරුට විරුද්ධව රැකියාවක් පිළිබඳ කොන්ත්‍රාත්තුවක් කැඩීම නිසා නඩුවක් පවරන ලදී. පැමිණිලිකරු ප්‍රකාශකර සිටින්නේ විත්තිකරු විසින් තමාගේ සේවය නතර කළ නිසා ඒ නයින් එය නීතිවිරෝධී ලෙස සේවය නතර කිරීමක් වන අතර ඒ නිසාම එය රක්ෂාව පිළිබඳ කොන්ත්‍රාත්තුවක් කැඩීම බවයි. මෙම නඩුවේ විත්තිකරු ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයායි. නීතිපතිවරයා සිවිල් නඩුවිධාන සංග්‍රහයේ 463 වන වගන්තිය යටතේ අධ්‍යක්ෂවරයාගේ නිදහසට කරුණු දැක්වීමට ඉදිරිපත් වූයෙන් ඔහු ද මෙම නඩුවේ පාර්ශ්වකාර විත්තිකරුවකු වශයෙන් ද අධ්‍යක්ෂවරයා වෙනුවට ඇතුළත් කොට තිබේ. පැමිණිලිකරු තමාගේ පැමිණිල්ලේ රක්ෂාව නතර කිරීම නිසා කොන්ත්‍රාත්තුවක් කැඩීමෙන් තමාට වූ අලාභය ඉල්ලා ඇති අතර මෙම උසාවියට සුදුසු යැයි හැඟෙන අතිරේක සහන ඇත්නම් එය ද තමාට ලැබෙන සේ ආයාචනා කොට ඇත. මෙම නඩුවෙහි විසඳිය යුතු ප්‍රශ්න අතුරෙන් උගත් විනිශ්චයකාරවරයා විමසා ඇති පස්වන ප්‍රශ්නය පහත පෙනෙන පරිදි වේ.: "20.9.60 වන දින විත්තිකරු විසින් සාධාරණ යුක්ති යුක්ත හේතුවක් නොමැතිව පැමිණිලිකරුගේ සේවය නීති විරෝධී අයුරින් නිම කොට තිබේ ද?" මෙම ප්‍රශ්නය උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් නිෂේදයෙන් පිළිතුරු දී විසඳා තිබේ. ඔහු නිගමනය කොට ඇත්තේ නිවැරදි ලෙස සේවයෙන් පහකොට ඇති නිසා පැමිණිලිකරුට නැවත වාරයක් එම රක්ෂාව ලබා ගැනීමට සුදුසුකමක් නොමැති බව ය. වැඩිදුරටත් පැමිණිලිකරු ලංකා ආණ්ඩුව යටතේ රක්ෂාවක් ලැබීමට අයිතිවාසිකම ඇති අයගේ ගණයට නොවැටෙන එම තීරණය කොට තිබේ. මේ නිසා උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා පැමිණිලිකරුගේ නඩුව ගාස්තුවටත් යටත් කොට නිෂ්ප්‍රභා කළේ ය.

වර්ෂ 1960 සැප්තැම්බර් මස 20 වැනි දින දරණ පී. 6 ලකුණු කොට ඇති ලිපිය ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයා විසින් ක්ෂණිකව ක්‍රියාත්මක වන හැටියට පැමිණිලිකරුගේ සේවය නතර කළ බව කියැවෙන ලිපියකි. පී. 6 දරණ මෙම ලිපියේ එසේ සේවය නතර කර ඇති බව දී ඇති තීන්දුවෙන් පෙනී යන්නේ පැමිණිලිකරුට තමාගේ 'වීසා' බලපත්‍රය 4.12.56 වන දින නිමාවට ගොස් ඇති බැවින් ඔහුට ලංකාවේ නැවැතී සිටීමට අයිතිවාසිකමක් නැති බව ය. පොදු රාජ්‍ය සේවා කොමිසම විසින් වර්ෂ 1946 ලංකා පාලන සංස්ථා රාජාඥාවේ 61 වන ඡේදය යටතේ වර්ෂ 1955 ඔක්තෝබර් මස 7 වන දින අංක 10847 ගැසට් පත්‍රයෙන් පළකළ පරිදි දෙපාර්තමේන්තු අධිපතියකුට පහත සඳහන් පරිදි බලතල දී තිබේ.

"(ඒ) විශ්‍රාම වේතන ලැබිය හැකි රක්ෂාවක් දරණ අවුරුද්දකට රු: 2,700 ට වැඩි නොවන පඩියක් දරණ එසේ නැත්නම්,

(බී) විශ්‍රාම ලැබිය හැකි පඩියක් නොලබන රක්ෂාවක් දරණ වර්ෂයකට රු: 3,180 වකට වැඩි නොවන පඩියක් ලබන ඇමැතිවරයකු යටතට පැවරුණු දෙපාර්තමේන්තුවක වැඩ කරන රජයේ සේවකයකුට (මොහු ආබද්ධ හමුදාවල කටයුතු කරන කෙනකු හෝ ලිපිකරුවකු බඳු සේවයක කටයුතු කරන කෙනකු හෝ නොවිය යුතුයි) උසාවියෙන් වරදකරු බවට පත්වීමේ හේතුව උඩ හැරුණු විට වෙනයම් හේතුවක් උඩ ඔහුගේ විෂමාචාරය නිමිත්තෙන් ඔහු සේවයෙන් පහකිරීමට හෝ ඔහුට වෙන අයුරකින් දඬුවම් කිරීමට හෝ දෙපාර්තමේන්තුවේ අධිපතිතැනට බලය පවරා දී තිබේ."

ඉහත සඳහන් පරිදි බලය පවරාදීමෙන් දෙපාර්තමේන්තුවේ අධිපති තැනට විෂමාචාරය හැරුණු විට අනික් හේතුවක් උඩ නිලධාරියකු සේවයෙන් පහ කිරීමට බැරි බව පැහැදිලි ය. අප ඉදිරියේ ඇති මෙම නඩුවේ ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයා පැමිණිලිකරුගේ සේවය නිමකොට තිබෙන්නේ විෂමාචාරය හේතුවෙන් නොව, ඔහුගේ වීසා බලපත්‍රයට හිමි කාල සීමාව අහෝසි වීම

නිසා ඔහුට ලංකාද්වීපයේ පදිංචිව සිටීමට බලයක් නොමැති කමේ හේතුව උඩ ය. මේ නිසා පැමිණිලිකරුගේ සේවය නතර කිරීම බල රහිත අක්‍රියාකාරී කටයුත්තක් ලෙස ගිනිය හැක. මේ අනුව උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් චිත්තිකරු විසින් පැමිණිලිකරුගේ සේවය නීති විරෝධී ලෙස නතර කර නැතැයි යන නිගමනයට බැස තිබීම වැරැදි බව අපේ පිළිගැනීමයි.

ඇටෝර්නි-ජනරාල්තුමා වෙනුවෙන් පෙනී සිටි රජයේ අධිනීතිඥවරයා සැළකර සිටියේ රජයේ සේවාවක නියැලී නිලධාරියෙකුට තම රක්ෂාව පිළිබඳ කොන්ත්‍රාත්තුව කැඩීම නිසා රජයට විරුද්ධව නඩු පැවරිය නොහැකි බව දැනට ලංකාවේ පවත්නා නීතිය අනුව ඇති තත්වය බව කියමිනි. කෙසේ හෝ වේවා රාජ්‍ය සේවකයකුට තමාගේ රක්ෂාව නීති විරෝධී ලෙස නතර කොට ඔහු චිත්තසන්තාපයට පත්වූ විට එසේ තමාගේ සේවය නතර කිරීම බල රහිත අක්‍රියාකාරී කටයුත්තක් යැයි යන ප්‍රකාශය ලබා ගැනීම සඳහා නඩුවක් පැවරිය නොහැකියයි ඔහු සැලකර සිටියේ නැත. ඇත්ත වශයෙන්ම සිල්වා එ. ඇටෝර්නි-ජනරාල්වරයා (60 න.නී.වා 145 වැනි පිටුව) අතර කියැවුන නඩුවේදී රජයේ සේවකයකුට තමාගේ රාජ්‍ය සේවය නීතිවිරෝධී ලෙස රාජ්‍ය සේවා කොමිසම විසින් නතර කළ අවස්ථාවකදී තමා එසේ සේවයෙන් පහ කිරීම නීතියට එකඟව නොකරන ලද එකකැයි ප්‍රකාශයක් විධිමත් ලෙස ආඥා බලයක් ඇති අධිකරණයකින් ලබා ගැනීමට අවකාශ තිබේ යයි තීරණය වී තිබේ. පැමිණිලිකරු විසින් තම පැමිණිල්ලේ කියන ලද අන්දමට මෙහි ඇති රක්ෂාවේ කොන්ත්‍රාත්තුව කැඩීම අනිකක් නොව, ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයා විසින් තමාගේ සේවය නීති විරෝධී ලෙස නතර කර තිබීමය. පැමිණිලිකරුගේ සේවය නතර කිරීම නීත්‍යානුකූල ද? නැද්ද? යන්න ගැන ඇති ප්‍රශ්නය නඩුව ඇසූ උසාවිය විසින් විමසන ලදී. වැඩි දුරටත් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් සිල්වා එ. ඇටෝර්නි-ජනරාල් අතර කියැවුන නඩුවේ තීරණය වූ යේ පැමිණිලිකරුගේ සේවය හමාර කිරීම බල ශූනය අක්‍රියාකාරී කටයුතු කළාය යන ප්‍රකාශය තමා විසින් කිරීමට අවකාශ තිබේ ද යන ප්‍රශ්නය ද ඔහු විසින් සළකා බලා තිබේ. සිල්වා එ. ඇටෝර්නි-ජනරාල්වරයා අතර තිබුන නඩුවේ තීන්දුවට තමා අවනත විය යුතු බව දිස්ත්‍රික් විනිශ්චයකාරවරයා පිළිගත්තේ ය. නමුත් ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයාට පැමිණිලිකරුගේ සේවය නතර කිරීමට බලය තිබෙන බවත් ඒ නිසා එම බලය ඔහු නීත්‍යානුකූලව ක්‍රියාවෙහි යොදවා ඇති බවත් දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ මතයවූ නිසා ඔහු මෙසේ පැමිණිලිකරුගේ සේවය නතර කිරීම බල රහිත අක්‍රියාකාරී දෙයක්ය යන ප්‍රකාශය මෙහි දී කර නොමැත.

ඉහතින් දක්වන ලද හේතූන් අනුව සිතා මතා ගැනීමේ දී මෙම නඩුවේ පැමිණිලිකරුගේ පැමිණිල්ලේ ඇති යාඥාවේ උසාවියට සුදුසු යැයි හැඟෙන වෙනත් අතිරේක සහනයක් වෙතොත් එය ද බලාපොරොත්තු වී ඇති නිසා ඒ ගැන සළකා බලන විට පැමිණිලිකරුගේ සේවය ඉඩම් සංවර්ධන අධ්‍යක්ෂවරයා විසින් නතර කිරීම බල ශූන්‍ය අක්‍රියාකාරී කටයුත්තක්යැයි යන ප්‍රකාශය කිරීමට මෙම අධිකරණයට අවකාශ ඇති බව අපේ මතය වේ. ඒ අනුව එම ප්‍රකාශය මෙහි ලා කරන අපි උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ නඩු තීන්දුව සහ තීන්දු ප්‍රකාශය ඉවත හෙළමු.

දිස්ත්‍රික් උසාවියේ නඩු ගාස්තුව ද, එසේ ම මෙම අභියාචනයේ ගාස්තුව ද ලබා ගැනීමට පැමිණිලිකරුට අයිතිය තිබේ.

සමරවික්‍රම විනිශ්චයකාරතුමා:
මම එකඟවෙමි.

ඇපැලට ඉඩදෙන ලදී.

ටී. ඇස්. ප්‍රනාන්දු සහ සමරවික්‍රම විනිශ්චයකාරවරුන් ඉදිරිපිට දී ය

දොඩන්දූවේ නගර සභාව එ. විල්බට් ද සිල්වා සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලුම් පත්‍ර අංක 43/68

දොඩන්දූවේ, ග්‍රීන්වුඩ්හි ගල්බොක්ක හේවගේ විල්බට් ද සිල්වා සහ තවත් කෙනකු වෙත මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමේ ඉල්ලුම

තර්ක කළේ සහ තීන්දු කළේ: 1968 අප්‍රෙල් 6 වැනි දා

මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමේ ඉල්ලීමක් — සාම මණ්ඩලයක් විසින් නඩුවක් උසාවියකට ඉදිරිපත් කිරීමට අවශ්‍ය සහතිකය නොදී පැහැර හැරීමේ ක්‍රියා පිළිවෙලක් — මැන්ඩාමුස් ආඥාව නිකුත් කිරීම — සමාදාන මණ්ඩල ආදර්ශමත් විය යුතු බව

සාම මණ්ඩලයක් විසින් නගර සභාව බල සීමාවට අයත් ගෘහයක් අවුරුදු හයකට වැඩි කාලයක් වරිපනම් නොගෙවා බුත්ති විඳගෙන ආ බැවින් එකී සභාව විසින් නගර සභා ආඥා පනත යටතේ එය තහනම් කොට විකිණීමට ප්‍රයත්නයක් දරන ලදී. මේ පියවර අසාර්ථක වූ පසු නගර සභාවට එය පවරාගෙන සමාදානයෙන් අවුරුදු දෙකක් තව වැඩිදුර බුත්ති විඳීමට ඉඩ දුන් නමුත් ඒ අවුරුදු දෙක තුළ දී සාම මණ්ඩලයේ සාමාජිකයින් ඉන් ඉවත්ව නොගිය බැවින් සාම මණ්ඩල ආඥා පනත අනුව ඔවුන් ඉන් ඉවත් කිරීමට උසාවියේ නඩුවක් පැවරීම සඳහා අවශ්‍ය වූ සහ-

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කාණ්ඩයෙහි 76 වෙනි පිට බලනු.

තිකයක් සාම මණ්ඩලයෙන් (මෙහි පළමුවැනි වගඋත්තරකරුගේ සභාපතිත්වයෙන් යුතු)ලබා ගැනීමට 1967 ජූනි 11 වැනි දින ඉල්ලුම් කරන ලද නමුත් අසාධාරණ ලෙස පමා කරන ලද හෙයින් සභාපති හා අනෙක් සාමාජිකයන් වගඋත්තරකරුවන් කර නගර සභාව මැන්ඩාමුස් ආඥාවක් ඉල්ලන ලදී. වගඋත්තරකරුවන් කියා සිටියේ සාම මණ්ඩලයේ විභාගය අවසන් වී නැති බවයි.

තීන්දුව: ඉහත සඳහන් කරුණු උඩ පෙනී යන්නේ සාම මණ්ඩලය විසින් ඉල්ලුම්කරුට දිය යුතු සහතිකය දීම පැහැර හැරීමේ ප්‍රයත්නයක් දරණ බවයි. එම නිසා වහා ම සහතිකය දීමට අවශ්‍ය පියවර ගන්නා ලෙස වගඋත්තරකරුවන්ට අණ කෙරෙන මැන්ඩාමුස් ආඥාවක් ලබා ගැනීමට ඉල්ලුම් කරුට සුදුසුකම් තිබේ.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා: "සාම මණ්ඩල මීට වඩා හොඳ ආදර්ශයක් දිය යුතු අතර පළාත් පාලන සභා සමග සහයෝගයෙන් ක්‍රියා කළ යුතු ය. මීට සම්බන්ධ පක්ෂය එහි සභාපතිවරයා වීම නිසාදෝ සාම මණ්ඩලය බාධාකාරී ක්‍රියා මාර්ගයක් අනුගමනය කර ඇති බව අපට ඒත්තු ගොස් තිබේ. සාම මණ්ඩලයේ මෙම ක්‍රියාපටිපාටිය ඉතා කණගාටුදායක වන අතර පොදු යහපත පිළිබඳ හැඟීමෙන් තොර බව ද පෙනෙයි. එමෙන් ම පෙත්සම්කාර නගර සභාව හැම අතින් ම ලැබිය යුතුව තිබූ සහතිකය දීම ප්‍රතික්ෂේප කොට ඇති බව ද අපට ඒත්තු ගොස් තිබේ.

අධිනීතිඥ හරිශ්චන්ද්‍ර මැන්ඩිස් මහතා, අධිනීතිඥ ගැමුණු සෙනෙවිරත්න මහතා සමග, පෙත්සම්කරු වෙනුවෙන්.
පළමුවැනි හා දෙවැනි වගඋත්තරකරුවන් පෞද්ගලිකව

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

අපි පෙත්සම්කරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥ වරුන්ට සවන් දුන්නෙමු. පළමුවැනි හා දෙවැනි වගඋත්තරකරුවන් පැමිණ සිටිනත් ඔවුන් වෙනුවෙන් නීතිඥයින් පෙනී සිටින්නේ නැත. වගඋත්තරකරුවන් වෙනුවෙන් ඉදිරිපත් කෙරුනු තර්කය වන්නේ ඔවුන් ද සාමාජිකයින් වන සාම මණ්ඩලය මේ කාරණය ගැන විභාගය අවසාන කර නැති බවයි.

මේ ඉල්ලුම් පත්‍රයෙන් හෙළිදරව් කෙරෙන සාම මණ්ඩලයේ විභාග වාර්තාවෙන් ඉතා කණගාටුදායක කරුණු රාශියක් හෙළි වේ. පළමුවැනි වගඋත්තරකරු සාම මණ්ඩලයේ සභාපති ය. අවුරුදු හයකට අධික කාලයක් තිස්සේ ඔහු පදිංචිව සිටි නගර සභා සීමාව තුළ පිහිටි නිවාසයෙන් අයවිය යුතු වරිපණම් ගෙවීම ඔහු අතපසු කොට තිබේ. එම මුදල් නොගෙවීම නිසා භීතියට පත් නගර සභාව නිවාසය තහනම්ට යටත් කොටගෙන විකිණීමට උත්සාහ දරා ඇති බව පෙනේ. වෙන්දේසියේ දී ගැනුම්කරුවන් ඉදිරිපත් වී නැත. මෙවැනි තත්වයක් මධ්‍යයේ ගැනුම්කරුවන් විය හැකි පුද්ගලයින් පවා ඇත්වීම අපට තේරුම්ගත හැක.

නගර සභාව ගත් ඊළඟ පියවර නම් අයබදු නොගෙවීමේ හේතුව පිට ගෘහය තමන් වෙත ම පවරා ගැනීමයි. මේ පියවර නිසා වුව ද සමාදානයෙන් බුත්තිය නොදුන්නේ නම් බුත්තිය ලබා ගැනීමට නගර සභාවට ඉඩ නොලැබීන. මේ ගෘහයේ බුත්තිය බාර දීම සඳහා තවත් අවුරුදු දෙකක කාලයක් නගර සභාව විසින් දී ඇති බව පෙනේ. මේ අවුරුදු දෙක ගෙවී ගිය පසු ද බුත්තිය ලබා ගැනීමට නොහැකි වූයේ වුව ද සාම මණ්ඩල ආඥා පනතේ විධිවිධානයන්ට ගරු කිරීමක් වශයෙන් නගර සභාව 1967 ජූනි 11 වැනි දින පළමුවැනි වගඋත්තරකරුගේ සභාපතිත්වය යටතේ පවතින සාම මණ්ඩලය ඉදිරියේ කාරණය ඉදිරිපත් කොට පළමුවැනි වගඋත්තරකරු ගෘහයෙන් ඉවත් කිරීම හා අයිතිය ප්‍රකාශ කරවා ගැනීම සඳහා දිස්ත්‍රික් උසාවියේ නඩුවක් පැවරීමට අවශ්‍ය වන සහතිකය ඉල්ලා සිටියා ය.

පළමුවැනි වගඋත්තරකරුගේ (සාම මණ්ඩලයේ සභාපති) දෙවැනි වග උත්තරකරු (සාම මණ්ඩලයේ සාමාජිකයෙක්) ගේ හා අපට පෙනෙන අන්දමට අනික් වගඋත්තරකරුවන්ගේ ද තර්කය වන්නේ සාම මණ්ඩලය ඉදිරියේ විභාගය අවසාන වී නැති බවත් එම හේතුව නිසා මැන්ඩාමුස් ආඥාවක් ලද නොහැකි බවත් ය.

සාම මණ්ඩල මීට වඩා හොඳ ආදර්ශයක් දිය යුතු අතර පළාත් පාලන සභා සමග සහයෝගයෙන් ක්‍රියා කළ යුතු ය. මීට සම්බන්ධ පක්ෂය එහි සභාපතිවරයා වීම නිසා දෝ සාම මණ්ඩලය බාධාකාරී ක්‍රියා මාර්ගයක් අනුගමනය කර ඇති බව අපට ඒත්තු ගොස් තිබේ. සාම මණ්ඩලයේ මෙම ක්‍රියාපටිපාටිය ඉතා කණගාටුදායක වන අතර පොදු යහපත පිළිබඳ හැඟීමකින් තොර බව ද පෙනෙයි. එමෙන් ම පෙත්සම්කාර නගර සභාව සෑම අතින් ම ලැබිය යුතුව තිබූ සහතිකය දීම ප්‍රතික්ෂේප කොට ඇති බව ද අපට ඒත්තු ගොස් තිබේ.

පළමුවැනි වගඋත්තරකරුගේ සිට 11 වැනි වගඋත්තරකරුවන්ට ඉල්ලුම්කරු වෙත ඔවුන් ඉල්ලා සිටින සහතික නිකුත් කිරීම සඳහා සෑම පියවරක් ම ගැනීමට නියෝග කෙරෙන මැන්ඩාමුස් ආඥාවක් ලබා ගැනීමට ඉල්ලුම්කරුට අයිතියක් තිබේ.

වගඋත්තරකරුවන්ගෙන් මේ ඉල්ලීමේ ගාස්තු අයකර ගැනීමට ද අයිතියක් තිබේ.

සමරවික්‍රම විනිශ්චයකාරතුමා:
මම එකඟ වෙමි.

මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමට අණදෙන ලදී.
(පරිවර්තනය: අධිනීතිඥ චුල්පත්මේන්ද්‍ර දහනායක (ඇල්.ඇල්.බී.) ලංකා.)

වීරමන්ත්‍රී විනිශ්චයකාරතුමා ඉදිරිපිටදිය

නාගනාදන් එ. ද සිල්වා, පිටකොටුවේ උප පොලිස් පරීක්ෂක*

ශ්‍රේෂ්ඨාධිකරණයේ අංක 391/67

කොළඹ නාගරික මහේස්ත්‍රාත් උසාවියේ නඩු අංක 42723
පිළිබඳ පුනරීක්ෂණය සඳහා ඉල්ලීම

තර්ක කළේ සහ තීන්දු කළේ: 1968 පෙබරවාරි, 27 වැනිදා

අපරාධ විධිවිධාන සංග්‍රහය 413 ඡේදය — ජැක්පොට් යන්ත්‍රයක් ළඟ තබා ගැනීමේ චෝදනාවක් — 1961 අංක 48 සහ 1957 අංක 26 දරණ ආඥා පනත්වලින් සංශෝධිත සුදු ආඥා පනතේ 3 බී (1) ඡේදය යටතේ වරදක් — චිත්තිකරු නිදහස් වීම — නඩු විභාගයේ දී ඉදිරිපත් කරන ලද ජැක්පොට් යන්ත්‍ර ආපසු ලබා ගැනීමට චිත්තිකරු ඉල්ලීමක් කිරීම — මහේස්ත්‍රාත්වරයා එය ප්‍රතික්ෂේප කිරීම — එම නියෝගය පුනරීක්ෂණය කිරීමට චිත්තිකරු ඉල්ලීම.

1957 අංක 26 හා 1961 අංක 48 දරණ ආඥා පනත්වලින් සංශෝධිත සුදු ආඥා පනතේ 3 බී (1) අනු ඡේදය උල්ලංඝණය කරමින් ජැක් පොට් යන්ත්‍රයක් ළඟ තබා ගැනීමේ වරදට චිත්තිකරුට විරුඬව නඩු පවරන ලදුව චෝදනාවෙන් නිදහස ලැබීමෙන් ඉක්බිතිව චිත්තිකරු නඩු විභාගයේ දී ඉදිරිපත් කරන ලද ජැක්පොට් යන්ත්‍රය ආපසු දෙන ලෙස කළ ඉල්ලීම මහේස්ත්‍රාත්වරයා ප්‍රතික්ෂේප කිරීමෙන් පසුව එකී නියෝගය පුනරීක්ෂණය කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ආයාචනයක් කළේ ය.

ස්වකීය නියෝගය දීමේ දී (අ) චෝදනාව ඔප්පු කිරීමෙහි ලා පැමිණිලි පක්ෂය විසින් ළඟ තබා ගැනීම ඔප්පු කළ නොහැකි වූ තාක් දුරට පෙත්සම්කරු ද මෙම ඉල්ලීමේ අවශ්‍යතාවයන් සඳහා ළඟ තබා ගැනීම ඔප්පු කිරීමට අසමත් වන බවත්,

(ආ) එම උපකරණ හා මෙවලම් පෙත්සම්කරුට ආපසු දුනහොත් පෙත්සම්කරු අනායාසයෙන් ම ඒවා ළඟ තබා ගැනීමේ වරදට හසුවන බවත්, එසේ වූ කල මෙම උපකරණ ආපසු දීමට උසාවිය කරන නියෝගය ඔහුට නිදහසට හේතුවක් වශයෙන් දැක්විය හැකි බවත්

මහේස්ත්‍රාත්වරයා පූර්ව නිගමනයක් ලෙස ගෙන ඇති බවත් පෙත්සම්කරු වෙනුවෙන් තර්ක කරන ලදී.

තීන්දුව: (1) අපරාධ නඩුවක් සඳහා අවශ්‍ය වන ඉහළ මට්ටමේ ඔප්පු කිරීමේ භාරය තමා ඉදිරියේ තිබුනු ප්‍රශ්නය සම්බන්ධයෙන් යොදා ගැනීමෙන් මහේස්ත්‍රාත්වරයා වැරදි ලෙස ක්‍රියා කොට ඇත.

(2) අපරාධ විධිවිධාන සංග්‍රහයේ 413 වන ඡේදයෙන් තමා වෙත පිරිනැමෙන බලතල කෙරෙහි සිය මනස යොමු කිරීම මහේස්ත්‍රාත්වරයාගේ යුතුකමක්ව තිබින.

(3) ඉතා කලාතුරකින් වුව ද මෙවැනි උපකරණ ළඟ තබා ගැනීම වරදක් නොවන අවස්ථා ඇති නිසා, හුදෙක් ඒවා ළඟ තබා ගැනීම ම, වරදක් නොවන හෙයින් මෙය නැවත විභාග කිරීමට සුදුසු නඩුවකි.

ආචාර්‍ය්‍ය කොල්වින් ආර්. ද සිල්වා, ආනන්ද විජේසේකර සමඟ, පෙත්සම්කරු වෙනුවෙන්.

ලලිත් රුද්‍රිගු රජයේ අධිනීතිඥ වග-උත්තරකරු වෙනුවෙන්.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා

මේ නඩුවේ චිත්තිකාර පෙත්සම්කරු ජැක්පොට් යන්ත්‍ර දෙකක් සම්බන්ධයෙන් මහේස්ත්‍රාත්වරයාගේ නියෝගයක් පුනරීක්ෂණය කරන ලෙස ඉල්ලා තිබේ. 1957 අංක 26 හා 1961 අංක 48 දරණ ආඥාපනත් වලින් සංශෝධනය වූ සුදු ආඥා පනතේ 3 බී(1) උපඡේදයේ විධිවිධාන උල්ලංඝනය කරමින් මේ යන්ත්‍ර ළඟ තබා ගැනීමේ චෝදනාව පිට චිත්තිකරුට විරුද්ධව පැවරුනු නඩුවක දී මේ යන්ත්‍ර දෙක පැමිණිල්ල විසින් උසාවියට ඉදිරිපත් කරන ලදී. මේ නඩු විභාගයේ දී චිත්තිකරු නිදහස් කරන ලදී.

පෙත්සම්කරු වෙනුවෙන් ආචාර්‍ය්‍ය කොල්වින් ආර්. ද සිල්වා, උගත් මහේස්ත්‍රාත්වරයා ඔහුගේ නියෝග-

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කාණ්ඩයෙහි 95 වෙනි පිට බලනු.

යෙහි කර ඇත්තේ මේ යන්ත්‍ර ළඟ තබා ගැනීමේ චෝදනාව පැමිණිල්ලට ඔප්පු කර ගත හැකි නොවූ හෙයින් ම, පෙත්සම්කරු යන්ත්‍ර ආපසු ලබා ගැනීම සඳහා කරන ඉල්ලීම සම්බන්ධයෙන් ඔප්පු කළ යුතු වන ළඟ තබා ගැනීම ද ඔප්පු වී නැත යන මූලික පිළිගැනීම මත ක්‍රියා කිරීම බව ගෙන හැර දක්වයි. එකී අපරාධය පිළිබඳ චෝදනාව සඳහා අවශ්‍ය වන ඔප්පු කිරීමේ මට්ටම අවබෝධයෙන් යුතුව අන්‍යයින් බැහැර කරමින් තනිව ම ළඟ තබා ගෙන සිටී බවට හේතු සහිත සැකයකින් තොරව ඔප්පු කිරීම බවත්, මේ මට්ටම මෙම ඉල්ලීමෙන් තමන් වෙත ඉදිරිපත් වූ කරුණු වලට මහේස්ත්‍රාත් වරයා යොදවා තිබීම වරදක් බවත් ඔහු තර්ක කළේ ය. පසුව දක්වන ලද පරමාර්ථය සඳහා ළඟ තබා ගැනීම පිළිබඳ අවශ්‍ය වන ඔප්පු කිරීමේ භාරය අවබෝධයෙන් යුතුව හා අන්‍යයන් බැහැර කරමින් තනිව ම ළඟ තබා ගැනීම හේතු සහිත සැකයකින් තොරව ඔප්පු කිරීම සඳහා පැමිණිල්ල වෙත පැවරෙන ඔප්පු කිරීමේ භාරයට වඩා වෙනස් අන්දමේ එකක් බව පෙනේ. එහෙයින් මහේස්ත්‍රාත්වරයා තමා ඉදිරියෙහි වූ ප්‍රශ්නය සම්බන්ධයෙන් අපරාධ නඩුවක දී අවශ්‍ය වන ඔප්පු කිරීමේ භාරය පිළිබඳ උසස් මට්ටම යෙදවීම වරදකි.

අපරාධ විධිවිධාන සංග්‍රහයේ 413 වන ඡේදය අනුව අපරාධයක් කිරීම සඳහා පාවිච්චි කරන ලදැයි හෝ අපරාධයක් කිරීමට අදාල වී යැයි සලකා තමා වෙත ඉදිරිපත් කෙරෙන ලියවිල්ලක් හෝ දේපළක් සම්බන්ධයෙන් ගත යුතු පියවර කුමක් දැයි ස්වකීය අභිමතය අනුව නිගමනය කිරීමේ බලය ඔහු සතු වේ. සාමාන්‍යයෙන් මහේස්ත්‍රාත්වරයා එසේ ඉදිරිපත් කෙරෙන දේවල් ලබා ගන්නා ලද තැනැත්තා වෙත ආපසු දීමට නියෝග කරයි. මෙම ඉල්ලීම මත මහේස්ත්‍රාත්වරයා ඉදිරිපිට වූ කරුණ මෙය වන අතර, ඔහුගේ කාර්‍යය විය යුතු වූයේ තමා අපරාධ නඩුවේ දී පැමිණි නිගමනයෙන් සම්පූර්ණයෙන් ම නිදහස්ව ඒ පිළිබඳ තම මනස මෙහෙයවීමයි.

එහෙයින් ආචාර්‍ය්‍ය ද සිල්වාගේ ප්‍රථම තර්කය පිළිගත යුතුව තිබේ.

ආචාර්‍ය්‍ය ද සිල්වා කොයි විධියකින් වුව ද මෙම යන්ත්‍ර ළඟ තබා ගැනීම වරදකැයි මහේස්ත්‍රාත්වරයා කර ඇති නිගමනයට ද පහර දෙයි. මේ පිළිගැනීම මත ක්‍රියා කරන මහේස්ත්‍රාත්වරයා හේතු දක්වමින් මෙම භාණ්ඩ ඉල්ලුම්කරුට ආපසු දුනහොත් ඔහු නිරායාසයෙන් ම නැවතත් ඒවා ළඟ තබා ගැනීමේ වරද කරන බවත්, එතෙකුදු වුවත් තමාගේ නිදහස සඳහා මේ භාණ්ඩ ආපසු දෙන උසාවියේ නියෝගය පෙන්විය හැකි බවත් දක්වයි. ආචාර්‍ය්‍ය ද සිල්වාගේ තර්කය වී ඇත්තේ එසේ මෙම භාණ්ඩ ළඟ තබා ගැනීම අපරාධයක් නොවන්නා වූ අවස්ථා ඇති බවයි. සුදු ආඥා පනතේ 21 වැනි වගන්තිය විශේෂයෙන් ම ගෙන හැර දක්වන ඔහු එම ආඥා පනතේ දැක්වෙන වරදවල්වලින් නිදහස් කිරීම් රාශියක් එමගින් බිහි වී ඇති බව ද පෙන්වා දෙයි. ආඥා පනතේ ඉහත දැක්වුනු ඡේදයෙන් එම ආඥා පනතේ ඇති කිසිවක් නගර සභාවක හෝ සුළු නගර සභාවක හෝ දේපොළ අයිති සමාජයක හෝ බලපත්‍ර ලත් හෝටලයක යම් යම් කොන්දේසි උල්ලංඝනය නොකරන තාක් දුරට එම ස්ථාන කෙරෙහි බලනොපවත්වන බව කියැ වේ.

මුල් පනතට කරන ලද සංශෝධනයක් ද සහිතව අද පවත්නා තත්ත්වය අනුව මෙම ආඥා පනත සමස්තයක් වශයෙන් ගත් කල ද එම විධිවිධාන බලපවත්වන බව ආචාර්‍ය්‍ය ද සිල්වා තර්ක කරයි. එම නිසා 1961 අංක 48 දරන සංශොධන ආඥා පනතින් සංශොධිත මෙකී ආඥා පනතේ 3 බී(1) ඡේදයෙන් ආනයනය කිරීම තහනම් කරන ලද භාණ්ඩ හෝ උපකරණ හෝ ළඟ තබා ගැනීමේ වරද මුල් පනතේ 21 වැනි වගන්තියෙන් දැක්වෙන විශේෂතාවන්ට යටත්ව කියැවෙන බව ඒ මහතා පෙන්නා දෙයි.

හුදෙක් ළඟ තබා ගැනීම ම අවශ්‍යයෙන් ම නීති විරෝධී නොවේය යන තර්කයට කරුණු ගෙන හැර දක්වමින් කථා කළ උගත් අධිනීතිඥවරයා, මේ ඉල්ලීමට අදාල භාණ්ඩ ආනයනය කරන ලද බවට සාක්ෂි නොමැති බවත්, ආනයනය කිරීම තහනම් කිරීමට කලින් මේ භාණ්ඩ ආනයනය කරන ලද්දේ නම්, පැහැදිලි වශයෙන් ම ළඟ තබා ගැනීම වරදක් නොවන්නේ ය. ඇපැල්කරු වෙනුවෙන් නඟන ලද තර්කයක් නම්, ඇතැම් අවස්ථාවල දී මේ උපකරණ ළඟ තබා ගැනීම වරදක් විය හැකි වුවත්, එම උපකරණ ආපසු දෙනු ලබන පුද්ගලයාට ඒවායේ නොයෙක් ප්‍රයෝජනවත් කොටස් ඇති බව සලකා ඒවා කඩා බිඳ වෙන්කර දැමීමට හැකි බවත් ය. එවැනි වෙන් කරන ලද කොටස් ළඟ තබා ගැනීම වරදක් නොවේ.

ළඟ තබා ගැනීම වරදක් නොවන්නේ ඉතාම ස්වල්ප අවස්ථා කිපයක දී විය හැක. එහෙත් හුදු ළඟ තබා ගැනීම අත්‍යාවශ්‍යයෙන් ම නීති විරෝධිය යන පිළිගැනීම මහේස්ත්‍රාත්වරයාගේ නියෝගයට පදනම් වී ඇති සාවද්‍ය පිළිගැනීමකි.

මෙම ඉදිරිපත් කිරීම් ආපසු දීමේ ප්‍රශ්නය ගැන නැවත විභාග කර බැලීම සඳහා මෙය මහේස්ත්‍රාත්වරයා වෙත ආපසු යැවිය යුතු නඩුවකැයි මම සිතමි. ළඟ තබා ගැනීම පිළිබඳව තමා වෙත ඉදිරිපත් කරන සාක්ෂි වෙනොත් ඒවා කෙරෙහි ඔහු නිසැකයෙන් ම සිය මනස යොමු කරනු ඇත. ඒ අතර ම හුදෙක් එම උපකරණ ළඟ තබා ගැනීම ම සංශෝධනය කරන ලද ආඥා පනත යටතේ අත්‍යාවශ්‍යයෙන් ම වරදක් වන්නේ ද යන ප්‍රශ්නය ද ඔහු විසින් සලකා බලනු ඇත.

ඉදිරිපත් කරන ලද ද්‍රව්‍ය විනාශ කර දැමීමට කර ඇති මහේස්ත්‍රාත්වරයාගේ නියෝගය නිෂ්ප්‍රභා කරන අතර, මෙම නඩුව ළඟ තබා ගැනීමේ ප්‍රශ්නය ගැන ආපසු දීමේ නියෝගයක් අත්‍යාවශ්‍යයෙන් ම නීති විරෝධිතාවයක් ඇති කරන්නේ ද යන්නත් සලකා බලමින් නැවත විභාග කිරීම සඳහා මහේස්ත්‍රාත්වරයා වෙත ආපසු යවමි.

නියෝගය නිෂ්ප්‍රභා කර ආපසු යවන ලදි.

පරිවර්තනය අධිනීතිඥ චූල්පත්මේන්ද්‍ර දහනායක
(ඇල්.ඇල්.බී. ලංකා) විසිනි.

අලස් සහ තෙන්නකෝන් විනිශ්චයකාරතුමන් ඉදිරිපිටදිය

ජස්ටින් විල්ප්‍රඩ් ද අල්විස් එ. වික්ටර් සිරිල් ද සිල්වා*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලීම් අංක 265/67

මැන්ඩාමුස් ආඥාවක ස්වරූපයෙන් අධිකරණ ආඥාවක් නිකුත් කරන ලෙස ඉදිරිපත් කෙරුණු ආයාචනයක් පිළිබඳවයි.

විවාද කළ දිනය: 1967 සැප්තැම්බර් 19 සහ 27 වන දින
හේතු සහිතව තීන්දුව දුන් දින: 1967 ඔක්තෝබර් 22 වන දින

මැන්ඩාමුස් ආඥාවක් — රාජ්‍ය සේවා කොමිසම හා භාණ්ඩාගාරයේ ලේකම් ද අමතා ලියනු ලැබ දෙපාර්තමේන්තුවේ අධිපතිතැනගේ මාර්ගයෙන් රාජ්‍ය සේවකයකු විසින් යවන ලද පෙත්සම් දෙකක් — පෙත්සම්වලට පමා වී පිළිතුරු ලැබීම — පෙත්සම්වලින් අමතනු ලැබූ අයට ඒවා පිළිවෙලින් යවන ලෙස වගඋත්තරකරුට නිර්දේශ කරන ලෙස මැන්ඩාමුස් ආඥාවක් ඉල්ලීම — වගඋත්තරකරු එසේ කිරීමට ලිඛිත නීතියක අනුසාරයෙන් බැඳී සිටී ද යන්න — රජයේ කායර්‍යාංශ පාලන නීති සංග්‍රහයේ සඳහන් කොට ඇති පරිපාලන රෙගුලාසි — මේවායේ නීතිමය බලයක් ගැබ් වී තිබේද යන්න.

ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 72, 87(1), 87(2), 88 වන ඡේද—අර්ථ කථන ආඥා පණතේ 17(1) වන ඡේදය.

තීන්දුව: (1) රජයේ කායර්‍යාංශ පාලන නීති සංග්‍රහයේ (The Manual of Procedure) සඳහන් පරිපාලන රෙගුලාසිවල නීතිමය බලය ගැබ් වී නැත. එම නිසා එබඳු රෙගුලාසි උල්ලංඝනය වූ විට මැන්ඩාමුස් ආඥාවකින් ඒවා ක්‍රියාත්මක කළ නොහැක.

(2) තමා ම රජයේ සේවකයකු වූ වගඋත්තරකරු එබඳු රෙගුලාසිවලට අවනතව ක්‍රියා කිරීමේ රාජකාරිය තමා සේවකයකු ලෙස පත්ව සිටින රජයට ඉටු කිරීමට බැඳී සිටිනු විනා තමාගේ දෙපාර්තමේන්තුවේ උප නිලධාරියකු වූ පෙත්සම්කරුට පක්ෂව ඉටු කිරීමට බැඳී නැත.

(3) අර්ථ කථන ආඥා පණතේ 17(1)සි දරණ ඡේදයෙන් සැලකෙන්නේ ආඥා පණතක් ලෙස හෝ ලංකාවේ පණතක් ලෙස විග්‍රහ කරන ලද පැනවීමකට ඇතුළත් රීති, රෙගුලාසි හා අනුරූ ව්‍යවස්ථා පමණකි.

ඇස්. සිවඥානසුන්දරම් මහතා, ඇල්. ඇස්. බාර්ටිලට් සහ කේ. කනගිස්වරම් යන මහතුන් සමග පෙත්සම්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ එච්. ඇල්. ද සිල්වා මහතා, වගඋත්තරකරු වෙනුවෙන්.

අලස් විනිශ්චයකාර තුමා:

මෙම නඩුවෙහි විවාදය නිම වූ පසු එය නඩු ගාස්තුවට යටත් කොට නිෂ්ප්‍රභා කළ අපි ඒ සඳහා අපේ හේතු යුක්ති පසුව දන්වන බව කීවෙමු. එම නියෝගය දීමට හේතුභූත වූ කරුණු අපි දැන් මෙහි ලා දක්වමු. මෙම නඩුවෙහි පෙත්සම්කරු රජයේ වැඩ දෙපාර්තමේන්තුවේ රජයේ වැඩ පිළිබඳව ජ්‍යෙෂ්ඨ සහකාර අධ්‍යක්ෂක වරයාව සිටිය දී ඔහු විසින් යම්කිසි අයථා අල්ලසක් ගන්නා ලදැයි චෝදනා මුඛයෙන් කළ පැවසීමක් අනුව වර්ෂ 1960 ඔක්තෝබර් මස 1 වැනි දින ඔහුගේ වැඩ තහනම් කරනු ලැබී ය. රාජ්‍ය සේවා කොමිෂන් විසින් පත් කරන ලද මණ්ඩලයක් විසින් මෙම චෝදනාවන් සඳහා පරීක්ෂණයක් පවත්වනු ලැබ එහි වාර්තාවෙන් පෙත්සම්කරුට විරුද්ධව තිබුණු චෝදනා ඔප්පු වී නැතැයි පිළිගත්තේ ය. කෙසේ හෝ වේවා රාජ්‍ය සේවා කොමිෂන් එම මණ්ඩලයේ තීරණය පිළි නොගෙන එම තීන්දුව වෙනස් කොට පෙත්සම්කරු වරදකරු බවට පත් කළේ ය. ඔහු රක්ෂාවෙන් අස්කිරීම වෙනුවට ගත

*ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 74 වෙනි කාණ්ඩයෙහි 97 වෙනි පිට බලනු.

හැකි සානුකම්පික වෙනත් පියවරක් ලෙස පෙත්සම්කරු කාර්යයෙහි අදක්ෂතාවයේ හේතුවෙන් බලයෙන් ම විශ්‍රාම ගැන්වීමට යැයි නිර්දේශ කොට තිබේ. වැඩ තහනම් කර සිටි අවදියේ ඔහු විසින් ලැබීමට සුදුසුකම් තිබුණු සියළු ම දීමනා ඔහුට ගෙවා තිබෙනු පමණක් නොව, පෙත්සම්කරුගේ විශ්‍රාම අයිතිවාසිකම් ද සියල්ල ම ඒ පියවර ගැනීමෙන් පසු ඔහුට ලැබී තිබේ. 1965 මාර්තු මාසයේ දී අලුතින් පත්කරනු ලැබූ රාජ්‍ය සේවා කොමිෂමක් අමතා ලියුම් යවන ලද ඔහුට වර්ෂ 1966 මාර්තු 1 වැනි දින සිට රාජ්‍ය සේවයේ නැවතත් රක්ෂාව ඔහුට එම කොමිෂම විසින් දෙන ලදී. මෙසේ දෙන ලද රක්ෂාව කලින් තිබුණු දෙයට වඩා එම දෙපාර්තමේන්තුවේ පහළ තත්ත්වයක තිබුණු දෙයක් වුව ද පෙත්සම්කරු මෙම පිරිනැමීම භාර ගත්තේ ය.

වර්ෂ 1966 නොවැම්බර් මස 10 වැනි දින සහ වර්ෂ 1967 පෙබරවාරි මස 16 වන දින ඒ සහ බී දමා ලකුණු කරන ලද පෙත්සම් දෙකක් පෙත්සම්කරු විසින් රාජ්‍ය සේවා කොමිෂමට සහ භාණ්ඩාගාරයේ ලේකම්වරයාට ද පිළිවෙලින් ඉදිරිපත් කොට තිබේ. එම පෙත්සම්වල සඳහන් වන්නේ ඔහුගේ පුද්ගලික අයිතිවාසිකම් සහ දෙපාර්තමේන්තුවේ ඔහුට තිබුණු තත්වය සම්බන්ධයෙනි. මෙම පෙත්සම් යවා ඇත්තේ ඔහුගේ දෙපාර්තමේන්තුවේ ප්‍රධානියා වූ වග-උත්තරකරුගේ මාර්ගයෙනි. "බී" අක්ෂරය දමා ලකුණු කරන ලද පෙත්සමේ පිටපත් මෙම නඩුවේ පෙත්සම්කරු විසින් භාණ්ඩාගාරයේ ලේකම්වරයාට ද රාජ්‍ය සේවා කොමිෂමේ සභාපතිවරයාට සහ සාමාජිකයනට ද කෙලින් ම යවා තිබේ. භාණ්ඩාගාරයේ ලේකම්වරයා වර්ෂ 1967 සැප්තැම්බර් මස 13 වන දින පිළිතුරු එවමින් පෙත්සම්කරුට කිසි ම සහනයක් දීමට තමාට නොහැකි බව දන්වා තිබේ. "ඒ" අක්ෂර දමා ලියන ලද පෙත්සම වර්ෂ 1966 දෙසැම්බර් මස 18 වන දින මෙම නඩුවෙහි වග-උත්තරකරු විසින් එහි කිසි ම සටහනක් නොලියා රාජ්‍ය සේවා කොමිෂමට යවනු ලැබ එම කොමිෂම විසින් භාණ්ඩාගාරයේ ලේකම්වරයා විසින් යවන ලද පිළිතුරෙහි ඇති තත්වය ම ප්‍රකාශ වන පිළිතුරක් යවා තිබේ.

දැනට අප ඉදිරියෙහි ඇති වර්ෂ 1967 ජූලි මස 18 වන දින උසාවියට ඉදිරිපත් කරන ලද මෙම ඉල්ලීමෙන් යාඥා කරන්නේ ඉහත කී පෙත්සම් දෙක පිළිවෙලින් එහි ලියා ඇති ඒ ඒ ලිපිනයට යවන ලෙස නිර්දේශ කරමින් වග-උත්තරකරුට විරුද්ධව මැන්ඩාමුස් ආඥාවක් නිකුත් කරන ලෙස ආයාචනා කරමිනි. එහි ලිපිනය අනුව කියැවෙන තැනැත්තන් විසින් මෙම පෙත්සම් ගැන සළකා බලා ඒවාට පිළිතුරු යවා ඇති බැවින් මේ අවස්ථාවේ දී එබදු ආඥාවක් නිකුත් කිරීමට ඇති අවශ්‍යතාවය පිළිබඳ ප්‍රශ්නය කොහෙත් ම මතුවන්නේ නැති සේ ය. මේ කරුණු කෙසේ වෙනත් පෙත්සම්කරුගේ නීතිවේදියා සැළකර සිටින්නේ පෙත්සම්කරු උසාවියට පැමිණි අවස්ථාවේ දී ඔහුට එසේ ඒකාන්තයෙන් ම එන්නට සිදුවූයේ වගඋත්තරකරුවන් විසින් පෙත්සම්කරු වෙනුවෙන් ඉටු කළ යුතු රාජකාරියක් ඉටු නොකළ නිසා බැවින් පෙත්සම්කරුට මෙම නඩුව ඉදිරිපත් කිරීමේ ගාස්තුව වගඋත්තරකරුවන්ගෙන් අයවිය යුතු බවකි. එම සැළකිරීම අනුව පෙත්සම්කරුගේ නීතිවේදියාට වගඋත්තරකරු විසින් ඉටු කළ යුතු ලිඛිත නීතිගත මහජන රාජකාරියක් තිබුනු බවට කරුණු පෙන්වා අපව සෑහීමකට පත් කරන ලෙස අපි කීවෙමු. එම රාජකාරිය විය යුත්තේ පහත සඳහන් පෙත්සම් දෙක ඒ ඒ ලිපිනයට ඉදිරිපත් කිරීම ය. මෙම නඩුවෙහි ආඥාවන් නිකුත් කළ යුතු තත්වයක් ඇත යන්නෙන් එම නීතිවේදියා කරන ලද සැළකිරීම්වලට අපට එකඟ විය නොහැක්කේ මන්ද යන හේතූන් දැන් අපි මෙහි ලා දක්වන්නෙමු.

මෙහි පෙත්සම්කරුගේ ප්‍රධාන පැමිණිල්ල වී ඇත්තේ දෙපාර්තමේන්තුවේ ලියකියවිලි සම්බන්ධයෙනුත්, දෙපාර්තමේන්තුවේ ක්‍රියා පිළිබඳවත්, විශේෂයෙන් (තමන්ගේ මාර්ගයෙන් ඉදිරිපත් කරන පෙත්සම් පිළිබඳව දෙපාර්තමේන්තු අධිපතීන් විසින් අනුගමනය කළ යුතු ක්‍රියා මාර්ගය දැක්වෙන) රජයේ කාර්යාංශ සම්ප්‍රදා සංවිධාන සංග්‍රහයේ (Manual of Procedure) 46 වන සහ 47 වන ඡේදයන්ට අනුකූලව සහ ඒ අනුව සකස්වන රෙගුලාසිවලට අනුව වග උත්තරකරු කටයුතු කිරීම පැහැර හැර තිබෙන බවයි. මේවා රජයේ කාර්යාංශ සම්ප්‍රදා සංවිධාන සංග්‍රහයට ඇතුලත් වන පරිපාලන රෙගුලාසි නිසා උගත් නීතිවේදියා සැළකර සිටියේ මෙම රෙගුලාසි වල නීතියෙහි ඇති බලය ගැබ්ව පවත්නා බවත් ඒ නියමයෙන් එම රෙගුලාසිවලට එකඟව කටයුතු

ඉටු නොවූ විටක මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමට මග පෑදෙන බවත් ය.

උගත් නීතිවේදියාගේ මෙම සැලකිරීම් සාර්ථකවේ දැයි යන්න කල්පනා කිරීමට මෙම රෙගුලාසිවල ඉතිහාසය පරීක්ෂාවට භාජනය කළ යුතු ය. වර්ෂ 1931 ලංකා (රාජ්‍ය මන්ත්‍රණ සභා) රාජාඥාවෙහි ව්‍යවස්ථා 39(1) සහ 39(2) සළකා බලන කල විධායක මණ්ඩල මගින් සහ රජයේ නිලධරයන් මගින් කෙරුණු රජයේ කාර්ය පිළිබඳව සහ රජයේ කාර්ය විධානය සහ පාලනය කිරීම සම්බන්ධයෙන් පැවති පරිපාලන ක්‍රමය කෙරුනේ ආණ්ඩුකාරතුමන් විසින් සාදන ලද රීතිවලට අනුව ය. ඉහත සඳහන් ව්‍යවස්ථාවන්ට අනුව මහජනයා පිළිබඳව සහ විධායක මණ්ඩලවලට ක්‍රියා කිරීමට සිදු වූ කාර්යයන් පිළිබඳව ද ගතයුතුව තිබුණු පියවර රජයේ නිලධරයන්ට ගැනීමට හැකිවන සේ සම්ප්‍රදා රීති මාලාවක් ආණ්ඩුකාර තුමා විසින් සකස් කරන ලදී. මෙම රීතිමාලාව වර්ෂ 1931 ජූනි මස 5 වැනි දින පළ වූ අංක 7858 දරණ ගැසට් පත්‍රයේ ප්‍රසිද්ධ කරනු ලැබ, වර්ෂ 1946 දක්වා ම ක්‍රියාත්මක වෙමින් පැවතුනි. වර්ෂ 1946 දී යම්කිසි සාමාන්‍ය නියෝගයක පැනවීම් හෝ මුදල් පිළිබඳ රෙගුලාසි හෝ රාජ්‍ය සේවා රෙගුලාසි හෝ අන් කිසි වෙනත් පරිපාලන රෙගුලාසි හෝ නියෝග හෝ එසේත් නැත්නම් එයින් බාහිර අන් කිසි දෑයක් හෝ ඇතුලත් වන පරිපාලන නීතියක හෝ නියෝගයක ගැබ් වී ඇති කෙබඳු පැනවීමක් හෝ වර්ෂ 1946 ලංකා (ආණ්ඩුක්‍රම) රාජාඥාවේ පැනවීම්වලට එකඟවන සේ හෝ එය ක්‍රියාත්මක කළ හැකි වන සේ එකී පැනවීම් සැහැල්ලු කිරීමට එයට යම් යම් දේ එකතු කිරීමට හෝ පරිශෝධනයෙන් සකස් කර ගැනීමට හෝ එම රාජාඥාවේ 87(1) දරණ ඡේදයෙන් ආණ්ඩුකාරතුමාට බලය ලැබිනි. මෙම ඡේදයෙන් පිරිනැමුනු බලතලවලට අනුව ක්‍රියා කළ ආණ්ඩුකාර තුමා පහත සඳහන් පරිදි නියෝගයක් නිකුත් කළේ ය.

'නියෝජිත මන්ත්‍රණ සභාවේ පළමුවන රැස්වීම පවත්වන දිනයෙන් පසු ක්‍රියාත්මක වන අන්දමට ලංකාණ්ඩුවේ ඇති පරිපාලන රෙගුලාසි මෙහි උප ලේඛනයෙහි සඳහන් කර ඇති අන්දමට කියැවෙන අයුරින් සැහැල්ලු කිරීම්වලට වැඩිමනත් එකතු කිරීම හෝ එය පරිශෝධනයෙන් සකස් කිරීම හෝ මේ රෙගුලාසියෙන් කෙරෙනු ලැබේ. (වර්ෂ 1947.9.22 දනම සහ අංක 9769 දරණ ආණ්ඩුවේ ගැසට් පත්‍රය බලන්න) එකී උප ලේඛණයෙහි පැරණි පරිපාලන රෙගුලාසි නිසි ඉන්දමින් සැහැල්ලු කොට ද, අළුත් රාජ්‍ය පාලන සංස්ථාවෙහි ඇති පිළියෙල කිරීම්වලට අදාලවන සේ සකස් කොට ද එකී උප ලේඛනයෙහි අන්තර්ගත කොට තිබේ. ආණ්ඩුවේ කාර්ය සම්ප්‍රදා සංග්‍රහය යන්නෙන් (The Manual of Procedure) ඉහත සඳහන් පරිදි ප්‍රසිද්ධ කොට තිබෙන්නේ මෙම රෙගුලාසි මාලාව ය. රාජ්‍ය සේවක නිලධාරීන් විසින් යවන පෙත්සම් පිළිබඳ පැනවීම් එයට ඇතුලත් ය. ලංකා ස්වාධීන රාජාඥාවේ 7සි දරණ ඡේදය යටතේ මෙම රෙගුලාසිවල බලයට කිසිදු හානියක් වී නැති අතර, එම රෙගුලාසි ඉවත් කරනතුරු හෝ ඒ වෙනුවට අළුත් රෙගුලාසි ඇතුලත් කරන තුරු හෝ බලපවත්වමින් ක්‍රියාත්මක වී තිබේ. එම නිසා එම රෙගුලාසි අද දක්වාත් ක්‍රියාත්මක වෙමින් පවතින බව කිය යුතු ය. කෙසේ වුවත් වර්ෂ 1946 රාජාඥාව යටතේ පනවන ලද සෑම රෙගුලාසියක ම නීතියක ඇති බලය ගැබ් වී නැත. එහි 87(2) දරණ ඡේදයෙහි, පහත සඳහන් පරිදි පැන වී තිබේ. ''87 වන ඡේදයේ පළමුවන උප ඡේදය යටතේ සකස් කරන ලද සෑම රෙගුලාසියක් ම එය සංශෝධනය කරන තුරු හෝ ඉවත් කරන තුරු හෝ එම රාජාඥාවට අනුව ඒ සඳහා බලතල ලත් නියම ඇමතිවරයා විසින් ඒ වෙනුවට වෙනෙකක් පනවන තුරු හෝ බලපවත්වමින් තිබිය යුතු.ය මෙම ඡේදයෙහි ඇතුළත් භාෂාව එම රාජාඥා පනතෙහි අනික් ඡේදයන්ට ඇතුලත් භාෂාවට බෙහෙවින් ප්‍රතිවිරුද්ධ තත්වයක් ගෙන තිබේ. එම ඡේදයන්හි ගැබ්වී ඇත්තේ එම ඡේදයන් යටතේ සකස් වන රෙගුලාසිවල නීතියක ඇති බලය නිබිය යුතු බවකි. (72 සහ 88 (2)) යන ඡේදයන් බලන්න. විශේෂයෙන් ම ව්‍යවස්ථාදායක බල මණ්ඩලයක් හැටියට පාර්ලිමේන්තුව නම්කර ඇති මෙම රාජාඥාව යම්කිසි සීමාසහිත ක්ෂේත්‍රයක් ඇතුලත හෝ යම්කිසි නියමිත කරුණකට සීමාවන අන්දමින් හෝ රීති මාලාවන් හෝ රෙගුලාසි මාලාවන් සකස් කිරීමට වෙන කාර්යාංශයකට බලතල පවරන විට එසේ සැපයෙන රීති අතුරින් හෝ රෙගුලාසි අතුරින් හෝ කුමන රීතියකට හෝ රෙගුලාසියකට නීතියෙහි බලයක් තිබේ ද? කුමන දෙයකට එය නැද්ද? යන්න සඳහන් කර නිබීම ගැන කෙනකුට පුදුම විය නොහේ.

87 වැනි ඡේදය යටතේ ඇති රෙගුලාසිවලට නීතියේ බලය හා ස්වභාවය දීම මෙම රාජාඥා පණතින් පැහැදිලි ලෙස ම වලකා තිබේ.

පෙත්සම්කරු වෙනුවෙන් කරුණු පෙන්වීමේ දී ඔහු වෙනුවෙන් සැළකරන ලද්දේ අර්ථ කථන ආඥා පණතේ 17 (1) (ඊ) ඡේදයෙන් ගැසට් පත්‍රයේ පළකරන ලද රීතිවලට නීතිමය බලයක් දී තිබෙන බවකි. (මෙයට රෙගුලාසි සහ අතුරු නීති ද ඇතුලත් වේ); නමුත් එකී පැණවීමෙන් අදහස් කරන්නේ ''ආඥා පණත්'' යටතේ පැණවෙන නීති රෙගුලාසි සහ අතුරු නීති පමණකි. ආඥා පණත විග්‍රහ වන අවස්ථාවේ දී එයට ''ආඥා පණතක් සහ ලංකා පණතක් ද ඇතුලත්'' වන බව පෙනේ. නමුත් ''ආඥා පණතක'' විග්‍රහයට රාජාඥාවක් ඇතුලත් නොවන බව සැලකිය යුතු ය. සමහර විට මෙම රාජාඥා පණතෙන් අවධාරණයෙන් ම නීතියක බලය තිබෙන්නේ එම ආඥාපණත යටතේ සකස් කෙරෙන එක්තරා රෙගුලාසි කොටසකට බව සඳහන් කරන්නේ මේ නිසා විය හැක.

ද සොයිසා එ. රාජ්‍ය සේවා කොමිසම 62 න.නී.වා. 492 යන නඩුවේ දැනට සිටින අග්‍ර විනිශ්චයකාරතුමාට රාජ්‍ය සේවා රෙගුලාසි යටතේ තැනෙන රෙගුලාසි වලට නීතියේ බලයම තිබෙදැයි යන්න නිගමනය කිරීමට අවස්ථාව සැලසුණි. එහි දී මෙම රෙගුලාසි වල ඉතිහාසය (මෙය පරිපාලන රෙගුලාසිවල ඉතිහාසයට සමානය) ගැන කල්පනා කළ එතුමා තීරණය කළේ රාජ්‍ය සේවකයන් විශ්‍රාම ගැනීම පිළිබඳ රෙගුලාසි වලට ලිඛිත නීති පැණවීමක ඇති තත්වයක නීතිමය බලයක් නොමැති බව ය. පරිපාලන රෙගුලාසි මෙන් නොව එම රෙගුලාසිවලින් පොදු රාජ්‍ය සේවකයන්ගේ සේවා කාලය පිළිබඳ උග්‍ර ලෙස බල පැවැත් වේ. මෙයට හේතුව එම රෙගුලාසිවලට අනුව එම රාජ්‍ය සේවකයින් ගේ පත්වීම, මාරු කිරීම හා නෙරපීම ද ඒවා කළ යුතු විනයානුකූල සම්ප්‍රදාය ද කෙරෙන්නේ ඒ අනුව ය. මේ නිසා පරිපාලන රෙගුලාසි රාජ්‍ය සේවකයින්ගේ විනයානුකූල ක්‍රියාවලට ආරක්ෂාව සපයා දෙන එසේ ම ඒවා ක්‍රියා කරවන රෙගුලාසි යැයි කිව හැක. මෙම රෙගුලාසි රජයේ කාර්‍යාංශවල ක්‍රියා මාර්ගය අවුලින් වියවුලින් තොරව කරගෙන යාමේ ප්‍රධාන පරමාර්ථය පිට සකස්ව ඇති බැව් පෙනේ. මෙම පරිපාලන රෙගුලාසි වලට දී ඇති ''ලංකා ආණ්ඩුවේ ක්‍රියා සංවිධාන සංග්‍රහය'' යන නාමය විශේෂයෙන් ම මේ රෙගුලාසි රජයේ කාර්‍යාල වල කෙරෙන කාර්‍ය කටයුතු විධිමත් ලෙස කිරීමට එය අවශ්‍ය පරිපාලන රෙගුලාසි මාලාවක් බව පෙන්වා දේ. 1937 සමස්ත භාරතීය රජෝර්තුවල වාර්තාවේ 31 වැනි පිටුවේ පෙනෙන **වෙන්කතරාවෝ එ. විජිත පිළිබඳ ලේකම්** අතර කියැවුන නඩුවේ රාජාධිකරණයේ ඒවා විග්‍රහ කර ඇත්තේ මෙබඳු වචනවලිනි. ''මෙම රීති ඉතා බහුලව සංඛ්‍යා වශයෙන් පවත්නා අතර ඒවායේ සියළු නියමිත තත්වයන්ද ඇති නිසා ඒවා වෙනස් කිරීම්වලට ගොදුරු විය හැක. මෙබඳු රෙගුලාසිවලට නීතියක ම තත්වයන් පිරිනැමීමට අදහස් කිරීමෙන් ආණ්ඩුවේ ක්‍රියා කටයුතු දක්ෂ ලෙස කිරීමට බාධා වීමට මග පෑදෙන බැව් ඒකාන්ත ය. 20 වැනි රෙගුලාසියෙහි මෙම රෙගුලාසි මාලාවේ රෙගුලාසියක අර්ථ කථනය කිරීම සහ ඒවා ක්‍රියාවේ යෙදවීම පිළිබඳ බලය භාණ්ඩාගාරයේ ලේකම් තැන වෙත පැවරී තිබෙන්නේ සමහර විට මේ හේතුවෙන් විය හැක.

මේ නිසා ආණ්ඩුවේ කාර්‍ය සංවිධාන සංග්‍රහයේ ඇතුළත් කොට ඇති පරිපාලන රෙගුලාසිවල නීතියේ තත්වය නොමැති බව මට ඉදුරා පැහැදිලි ය. මේ නිසා එම රෙගුලාසි ක්‍රියාත්මක නොකිරීම හේතුවෙන් එසේ කිරීමට බල කිරීමට මැන්ඩාමුස් ආඥාවන් නිකුත් කළ නොහේ. ඉහත දැක් වූ හේතු මෙම ඉල්ලීම නිමාවට ගෙන යෑමට ප්‍රමාණවත් විය හැකි වෙතත් රජයේ අධිනිතිඥවරයා මේ කරුණෙහි විශේෂයෙන් ම මැන්ඩාමුස් ආඥාවක් නිකුත් නොකළ හැකි බව පෙන්වීමට තවත් කරුණු දෙකක් සැලකර සිටියේ ය. ඉන් පළමුවැන්න, වූයේ ප්‍රශ්නයට භාජනය වී ඇති රෙගුලාසි යටතේ උද්ගතවන යම්කිසි යුතුකමක් ඇත්නම් එය යුතුකමෙන් සැලසෙන ප්‍රයෝජන ලාභියා රජය මිස පෙත්සම්කරු නොවේ. මෙම ප්‍රඥප්තිය සනාථ කිරීමට රජයේ අධිනිතිඥවරයා විසින් උපයෝගි කර ගන්නා ලද්දේ **මහ රැජින එ. සංග්‍රාම සමයේ විජිත ලේකම්** අතර කියැ වී (1891) 2 Q.B. 326 වැනි පිටුවේ සිට වාර්තා වී ඇති නඩුවේ 335 වැනි පිටුවේ සහ 336 වැනි පිටුවේ පළ වී ඇති වාර්ල්ස් විනිශ්චයකාරතුමාගේ ප්‍රකාශ කිරීම් ය. එම ඒ ප්‍රකාශය සමග එකහෙලා ම එකඟ වෙමි. මෙම රෙගුලාසිවලට අනුව කටයුතු කිරීමේ

යුතුකම රාජ්‍ය සේවකයකු වූ වගඋත්තරකරු රජයේ මෙහෙකරුවකු හැටියට ඉටුකළ යුතු යුතුකමක් විනා, තමා යටතේ වැඩකරන තමාගේ ම දෙපාර්තමේන්තුවේ ම යටත් නිලධාරියකු වන පෙත්සම්කරුට පක්ෂව ඉටුකළ යුතු යුතුකමක් නොවේ. තවදුරටත් රජයේ අධිනීතිඥවරයා සැලකර සිටියේ මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමට පෙර ඉල්ලුම්කරුට මහජන අයිතියක ස්වභාවයක් ඇති පුද්ගලික ස්වභාවයක් නැති යම්කිසි යුතුකමක් ඉටු කරවා ගැනීමට නීත්‍යානුකූල අයිතිවාසිකමක් තිබිය යුතු බව ය. (**පෙරේරා එ. කොළඹ මහ නගර සභාව** 48 න.නී.වා. 66) මෙම යුතුකම ලිඛිත නීතියක පැනවීමකින් උද්ගතවන්නක් වුවත් එය පුද්ගලික ස්වභාවයන් උසුලන යුතුකමක් විය හැකි බව ද රජයේ අධිනීතිඥවරයා කියා සිටියේ ය. (**පෙරේරා එ. ලංකා දුම්රිය නිල ඇඳුම් සේවකයන්ගේ අර්ථ සාධක අරමුදල** 67 න.නී.වා. 191) අප අතර ඇති මෙම නඩුවෙහි ද ඉදිරිපත් වූ කරුණුවලින් උද්ගතවන යම්කිසි යුතුකමක් ඇත්නම් එය පැණ නගින්නේ රජයේ සේවකයින්ගේ ක්‍රියා කලාපය හා රාජකාර්‍ය්‍ය එම කාර්‍ය්‍යාංශය මගින් ම හැසිරවිය්‍යම් විධිමත් ක්‍රමයක් බලාපොරොත්තු වෙන් සකස් කරන ලද රීති පද්ධතියකිනි. මෙම රීති වල ඒවා මහජන යුතුකම් ඇතුලත් රීති බව පෙන්වන කිසිදු අංගයක් නොපෙනේ.

මෙම ඉල්ලීමෙහි නීතියේ අංශයෙන් සලකා බැලුවත් කරුණු අනුව සළකා බැලුවත් පෙනී යන සාරයක් නැති නියා එය නිෂ්ප්‍රභා කළ යුතුයි.

තෙන්නකෝන් විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

ඉල්ලීම නිෂ්ප්‍රභා කරන ලදී

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිට දී ය.

තෙන්නකෝන් එ. කොයින් මැණිකේ

ග්‍රේ. 578/66 (අ/ජ) — මහනුවර දී. උ. 5996/L

වාද කළේ සහ තීන්දු කළේ : 1968 අප්‍රෙල් 9 වැනි දා

හවුල් අයිතිකරුවන් අතර බුත්තියට යවිවීම — හවුල් අයිතිකරුවන් දෙදෙනෙකු ඉඩමෙන් බාගය බැගින් ලබා ගැනීමෙන් පසු ඔවුන් අතර වෛරයක් ඇතිවීම — ඉන් එක්කෙනෙකු දහ අවුරුද්දකට වැඩි කාලයක් මුළු ඉඩම තනිව භුක්ති විඳීම — එකෙකු අනෙකා වෙනුවෙන් භුක්ති විඳින ලදැයි පිළිගැනීමේ අසාධාරණකම.

පුංචිරාළ සහ කිරිබණ්ඩා ඉඩමක හවුල් අයිතිකරුවෝ වූහ. වර්ෂ 1929 දී ඩී 1 දරණ ඔප්පුව පිට කිරිබණ්ඩා මුළු ඉඩම ම තමාගේ පුත්‍ර තීන්අප්පුහාමිට පැවරී ය. මේ නඩුවේ වග-උත්තරකරු ඉඩමට අයිතිය දක්වන්නේ ඔහුගෙන් ලැබුන හිමිකම් අනුවය.

කිරිබණ්ඩාගේ තවත් පුත්‍රයෙකු වූ උක්කුබණ්ඩා, පුංචිරාළගේ කොටස සතියක්තුලදීම මිලයට ගත්තේය. පැහැදිලි වශයෙන් ම එසේ කරන ලද්දේ ඩී1 දරණ ඔප්පුව අභියෝගයට ලක් කිරීමට ය. 1930 දී තීන්අප්පුහාමිට විරුද්ධව උක්කුබණ්ඩා වෙනත් ඉඩම් සම්බන්ධයෙන් නඩු පැවරූ බවත් එහි ප්‍රතිඵලයක් වශයෙන් දෙපාර්ශවය අතර වෛරයක් පැවති බවටත් සාක්ෂි තිබේ.

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*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 74 වෙනි කාණ්ඩයෙහි 109 වෙනි පිට බලනු.

1929 සිට හීන්අප්පුහාමි මේ ඉඩම භුක්ති විඳගෙන ආ බවත් එහි මුළු පලදාව ම උක්කුබණ්ඩාට කිසිවක් නොදී තනිව ම පරිභෝග කළ බවත් සාක්ෂිවලින් තහවුරු වේ.

තීන්දුව: සහෝදරයින් දෙදෙනා ඉඩමට අයිතිය ලැබීමේ පටන් ම දෙදෙනා අතර වෛරයක් පැවතීමේ විශේෂ කාරණය නිසා එක් හවුල් අයිතිකරුවෙකු අනිකා වෙනුවෙන් භුක්ති වින්දේ ය. යන්න පූර්ව නිගමනයක් ලෙස සැලකීම අසාධාරණ වන්නේ ය.

ඩී. ආර්. පී. ගුණතිලක, විත්තිකාර ඇපැල්කරු වෙනුවෙන්.

ටී. බී. දිසානායක, පැමිණිලිකාර වග-උත්තරකරු වෙනුවෙන්.

එච්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍ර විනිශ්චයකාරතුමා:

මේ නඩුවට සම්බන්ධ දෙපක්ෂය ආරවුලට මුල් වූ ඉඩමට අයිතිවාසිකම් ලබා ගත් මුල් අයිතිකරුවන් ඉඩම හවුලේ භුක්ති විඳීම කරණකොට ගෙන බුත්තියට සවිවීමේ ප්‍රශ්නය උඩ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා විත්තිකරුට විරුද්ධව තීන්දුව දී තිබේ. විත්තිකරුවන්ගේ අයිතිවාසිකම් සඵලවීමට හවුල් අයිතිකරුවන් අතර බුත්තියට සවිවීම පිළිබඳ සුපතල රීති නිසා ඉඩක් නැතැයි යනු උගත් විනිශ්චයකාරතුමා සිතා ඇති බවක් පෙනේ. එතෙකුදු වුවත් මේ නඩුවේ කරුණු කිට්ටුවෙන් පරීක්ෂා කර බැලීමේ දී පැමිණිලි කරු සහ ඔහුට කලින් අයිතිකරුවෝ, විත්තිකරු හා ඔහුට කලින් අයිතිකරුවන් විසින් ඉඩමෙන් බැහැර කොට ඇතැයි යන නිගමනයට පැමිණීම බෙහෙවින් ම සාධාරණ බව පෙනී යයි. ඉඩමේ අයිතිය ගැන සිතන කල්, වර්ෂ 1929 තත්වය වූයේ මේ නඩුවට අදාල ඉඩමෙන් භාගයක් පුංචිරාල නමැත්තෙකුට හිමිව පැවති අතර, අනික් කොටස කිරිබණ්ඩාට අයත්ව තිබීමයි. 1929 ජූලි 19 වැනි දින කිරි බණ්ඩා ඩී1 දරණ ඔප්පුවෙන් මුළු ඉඩම ම තම පුත්‍ර හීන් අප්පුහාමිට පවරා දුන් අතර විත්තිකරුවෝ එම හීන්අප්පුහාමිගේ උරුමක්කාරයෝ වූහ.

1929 ජූලි මස 25 වැනි දින කිරිබණ්ඩාගේ තවත් පුත්‍රයෙකු වූ උක්කුබණ්ඩා පුංචි රාලට ඉතිරි ව තිබූ අඩ කොටස ඔහුගෙන් මිලයට ගත්තේ ය. මේ අවස්ථාවේ දී උක්කුබණ්ඩා එසේ ඉඩමේ අයිතිය පවරා ගත්තේ තමාගේ ම පියා මුළු ඉඩම ම හීන්අප්පුහාමිට පැවරූ ඩී1 දරණ ඔප්පුව අභියෝග කිරීමට බව කෙනෙකුට එකවර ම පෙනී යයි.

මේ ඉඩම සම්බන්ධයෙන් 1930 දී සිය සොහොයුරු හීන්අප්පුහාමිට විරුද්ධව උක්කුබණ්ඩා නඩුවක් පැවරූ බවට ද සාක්ෂි තිබේ. සහෝදරයින් දෙදෙනා අතරේ පැවති ආරවුලේ නියම ස්වභාවය ගැන කරුණු ඔප්පු වී නැතත්, මේ වකවානුවේ දී දෙදෙනා අතර වෛරයක් පැවති බව පැහැදිලි ය.

1929 සිට හීන්නිඅප්පුහාමි නියම වශයෙන් ම මේ ඉඩම භුක්ති විඳි බවත් එම ඉඩමේ පලදාවෙන් කිසිදු කොටසක් උක්කුබණ්ඩාට නො දී ඔහු ගත් බවත් සාක්ෂිවලින් තහවුරු වී තිබේ. හවුල් අයිතියක් පැවැතීම නිසා මෙසේ උක්කුබණ්ඩාට කොටසක් දීමට අසමත් වීම හෝ මගහැරීම හෝ හීන්නිඅප්පුහාමි ඉඩම භුක්ති වින්දේ තමාත් තම සහෝදරයාත් වෙනුවෙන් ය යන පදනම මත පැහැදිලි කළ හැකි ය. එහෙත් සහෝදරයින් දෙදෙනා ඉඩමට අයිතිවාසිකම් ලබාගත් නැන් පටන් ඔවුන් අතර වෛරයක් පැවතීමේ විශේෂ කාරණය ගැන සලකා බලන කල, මේ නඩුවේ දී එක් හවුල් අයිතිකරුවෙකු භුක්ති වින්දේ අනිකා ද වෙනුවෙන් ය යන පූර්ව නිගමනය භාවිතයට ගැනීම අසාධාරණ ය.

මේ හේතූන් නිසා මේ නඩුවට අදාල ඉඩම වග-උත්තරකරුවන්ට බුත්තියට සවි වීයැයි ඔවුන් කියා සිටින අයිතිවාසිකම සාර්ථක වී ඇති බව අපි නිගමනය කරමු. ඇපැලට ඉඩ දෙනු ලබන අතර, පැමිණිලිකරුගේ නඩුව උසාවි දෙකහි ම ගාස්තුවටත් යටත් කොට මින් නිෂ්ප්‍රභා කරනු ලැබේ.

අලස් විනිශ්චයකාර තුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

පරිවර්තනය : අධිනිතිඥ චුල්පත්මේන්ද්‍ර දහනායක විසිනි.