The

Ceylon Law Weekly

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

with a Section in Sinhala and Tamil

VOLUME LXXX

WITH A DIGEST

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1972

Subscription payable in advance, Rs. **17/50** per Volume. Past Volumes (10-58) are available at Rs. **20/00** per Volume and from Volumes 59-80 at Rs. **22/50** per Volume, plus postage. Copies may be obtained at: 50/3, Siripa Road, Colombo 5.

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DIGEST

ATTORNEY

Power of Attorney — Attested in India — Signed before Magistrate in India — Absence of designation of office under signature — Validity of Power of Attorney.

Where it was admitted that the power of attorney bore the signature of the plaintiff and further that it bore

(*a*) the seal in Tamil which was apparently the Seal of Magistrate's Court,

(*b*) the attestation by the Attache of the High Commissioner of India in Ceylon that it had been signed by the Sub-Divisional Magistrate, Tuticorin,

Held: That it was sufficient authority for the plaintiff's attorney to proceed with the case, though the designation of his office was omitted under the said Magistrate's signature.

ARUMUGAM *v.* VALLIAMMA 48

AUTREFOIS ACQUIT

DE SILVA *v.* VIDANAGAMACHCHI 94

BETTING ON HORSE RACING ORDINANCE

Betting on Horse Racing Ordinance (*Cap.* 44), *section* 3(3)(b) — *Charge of receiving or negotiating a bet on a race proposed to be run in a meet in England on a certain day — Prosecution relying on decoy's evidence and newssheet containing names of horses to run on that day at the meet and two reports in the London Times — Acceptance of decoy's evidence but acquittal of accused on the ground that the reports in London Times hearsay — Evidentiary value of such report — Evidence Ordinance section* 114 — *Presumption.*

The accused was charged that on 21.4.1967 he did receive or negotiate a bet on a horse race, to wit, an all-on bet one rupee win, one rupee place on a horse named 'St. Mungo' proposed to be run in a race meet in England on 21.4.1967 from one P, a bet in breach of section 3(3)(b) of the Betting on Horse Racing Ordinance.

The prosecution established

(i) that on 21.4.1967 a decoy went to the accused's premises showed him the news sheet (P4) called the *Grand Sporting News* purporting to contain the names of horses to run at a Race meeting at Thirsk in England and among these names was St. Mungo, as being a runner in the 4th race and asked him whether the horse St. Mungo will run, to which, after referring to the news sheet (P4) the latter replied in the affirmative.

(ii) that the decoy then gave the accused the marked two-rupee note and asked him to place the bet.

(iii) that the accused handed to the decoy chit P3 containing the following —

"Thirsk (4)
1/- St. Mungo 1/- 1729
(2/-)"

(iv) that the police subsequently found in the accused's possession the marked currency note and a chit book which contained the duplicate of P3.

(v) by producing issues of the *London Times* of 21.4.1967, that it published the name of St. Mungo as a 'declared runner' in the 4th race at the said Race Meeting of that day and by the issues of 22.4.1967 that it announced that St. Mungo ran unplaced in that race.

The Magistrate acquitted the accused on the ground that although he accepted the evidence that the accused received the bet yet the prosecution failed to prove that the horse 'St. Mungo' was proposed to be run in the race mentioned in the charge as the reports in the news sheet P4 and in the issues of the *London Times* would be only hearsay evidence and would be inadmissible to prove it.

The Crown appealed.

Held: (1) That a bet on a horse race is a contract known to the law as "wagering contract" (which under the present law in Ceylon is void) to conclude which there must be a *consensus ad idem* between the parties to lay and take the bet.

(2) That once the Magistrate believed the evidence of the decoy that he intended to place the bet aforesaid and that the accused agreed to take the bet and wrote out the chit P3 which recorded the consensus, it was established according to commonsense that there was a meaningful transaction, not a meaningless one.

(3) That the probability of such consensus having been reached became a certainty when the prosecution produced the two issues of the *London Times*, being a reputable newspaper containing lists of probable runners and of the results of horse races, (which are legal under the existing English Law) which publications as a matter of common knowledge were relied on by the members of the public in settling betting transactions as reasonably correct.

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(4) That therefore, when regard is had to the common course of human conduct and private business in relation to the practice on betting on horse races, the court is entitled to presume from the said two reports in the *London Times* in the absence of any evidence or reference to the contrary, that a horse named St. Mungo did run in a horse race which was actually run at Thirsk on 21.4.1967.

(5) That therefore it is an irresistible conclusion on the evidence which the Magistrate has accepted, that the accused did receive a bet on that race.

PERERA, INSPECTOR OF POLICE *v.* MOHIDEEN .. 6

BUDDHIST ECCLESIASTICAL LAW

Buddhist Ecclesiastical Law — Viharadhipathi — Deed of dedication — Words given different rendering in translation — Judge's failure to consider adequately matters relevant to the determination of the issues — Delay between end of hearing and delivery of judgment.

Plaintiff sought a declaration that he was the duly constituted Viharadhipathi of a temple. In deciding whether there was a valid oral dedication or whether there was a valid dedication duly made only on execution of deed P5, the learned District Judge was influenced by the presence of the words "hereby dedicates" in the translation of the deed of dedication. On an examination of the original it appeared that the English rendering of the words should read "have dedicated".

Held: (1) That in the circumstances a finding based on the words "hereby dedicates" cannot be sustained.

Held furthr: (2) That where a Judge fails to consider many matters relevant to the determination of issues, the judgment should be set aside and the case be sent back for re-trial.

Per **Samerawickrame, J.** "The learned District Judge has failed to consider adequately many matters relevant to the determination of issues 11 and 12 and also to the questions to what extent the *Kathikawathas* were binding and whether their provisions operate to control the succession to the office of Viharadhipathi in respect of temples held by members of the Ramanna Nikaya."

GUNASIRI THERO *v.* DHAMMANANDA THERO .. 61

CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL 1946

Ceylon (Parliamentary Elections) Order-in-Council 1946, section 77(C) — Petition to declare election of a Member of Parliament void — Allegations of commission of corrupt practice of undue influence by six persons — Failure to make any of them parties — Is it fatal to the petition? — Section 80A(1)(b) of the Amending Act No. 9 of 1970 — Is it mandatory? — Power of Court to add parties subsequently.

Later attempts to rectify omission — Is it of any avail in Law? — Section 80B of the said Amending Act, deleting Rules 4(1) and 5 in the 3rd Schedule to the said Order-in-Council of 1946 and requiring full particulars to be set forth in cases of corrupt and illegal practices — Vagueness and want of particularity of the charges in petition — Can Judge permit amendments later?

English Parliamentary Election rules, Rule 60 — Petition not to be defeated by formal objection — Applicability of Rule — Effect of failure to comply with mandatory provisions — Dismissal of petition.

The petitioner filed this petition praying for a declaration that the election of the respondent as a Member of Parliament was void under Section 77(c) of the Ceylon (Parliamentary Elections) Order-in-Council 1946, alleging the commission of corrupt practices of undue influence against six persons mentioned by name in a Schedule thereto. This Schedule further stated that the six named persons had committed the said corrupt practices with the knowledge or consent, of the respondent and that one of them was his agent.

Paragraph 4 of the petition read with this Schedule suggested that the said six persons named therein acted with the knowledge or consent of the respondent as required by section 77(c) of the said Order-in-Council but none of the six had been joined as respondents as required by section 80A(1)(b) of the Amending Act No. 9 of 1970, nor was there an averment in the petition that at least the person named as the agent had been joined as a party.

Later, the petitioner tendered notices to be served through the fiscal on each of the said six persons that he had been named in the petition as a person who had committed a corrupt practice and further, within ten days of the filing of the petition, published a notice in the Government Gazette that these persons had been joined as respondents to the petition filed.

The charges were stated in paragraph 3 of the petition as follows:— "And your Petitioner states that by reason of general intimidation or other circumstances

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the majority of electors were or may have been prevented from electing the candidate whom they have preferred."

On a preliminary objection taken to the hearing of the petition on the ground of the petitioner's failure to join as respondents the said six persons against whom the allegations were made.

Held: (1) That the provision of section 80A(1)(b) of the Amending Act No. 9 of 1970 which makes it necessary to join as respondents on the petition the persons alleged to be agents and other persons acting with the knowledge or consent of the candidate who was returned, and against which persons allegations of corrupt practice are made, is mandatory, whereas Rule 4 of the Third Schedule of the Order-in-Council referring to the form of the petition is merely directory.

(2) That the later attempts to remedy the omission to join the said persons at the time of the filing of the petition being of no avail, the petitioner has failed to comply with the requirements of the said Section 80(1)(b).

(3) That the affidavit which is required by Section 80B(d) to accompany a petition with an allegation of a corrupt practice may be one of information and belief.

(4) That the new Section 80B of the Amending Act No. 9 of 1970, which replaced Rules 4(1) and 5 in the Third Schedule (requiring the setting out of only bare allegations and stating facts only upon an order to furnish particulars), requires full particulars to be set forth in the petition in the case of corrupt or illegal practices.

(5) That paragraph 3 of the petition above set out does not comply with the requirements of Section 80B(c) of the said Amending Act inasmuch as the grounds stated are vague and lacks particularity to a degree sufficient to give notice to the respondent of the precise allegations to enable him to get ready for the defence.

(6) That for an election Judge to receive petitions of this nature containing bald allegations and to order particulars at the stage of trial would be to reintroduce by judicial process the very evil, which the legislature sought to do away with by the Amending Act No. 9 of 1970.

(7) That Rule 60 of the English Parliamentary Rules which provides that a petition shall not be defeated by a formal objection does not apply where the objection arises from a failure to comply with the mandatory provisions of the Order-in-Council and where the objections in the context of our election law, are material.

(8) That in the absence of a power vested in the court to add as parties who ought to have been joined as respondents or to permit an amendment to the petition after the period for filing a petition has lapsed and in view of the imperative provisions enacted by the legislature by an Amending Act for the express purpose of remedying what were considered to be defects in the existing law, it is not competent for the Judge to grant relief.

(9) That therefore, both on principle and on authority (*Vide cases cited*) the failure to comply with the said mandatory provisions must result in the dismissal of the petition although the Order-in-Council does not provide for such dismissal for failure to comply with its provisions except for failure to give security in terms of Rule 12.

WIJEWARDENE *v.* SENANAYAKE 1

Election petition — Security required under rule 12 *of the Ceylon (Parliamentary Elections) Order-in-Council as amended by Act No.* 9 *of* 1970 *— Interpretation of words "any such ground" in the rule — Allegation of a corrupt practice in petition — Failure to join person against whom such allegation made, Section* 80A(1)(b) *— Effect of non-compliance therewith — Section* 80(d) *— Whether relief of scrutiny available where candidate for whom seat is claimed is dead.*

Held: (1) That in determining the quantum of security required to be deposited (under rule 12 as amended), in respect of an election petition, a construction which would lead to the requirement of an absurdly large deposit should be avoided. Rule 12 requires that a deposit of Rs. 5,000/- be made in respect of "the first charge constituting a distinct ground on which the petitioner relies" and ".....a further sum of two thousand five hundred rupees in respect of each additional charge constituting any such ground". An interpretation that the words "any such ground" in the latter part of the rule could relate back to a prohibitive amount of security being required in a situation where a petition contains a large number of separate charges each based upon a common "ground" or principle of evidence.

Although such an interpretation may serve a purpose in discouraging frivolous charges being included in petitions, it is not to be presumed that the legislature could have set out to achieve this object by rendering impossible the case of a *bona fide* petitioner who had numerous genuine charges to make. Such a construction though possible should accordingly be avoided for the reason that it would lead to absurdity. In the result, the words "any such ground" should be

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taken to refer to grounds other than the first ground upon which a charge is preferred in an election petition.

(2) That where a certain allegation of fact is relied upon by the petitioner, which affords him relief under more than one principle of law, only a single deposit of security is required in respect of such an allegation as it is neither justifiable nor in consonance with the object of the legislature to require that security should be tendered in respect of an allegation as many times over as the relief following therefrom.

(3) That where the statute itself does not prescribe the sanction for a non-compliance with a particular provision, as is the case with section 80A(1)(b), (which requires the joining as a respondent of a person against whom an allegation of a corrupt practice has been made, the effect of a non-compliance with such a provision must be gathered from the general principles of statutory interpretation. According to these principles, mandatory provisions in matters of a procedural nature, particularly where a person is given certain rights but is required to follow a specific procedure in the assertion of those rights, are considered imperative rather than directory. However there are other considerations which may supervene and alter the character of a particular statutory requirement. In the present case, one such consideration is the fact that not merely the petitioner but also the entire electorate has an interest in an election petition which is meant to ensure that only the candidate who had received the majority of lawful votes would represent his constituency. The electorate ought not to be penalised by the dismissal of the petition, for the default of a petitioner even in the disregard of a mandatory provision of law, unless the particular provision is one dealing with a matter of fundamental importance.

(4) In the present case, the allegation of a corrupt practice to which section 80A(1)(b) applies is one of 195 such allegations made in the petition for the purpose of showing that the elected candidate did not in fact have a majority of **lawful** votes. As the majority was 75, the one allegation in question is, in the context of the entire petition, of such minor importance that much injustice would result if the petition itself were to be dismissed as a result of the non-joinder of that one individual. Further this objection on the ground of non-joinder is in the circumstances of this case purely incidental and subsidiary and does not go to the root of the petition.

(5) That furthermore, the main purpose of joining as a party, a person alleged to have committed a corrupt practice is to enable him to defend himself at the hearing of the petition itself. Counsel for the petitioner has however stated at the very outset that he does not propose to lead evidence on that particular allegation. There would then be no matter in respect of which that party would be called upon to defend himself.

(6) That where a defect in an election petition, is of a purely formal nature, and is not one of substance, the petition ought not ordinarily to be dismissed for such reason. Where petitions have been dismissed for non-compliance with a statutory provision, both in England and Ceylon, they have in each case been dismissed on account of some substantial defect.

(7) That although the legislature may not have in the provisions of section 80(d) contemplated a situation where a seat would be claimed for a candidate who had died after the election but before the election petition was filed, it would not be justifiable to place, upon the words "where the seat is **claimed** for an unsuccessful candidate" so literal an interpretation as to prevent a petitioner from claiming a seat for a deceased candidate. Section 80(d) must be read in its context and in accord with the normal principle that whatever declaration a court may make can relate only to the date of the election.

(8) That even if there is no machinery in the Order-in-Council to provide for a purely fortuitous circumstance such as death, all that a Court is concerned with is the making of the declaration if the basis on which such declaration is sought is adequately established by the petitioner. The administrative machinery which would have to be set in motion consequent to such a declaration is not a difficulty which faces the Court. The petitioner would accordingly be entitled to claim the seat.

Per **Weeramantry, J.** "I would like to observe finally that in regard to all preliminary objections of this nature an important consideration to be borne in mind, to which I have already adverted, is the principle that election petitions are not a matter between party and party in which technicalities should be permitted to defeat the object of the petition. This principle has been fully accepted and recognised by this Court....."

SINNAPILLAI & ANOTHER *v.* MUSTAPHA & THREE OTHERS 73

CIVIL PROCEDURE CODE

Civil Procedure Code — Section 756 — Whether absence beyond seas constitutes "sufficeint cause for not preferring an appeal or making an application within prescribed period".

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Held: (1) That where the other conditions of Section 765 of the Civil Procedure Code are satisfied the period that elapses while a petitioner is away from the island may not be considered as delay on his part provided he satisfies the Court that he had sufficient cause for not preferring the appeal within the time prescribed or for the delay in making the application owing to such absence.

(2) That the words "sufficient cause" in the Indian Limitation Act has been interpreted to receive a liberal construction so as to advance substantial justice when no negligence nor inaction, nor want of *bona fides* is attributed to the appellant.

FOENANDER *v.* ATTORNEY-GENERAL

Civil Procedure Code, sections 394(2), 398, 547 — *Meaning of the words "Next of kin" in section* 394 (2) — *Is widow included in the expression? — Substitution of widow in place of deceased defendant — Is it valid? — Matrimonial Rights and Inheritance Ordinance, section* 26.

The defendant in a tenancy action consented to judgment in a sum of Rs. 6,027/40 as arrears of rent, for ejectment and in a sum of Rs. 138/35 per month as damages from 1.6.1966. If however, the Rs. 6,027/40 was paid in instalments without default before 30.6.1968, satisfaction of decree would be entered and the defendant would be allowed to continue occupation on a fresh contract of tenancy as from 1.7.1968.

The defendant after paying certain instalments and damages as agreed died on 31.5.1967 and the plaintiff, having obtained an order for substitution of the defendant's widow under section 398 of the Civil Procedure Code, issued writ of ejectment against her on 2.12.1967.

On 5.12.1967, the petitioner-appellant, as brother of the deceased defendant, moved to stay execution of decree on the ground *inter alia* that he adiated the inheritance which being less than the administrable value and which consisted of only the business carried on in the premises in question and managed by him. He further averred that the substituted defendant-respondent had deserted the defendant, taking with her their only child, about five years prior to the death of the defendant from whom she was receiving maintenance for the child on an order of Court.

The District Judge held that the substitution of the widow was legally correct and further that on the death of the defendant the substituted defendant went to the premises to take over the assets but the petitioner-appellant did not allow her to do so.

Held: (1) That it could not be said that the District Judge misdirected himself in holding that the substitution of the widow as the legal representative of her husband in the execution proceedings was wrong in law.

(2) That the expression "next of kin" in section 394(2) of the Civil Procedure Code includes a widow, who is an intestate heir under the Matrimonial Rights and Inheritance Ordinance No. 5 of 1876.

Per **G. P. A. Silva, S.P.J.** "Considering the stage that this case had reached it seems to me that the application to court should have been made under section 341 of the Civil Procedure Code."

Per **Samerawickrema, J.** (*a*) "I desire to deal with a point raised by learned counsel for the appellant. He submitted that a widow is not a blood relation of the husband and therefore does not fall within the class of next of, in section 394(2) of the Civil Procedure Code. There is no doubt that the proper and primary meaning of 'next of kin" is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of ..... The term may however be also used in a sense which would include a spouse."

(*b*) "By reason of a long cursus before the enactment of the Civil Procedure Code and by reason of the fact that section 547 does not require administration in respect of estates of small value, heirs to such intestate estates have and do institute actions to enforce certain rights of the deceased. The widow as an intestate heir under the provisions of Ordinance 15 of 1876, would join in instituting such action along with other intestate heirs. Accordingly where a party to an action dies leaving an estate of small value and it becomes necessary to substitute the 'next of kin' who have adiated the inheritance, in place of the intestate, there does not seem to be any reason why the widow along with the other intestate heirs should not be joined as legal representatives of the deceased as they would be entitled to file an action in respect of a right of the deceased intestate."

FERNANDO *v.* MAGLIN HAMINE 97

CONCILIATION BOARDS ACT

At what stage should the point that matter in dispute should first have been brought before the Conciliation Board be taken.

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CONDITIONAL TRANSFER

Conditional Transfer by M to defendant — Within period of redemption settlement before Debt Conciliation Board — Extension of time for repayment and re-transfer—Transfer of M's rights to obtain re-transfer and in settlement order to plaintiffs — Plaintiffs duly tendering money and claiming re-transfer — Refusal by defendant — Action to enforce — Court dismissing action on ground that Debt Conciliation Board gave relief to M, not to assignee — Debt Conciliation Board Ordinance — Section 30 — Effect.

By deed P1 dated 29.6.1964, one M. transferred a land to the defendant for Rs. 2,500/-, subject to a condition that the latter "shall re-transfer the land within a period of six years on repayment of the said sum."

Within this period of redemption on an application to the Debt Conciliation Board for relief an amicable settlement was arrived at and according to which *inter alia*, if the debtor (M) made payments due in terms of the settlement before 31.12.1965 the creditor should transfer the property back to M.

Thereafter M. transferred to the plaintiffs his right to obtain a re-transfer in terms of P1 and the rights in the said settlement Order. The plaintiffs duly tendered the sum of Rs. 2,500/- and claimed a re-transfer, but the defendant refused which resulted in this action, being filed, It was dismissed by the learned District Judge on the ground that the settlement as recorded gave relief only to M, the original debtor and it could not be extended to his assigns.

Held: (1) That the learned District Judge had erred in dismissing the action as the only effect of the settlement was to extend the time of fulfilment of the condition to re-transfer and not to alter the position of P1 that the re-transfer be made to M and his heirs ..... assigns.

(2) That section 30(2) of the Debt Conciliation Board Ordinance is a statutory recognition of the validity of the alteration as to the time for re-transfer mentioned in settlement.

(3) That in the absence of any condition in the settlement that the relief given is personal to M, the purchaser from M was entitled to rely on the terms of P1 as altered by the settlement only in respect of the period specified therein.

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CONFESSION

A confession made to a police officer is not inadmissible in a civil proceeding.

MACKWOODS LTD. *v.* TEA, RUBBER, COCONUT & GENERAL WORKERS' UNION 47

CONTROL OF PRICES

Price Control — Conviction for selling variety of artificial silk called Hipolon in excess of controlled price — Hipolon not mentioned among the categories of artificial silk mentioned in the charge — Should conviction be upheld?

The two accused were convicted of having sold in excess of the controlled retailed price two yards of Hipolon (C.W.E. made in Japan), a piece good of artificial silk described in the charge as coming within the categories of artificial silk referred to in the relevant price order and as "consisting of crepe, sateen, taffeta, haircord, muslin and sheer crepe other than furnishing fabrics and dyed nylon taffeta 48" in width and dyed nylon sheers 44/"45" in width.

Held: That in the absence of evidence that the material sold by the appellants fell within any of the categories of artificial silk set out in the charge as being the piece goods of artificial silk the price of which was controlled, the conviction could not be sustained.

HAMEEN & ANOTHER *v.* FOOD & PRICE CONTROL INSPECTOR, COLOMBO 37

Control of Prices Act — Charge of selling beef in excess of the controlled price — Applicability of price order to the location of offence — Judicial notice — Proof as to whether beef imported or local — Proof as to weight.

The accused-appellant was convicted for having sold beef in excess of the controlled price at Belummahara which was alleged to be situated within the Colombo District (outside the Colombo Municipal limits). In appeal objection was taken to the convition tion on the grounds that

(*a*) there was no proof that Belummahara fell within the Colombo administrative district to which the relevant price order referred;

(*b*) there was no proof that the beef was not imported beef; and

(*c*) the certificate of weighing relied on was not proved.

Held: (1) That judicial notice of the situation of Belummahara could be taken by virtue of section 57 of the Evidence Ordinance by reference to the "Alphabetical and Numerical list of Villages in the Western Province" compiled by the Department of Census and Statistics, being a work published by authority, where Belummahara is stated to fall within the Colombo Administrative district.

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(2) That the oral evidence in the case as to the condition of the stall and the carcasses found therein provided *prima facie* proof that the beef was not imported beef.

(3) That although the certificate issued by the Revenue Inspector was inadmissible as it had not been proved, there was oral evidence to establish that the portion of beef sold weighed only 14¾ ounces, and therefore the accused contravened the Price Control Regulations.

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CO-OPERATIVE SOCIETIES ORDINANCE

Co-operative Societies Ordinance (Cap. 124), section 53(1) — Action for damages filed in District Court for wrongfully and maliciously terminating membership — Does this dispute come within section 53(1) of the said Ordinance? — Jurisdiction of District Court.

Held: That the question whether a memebr of a Co-operative Society has been wrongly deprived of his membership is one which must be determined by the process of arbitration in terms of section 53(1) of the Co-operative Societies Ordinance.

MULTIPURPOSE CO-OPERATIVE SOCIETY LTD. *v.* GUNATILLEKE 92

COURTS ORDINANCE

Section 62 — Jurisdiction in matrimonial cases — Waiver of objection to jurisdiction.

FERNANDO *v.* FERNANDO 14

Section 36 — Powers of appellate jurisdiction of Supreme Court in a case where accused are convicted of summarily triable charges and of indictable charges at one trial.

GILBERT, POLICE SERGEANT *v.* P. KANDIAH & OTHERS 44

CRIMINAL PROCEDURE

Transfer of murder case — Application for transfer from one circuit to another by accused who are Sinhalese — Offence committed in predominantly Tamil area — Victims Tamils — Sinhala speaking jury resident in Tamil area selected by accused —Likelihood of jury being subconsciously influenced — Absence of allegation of racial or communal issue — Application to transfer case refused.

WILLIAM & ANOTHER *v.* THE QUEEN 38

Identification of accused — Hearsay evidence forming link in the chain of evidence regarding identification — Plaint filed on basis of description given by the Grama Sevaka — No subsequent identification — Failure of Magistrate to probe real issue.

The police, upon receiving information that one Somapala of Barawawila was unlawfully distilling spirits, proceeded to Barawawila where they saw a person seated by a still. Upon seeing the police, the said person ran away and was seen by the police thereafter only at the trial of this case. The police officers thereafter obtained from the Grama Sevaka of the area the full name and address of a "Somapala of Barawawila" and filed the present action against the accused. The Grama Sevaka did not give evidence, nor was there any evidence to show the connection between

(i) the name and address given by the Grama Sevaka

(ii) "Sompala of Barawawila" given by the informant to the police and

(iii) the person who was seen by the police on the day of the raid.

Held: That in view of the absence of any evidence which would have helped to determine whether the man whom the police saw near the still was the identical person whose particulars were given by the Grama Sevaka and of the failure of the learned Magistrate to probe into this aspect, the conviction could not stand.

SOMAPALA *v.* PILAPITIYA, SUB-INSPECTOR OF POLICE 101

CRIMINAL PROCEDURE CODE

Criminal Procedure Code — Accused convicted of summarily triable charges and of indictable charges at one trial — Magistrate's failure to assume jurisdiction under section 152(3) — Are such proceedings illegal? — Is it permissible for the Supreme Court to separate the illegal trial and sustain conviction on summarily triable Counts?

Courts Ordinance, section 36 — Powers of appellate jurisdiction of Supreme Court in such cases — Are they sufficient to uphold conviction of summary charges only where no prejudice to either party — Whether such joinder amounts to error of law.

Seven accused were convicted by the Magistrate on four charges. Three of these were offences triable summarily and the other (rioting) was triable only by indictment.

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On appeal it was submitted on their behalf that in view of the decisions in *Ramasamy v. Gunaratne*, 72 N.L.R. 187 and *William v. Inspector of Police, Mirigama*, 72 N.L.R. 406, that the trial was illegal and this was not curable under section 425 of the Criminal Procedure Code and that therefore, the proceedings should be quashed and a re-trial ordered on the charges summarily triable.

A contrary view was expressed in *Joseph v. Woolter*, 72 N.L.R. 213 where it was held that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction of the summarily triable count.

Without deciding which of these conflicting views is correct,

Held: (1) That the appellate jurisdiction of the Supreme Court is quite sufficient to enable the conviction on the summary charges to be upheld even if the learned Magistrate wrongly tried the charge of rioting.

(2) That at most, such a joinder would be an error of law and under section 36 of the Courts Ordinance, it is open to the Supreme Court, in appropriate circumstances, to uphold a conviction, if the error has not prejudiced the substantial rights of either party.

(3) That the conviction of the appellants under section 144 of the Penal Code for rioting should be set aside and the convictions and sentences on the summary counts should be affirmed.

Per **Alles, J.** "If the prosecution wishes the non-summary charges to be tried with the summary charges, the most desirable course would be for the Magistrate to assume jurisdiction under section 152(3) of the Criminal Procedure Code and try both the summary and non-summary charges at one trial, mindful of the fact that the sentences that can be imposed by him cannot exceed his punitive powers — vide *Madar Lebbe v. Kiribanda*, 18 New Law Reports, page 376."

GILBERT, POLICE SERGEANT *v.* P. KANDIAH & OTHERS 44

Section 440 — *Witness making two contradictory statements — Conviction for perjury in open court — Magistrate's power to punish summarily for contempt of court — Need to give reasons.*

Held: That a Magistrate cannot convict for a contempt of Court under section 440 of the Criminal Procedure Code unless he is able to hold that any particular statement is false. He should record what, in his opinion, was the statement the witness made, knowing or believing it to be false.

SIRISENA *v.* O.I.C., POLICE STATION, AMBALANGODA 65

Autrefois acquit — Order of acquittal by Magistrate on merits after considering material facts, but before the formal witnesses summoned by prosecution gave evidence — Criminal Procedure Code, Sections 190 *and* 330.

(1) That an order of acquittal entered by a Magistrate on the merits after considering all the material facts of the prosecution case at the virtual end of the prosecution case would be an order of acquittal in terms of section 190 of the Criminal Procedure Code notwithstanding the fact that the technical and of the prosecution case was not reached by reason of the fact that the formal witnesses summoned by the prosecution had not given evidence.

(2) That, such an order is sufficient to support a plea of *autrefois acquit*.

(3) That when the complainant has failed to take steps to have such an order reversed, it must be considered to have the force of an acquittal.

DE SILVA *v.* VIDANAGAMACHCHI 94

CUSTOMS ORDINANCE

Customs Ordinance, section 101(1) — *Accused convicted of an offence committed at Korteboam Street, Kotahena within Customs premises — Evidence for prosecution referring to Aluthmawatta Road — No evidence that Korteboam Street is within Customs premises or that limits of Port of Colombo correspond to limits of ths Customs premises — Is conviction sustainable?*

The 2nd accused was convicted of handling certain articles in the Customs premises as contemplated under section 101(1) of the Customs Ordinance. The charge stated that the offence was committed at Korteboam Street in Kotahena within the Customs premises whereas the evidence for the prosecution showed that it took place at Aluthmawatta Road. There was no evidence whatever to show that Korteboam Street, in Kotahena is within the Customs premises or that the limits of the Port of Colombo correspond to the limits of the Customs premises.

Held: That the prosecution had failed to establish that the accused committed the offence within the Customs premises as defined in the Customs Ordinance.

INSPECTOR OF POLICE (FORESHORE) COLOMBO *v.* MATHIYAPARANAM 51

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DEBT CONCILIATION BOARDS ORDINANCE

Section 30 — *Effect of.*

ASONCHINA & ANOTHER *v.* BABUN APPU .. 86

DEED

Of gift — "absolute and irrevocable" — Revocability

SUMANASIRI *v.* TILAKERATNE BANDA .. 63

DIVORCE

Conciliation Boards Act, No. 10 *of* 1958 (as *amended*), *sections* 6(*b*) *and* 14(1)(*a*) — *Courts Ordinance* (*Cap.* 6), *section* 62 — *Jurisdiction.*

Divorce action — Amendment of answer to plead objection to jurisdiction based on Conciliation Boards Act — Application to amend made after several trial dates — Amendment allowed — Objection to jurisdiction upheld and plaintiff's action dismissed — Has defendant right to raise such plea at so late a stage — Prejudice to plaintiff — Waiver of objection to jurisdiction.

The plaintiff-appellant filed this action against his wife, the defendant-respondent for, a divorce on the ground of malicious desertion. Answer was filed denying the allegations and counter-claiming a decree for judicial separation. After the plaintiff's case was closed and after the defendant had given evidence an application was made by the defendant to amend the answer to enable him to raise the plea that the Court had no jurisdiction to try the case, as the dispute had not been referred to the Conciliation Board and the certificate annexed as required by section (14)1(a) of the Conciliation Board Act No. 10 of 1958.

The learned District Judge allowed the amendment and despite objection that the defendant had waived his right to raise such plea as regards jurisdiction upheld the said plea and dismissed the plaintiff's action with an order to return to the plaintiff all alimony pendente lite obtained from him. The plaintiff appealed.

Held: (1) That in view of the defendant's

(*a*) counter-claim for judicial separation and the invitation to court to exercise jurisdiction in this action;

(*b*) applying for and obtaining an order for alimony *pendente lite* and receiving payments for a period of over two years;

(*c*) delay for nearly three years since the institution of action and the failure to raise this plea till the plaintiff had been put to much expense on the several trial dates already had and other prejudice caused to the plaintiff in consequence,

the defendant is precluded by delay and acquiescence from raising the objection to jurisdiction and in fact had waived it.

Per **Samerawickrema, J.** (*a*) "Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mere mortu* to raise the point even if the parties fail to do so."

(*b*) "The position however appears to be different where the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts".

FERNANDO *v.* FERNANDO 14

EVIDENCE ORDINANCE

Section 114 — *Presumption — Evidentiary value of report in London Times.*

PERERA, INSPECTOR OF POLICE *v.* MOHIDEEN .. 6

Section 114, *illustration* (*f*) — *When Court may refuse to apply presumption under this section.*

Held: That section 114 of the Evidence Ordinance is a provision under which a court "**may**" and not **'shall'** presume certain facts to exist in certain circumstances. A court may refuse to apply the presumption if the particular facts of the case do not warrant it.

Where a Village Headman summoned to give evidence was present in Court on several postponed dates of trial, but was absent on the date on which the trial took place as the summons taken out on him had been returned unserved, and the case proceeded to trial notwithstanding an application for postponment supported by both parties, and where an entry of a complaint made in the Headman's diary and signed by the plaintiff, who summoned him, was produced in support of his evidence.

Held: That the Court was justified in not applying the presumption under section 114 of the Evidence Ordinance that the witness was not called as he would not have supported the plaintiff's story.

MALHAMY & ANOTHER *v.* ANGAMMANA .. 35

Section 41(2) — *Does it extend to grounds upon which a divorce is granted.*

PERUMAL *v.* KARUMEGAM 67

Section 57 — *Judicial notice of situation of village.*

WILLIAM *v.* INSPECTOR OF POLICE, GAMPAHA .. 104

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HABEAS CORPUS

Habeas Corpus application by mother of twenty five years — Custody of Female infant child — Divorce action pending — Court informed through counsel that reconciliation impossible — Interests of child paramount.

Where a young mother of twenty five years sought the custody of her infant daughter of 18 months from her husband, who had filed a divorce action and who informed court through counsel that reconciliation is impossible.

Held: That it is in the interests of the infant female child that she be restored to the custody of her mother the petitioner.

RAJARATNE *v.* RAJARATNE & ANOTHER .. 69

INDUSTRIAL DISPUTES

See also under — LABOUR TRIBUNAL

Industrial Disputes Act, section 31B(2) *— Dismissal of employee for misconduct — Absence of evidence of misconduct at Labour Tribunal inquiry — Relevance of statement of representative — Burden of proof — Tribunal to act judicially in its approach to the evidence.*

The applicant-respondent was dismissed from service for misconduct after a domestic inquiry. Before the Tribunal the employer-appellant led only the evidence of their Internal Audit officer who conducted the preliminary investigations into the allegations of misconduct. The applicant-respondent led no evidence on his own behalf, but had set out the circumstances in which the alleged act of misconduct was committed, in the statement made to the Tribunal through a friend who represented him. The President took cognizance of this statement in arriving at his findings.

Held: (1) That in ascertaining the facts of case, the Tribunal must act judicially in its approach to the evidence and must therefore not decide the issues purely on averments in a statement of the nature referred to above, made by a representative of the applicant, the truth of which could not be tested.

(2) That in the circumstances of the present case the employer-appellant had not made out a *prima facie* case against the applicant-respondent and therefore the stage had not been reached for the latter to offer an explanation.

CO-OPERATIVE WHOLESALE ESTABLISHMENT *v.* RATNAYAKE 41

Industrial Disputes Act, section 31*B*(5) *— Workman's services terminated by employer — Action filed in District Court for relief — Later application made to Labour Tribunal under section* 31*B*(1) *— Order that application to Labour Tribunal be taken up after action in District Court decided — Application to withdraw action allowed and action dismissed — Thereafter in application to Labour Tribunal objection under section* 31*B*(5) *that Tribunal had no jurisdiction as remedy already sought in District Court — Objection upheld — Appeal.*

The appellant, a clerk, filed action in the District Court on 28.2.1966 praying for relief against his employer for wrongfully terminating his services. Pending this action, on 20.3.1966 he applied to the Labour Tribunal praying substantially for the same relief.

On 29.3.1967 when it was brought to the notice of the Tribunal that an action was pending in the District Court the President made order that the parties should move after the "D.C. Case is finalised."

On 13.6.1968 Counsel for the plaintiff (applicant) in the District Court case moved to withdraw the action without prejudice to his right to make an application to the Labour Tribunal. Counsel for the defendant objected to any reservation of a right to the plaintiff and stated that the law would take its own course. The Court allowed the plaintiff's application and dismissed the action with costs.

On 26.9.1968 when the matter came up in the Labour Tribunal, on an objection taken by Counsel for the employer, that in terms of Section 31B(5) of the Industrial Disputes Act, the Tribunal had no jurisdiction to hear and determine the application in view of the fact that the plaintiff had sought his remedy in the District Court, the President upheld the objection. The applicant appealed.

Held: (1) That what Section 31B(5) provides is not that a workman cannot seek his remedy under the Act and any other legal remedy also but that he cannot obtain both.

(2) That the appellant is not barred by section 31B(5) from proceeding with the application before the Labour Tribunal as there had been no final order or adjudication on the remedy sought in the District Court.

MENDIS *v.* RIVER VALLEYS DEVELOPMENT BOARD .. 49

Industrial Disputes Act — Definition of 'employer' — Partnership — Change of composition of partnership — Representation that workman's interests would

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be conserved — Does new partner take over liabilities incurred by old partnership — Joint liability — Distinction between liability of a partner and a co-owner.

The co-owners of an estate employed the respondent, in 1946, representing to the respondent that they were carrying on business of running the estate as partners. The Appellant became a shareholder in 1960. By letter A1 he informed the respondent *inter alia*, that he would see that his interests as Superintendent were conserved fairly and squarely. The services of the respondent were terminated in 1962. He made application to the Labour Tribunal and was awarded compensation in respect of the termination of his services, gratuity and Provident Fund benefits.

Held: (1) That the appellant's liability for the period 1960 to 1962 is based on the principle of implied contract or implied agency.

(2) That the appellants' liability to pay terminal benefits for the 14 years of service which preceded his acquisition of an interest in the estate is based on two factors, namely:

(*a*) Letter A1 by which the appellant has assured the rights that have already accrued to the respondent.

(*b*) The absence of a fresh contract of service when the Management changed its composition.

Per **Weeramantry, J.** — "Had the relationship between the owners been one of co-ownership, there may have been substance in the submission of learned counsel for the appellant that the claim would be exigible against one co-owner only *pro rata* and that one co-owner could not be sued in regard to the entirety, in consequence of the difference between the Roman-Dutch concept of joint liability and the English concept."

GAFFOOR *v.* DE ALMEIDA 54

KANDYAN LAW

Kandyan Law — Devolution of acquired property of deceased who died leaving widow, a child by her, a child adopted during the subsistence of her marriage with the deceased, and a child by former marriage — Is the share of the child of former marriage subject to widow's life interest in half the estate — Kandyan Law Declaration and Amendment Ordinance (Cap. 59), sections 11 and 13.

A, a Kandyan, died after the commencement of Kandyan Law Declaration and Amendment Ordinance of 1939, leaving acquired property and his widow (3rd defendant) a child by her, the (2nd defendant), an adopted son (1st defendant) and a child by a previous marriage (the plaintiff). The 1st defendant was born and adopted during the subsistence of the deceased's marriage to the 2nd defendant.

Under section 11(1) of the said Ordinance the 3rd defendant was entitled to an estate for life in one half of the property and under section 13 the three children aforesaid to 1/3 share each.

The question arose as to whether the 1/3 share of the plaintiff (the child of the 1st marriage) is or is not free of the life interest in a half-share to which the widow is admittedly entitled.

Held: That the plaintiff's share is not subject to the widow's life interest as the *per capita* shares of the widow's own issue and that of the 1st defendant, whom it is proper to regard in this case as her issue, exceed one half.

TIKIRI BANDA *v.* DINGIRI BANDA & TWO OTHERS .. 11

Deed of gift — Revocability,

SUMANASIRI *v.* TILAKERATNE BANDA .. 63

KANDYAN LAW DECLARATION & AMENDMENT ORDINANCE

Kandyan Law Declaration and Amendment Ordinance, sections 4 and 5(1)(d) — Revocation of deed of gift — Mere description of deed as "by way of gift absolute and irrevocable" — Are these words sufficient to satisfy the conditions necessary for irrevocability prescribed by section 5(1)(d)?

Effect of condition appended to deed of gift that "the donee shall and will" render assistance etc.

A Kandyan deed of gift contained the following words: "I, N. Rankiri of Gurugama ..... hereby give grant convey, transfer, set over and assure unto the said donee, his heirs, executors, administrators and assigns by way of gift absolute and irrevocable all those lands and premises described in the Schedule ...

There was also appended to this deed a condition "that the donee shall and will render assistance during the period of her natural life and after her death bury her remains decently according to the customs of the Buddhist religion."

The Donor subsequently revoked this gift and on the same day conveyed her interests to the appellant. The donee on the original gift transferred the interests which he purported to possess on that gift to the plaintiff four days after the revocation.

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The rival claims of the plaintiff and the appellant came up for adjudication in a partition action and the learned District Judge held that the deed of revocation was not effective to revoke the original gift and held in favour of the plaintiff.

Held: (1) That the description of the said gift as "absolute and irrevocable" is not sufficient to satisfy the condition for irrevocability prescribed by section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance which provides that a renunciation of a Kandyan gift is not valid unless the deed expressly contains a special clause of renunciation expressed in the particular manner stated in that section.

(2) That, therefore, the said deed of gift is revocable, and the appellant, acquired a good and valid title to the land as against the plaintiff.

Followed: *Dullewa v. Dullewa*, 71 N.L.R. 289 (P.C.); 75 C.L.W. 97.

Held further: (3) That the aforesaid condition appended to the original deed of gift that the donee shall and will render assistance etc., takes away the effect of the words "by way of gift absolute and irrevocable". This view is confirmed by the recital in the said deed of revocation that the said donee failed and neglected to render the donor the succour and assistance in consideration of which the latter gifted the land.

SUMANASIRI *v.* TILAKERATNE BANDA .. 63

LABOUR TRIBUNAL

See under Industrial Disputes.

A Labour Tribunal must act judically in its approach to the evidence.

CO-OPERATIVE WHOLESALE ESTABLISHMENT *v.* RATNAYAKE 41

Labour Tribunal — Termination of services — Order for reinstatement of workman with back wages —Order for continuing damages in default of re-instatement — Legality of such order — Industrial Disputes Act, sections 31(*C*), 31 (*D*)(2) *and* 40.

The Labour Tribunal, while holding there the dismissal of a workman by the Employer was not justified and ordering his re-instatement with back wages, added that in the event of the failure to re-instate continuing damages were to be on the basis of Rs. 160 per month from 1st October 1965.

Held: That such an order for continuing damages is not justified under the provisions of section 31*C* of the Industrial Disputes Act as it would have the effect of penalising the employer twice over which would not be just or equitable.

CO-OPERATIVE WHOLESALE ESTABLISHMENT *v.* RATNAYAKE 41

Labour Tribunal — Workman dismissed on a charge of theft and abetting it — President holding dismissal not justified — Misdirection in not taking into consideration a statement made by workman to Police and admitted by him — Admissibility of such confession in civil proceedings.

The President of a Labour Tribunal having failed to consider a statement which the workman had made to the police, because he overlooked it or thought it was inadmissible being a confession to a police officer, ordered his re-instatement stating that there was no evidence that he had any hand in the theft or aided and abetted in the commission of the theft on the ground of which he was dismissed.

Held: (1) That there was clear evidence in the said statement that the workman had aided and abetted the commission of the theft.

(2) That a confession, made to a Police officer is not inadmissible in a civil proceeding.

MACKWOODS LTD. *v.* TEA, RUBBER, COCONUT AND GENERAL PRODUCE WORKERS' UNION .. 47

Labour Tribunal — Termination of workman's services — Award of compensation made in lieu of re-instatement — Appeal from award on ground that it is inadequate — Factors to be taken into consideration in computing such award — Is failure to consider basis of computation a matter of law?

Holding that the termination of the applicant's services is not justified the President of the Labour Tribunal awarded a sum of Rs. 3,255/- as compensation in lieu of reinstatement.

It was contended in appeal on behalf of the applicant that the sum awarded was inadequate in the circumstances of the case and that the learned President has failed to give consideration to certain material factors in his computation. His counsel cited the following passage from the judgment of *S. S. Shetty v. Bharat Nidhi Ltd.*, 1958 S.C.R. India, p. 442.

"That the monetary value of the benefit of reinstatement is to be computed not on the basis of a breach of the employment nor on the basis of a tort alleged

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to have been committed by the employer by reason of the non-implementation of the direction for re-instatement contained in the award. The computation has to be made by the Industrial Tribunal having regard to all the circumstances of the case, such as, the terms and conditions of employment, the tenure of service, the possibility of termination of the employment at the instance of either party, the possibility of retrenchment by the employer or resignation or retirement by the employee and even of the employer himself ceasing to exist, or of the employee being awarded various benefits including reinstatement under the terms of future awards by Industrial Tribunals in the event of industrial disputes arising between the parties in the future."

His Lordship apporved the principles set out in the above case and —

Held: (1) That, having regard to all the circumstances of the cases the award be increased by Rs. 1,000/- as the President has failed to give consideration to all the material factors.

(2) That the failure to consider the basis of computation of the monetary value of the benefit of reinstatement amounts to a question of law.

NANAYAKKARA *v.* HETTIARATCHI & ANOTHER .. 52

LANDLORD AND TENANT

Landlord and Tenant — Premises subject to Rent Restriction Act — Tenant suing landlord for over-payments made during 1962-1964 *— Application in* 1964 *to Rent Restriction Board to fix rent — Notice on landlord who was absent on inquiry date — Rent fixed at* 58.82 *per month — Landlord informed of the amount fixed — Claim of tenant based on difference between* 58.82 *and Rs.* 100/- *per month and assessment rates paid during the period — District Judge not accepting Board's determination — Validity of his reasons.*

The plaintiff sued the defendant, his landlord to recover a sum of money alleged to have been over-paid as rent for the period 1.1.1962 to 30.9.1964. The plaintiff proved that he paid during this period a sum of Rs. 100/- per month as rent and Rs. 158.73 as assessment rates.

In 1964, the plaintiff applied to the Rent Control Board to fix the rent of the premises in terms of Section 4 of Rent Restriction Act. The landlord was not present at the inquiry held on 5.11.1964 though notice thereof was given to him.

The Rent Control Board determined that the rent of the premises in question is Rs. 58.82 per month apparently under section 16A of the Rent Restriction Act as amended by Act No. 10 of 1961. The claim of the plaintiff was an amount representing the difference between Rs. 100/- and Rs. 58.82 determined by the Board, as the authorised rent.

The learned District Judge declined to accept the Board's determination of Rs. 58.82 during a period prior to its order on 5.11. 1964 for two reasons

(*a*) that the form of D1, being the Board's office copy of the notice sent to the defendant informing the Board's order that the monthly rent payable is Rs. 58.82 is not due compliance with the Board's duty to send the defendant a copy of its order under section 20(13).

(*b*) that the case of *Ranasinghe v. Fernando*, 53 N.L.R. 163, applied to the case and consequently the rent fixed by the Board did not apply to the premises prior to the date of the fixation.

Held: (1) That a notice in the form D1 adequately satisfies the object of section 20(13), which is only that the parties must have authentc notice of the contents of an order affecting them.i

(2) That the learned trial Judge has erred in applying the decision in *Ranasinghe v. Fernando* as that case related to premises which came under paragraph (c) of section 5(2), that is where the standard rent is declared to be the agreed rent until there was a fixation by the Board; whereas in the present case the authorised rent had been fixed by reference to the assessment in 1941.

(3) That the purpose of section 16A, which authorised the determination of the authorised rent, is not that the Board alters the authorised rent from one amount to another, but that it determines the authorised rent in terms of the relevant provisions of the Act.

(4) That if the correctness of the amount determined by the Board is not contested and if no evidence is offered to show that the true authorised rent is different from the amount determined by the Board, a Court must accept and act upon the determination.

(5) That therefore the plaintiff has established that the authorised rent for the relevant period was Rs. 58.82 per month and that he has made the over-payments claimed in the plaint.

RANASINGHE *v.* JAYATILLEKE 88

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LOCAL AUTHORITIES ELECTIONS ORDINANCE

Quo Warranto, Application for — Local Authorities Election Ordinance, section 9 — Amended Act No. 9 of 1963, section 4 — Disqualification for election if already a member of another local authority — Does Quo Warranto lie?

On an application for a Writ of Quo Warranto, on the respondent, who, admittedly, was at the time of his election as a member of the Jaffna Municipal Council, already a member of the Village Council of Pulopallai—

Held: That in view of the provisions of section 9 of the Local Authorities Election Ordinance as amended by section 4 of Act No. 9 of 1963, which expressly provides that a person is disqualified for election, if he is already a member of another local authority, the respondent's election as a member of the Jaffna Municipal Council is null and void."

ANTHONYPILLAI *v.* RAJASOORIAR 91

MAINTENANCE

Maintenance — Order in respect of a child — Subsequent decree for divorce after ex-parte trial in the District Court on the ground that the mother had been pregnant at the time of marriage unknown to her husband — Whether magistrate's order for maintenance may be cancelled upon the decision of the civil court — Decisions of Indian Courts whether applicable — Whether section 41(2) of Evidence Ordinance extends to grounds upon which a divorce is granted.

A child was born to the applicant-respondent six months after her marriage to the defendant-petitioner, who disputed paternity. The applicant-respondent made an application for maintenance and obtained an order in her favour in the Magistrate's Court. This order was affirmed in appeal. Thereafter the defendant-petitioner obtained a decree in the District Court after an *ex-parte* trial, annulling his marriage to the applicant-respondent on the ground that unknown to him she had been pregnant at the time of their marriage. In his present application the defendant-petitioner seeks to have the order for maintenance set aside by reason of the judgment in the nullity proceedings before the District Court.

Held: (1) That there is no provision under our law empowering a Magistrate to cancel an order for maintenance following a decision in a competent civil court.

(2) That Indian authorities, based as they are upon a special provision in the Indian Criminal Procedure Code (Section 489(2)) which empowers a magistrate to vary or cancel an order consequent upon a decision of a competent civil court in India, are not applicable in the absence of such a provision in Ceylon. Cases decided before section 489(2) was introduced into the Indian Code were cases where the petitioner had obtained a declaration in a civil case that the child was not his and not merely an incidental finding in a matrimonial action. Further the jurisdiction under our Maintenance Ordinance is not auxiliary to that possessed by the Civil Court as is the case in India.

(3) That while section 41(2) of the Evidence Ordinance renders conclusive the order of the District Court as to the nullity of the marriage on all persons, it does not extend its application to the grounds upon which such order was made as against strangers.

(4) That as the child for whose benefit the order for maintenance was made was not a party to the nullity proceedings before the District Court, the child is not bound by the finding on pregnancy unknown to the petitioner at the time of marriage.

PERUMAL *v.* KARUMEGAM 67

MOTOR TRAFFIC ACT

Motor Traffic Act (Cap. 203) — Registration of owner of motor vehicle on change of ownership— Has the Government Agent power to prevent registration of new owner?

Held: (1) That under the Motor Traffic Act, the Registrar of Motor Vehicles is bound to register the new owner of a motor vehicle upon a change of ownership if the conditions and requirements of that Act relating to the matter of such registration are complied with.

(2) That a Government Agent has no power under the Heavy Oil Motor Vehicles Taxation Ordinance or the Motor Traffic Act to prevent the registration of a new owner of a motor vehicle.

ABEYSENA *v.* THE REGISTRAR OF MOTOR VEHICLES .. 71

PARTITION

Partition Act section 22(2) — New parties disclosed by a defendant — Whom should the trial judge order to issue summons as a general rule.

Held: That in partition cases where a defendant discloses new parties, the trial judge should as a rule

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order the defendant who disclosed the new parties to issue notices on their under the proviso to section 22(2) of the Act.

ABEYSURIYA *v.* DIONIS APPU & OTHERS .. 70

PENAL CODE

Penal Code, section 386 — *Charge of dishonest misappropriation — When misappropriation takes place? — Initial innocent taking followed by subsequent dishonest charge of intention necessary — Distinguished from theft and cheating.*

Held: (1) (After reviewing all the authorities) That in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offence of theft and other offences which may be committed.

(2) That to view this matter, otherwise may result in obscuring the line of demaraction between criminal misappropriation and such offences as theft and cheating.

Per **Weeramantry, J.** "It would appear that the offence of dishonest misappropriation of property was created in our Penal Code by way of a conscious departure from the principles then prevalent under the English criminal law. Dishonest misappropriation was a new offence which, as Gour observes, (*Indian Penal Code*, 8th ed. 4 p. 2824), was carved out of theft, and laid down a rule at variance with the English law which looks only to the intention at the time the property is obtained (*ibid.* p. 2825; Ratnalal & Thakore, *Law of Crimes*, 20th ed. p. 1024.")

RANASINGHE *v.* WIJENDRA, INSPECTOR OF POLICE, FORT 106

PLEADINGS

Amendment of answer to plead objection to jurisdiction — Application to amend made after several trial dates — Amendment allowed — Has defendant right to raise such plea at so late a stage — Prejudice to plaintiff.

FERNANDO *v.* FERNANDO 14

PRIVY COUNCIL CASES

SANDANAM *v.* JAMALDEEN & OTHERS (Specific Performance) 57

QUO WARRANTO

Quo Warranto — Election as Member of Village Council — Application for Writ to have election declared null and void prior to Member taking office — Preliminary objection that it does not lie Village Communities Ordinance (*Cap.* 257), *Section* 11(1).

The respondent was declared duly elected a Member of a Ward of the Village Council on 22.3.1969 (nomination day) to hold office in terms of Section 11(1) of Cap. 257 of the Legislative Enactments as from 1.7.1969.

The petitioner, a ratepayer of the said Council, by his application for a Writ of Quo Warranto dated 19.5.1969, prayed for a declaration that the election of the respondent was null and void.

The affidavit of the respondent averred that the 1st meeting of the newly elected council was on 18.7.1969 at which the respondent was elected Chairman.

The petitioner submitted that immediately after the respondent was declared elected by the Presiding Officer he addressed those present and promised to perform his duties to the best of his ability etc.

On a preliminary objection to the hearing of the application,

Held: (1) That the Writ of Quo Warranto does not lie in the circumstances, as at the time the rule *Nisi* in these proceedings was issued the respondent had not attended any meeting of the Council or done any act showing that he had acted in or accepted office.

(2) That the words used in his said address on the day he was elected Chairman viz. 18.7.1969 pointed to no more than a statement of his intention to do when in due course he took his seat in the Council and there was enough time to decide that it was wiser not to use the rights his election gave him.

(3) That a mere claim to be admitted to office is not sufficient to grant a Writ of Quo Warranto; there must be a possession or user as well as a claim.

(3) That a mere claim to be admitted to office is not sufficient to grant a Writ of Quo Warranto; there must be a possession or user as well as a claim.

ANDIRIS *v.* THOMARATNE 33

RENT RESTRICTION

See also LANDLORD AND TENANT

Rent Restriction Act, No. 12 *of* 1966, *Section* 4(1) — *Does it apply to actions for ejectment of tenant on the ground of sub-letting.*

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Held: That the provisions of section 4(1) of No. 12 of 1966 are not applicable to a pending action in which a landlord claims the right to eject a tenant on the ground of sub-letting.

NAINA MARIKAR *v.* DADA & ANOTHER .. 39

Rent Restriction Act section 4 — *Effect on execution of decree entered prior to commencement of the Act.*

Held: That a cause is pending until the judgment is satisfied and section 4 of the Rent Restriction Act No. 12 of 1966 prevents execution of decree obtained prior to the date of the Act coming into operation.

KIAS *v.* DON DELIS SINGHO 72

RES JUDICATA

Res Judicata — Second action by plaintiff against same defendant for recovery of same sum of money — Principal matters in dispute between parties decided in favour of plaintiff in earlier action, but plaintiff's action dismissed on ground that it was prematurely brought — Are the matters so decided in favour of plaintiff operate as res judicata against the defendant — The Principle involved in such case.

The plaintiff sued the defendant for the recovery of Rs. 8,000/- averring

(*a*) that the sum had been deposited with the defendant when the former took certain premises on rent from the latter.

(*b*) that this deposit was to be returned on surrendering possession in accordance with the terms of the tenancy agreement.

(*c*) that possession of the premises had been duly surrendered.

One of the issues framed at the trial on behalf of the defendant as No. 12 was whether the payment of Rs. 8,000/- was in contravention of section 18 of the Rent Restriction Act.

The plaintiff thereupon framed a further issue, viz. "Is the finding of this Court in 44364/M *res judicata* as between the parties on issue 12."

In this action, No. 44364/M, the same plaintiff had sued the defendant for the recovery of the same sum of Rs. 8,000/- on the basis that the deposit was returnable on demand, and the substantial defence in the former case was a denial that the sum of Rs. 8,000/- had been deposited with the defendant.

The learned District Judge in that case rejected this defence and further held on the issues

(*a*) that the defendant demanded and received from the plaintiff the said sum of Rs. 8,000/- to be held as a deposit.

(*b*) that the plaintiff was entitled to a refund of the said sum only after restoring the premises to the defendant.

(*c*) that the payment of the said sum by the plaintiff was not illegal.

(*d*) that the action should be dismissed as it was prematurely brought, the defendant not having surrendered possession.

The learned District Judge in the present case held that the decisions of the issues in the former case operated as *res judicata* precluding the defendant from contesting the principal matters in dispute.

Held: (1) That the issues decided by the Court in the former case in favour of the plaintiff whose suit is ultimately dismissed on another ground, cannot operate as *res judicata.*

(2) That the principle on which this view is based is that once the plaintiff's earlier action was dismissed on the ground that it was premature, there was no need for the defendant to seek by way of appeal a reversal of the finding against him.

Per **H. N. G. Fernando, C.J.** "That being so, it would be manifestly unjust that in the present case the defendant should be held to be bound by a finding of a District Court against which he could not institute an appeal; since the finding lacked the character of being a final order, it cannot operate as *res judicata.*

ZANEEK *v.* AHAMED 109

REVISION

Revision — Appeal from conviction — Appellant unrespresented at appeal — Dismissal of appeal after consideration by Court — Subsequent application in revision — Is the application barred? — When revisionary powers will be exercised in such a situation.

The accused petitioner appealed to the Supreme Court from his conviction and sentence on a charge of criminal trespass and the appeal was dismissed after consideration by Court. Threafter this petition for relief by way of revision was filed by the accused who was unrepresented at the hearing of the appeal and it was demonstrated to Their Lordships that a conclusive piece of evidence which would have gone to the root of the entire case had not been brought to the notice of Court when the appeal was dismissed.

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Held: (1) That although the Supreme Court would be extremely hesitant and cautious before it makes any order in revision which is contrary to an order made by it in appeal in the same case, such an order in the exercise of its revisionary powers would be made in special circumstances where the original order is based upon a manifest error.

(2) That there being an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal, the Supreme Court would in the present case exercise its revisionary powers to grant relief and quash in the conviction.

POTMAN *v.* INSPECTOR OF POLICE, DODANGODA .. 9

ROMAN-DUTCH LAW

Servitude — Is owner of servient tenement entitled to offer a deviation of route or track from right of way acquired by prescription.

MARASINGHE & OTHERS *v.* SAMARASINGHE .. 17

Specific Performance — Where immovables are sold and transfer has to be given, it is the active duty of the seller to pass the transfer.

SANDANAM *v.* JAMALDEEN & OTHERS .. 57

SERVITUDE

Servitude — Right of way acquired by prescription over a definite track — Is owner of servient tenement entitled to offer a deviation of route or track from such right of way acquired? — Roman Dutch Law.

Held: By Alles, J. and de Kretser, J. (*H. N. G. Fernando, C.J. dissenting*) That where a servitude has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track from the one over which the right has been acquired, provided the new route or track offered is equally convenient and serviceable to the owner of the dominant tenement.

Per **Alles, J.** "That law as laid down in Voet 8-3-8 in regard to the rights of the servient owner is applicable to servitudes created *simpliciter* and servitudes acquired by prescriptive user. This view is supported by an examination of the text in Voet 8-3-8, the principles of the Roman Dutch law found in the Commentaries and the South African texts and also in the decisions of the South African Court of Appeal.

The principles that have been considered by the learned Judges of the South African Court of Appeal appear to be that the servitude should be exercised, to borrow the words of Solomon, J. in *Rubidge v. McCabe and Sons* at p. 448, in a manner that would 'satisfy the legal claims of the owner of the dominant tenement' and also 'meet the convenience of the owner of the servient tenement'. In my view this is an eminenlty reasonable attitude having regard to the paramount consideration that the servitude should be exercised in a manner which will cause the least burden on the owner of the servient tenement."

Per **H. N. G. Fernando. C.J.** "In Ceylon there have been the three judgments of 1912, 1921, and 1935, which purport to apply the Roman-Dutch Law, and which clearly declare that a servient owner has no right to deviate the line of a servitude acquired by prescription. In the absence of any contrary authority either in the Roman Dutch texts or in any decisions of our Courts. I am not persuaded of any reason why we should at this stage disagree with Ceylon decisions which are directly in point. "

MARASINGHE & OTHERS *v.* SAMARASINGHE .. 17

SPECIFIC PERFORMANCE

Specific performance—Notarial agreement to sell land to be allotted in pending Partition action within three months of entering of Final Decree for Rs. 3,000/- *— Part consideration of Rs.* 2,000/- *paid before execution of agreement — Balance Rs.* 1,000/- *to be paid at execution of conveyance — If vendors failed or neglected to complete conveyance refund of Rs.* 2,000/- *and further payment of Rs.* 2,000/- *as liquidated damages — Before Final Decree receipt of balance Rs.* 1,000/- *acknowledged in writing — After Final Decree possession of divided lot given to purchasers who erected buildings — Purchasers preparing deed of conveyance — Vendors neglecting to sign — Action for specific performance — Obligations of Vendor — Roman-Dutch law.*

By a notarially attested agreement dated 18.7.1956 the defendants respondents (Vendors) agreed to sell to the plaintiff appellant (Purchaser) certain land which was to be allotted to them in lieu of their undivided shares in a land in a Partition action then pending.

The relevant clauses of this agreement were:

(1) "The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the Purchaser sell and transfer unto the Purchaser whatever divided share or shares (together with the buildings and plantations and everything thereon) the Vendors will be allotted in the said partition action..... for the price of Rs. 3,000/- at any time within three months of the entering of the Final Decree in the said partition action No. P. 1119".

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Clause 2 provided that out of the said price of Rs. 3,000/- a sum of Rs. 2,000/- shall be paid by the Purchaser before the execution of the agreement and the balance Rs. 1,000/- at the time of executing the conveyance in favour of the Purchaser.

Clause 3 provided for forfeiture of the Rs. 2,000/- if the plaintiff failed to complete the purchase.

Clause 4 provided for the refund of the Rs. 2,000/- paid as advance together with a further sum of Rs. 2,000/- as liquidated damages and not as a penalty in the event of the Vendors failing or neglecting to complete the conveyance.

Before the Final Decree was entered on 18.12.1957 allotting a divided block to the defendants, one of the Vendors borrowed Rs. 500/- from the Purchaser and a further sum of Rs. 500/- subsequently for which said two sums the Purchaser received a receipt dated 10.2.1957 acknowledging the receipt of the full consideration for the transfer under the agreement.

The Vendors permitted the Purchaser in 1959-60 to enter upon the land they agreed to sell and erect buildings with their knowledge and acquiescence.

On 30.10.1961 Proctor for Purchaser prepared a deed of transfer and invited the Vendors, to execute the transfer and on the latter's failure and neglect to do so, this action was filed praying for specific performance of the agreement.

The issue before the Judicial Committee depend on the construction of Clause 4 aforesaid.

The Purchaser contended that the Vendors were under Clause 4 entitled to refuse to accept the final payment of Rs. 1,000/- and to refuse to complete the transaction on paying Rs. 4,000/- to the Purchaser. But that since they had accepted the final Rs. 1,000/- Clause 4 cannot operate.

The Vendors' reply was that the Purchaser may have paid the final Rs. 1,000/- prematurely, but the agreement continue in existence in each and every part and operate to the full when the time for completion arises. This contention appealed to the Supreme Court

Held: (1) That having accepted the final instalment, the Vendors must be taken to have accepted the position that they were under a duty to complete the bargain, for, payment of liquidated damages of Rs. 2,000/- in terms of the said clause would no longer be adequate according to the agreement of the parties.

(2) That, therefore as far as Clause 4 is concerned, Their Lordships agreed with the learned District Judge that it is no longer applicable and the Purchaser is entitled to specific performance.

(3) That by Roman Dutch Law the obligation is upon the Vendor to pass transfer and for this purpose he may appoint his own conveyancer although the Purchaser may by the terms of the contract be compelled to pay the costs of the transfer. (Vide *James v. Liquidators of the Amsterdam Township Co.* (1903) Transvaal Reports 653 and Wessels Law of Contract in South Africa, 2nd Edition, p. 1105 Sections 4500.)

(4) That accordingly, under Clause 1 of the said agreement the obligation was upon the Vendors to prepare and tender the conveyance, within the three months stipulated, and, as the purchase price has long since been paid, to deliver it upon payment of the costs of its preparation.

SANDANAM *v.* JAMALDEEN & OTHERS .. 57

SUPREME COURT

Powers of appellate jurisdiction of Supreme Court in case where accused are convicted of summarily triable charges and of indictable charges at one trial.

GILBERT, POLICE SERGEANT *v.* P. KANDIAH & OTHERS 44

VILLAGE COMMITTEE

Election of member — Application for writ to have election declared null and void prior to member taking office.

ANDIRIS *v.* THOMARATNE 33

WORDS AND PHRASES

"Absolute and irrevocable" in Kandyan deed of gift.

SUMANASIRI *v.* TILAKERATNE BANDA 63

"Customs premises"

INSPECTOR OF POLICE (FORESHORE) COLOMBO *v.* MATHIYAPARANAM. 51

"Employer" in Industrial Disputes Act.

GAFFOOR *v.* DE ALMEIDA 54

"Next of kin."

FERNANDO *v.* MAGLIN HAMINE 97

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Present: **The Honourable G. T. Samerawickrame, Election Judge**

H. P. WIJEWARDENE *v.* DUDLEY SHELTON SENANAYAKE*

Election Petition No. 12 *of* 1970

Dates of Inquiry: 3rd & 4th August, 1970
Order delivered on: 19th September, 1970

Ceylon (Parliamentary Elections) Order-in-Council 1946, *section* 77(*C*)— *Petition to declare election of a Member of Parliament void — Allegations of commission of corrupt practice of undue influence by six persons—Failure to make any of them parties—Is it fatal to the petition?— Section* 80*A*(1) (*b*) *of the Amending Act No.* 9 *of* 1970 *— Is it mandatory? — Power of Court to add parties subsequently.*

Later attempts to rectify omission — Is it of any avail in Law?— Section 80*B of the said Amending Act, deleting Rules* 4(1) *and* 5 *in the* 3*rd Schedule to the said Order-in-Council of* 1946 *and requiring full particulars to be set forth in cases of corrupt and illegal practices — Vagueness and want of particularity of the charges in petition — Can Judge permit amendments later?*

English Parliamentary Election rules, Rule 60 *— Petition not to be defeated by formal objection — Applicability of Rule — Effect of failure to comply with mandatory provisions — Dismissal of petition.*

The petitioner filed this petition praying for a declaration that the election of the respondent as a Member of Parliament was void under Section 77(c) of the Ceylon (Parliamentary Elections) Order-in-Council 1946, alleging the commission of corrupt practices of undue influence against six persons mentioned by name in a Schedule thereto. This Schedule further stated that the six named persons had committed the said corrupt practices with the knowledge or consent of the respondent and that one of them was his agent.

Paragraph 4 of the petition read with this Schedule suggested that the said six persons named therein acted with the knowledge or consent of the respondent as required by section 77(c) of the said Order-in-Council but none of the six had been joined as respondents as required by section 80A(1)(b) of the Amending Act No. 9 of 1970, nor was there an averment in the petition that at least the person named as the agent had been joined as a party.

Later, the petitioner tendered notices to be served through the fiscal on each of the said six persons that he had been named in the petition as a person who had committed a corrupt practice and further, within ten days of the filing of the petition, published a notice in the Government Gazette that these persons had been joined as respondents to the petition filed.

The charges were stated in paragraph 3 of the petition as follows:— "And your Petitioner states that by reason of general intimidation or other circumstances the majority of electors were or may have been prevented from electing the candidate whom they have preferred."

On a preliminary objection taken to the hearing of the petition on the ground of the petitioner's failure to join as respondents the said six persons against whom the allegations were made,

Held: (1) That the provision of section 80A(1)(b) of the Amending Act No. 9 of 1970 which makes it necessary to join as respondents to the petition the persons alleged to be agents and other persons acting with the knowledge or consent of the candidate who was returned, and against which persons allegations of corrupt practice are made, is mandatory, whereas Rule 4 of the Third Schedule of the Order-in-Council referring to the form of the petition is merely directory.

(2) That the later attempts to remedy the omission to join the said persons at the time of the filing of the petition being of no avail, the petitioner has failed to comply with the requirements of the said Section 80 (1)(b).

(3) That the affidavit which is required by Section 80B(d) to accompany a petition with an allegation of a corrupt practice may be one of information and belief.

* For Sinhala translation, see Sinhala section, Vol. 22, p. 1.

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(4) That the new Section 80B of the Amending Act No. 9 of 1970, which replaced Rules 4(1) and 5 in the Third Schedule (requiring the setting out of only bare allegations and stating facts only upon an order to furnish particulars), requires full particulars to be set forth in the petition in the case of corrupt or illegal practices.

(5) That paragraph 3 of the petition above set out does not comply with the requirements of Section 80B(c) of the said Amending Act inasmuch as the grounds stated are vague and lacks particularity to a degree sufficient to give notice to the respondent of the precise allegations to enable him to get ready for the defence.

(6) That for an election Judge to receive petitions of this nature containing bald allegations and to order particulars at the stage of trial would be to reintroduce by judicial process the very evil, which the legislature sought to do away with by the Amending Act No. 9 of 1970.

(7) That Rule 60 of the English Parliamentary Rules which provides that a petition shall not be defeated by a formal objection does not apply where the objection arises from a failure to comply with the mandatory provisions of the Order-in-Council and where the objections in the context of our election law, are material.

(8) That in the absence of a power vested in the court to add as parties who ought to have been joined as respondents or to permit an amendment to the petition after the period for filing a petition has lapsed and in view of the imperative provisions enacted by the legislature by an Amending Act for the express purpose of remedying what were considered to be defects in the existing law, it is incompetent for the Judge to grant relief.

(9) That therefore, both on principle and on authority (*Vide cases cited*) the failure to comply with the said mandatory provisions must result in the dismissal of the petition although the Order-in-Council does not provide for such dismissal for failure to comply with its provisions except for failure to give Security in terms of Rule 12.

Cases referred to: *Jagan Nath v. Jaswant Singh*, (1954) A.I.R., S.C. 211.
Wickremasuriya v. William de Silva, (1965) 67 N.L.R. 538.
Saravanamuttu v. Joseph de Silva, (1941) 42 N.L.R. 561
L. Rajapakse v. S. Kathirgamanathan, (1965) 68 N.L.R. 14.
P. A. Cooray v. H. J. G. Fernando, (1953) 54 N.L.R. 400.
Aron v. Senanayake, (1936) 40 N.L.R. 257.
K. Ramalingam v. V. Kumaraswamy, (1953) 54 N.L.R. 494.
Nair v. Teik, 2 A.E.R. 34.

Nimal Senanayake, with *Desmond Fernando*, *Miss Suriya Wickremasinghe*, *Miss Adela P. Abeyratne*, *Nalin Abeynayaka* and *Peter Jayasekera*, for the petitioner.

E. G. Wickramanayake, *Q.C.*, with *P. Navaratnarajah*, *Q.C.*, *S. J. Kadirgamar*, *Q.C.*, *Issadeen Mohamed*, *Q.C.*, *Stanley de Zoysa*, *H. D. Thambiah*, *S. C. Crosette-Thambiah*, *C. Sandarasagara*, *Bimal Rajapaksa*, *P. Sumathiratne* and *S. K. S. Dissanayaka*, for the respondent.

Samerawickrame, J.

The first objection on behalf of the respondent is that the petitioner has failed to join as respondents the persons against whom allegations of the commission of the corrupt practice of undue influence were made in the petition.

Section 80A. (1) states:—

"A petitioner shall join as respondents to his election petition —

(*a*) where the petition, in addition to claiming that the election of any of the returned candidates is void or was undue, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates, other than the petitioner, and where no such further declaration is claimed, all the returned candidates and

(*b*) any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition.

In a schedule to the petition it was stated that six named persons had committed the corrupt practice of undue influence and that one of them Dudley Wijeratne was an agent of the respondent.

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The ground for avoiding an election on the basis of the commission of a corrupt practice is stated as follows in section 77(c):—

> "The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely:—
>
> (*c*) that a corrupt practice or illegal practice was committed in connexion with the election by the candidate or with his knowledge or consent or by an agent of the candidate;"

In view of the above provision, I am of opinion, that it is necessary to join as respondents to the petition, persons alleged to be agents and other persons acting with the knowledge or consent of the candidate who was returned.

Paragraph 4 of the petition read with the schedule suggests that the six persons named therein acted with the knowledge or consent of the candidate who was returned. Learned counsel for the petitioner stated that the names of the five persons other than Dudley Wijeratne had been mentioned merely in the course of giving the full particulars of the corrupt practice in compliance with section 80B. (d). It is clear that Dudley Wijeratne at least should have been joined as respondent to the petition. Nowhere in the petition has the petitioner stated that he is joined as a party to the petition.

Learned counsel for the petitioner referred to the form of the petition given in rule 4 of the Third Schedule and pointed out that that form did not set out a part of the caption giving the names of the parties. There is however an express provision in section 80A. (1)(b) and, rule 4 appears to be merely directory. Substantial compliance with the rule would be sufficient while exact compliance with the express provision in the Order is *prima facie* necessary.

The petitioner did in fact in his caption set out parties. He named himself petitioner and the candidate who was returned respondent.

Four days after the petition was filed the petitioner tendered notices to be served through the fiscal on each of the six persons stating that a petition had been filed and that he had been named in the petition as a person who had committed a corrupt practice. Later, but within ten days of the filing of the petition a notice was published in the Government Gazette stating, *inter alia*, that these persons had been joined as respondents to the petition. It appears to me that these steps, particularly the notification in the Gazette, have been taken after the petitioner realized the omission made at the time of filing the petition and in an effort to remedy it. I hold that the petitioner has failed to comply with section 80A. (1) (b).

A provision similar to 80A. (1) is found in section 82 of the Indian Representation of the People Act, 1951. Section 85 as it originally stood provided for the dismissal of a petition for failure to comply with certain other provisions but did not so provide in respect of a non-compliance with section 82. Further section 90 of that Act made the procedure under the Indian Code of Civil Procedure applicable to the trial of Election Petitions. Order 1 Rule 9 provides, *inter alia*, that a suit is not to be defeated by non-joinder of parties and Order 1 Rule 10 enables a person who ought to have been joined as party to be joined at any stage. In *Jagan Nath v. Jaswant Singh*, 1954 A.I.R., S.C. 211, the Supreme Court of India considered the effect of a failure to join a contesting candidate in a petition making a claim to the seat in contravention of the provision corresponding to section 80A. (1)(a). It referred to the provision making the rules of Civil Procedure applicable and the absence of provision making a petition liable to be dismissed for non-compliance with a provision relating to joinder of parties and held that the defect was not fatal. In doing so it laid down the general rule and the reasons why it did not apply in the particular case thus:—

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it."

In our Order-in-Council the rules of Civil Procedure relating to joinder of parties are not made applicable nor is there any indication as there was in the original section 85 of the Indian Representation of the People Act that non-joinder was not to be a ground for dismissal of a petition.

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The present petition has not to do with the failure to join a contesting candidate in a petition claiming the seat but a failure to comply with section 80A. (1)(b) requiring any candidate or other persons against whom an allegation of corrupt practice is made in the petition to be joined. Upon a trial of an election petition such persons are liable, if they are found guilty, to be reported to the Governor-General, and, to lose civic rights for a period of seven years. This provision has been enacted to give effect to a fundamental principle that a person ought to be heard before a finding adverse to him and involving penalties is made. A petition based on a corrupt practice has to be filed within twenty-one days of the publication of the result. There is no provision in that Act, either express or by incorporation, for joining as a party any person who ought to have been joined. Having regard to these matters, it seems to me that the provision requiring persons against whom allegations of corrupt practice are made to be joined as respondents to the petition must be considered not merely directory but mandatory.

Under section 80B. (d) a petition in which an allegation of a corrupt practice is made has to be accompanied by an affidavit in support of the allegation. The petitioner has filed an affidavit affirmed to by himself in which he states that he obtained details of the incident from one Podiappuhamy. No affidavit from Podiappuhamy has been filed. Learned counsel for the respondent submitted that what was provided for was an affidavit from a person who could speak to facts from his own knowledge and not hearsay. There is substance in this submission. The provision however refers to an affidavit "in the prescribed form". No form has in fact been prescribed. It is possible that the proper authority might have prescribed, *inter alia*, an affidavit of information and belief, I am, therefore, unable to uphold the objection in respect of the affidavit.

Paragraph 3 of the petition reads:—

> "And your Petitioner states that by reason of general intimidation or other circumstances the majority of electors were or may have been prevented from electing the candidate whom they preferred."

It was the practice to formulate charges in election petitions baldly and setting out little more than the bare allegation and to state the facts only upon an order to furnish particulars. The relevant rules 4(1) and 5 are as follows:—

> "4(1) An election petition shall contain the following statements:—
>
> (*a*) It shall state the right of the petitioner to petition within section 79 of the Order.
>
> (*b*) It shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer."
>
> "5. Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered."

In *Wickremasuriya v. William de Silva*, 67 N.L.R. 538, it was held that a charge that merely set out the allegation satisfied Rule 4(1) mainly because Rule 5 showed that a petitioner need not set out all the facts and was liable to give facts not stated in his petition on an order to furnish particulars.

There had been much criticism of this procedure on the ground that it enabled a petitioner to make allegations in his petition without any real foundation and thereafter seek evidence to support them. The point was also made that as particulars are ordered to be given shortly before trial and on some occasions as much as a year after the election, the respondent did not have timely notice of the charges to make necessary enquiries and investigations into the facts to enable him to meet the charges.

By Act, 9 of 1970, Rules 4(1) and 5 in the Third Schedule were deleted and a new section 80B was introduced into the Order-in-Council. In the case of corrupt or illegal practice full particulars had to be set forth in the petition and the petition was to be accompanied by an affidavit in support of the allegation of such practices. In respect of other matters section 80B(c) provides that an election petition shall contain a concise statement of the material facts on which the petitioner relies. This provision would apply to matters set out in paragraph 3 of the petition. As the rule regarding particulars has been deleted, a trial would ordinarily proceed on the averments made in the petition. They must therefore be such as to give the respondent fair notice of the allegations made against him. The formulation of a ground in the very general and bald manner in which paragraph 3 of the petition set out grounds fails to do so and is vague and lacks particularity to a degree that makes it fall short of compliance with section 80B. (c). At the least sufficient facts should be stated as to give the respondent notice of the precise allegation

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made against him and thus enable him to make the necessary enquiries and obtain information to defend himself. Paragraph 3 of the petition, in my view, does not do so. Learned counsel for the petitioner submitted that notwithstanding the repeal of Rule 5, the Court still had power to order particulars to be given to avoid prejudice to the respondent. The Court may have the power to do so on the application of and in the interests of the respondent but that fact is not an excuse for non-compliance by the petitioner with the provisions of section 80B. (1)(c). Moreover, for an Election Judge to receive petitions containing bald allegations and to order particulars at the stage of trial would be to re-introduce by judicial process the very evil which the legislature sought to do away with by amending Act, 9 of 1970. Further, a respondent will be in a better position to make enquiries and gather evidence to defend himself against an allegation if he has notice of it within a short time of its alleged occurrence than if he is given particulars of it much later. The provision has been made in the interests of a party respondent and for the purpose of ensuring a fair trial. I am unable to regard it as merely directory and I consider it mandatory.

Learned counsel submitted that Rule 60 of the English Parliamentary Election Petition Rules which provides that a petition shall not be defeated by a formal objection should be applied. In view of section 86 (2) of the Order-in-Council, I think the rule may be applied in an appropriate case — vide *Saravanamuttu v. Joseph de Silva*, 42 N.L.R. 561 at 569.The objections in this matter however arise from a failure to comply with mandatory provisions of the Order-in-Council and in the context of our law of elections, are material. I am therefore of the view that Rule 60 does not apply to them.

The Order-in-Council does not provide for dismissal of a petition for failure to comply with its provisions, except for failure to give security in terms of Rule 12. Petitions have been dismissed for failure to make the successful candidate a respondent — vide *L. Rajapakse v. S. Kathirgamanathan*, 68 N.L.R. 14, and for failure to give notice of presentation of a petition within the time limit prescribed by Rule 15 — vide *Aron v. Senanayake*, 40 N.L.R. 257, *P. A. Cooray v. H. J. G. Fernando*, 54 N.L.R. 400, and *K. Ramalingam v. V. Kumaraswamy*, 54 N.L.R. 494.

In *Nair v. Teik*,? 2 A.E.R. 34, the Privy Council considered Rule 15 of the Election Petition Rules of Malaysia which is practically the same as our Rule 15 and held that the failure to give notice within the time prescribed entailed dismissal of the petition. It was stated, inter alia, "In contrast, for example, to the rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think that this omission was a matter of deliberate design. In cases where it was inteneded that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred on him, see, for example, r. 7 and r. 8 and r. 19." "Rules 7, 8 and 19 probably correspond to our rules 7, 8 and 19 which also give power to amend or postpone. The absence of a general power to give relief by extending the time appears to have been considered material in deciding that the provision was mandatory. It was further held that as the provision was mandatory, the failure to observe it rendered the proceedings a nullity, and no weight could be attached to the absence of an express power in the rules to strike out a petition for non-compliance with rule 15 and that the election judge must have an inherent power to strike out or dismiss such a petition.

I am not unmindful of the fact that an election petition does not affect only the parties but is of interest to the entire constituency and that therefore an order is not lightly to be made which will prevent an inquiry into it. On the other hand, the provisions in question are imperative and have been enacted by the legislature by an amending Act for the express purpose of remedying what were considered by it defects in the existing law. In the absence of a power to add as parties persons who ought to have been joined as respondents or to permit an amendment to the petition after the period for filing a petition has elapsed, it is not competent to me to grant relief. In such circumstances, it is my duty as Election Judge to give due effect to the imperative and indeed mandatory provisions enacted by the legislature. Both on principle and on authority, failure to comply with them has the result of dismissal of the petition.

I accordingly make order dismissing the petition with costs fixed at Rs. 1,050/-.

Petition dismissed.

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

S. P. A. PERERA, INSPECTOR OF POLICE *v.* KACHCHI MOHAMED HANIFFA MOHIDEEN

S. C. 506/68 — *J. M. C. Colombo* 36814

Argued on: 18th September, 1970
Decided on: 3rd October, 1970

Betting on Horse Racing Ordinance (*Cap.* 44), *section* 3(3)(b) — *Charge of receiving or negotiating a bet on a race proposed to be run in a meet in England on a certain day — Prosecution relying on decoy's evidence and newssheet containing names of horses to run on that day at the meet and two reports in the London Times— Acceptance of decoy's evidence but acquittal of accused on the ground that the reports in London Times hearsay — Evidentiary value of such report — Evidence Ordinance section* 114 *—Presumption.*

The accused was charged that on 21.4.1967 he did receive or negotiate a bet on a horse race, to wit, an all-on bet one rupee win, one rupee place on a horse named 'St. Mungo' proposed to be run in a race meet in England on 21.4.1967 from one P, a bet in breach of section 3(3)(b) of the Betting on Horse Racing Ordinance.

The prosecution established

(i) that on 21.4.1967 a decoy went to the accused's premises showed him the news sheet (P4) called the *Grand Sporting News* purporting to contain the names of horses to run at a Race meeting at Thirsk in England and among these names was St. Mungo, as being a runner in the 4th race and asked him whether the horse St. Mungo will run, to which, after referring to the news sheet (P4) the latter replied in the affirmative.

(ii) that the decoy then gave the accused the marked two-rupee note and asked him to place the bet.

(iii) that the accused handed to the decoy chit P3 containing the following —

" Thirsk (4)
1/- St. Mungo 1/- 1729
(2/-) "

(iv) that the police subsequently found in the accused's possession the marked currency note and a chit book which contained the duplicate of P3.

(v) by producing issues of the *London Times* of 21.4.1967, that it published the name of St. Mungo as a 'declared runner' in the 4th race at the said Race Meeting of that day and by the issues of 22.4.1967 that it announced that St. Mungo ran unplaced in that race.

The Magistrate acquitted the accused on the ground that although he accepted the evidence that the accused received the bet yet the prosecution failed to prove that the horse 'St. Mungo' was proposed to be run in the race mentioned in the charge as the reports in the news sheet P4 and in the issues of the *London Times* would be only hearsay evidence and would be inadmissible to prove it.

The Crown appealed.

Held: (1) That a bet on a horse race is a contract known to the law as "wagering contract" (which under the present law in Ceylon is void) to conclude which there must be a *consensus ad idem* between the parties to lay and take the bet.

(2) That once the Magistrate believed the evidence of the decoy that he intended to place the bet aforesaid and that the accused agreed to take the bet and wrote out the chit P3 which recorded the consensus, it was established according to commonsense that there was a meaningful transaction, not a meaningless one.

(3) That the probability of such consensus having been reached became a certainty when the prosecution produced the two issues of the *London Times*, being a reputable newspaper containing lists of probable runners and of the results of horse races, (which are legal under the existing English Law) which publications as a matter of common knowledge were relied on by the members of the public in settling betting transactions as reasonably correct.

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(4) That therefore, when regard is had to the common course of human conduct and private business in relation to the practice on betting on horse races, the court is entitled to presume from the said two reports in the *London Times* in the absence of any evidence or reference to the contrary, that a horse named St. Mungo did run in a horse race which was actually run at Thirsk on 21.4.1967.

(5) That therefore it is an irresistible conclusion on the evidence which the Magistrate has accepted, that the accused did receive a bet on that race.

Distinguished: *Charles v. Kandiah* (1950) 52 N.L.R. 212.

Cases explained: *Mihindukulasuriya v. David* (1956) 57 N.L.R. 382.
Galahitiyawa v. Joseph (1966) 69 N.L.R. 152.

V. S. A. Pullenayagam, Senior Crown Counsel, with *S. C. B. Wadugodapitiya*, Crown Counsel, for the complainant-appellant.

G. E. Chitty, Q.C., with *T. W. Rajaratnam*, for the accused-respondent.

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

The accused in this case was charged that he did on 21st April, 1967 "receive or negotiate a bet on a horse race to wit: an all-on bet one rupee win, one rupee place, on a horse named 'St. Mungo' proposed to be run in a race meet (Spring Meeting Stakes) in England on 21st April, 1967 from D. L. Tudor Peiris of Walana, Panadura other than a taxable bet in breach of section 3(3)(b) of the betting on Horse Racing Ordinance, Chapter 44". The learned Magistrate acquitted the accused despite the fact that he accepted as true the evidence adduced by the prosecution, and this appeal is against the order of acquittal.

The prosecution established the following facts:-

(*a*) on 21.4.1967, a news sheet (P4) called the *Grand Sporting News* purported to contain the names of horses to run at a Race Meeting at Thirsk in England, and among these names was "St. Mungo", as being a runner in the 4th race;

(*b*) on that day, a decoy went to the accused's premises, showed him the news sheet P4, and asked him whether the horse St. Mungo will run; the accused then referred to the news sheet and replied that this horse will run at Thirsk;

(*c*) the decoy gave the accused a marked two-rupee note and asked the accused to place a bet Rs. 1/- for win and Rs. 1/- for place;

(*d*) the accused then wrote out and handed to the decoy the chit P3 which reads as follows:—

"Thirsk (4)
1/- St. Mungo 1/- 1729
(2/-)"

(*e*) the Police subsequently found in the accused's possession the marked currency note, and a chit book which contained the duplicate of the chit P3.

(*f*) issues of the *London Times* of 21.4.1967 published the name "St. Mungo" as a "declared runner" in the 4th race at the Thirsk Race Meeting of that day, and issues of 22.4.1967 announced that St. Mungo ran un-placed in that race.

In a careful judgment, the learned Magistrate held that the accused must be acquitted because the prosecution had failed to prove that "the horse St. Mungo was proposed to be run in the race mentioned in the charge." This fact in his opinion was not proved by means of the reports in the news sheet P4 and in the issues of the *London Times*, because those reports would only be hearsay evidence of that fact and were therefore not admissible to prove it.

The Magistrate relied on the judgment in *Charles v. Kandiah* (52 N.L.R. 212) decided by Gunasekera, J. The question in that case was whether two names, which appeared on what purported to be a betting slip, were the names of horses which were to run at a race meeting in India. The only evidence on this point was that of witness who described himself as the Editor of a newspaper published in Ceylon and called the Sporting Times. This witness stated that he had received information from correspondents in India, who so the witness said in turn had received their information from Racing Clubs in India, to the effect that two horses bearing the names appearing on the betting slip were due to run in India on the relevant date. With respect, I entirely agree with Gunasekera, J. that the evidence of the witness was hearsay and inadmissible as proof of the fact in question. The learned Magistrate was therefore right in holding that the reports in the *London Times* and in P4 could not be lawful proof of the fact that a horse named St. Mungo was a runner in the race referred to in the charge in the present case. But he wrongly thought that a subsequent judgment, on

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which the prosecution relied, had accepted a news paper report as proof of a fact stated therein.

In *Galahitiyawa v. Joseph* (69 N.L.R. 152), where the question was whether the names on two alleged betting slips were the names of horses due to run in races in England on a particular day, Sansoni, C.J. said that reports in the *London Daily Telegraph* and *Times*, which mentioned horses so named as being runners in two races, were "relevant evidence making it more probable, according to common sense and common knowledge, that the races mentioned were proposed to be run on that day". The learned Chief Justice also cited his own earlier judgment in *Mihindukulasuriya v. David* (57 N.L.R. 382), where he had in a similar context made the following observations:—

> "The fact of publication of the race programme containing the names of the horses mentioned in the betting slips must be considered in interpreting what those betting slips meant. The only possible interpretation, I think, is that those betting slips were records of unlawful betting on horse races. The use of the newspapers for this purpose does not depend on the contents of the newspapers in regard to the race programme being true. One is entitled to attach some meaning to what appeared in the newspapers in order to throw some light on the meaning of the betting slips."

Because the reasoning of Sansoni, C.J. has been wrongly regarded as being in breach of the hearsay rule, I would with respect attempt to explain that reasoning. A bet on a horse-race is a contract of the class well known to the law as a "wagering contract", although under the present law in Ceylon such a contract is void as being illegal. What the "layer" of such a bet offers is to contract that he will pay a specified sum if a horse named by him does not win a contemplated race; and the consideration for his offer is that the "taker" of the bet contracts that he will, if the named horse does win the contemplated race, pay a sum of money, the amount of which is either pre-determined or left to be determined by the "starting price" or the Totalizator returns. For such a contract to be effected, there must be a *consensus ad idem* between the parties to lay and take the bet. Thus the real question in case like the present one is whether there was such a consensus for a bet on a horse expected to participate in a race proposed to be run. Once the Magistrate believed the evidence of the decoy in this case that he intended to place a bet of Rs. 1/- for win and Rs. 1/- for place on the horse St. Mungo, and that the accused agreed to take the bet and then wrote out the chit P3, it was established that the two parties agreed to enter into a wagering contract. In other words, the oral evidence and the chit P3 established according to common sense that there was a meaningful, and not a meaningless, transaction.

Hence it became the duty of the Court to ascertain the meaning of the transaction, if the available evidence rendered the meaning clear. The true meaning, according to the decoy, was that the chit P3 recorded the consensus for a wager on a horse named St. Mungo in a race proposed to be run in England, and this consensus was reached because both parties read the news sheet P4 which announced that St. Mungo would run in such a race. The probability of such a consensus having been reached became in my view a certainty when the prosecution produced the two issues of the *London Times*.

Under existing English Law, betting on horse-races is legal, whether on a race-course or in a betting shop, and it is common knowledge that reputable newspapers publish lists of probable runners and also the results of horse races, and that members of the public place bets on horse-races in reliance upon such lists, and settle betting transactions in reliance upon such published results. Sansoni, J. was well aware that the lists do not prove that a particular race is proposed to be run, and I myself do not hold that the results published in the *Times* of 22.4.67 (P17) prove that the race was actually run.

Nevertheless, there is the fact that the *London Times* announced St. Mungo in its issue of 21st April as a probable runner in the 4th race at Thirsk, and the further fact that the *Times* of 22nd April announced that St. Mungo ran unplaced in that same race. In the language of section 114 of the Evidence Ordinance, when regard is had to "the common course of human conduct and private business" in relation to the practice of betting on horse-races, it is surely "likely to have happened" that St. Mungo did run in the particular race. To think otherwise would be to think quite unreasonably that the *London Times* perpetrates on its readers either stupid pranks or fraudulent deceptions. Even if Sansoni, J. did not intend so to hold, I hold that section 114 entitled a Court to presume from these two reports, in the absence of any evidence or inference to the contrary, that a horse named St. Mungo did run in a horse-race which was actually run at Thirsk on 21st April, 1967. That being so, it is an irresistible conclusion, on the evidence which the Magistrate has accepted in the instant case, that the accused did receive a bet on that horse-race.

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In view of the conclusion just stated, it is not necessary to consider the correctness of an opinion which I tentatively expressed during the argument of this appeal, which is that the writing and delivery of a chit such as P3 by an accused, in response to an offer to place a bet on a horse-race advertised in a news sheet such as P3, may suffice to establish an admission by the accused that the named horse was expected to be a runner in a horse-race "proposed to be run". If that opinion be correct, a bet which is laid and taken upon *a consensus ad idem* that a named horse is expected to run in a horse-race is an illegal bet, even if it is not proved that the race was actually run or proposed to be run.

The acquittal of the accused is quashed. He is convicted of the offence charged, and I sentence him to a fine of Rs. 500/- in default to a term of simple imprisonment of 2 months.

Acquittal quashed and accused convicted.

Present: **Weeramantry, J. and Thamotheram, J.**

KODITUWAKKU ARATCHIGE POTMAN

v.

THE INSPECTOR OF POLICE, POLICE STATION, DODANGODA

S. C. Application No. 594/70 — *M. C. Kalutara No.* 40691

In the matter of an application in Revision.

Argued on: 9th & 21st December, 1970

Decided on: 2nd January, 1971

Revision — Appeal from conviction — Appellant unrepresented at appeal — Dismissal of appeal after consideration by Court — Subsequent application in revision — Is the application barred? — When revisionary powers will be exercised in such a situation.

The accused petitioner appealed to the Supreme Court from his conviction and sentence on a charge of criminal trespass and the appeal was dismissed after consideration by Court. Thereafter this petition for relief by way of revision was filed by the accused who was unrepresented at the hearing of the appeal and it was demonstrated to Their Lordships that a conclusive piece of evidence which would have gone to the root of the entire case had not been brought to the notice of Court when the appeal was dismissed.

Held: (1) That althought the Supreme Court would be extremely hesitant and cautious before it makes any order in revision which is contrary to an order made by it in appeal in the same case, such an order in the exercise of its revisionary powers would be made in special circumstances where the original order is based upon a manifest error.

(2) That there being an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal, the Supreme Court would in the present case exercise its revisionary powers to grant relief and quash the conviction.

Distinguished: *P. C. Batticaloa* 8306 (1921) 23 N.L.R. 475
Police Officer of Mawella v. Galappatta (1915) 1 C.W.R. 197

Cases referred to: *Ehambaram and Another v. Rajasuriya* (1947) XXXIV C.L.W. 65
Nanhamy v. Ranawana (1961) 62 N.L.R. 573
Elosingho v. Joseph (1948) 49 N.L.R. 312.

Aloy Ratnayake, for the accused-petitioner.

Chulpathmendra Dahanayake, for the complainant-respondent.

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Weeramantry, J.

The accused-petitioner was charged with committing criminal trespass by entering a land in the occupation of one H. A. Gunadasa with intent to commit mischief and also with the destruction of three buildings, tiles and some cement slabs which were on this land. The learned Magistrate found the accused guilty on both counts and sentenced him to a term of six months' rigorous imprisonment on each count and a further fine of Rs. 100/- on count two.

An appeal was filed against this conviction. The appellant was unrepresented and the appeal was considered by court and dismissed. This petition for relief by way of revision was filed thereafter.

At the hearing before us it was demonstrated to us that the order of the learned Magistrate could not be sustained for a reason which had not been brought to the notice of this Court at the time the appeal was dismissed. Briefly this reason is as follows:

The accused-petitioner was the holder of a writing from one Danoris, the father of Gunadasa. Gunadasa on giving evidence himself admitted that the land belonged to his father. This writing which has been marked D1 states that Danoris conveyed all right, title and interest in the land and all plantations, household articles, timber, cement slabs and all other things on the land and all the buildings and household articles to the accused-petitioner for a sum of Rs. 450/-.

This writing is an informal writing and though it is of no force or effect in law it shows that when the accused entered the land and dealt with the materials thereon he was doing so under the authority of the owner. It was a complete answer to the criminal charge.

The main issue before the learned Judge was therefore the authenticity of the document P1 for the position of Danoris who was called as a prosecution witness was that the contents of this writing took him by surprise. He admitted his signature but stated that the document was represented to him by the accused to be only a writing to the effect that the property was being entrusted to the accused for the purpose of being looked after until the return of Danoris' son from hospital.

The main reason which would appear to have weighed with the learned Judge when he concluded that Danoris did not know the contents of the document, was that the document apparently took Danoris by surprise and that he expressed astonishment when the contents of the document were explained to him in Court. In fact this reaction of surprise so attracted the notice of the learned Judge that he has caused a record of it to be made at the time the witness was giving evidence and has made a particular point of it in his judgment.

There exists, however, upon the record a conclusive piece of evidence which demonstrates that Danoris' apparent astonishment in Court was a mere pretence; and had the learned Judge given his attention to this, there is no doubt he would have reached a different conclusion.

I refer to the evidence of the Grāma Sevaka, Samarasinghe, another prosecution witness, who stated that a few days after the alleged offence, when he met Danoris, Danoris did not make a complaint to him but told him that the accused had obtained a writing from him purporting to transfer this land to the accused. Danoris well knew therefore long before he gave evidence what this document contained and no further proof was necessary of the falsity of the position of surprise taken up by him in Court.

This conclusive piece of evidence was not brought to the attention of my brother Thamotheram who dismissed this appeal and my brother is strongly of the view that the failure to notice this demonstration of the falsity of Danoris' evidence goes to the root of the entire case.

No further reason is needed to indicate how an observation of this piece of evidence would have reversed the result of this case but it may be noted also in passing that one of the witnesses to the document is another son of Danoris, one Hendrick. It is highly unlikely that if the accused successfully perpetrated this fraud upon the father, he should also choose a son as a witness and should have been successsful in perpetrating a fraud on the son as well.

Upon our attention being drawn to this piece of evidence, learned Crown Counsel as well has very rightly stated that he does not attempt to support the conviction.

The next question is whether since we are satisfied that the verdict of the learned Magistrate should not stand, the dismissal of the appeal operates as a bar to our dealing with this matter in revision. This court would no doubt be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which this Court itself has made upon appeal, but there would appear to be a precedent for orders of this kind where the original order is based upon a manifest error.

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Shaw, J. acting in revision in P.C. Batticaloa 8306 (1921) 23 N.L.R. 475, varied an order he had made in appeal on the basis that his earlier decision was undoubtedly wrong and made *per incuriam*. Shaw, J. was relying on a judgment of Wood Renton, C.J. in *Police Officer of Mawella v. Galappatta*, (1915) 1 C.W.R. 197 where Wood Renton C.J. observed that it appeared to him that the powers of the Supreme Court were sufficiently wide to enable him to interfere by way of revision and to set aside as having been made per incuriam the order dismissing the appeal.

In *Ehambaram and Another v. Rajasuriya* (1947) 34 C.L.W. 65, Nagalingam, J. held that where the object of an application in revision was in fact to re-argue a case already decided the court cannot and could not entertain such application. He referred to the decision of Wood Renton C.J. and Shaw, J. to which I have referred and distinguished them as in the case before him the judgment made in appeal had been pronounced after counsel had been fully heard on behalf of the accused and in their petitions the petitioners were seeking to controvert some of the opinions expressed by the Supreme Court in its judgment on appeal as having been made *incuriam*. He further observed that the Court in delivering the judgment in appeal had not expressed its views *per incuriam* and that these views represented one line of thought upon certain disputed questions of fact which were debated in the Bar.

The present case is clearly different from the case before Nagalingam, J. for this is a case of an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal. In fact Nagalingam, J. observed in dismissing the application before him that this Court had modified or even vacated judgments pronounced in appeal when apprised of the fact that the Court had erred in regard to an obvious question of fact or of law.

In the recent case of *Nanhamy v. Ranawana* (1961) 62 N.L.R. 573, Sansoni, J. refused to reconsider an order made in appeal upholding the contention of Crown that there is no power to reinstate a criminal appeal which has been dealt with. This was based on a judgment of Basnayake, J. in the case of *Elosingho v. Joseph* (1948) 49 N.L.R. 312 to the effect that this Court had no power to reinstate a criminal appeal which had been dismissed in the absence of the appellant. It may be noted that in the case before Basnayake, J. it was not even suggested that the order was one made per incuriam, and the principle emerging from those two cases was different from that in issue before us, namely that this Court has no power to reinstate an appeal which had been dismissed in the absence of the appellant.

Having regard to the special circumstances of this case and the fact that the power of this Court in revision to correct or modify an order it has made in appeal appears to have been accepted over a long period of time, we think this is an appropriate case for the exercise of these powers. We accordingly act in revision and quash the conviction and acquit the accused.

Thamotheram, J.

I agree.

Accused acquitted.

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

H. M. TIKIRI BANDA *v.* R. M. DINGIRI BANDA & TWO OTHERS

S. C. 176/68 (*Inty*) — *D. C. Kurunegala* 2953/*P*

Argued on: 19th and 20th September, 1970
Decided on: 8th November, 1970

Kandyan Law — Devolution of acquired property of deceased who died leaving widow, a child by her, a child adopted during the subsistence of her marriage with the deceased, and a child by former marriage — Is the share of the child of former marriage subject to widow's life interest in half the estate — Kandyan Law Declaration and Amendment Ordinance (*Cap.* 59), *sections* 11 *and* 13.

A, a Kandyan, died after the commencement of Kandyan Law Declaration and Amendment Ordinance of 1939, leaving acquired property and his widow (3rd defendant) a child by her, the (2nd defendant), an adopted son(1st defendant) and a child by a previous marriage (the plaintiff) .The 1st defendant was born and adopted during the subsistence of the deceased's marriage to the 3rd defendant.

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Under section 11(1) of the said Ordinance the 3rd defendant was entitled to an estate for life in one half of the property and under section 13 the three children aforesaid to 1/3 share each.

The question arose as to whether the 1/3 share of the plaintiff (the child of the 1st marriage) is or is not free of the life interest in a half-share to which the widow is admittedly entitled.

Held: That the plaintiff's share is not subject to the widow's life interest as the *per capita* shares of the widow's own issue and that of the 1st defendant, whom it is proper to regard in this case as her issue, exceed one half.

Case referred to: *Hapu v. Esanda* (1924) 26 N.L.R. 298.

H. W. Jayawardena, Q.C., with *L. C. Seneviratne* and *G. M. S. Sameraweera*, for the plaintiff-appellant.

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

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

The facts in this action for partition are not in dispute. They are that one Appuhamy acquired the property which is the subject of the action, leaving his widow the 3rd defendant and a child by her who is the 2nd defendant, an adopted son who is the 1st defendant, and also a child by a previous marriage who is the plaintiff. It is also common ground between the parties that Appuhamy died after the date of the commencement of the Kandyan Law Declaration and Amendment Ordinance of 1939. Accordingly, sections 11 and 13 of that Ordinance govern the devolution of the property: the widow (3rd defendant) is entitled, under the first Proviso to section 11(1)(a) of the Ordinance, to an estate for life in one half of this property, and the plaintiff, the 1st defendant and the 2nd defendant are each entitled to a 1/3 share of the property. The only question in dispute is whether the 1/3 share of the plaintiff, who is the child of Appuhamy's first marriage, is or is not free of the life interest in a half-share to which the widow (the 3rd defendant) is admittedly entitled.

The learned trial Judge felt himself able to dispose of this difficult question of law without pronouncing an answer to it. He relied on the fact that, in the testamentary proceedings which followed Appuhamy's death, there was recorded a settlement by which it was agreed that the 3rd defendant is entitled to an interest for life in a "**half-share of the acquired properties of the entire estate**". On this basis, the decree for partition provides that one-half of each of the 1/3 shares, to which the plaintiff the 1st defendant and the 2nd defendant are respectively entitled, is subject to the life interest of the 3rd defendant.

The testamentary proceedings (marked D1 in the present case) show that the only matter in dispute in the Testamentary case was whether the present 1st defendant was duly adopted by the deceased Appuhamy. After evidence clearly establishing the adoption had been led, the settlement mentioned above was reached. Its effect was to settle the legality of the adoption and to recognize the adopted child's right to share equally with Appuhamy's natural-born children. I cannot agree with the learned trial Judge that the settlement decided the altogether different question, whether and to what extent the shares of each of the 3 children are subject to the widow's life interest. True, she has a life interest in one-half of the entire estate; but the other half is free of that interest, and the plaintiff's present claim is that he can take his one-third share out of this free half of the property.

The contention of Counsel for the plaintiff is that, when section 11 of the 1939 Ordinance declared that a surviving widow has a life interest in one-half of her deceased husband's acquired property, it gave statutory recognition to the decision in *Hapu v. Esanda* (26 N.L.R. 298). The deceased in that case was survived by the child of his first marriage and by the widow and issue of his second marriage; and the decision was that the first child "was entitled immediately to a half of the acquired property, subject to an equitable allowance in the event of it proving that the remaining one-half was insufficient for the maintenance of the widow and her own children." The decision obviously implied that the surviving widow had a

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life interest in the one-half share of the property which would ultimately pass on her death to her own children by her deceased husband; and section 11 of the Ordinance subsequently recognized that right of a widow. But apart from that, section 11 is silent as to the question whether or not the legal title of children of a former marriage is "encumbered" in favour of the widow.

Learned Counsel for the widow, and also the trial Judge, have relied on section 13 of the Ordinance, which provides that all children of a deceased inherit *per capita*, even when there are children of two or more marriage. But section 13 only has the effect that *the legal title* to the property devolves in equal shares on all surviving children. This section again is silent as to the question now under consideration.

Thus there is nothing in the Ordinance which purports to modify expressly the principle which the judgment in *Hapu v. Esanda* derived from the earlier authorities as being applicable in a case where there are children by two marriages: namely, the issue of the second marriage "are entitled to a moiety subject to the widow's right of maintenance out of that moiety", and "the widow must depend on the shares of her children". There is however, a modification which can arise by implication in consequence of the rule of *per capita* devolution stated in section 13. Where the share or shares on the widow's own issue is less than one-half, then the widow's right under section 11 to a life interest in one-yalf has to be "fed" out of the shares to which other children have title. But in a case where the shares of the widow's children do exceed one-half, the principle can apply, for she can then depend on the shares of her own children for her life-interest. Considering that a widow must maintain her children out of the proceeds of her life-interest, those children would have an unduly favourable double benefit if they have title to more than a half-share and yet enjoy the benefit of a contribution towards their maintenance out of the shares to which the issue of the former marriage have title.

I hold therefore that the *per capita* shares of children of any former marriage are not subject to the widow's life interest in a one-half share except if, and to such extent as, the *per capita* shares of the widow's own issue are less than one-half.

As already stated, the 1st defendant is an adopted child of the deceased, and the learned trial Judge has held that a half-share of his 1/3 share will be subject to the life-interest of the widow. Since no argument was addressed to us as to the correctness of this finding, my opinion on this matter has to be expressed with some hesitation. The evidence in the former Testamentary proceedings shows that the 1st defendant was born and adopted during the subsistence of the deceased's marriage to the 3rd defendant. That being so, it seems to me proper to regard the 1st defendant for present purposes as a child of this marriage, and not of the deceased's first marriage. (Had the 1st defendant been adopted before the deceased contracted his second marriage, the position could have been different, for he may then have had to be regarded as a child of a former marriage).

In the result, the position in this case is that of the three heirs who each have title to a 1/3 share of the property, two of them (the 1st defendant and the 2nd defendant) have to be regarded as the children of the marriage between the deceased and the 3rd defendant. Since the share of these two heirs (2/3) exceeds one-half, that share suffices to feed the widow's life interest, and the plaintiff's 1/3 share is free of that interest.

The order in the decree under appeal that "half share each of the shares allotted to the plaintiff 1st and 2nd defendants will be subject to the life interest of the 3rd defendant" is set aside, and the following is substituted therefore:—

> "Out of the 1/3 share allotted to the 1st defendant and to the 2nd defendant respectively, a 3/12 share shall in each case be subject to the life-interest of the 3rd defendant".

In the circumstances, I would make no order as to the costs of this appeal.

Thamotheram, J.

I agree.

Varied.

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Present: **Samerawickrame, J. and Pandita-Gunawardene, J.**

W. ROBISON FERNANDO *v.* S. HENRIETTA FERNANDO

S. C. 248/'68*F* — *D. C. Panadura* 9867/*D.* — (*with appeals S. C.* 96/'68 *Inty.* — *and S. C.* 260/'68*F*)

Argued on: 17th, 18th & 19th November, 1970
Decided on: 30th January, 1971

Conciliation Boards Act, No. 10 *of* 1958 (*as amended*), *sections* 6(*b*) *and* 14(1)(*a*) — *Courts Ordinance* (*Cap.* 6), *section* 62 — *Jurisdiction.*

Divorce action — Amendment of answer to plead objection to jurisdiction based on Conciliation Boards Act — Application to amend made after several trial dates — Amendment allowed — Objection to jurisdiction upheld and plaintiff's action dismissed — Has defendant right to raise such plea at so late a stage — Prejudice to plaintiff — Waiver of jurisdiction.

The plaintiff-appellant filed this action against his wife, the defendant-respondent for, a divorce on the ground of malicious desertion. Answer was filed denying the allegations and counter-claiming a decree for judicial separation. After the plaintiff's case was closed and after the defendant had given evidence an application was made by the defendant to amend the answer to enable him to raise the plea that the Court had no jurisdiction to try the case, as the dispute had not been referred to the Conciliation Board and the certificate annexed as required by section 14(1)(a) of the Conciliation Board Act No. 10 of 1958.

The learned District Judge allowed the amendment and despite objection that the defendant had waived to raise such plea as regards jurisdiction upheld the said plea and dismissed the plaintiff's action with an order to return to the plaintiff all alimony pendente lite obtained from him. The plaintiff appealed.

Held: (1) That in view of the defendant's

(*a*) counter-claim for judicial separation and the invitation to court to exercise jurisdiction in this action,

(*b*) applying for and obtaining an order for alimony *pendente lite* and receiving payments for a period of over two years,

(*c*) delay for nearly three years since the institution of action and the failure to raise this plea till the plaintiff had been put to much expense on the several trial dates already had and other prejudice caused to the plaintiff in consequence,

the defendant is precluded by delay and acquiescence form raising the objection to jurisdiction and in fact had waived it.

Per **Samerawickrema, J.** (*a*) "Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mere mortu* to raise the point even if the parties fail to do so."

(*b*) "The position however appears to be different where the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts. In such a case, it is for a party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts."

Cases referred to: *Farquharson v. Morgan*, 70 Law Times 152 at 153; (1894) 1 Q.B. 552; 10 T.L.R. 240
Marjan v. Burah, (1948) 51 N.L.R. 34 at 38; XL C.L.W. 81
National Coal Co. v. L. P. Dave, A.I.R. (1956) Patna 294
Kandy Omnibus Co. Ltd. v. T. W. Roberts, (1954) 56 N.L.R. 293

H. W. Jayawardena, Q.C., with *M. S. Nazeem* and *P. Edussuriya*, for the plaintiff-appellant and for the plaintiff-respondent in S.C. 96/'68 Inty. and S. C. 260/'68F.

C. Ranganathan, Q.C., with *S. Sharvananda* and *K. Kanagaratnam*, for the defendant-respondent and for the defendant-appellant in S.C. 96/'68 Inty. and S.C. 260/'68F.

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Samerawickrame, J.

The plaintiff-appellant filed this action against his wife the defendant-respondent seeking a divorce on the ground of malicious desertion. The defendant-respondent filed answer denying the allegations in the plaint and counter-suing for a decree for judicial separation. After the plaintiff's case was closed and after the defendant had given evidence, an application was made to amend the answer to raise the plea that the Court had no jurisdiction to try the case as the dispute had not been referred to the Conciliation Board and no certificate from the Chairman of the Panel of Conciliators had been annexed to the plaint as required by Section 14(1)(a) of the Conciliation Boards Act No. 10, of 1958. Objection to the application was taken on behalf of the plaintiff on the ground that the defendant had waived such an objection to jurisdiction. The learned District Judge made order allowing the application to amend the answer and thereafter upheld the plea to jurisdiction raised on behalf of the defendant and dismissed plaintiff's action but ordered the defendant to pay costs to the plaintiff and to return to the plaintiff all alimony pendente lite she had obtained from him.

Learned counsel for the plaintiff-appellant submitted —

(*a*) that a divorce action is not based upon a cause of action and that accordingly there was no dispute which may be a cause of action within the meaning of section 6(b) of the Conciliation Boards Act;

(*b*) that the defendant had waived objection to jurisdiction of the District Court.

It will be convenient to consider first whether the defendant-respondent was precluded by her conduct from raising an objection to jurisdiction.

Where the want of jursidiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mere motu* to raise the point even if the parties fail to do so. In *Farquharson v. Morgan*, Law Times 152 at 153, Halsbury L.C. said,

> "It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior court from exceeding its jurisdiction. That is to say, where the want of jurisdiction appears upon the libel, as in an ecclesiastical court, or upon the face of the record, and does not depend upon a matter of fact, and a cause is entertained by an inferior court which is clearly beyond its jurisdiction, no consent of parties will justify the Superior Court in refusing a prohibition."

In the same case, Lopes L.J. said,

> "The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by Lord Denman (6 N & M 176) to be for the sake of the public, because "the case might be a precedent if allowed to stand without impeachment" and I would add for myself, because it is a want of jurisdiction which the court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken."

The position however appears to be different where the want of jursidiction is not apparent on the face of the record but depends upon the proof of facts. In such a case, it is for a party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts. A Court has to proceed upon the facts placed before it and its jurisdiction must therefore depend upon them and not upon the facts that may actually exist. It is appropriate in this connexion to cite a dictum of Nagalingam, J. in the case of *Marjan v. Burah*, 51 N.L.R. 34 at 38:— "As stated by Hukm Chand (1894 ed. page 240) jurisdiction "does not depend upon facts or the actual existence of matters or things but upon the allegations made concerning them". Hukm Chand quotes a passage from Van Fleet in support:—

> "If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings .... A great deal of trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things instead of upon allegations made concerning them".

In the case of *National Coal Co., v. L. P. Dave* A.I.R (1956) Patna 294 at 297, Choudhary, J. said, "..... where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding.

In *Kandy Omnibus Co. Ltd. v. T. W. Roberts*, 56 N.L.R. 293 at 303, Sansoni, J. drew a distinction

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between patent and latent want of jurisdiction and he said, "When a Court has jurisdiction in particular cases which depend on the existence of a certain state of facts a person who admits, or does not challenge, the existence of those facts can estop himself from denying their existence at a subsequent stage of the proceedings".

There is no question in this case of any inherent want of jurisdiction. Section 62 of the Courts Ordinance confers jurisdiction on District Courts in all matrimonial matters. There was nothing on the face of the plaint or answer or of the proceeding until the application to amend the answer which could afford any reason to the Court to think it lacked jurisdiction. The objection to jurisdiction which the defendant sought to raise depended on the following facts which were set out in the amendment to the answer:—

1. That the matrimonial house was at No. 12, Molpe Road, Moratuwa.
2. That these premises were situate within the Moratuwa Urban Council area.
3. That a panel of Conciliators had been constituted for the Moratuwa Urban Council area as and from 2.6.65 and such panel of Conciliators was in existence at the date of action.
4. That the cause of action alleged in the plaint was that the defendant had left the matrimonial house and had refused to come back and had thereby maliciously deserted the plaintiff.
5. That the defendant's position was that she was compelled to leave and that she did not maliciously desert.
6. That the dispute was not referred to the panel of Conciliators and a certificate from the Chairman has not been produced.

These matters, particularly those set out at 2 and 3 above were not before the Court prior to the application to amend the answer.

The question for consideration therefore is whether at that time the defendant had precluded herself by waiver, delay or acquiescence from raising the objection to jurisdiction. The following matters are relevant:—

(i) By making a counter claim for a decree for judicial separation the defendant had invited the court to exercise jurisdiction in this action.

(ii) The defendant had applied for and obtained an order for monthly payment of alimony pendente lite and had received payments for a period of over two years.

(iii) A period of nearly three years had passed since the institution of the action.

(iv) The plaintiff had led all evidence andclosed his case and the defendant had given evidence and called two other witnesses to give evidence.

(v) The plaintiff had been put to much expense as there were several dates of trial apart from other interlocutory proceedings.

Having regard to these matters, and, in particular the prejudice to the plaintiff and the late stage at which the amendment was sought to be made, I am of the view that the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it.

In view of the finding at which I have arrived it is not necessary to consider the submission of the learned counsel for the appellant that a divorce action is not based on a cause of action.

I set aside the order allowing the amendment and the order dismissing the action and send the case back for decision on the other issues. As the defendant may have closed her case in reliance on this point it will be in the discretion of the District Judge to permit her to lead further evidence if he thinks it fit to do so. The order directing the defendant to pay the costs and to re-pay the amount received as alimony pendente lite are set aside. The defendant will in any event not be entitled to costs incurred in relation to the amendment of the answer to raise the objection to jurisdiction and the proceedings had in connection with it or to costs relating to the raising of issue No. 7 and the leading of evidence thereon and the proceedings had in connection with them.

The plaintiff-appellant will be entitled to costs of appeal.

In view of the order I have made, appeals numbered S.C. 96/'68 Inty. and S.C. 260/'68F filed by the defendant have become unnecessary and they are formally dismissed without costs.

Pandita-Gunawardene, J.

I agree.

Set aside and sent back.

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Present: **H. N. G. Fernando, C.J., Alles, J. and de Kretser, J.**

MARASINGHE BALAGALLAGE ARTHUR CHANDRASEKERA MARASINGHE & OTHERS
v.
TALUKKUWE KANKANAMALAGE AMURTHAWEERA SAMARASINGHE

S. C. 501/66(*F*) — *D. C. Gampaha* 10451/*RW*

Argued on: 22nd and 23rd July, 1970
Decided on: 3rd October, 1970

Servitude — Right of way acquired by prescription over a definite track — Is owner of servient tenement entitled to offer a deviation of route or track from such right of way acquired? — Roman Dutch Law.

Held: By Alles, J. and de Kretser, J. (*H. N. G. Fernando, C.J. dissenting*) That where a servitude has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track from the one over which the right has been acquired, provided the new route or track offered is equally convenient and serviceable to the owner of the dominant tenement.

Per **Alles, J.** "The law as laid down in Voet 8-3-8 in regard to the rights of the servient owner is applicable to servitudes created *simpliciter* and servitudes acquired by prescriptive user. This view is supported by an examination of the text in Voet 8-3-8, the principles of the Roman Dutch law found in the Commentaries and the South African texts and also in the decisions of the South African Court of Appeal.

The principles that have been considered by the learned Judges of the South African Court of Appeal appear to be that the servitude should be exercised, to borrow the words of Solomon, J. in *Rubidge v. McCabe and Sons* at p. 448, in a manner that would 'satisfy the legal claims of the owner of the dominant tenement' and also 'meet the convenience of the owner of the servient tenement'. In my view this is an eminently reasonable attitude having regard to the paramount consideration that the servitude should be exercised in a manner which will cause the least burden on the owner of the servient tenement."

Per **H. N. G. Fernando, C.J.** " In Ceylon there have been the three judgments of 1912, 1921, and 1935, which purport to apply the Roman Dutch Law, and which clearly declare that a servient owner has no right to deviate the line of a servitude acquired by prescription. In the absence of any contrary authority either in the Roman Dutch texts or in any decisions of our Courts, I am not persuaded of any reason why we should at this stage disagree with Ceylon decisions which are directly in point."

Cases referred to: *Garden Estates Ltd. v. Lewis* (1920) A.D. 450.
Rubidge v. McCabe and Sons (1913) A.D. 441.
Thambipillai v. Nagamanipillai (1950) 52 N.L.R. 225 at 227.
Costa v. Livera (1912) 16 N.L.R. 26 at 27.
Karunaratne v. Gabriel Appuhamy (1912) 15 N.L.R. 257.
Kandiah v. Seenitamby (1913) 17 N.L.R. 29.
Morgappa v. Casie Chetty (1913) 17 N.L.R. 31.
Dias v. Fernando (1935) 37 N.L.R. 304.
Sinnatamby v. Kathirgaman (1947) 47 N.L.R. 354.
Andiris v. Manuel (1909) 2 S.C.D. 69.
Van Heerden v. Coetzee, 1914 A.D. at p. 172

Overruled: *Madanayake v. Thimotheus* (1921) 3 C.L.R. 82.
Hendrick v. Sarnelis (1940) 41 N.L.R. 519.
Fernando v. Fernando (1929) 31 N.L.R. 126.

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Texts cited: Gane's Translation at pp. 471 and 472.
Van Leeuwen's Roman Dutch Law (1881) Book 11, Chap. XXI. Section 6. p. 294.
The Jurisprudence of Holland by Grotius — Cap. XXXV, Section 6. pp. 188, 189.
Lee's Introduction to Roman Dutch Law 3rd Ed. p. 172.
Wille — The Principles of South African Law (5th Ed.) p. 222.
Hall & Kellaway on Servitudes (1942) p. 122.
Institutes of South African Law — Vol. 11. p. 137

H. W. Jayewardena, Q.C., with *L. C. Seneviratne* and *B. Eliyatamby*, for the defendants-appellants.

C. Ranganathan, Q.C., with *M. Hussain*, for the plaintiff-respondent.

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

The only question which arises in this appeal is whether, when a servitude of a right of way across a land has been acquired by prescription, the owner of the servient tenement is entitled to deviate the route or track along which the right was acquired. In the present case, the defendants and their predecessors in title had acquired a servitude on a route which ran more or less across the centre of the plaintiff's land. The order of the District Judge, against which the defendants have appealed, is that the plaintiff is entitled to substitute a route along part of the boundary of the land, on the ground that this alternative route is equally practicable and convenient for the defendants.

An early case in which the question which arose in this appeal was considered is that of *Karunaratne v. Gabriel Appuhamy*, (1912) 15 N.L.R. 257. The question was not, however, decided in that case, because it had not been raised in the lower Court.

The same question arose again in *Madanayake v. Thimotheus* (1921, 3 C.L.R. 82), in which Schneider, J. examined the text of Voet 8.3.8 which is here set out from Gane's translation (Vol. 2 p. 471, 2):—

> "It is common to foot-passage, driving and right of way, nay to water-leading and to the drawing of water also that, when such a servitude over a farm has been granted in general terms, or has been so bequeathed by a testator, and no part of the farm has been allotted over which it is to be exercised, a choice of such part is enjoyed by the owner of the dominant tenement".
>
> * *
>
> "But in the second place also it is settled that he must thereafter pass or drive only by the way which he at first laid out, and that he no longer has the power to vary that way, so that the other parts of the farm beside that over which the servitude has been exercised are for the future deemed to be free, unless liberty to vary was also granted by covenant."
>
> "These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot-passage, driving or right of way a space different from that which was originally marked out by choice or by covenant, provided that no prejudice is created thereby to the owner of the dominant tenement."

Schneider, J. then made the following observations:—

> "These passages put it beyond any manner of doubt that the writer is speaking of only those servitudes which are created in a particular way, namely where the right is granted in general terms without mention of the route over which it is to be exercised. From the very terms of its creation the right is in theory exercisable over every part of the land. It is therefore necessary for principles to be laid down upon which the precise route should be determined, and Voet indicates what those principles are."
>
> * *
>
> "I am at a loss to conceive how those principles or any one of them can be made applicable to a servitude of way acquired by user for the necessary period of prescription over a definite route. It is not a right which can be said to extend over the whole of the servient tenement. It is acquired without the consent of the owner of the servient tenement and by possesion adversely to him. The reason given by Voet why the owner of the dominant tenement has the election of the route, and the owner of the servient the right to alter the route will not apply in the case of the acquisition of the right by prescription."

Schneider, J. also quoted the views of Lascelles, C.J. in *Karunaratne v. Gabriel Appuhamy*, which show a similar understanding that the principles stated in Voet are not applicable in the case of a servitude acquired by prescription.

In *Fernando v. Fernando* (1929, 31 N.L.R. 126), a Bench of two Judges adopted the reasoning of Schneider, J. and held that the owner of a servient tenement has no right to deviate the route of a right of way which had been acquired by prescription.

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Despite the full and able arguments which were submitted to us at the hearing of this appeal, Counsel had not been able to discover any statement in a Commentary on the Roman Dutch Law, other than the statement in Voet, regarding the diversion of the route of a right of way. Counsel appearing for the defendants has very properly conceded that the statement in Voet does not express the proposition that a deviation may be made in the circumstances of the present case. But Counsel relied on certain other decisions of our Courts, as well as a decision of the Appellate Division of South Africa, in support of this alleged right of deviation.

In *Costa v. Livera* (1912) 16 N.L.R. 26, the plaintiff claimed a right of way along the line marked d.....d, shown in the plan filed of record. The defendant admitted that the plaintiff had acquired a right of way by prescription along that line; but his case was that the parties had by mutual consent substituted a new route shown as a.....a for the former route, and that the plaintiff had lost the servitude of way over the line d.....d by abandonment or release. In the District Court, without evidence but upon a mere admission, it was decided that the plaintiff had used the new road. In appeal de Sampayo, J. thought that without more evidence it cannot be held that there had been abandonment of the servitude along the old line. He thereafter referred to the question whether the requirement of a Notarial Instrument for an agreement affecting land may create difficulty in a way of the substitution of a new route for that over which a right of way had originally been acquired by prescription. On this point, he approved the proposition that, where in the case of servitude acquired by prescription there is a deviation of the route, "the benefit of the old possession would attach to the new route." In this connection de Sampayo, J. stated that "after all, the essence of the servitude is the right of way over the servient tenement, and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over which the way lies, but the incorporeal right of servitude". The judgment in appeal ultimately left it open to the lower Court to find upon evidence whether or not there had been an agreed deviation from the old line to the new.

It will be seen that the question now before us did not in fact arise for decision in the case of *Costa v. Livera*. But Counsel for the defendant has relied upon the dictum which I have cited above from that judgment for his submission that in every case, except one in which a right of way has been defined in a grant, there are mutual rights and obligations of the parties with respect to the route along which the right is exercised. According to this submission the rule stated by Voet, that in a case of a grant *simpliciter* of a right of way without specification of a route, the servient owner may deviate in a convenient manner the route chosen by the dominant owner, is a rule applicable not only in the case of such a grant, but is equally applicable in a case where a prescriptive right has been acquired by long user of a specific route.

It seems to me that dictum of de Sampayo, J. must be read in the context in which it occurs. That distinguished Judge was considering a proposition that a prescriptive right of way is not lost if, after it has been acquired, there is an oral agreement to deviate the original route. He thought that proposition to be sound because the essence of the servitude is a right over the servient tenement, which right remains even though the manner of its exercise is altered *by an agreement to deviate the route*. Whatever was said in the judgment about the effect of an agreement to deviate from the original route, I cannot think that de Sampayo J. had in contemplation any possibility of a unilateral deviation by a servient owner.

Indeed in *Kandiah v. Seenitamby* (1913, 17, N.L.R. 29), de Sampayo, J. had occasion to refer to the passage in Voet which was considered by Lascelles, C.J. and Schneider, J. in the two earlier cases which I have cited, and he approved the following statement of Lascelles, C.J. in *Karunaratne v. Gabriel Appuhamy*:—

> "These principles (stated by Voet) appear to be limited to the case where the right of way was granted in general terms without specifying the exact course which it should follow. In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly limited."

In *Dias v. Fernando* (1935, 37 N.L.R. 304), there arose for decision the precise matter which de Sampayo, J. had earlier considered, namely, whether when there is an agreed deviation of the route of a right of way acquired by prescription, the prescriptive right of servitude is thereby lost. Koch, J. here followed the opinion of de Sampayo, J. and held firstly that the prescriptive right was not lost by deviation of the route, and secondly that a notarial instrument was not necessary for the Agreement to deviate. In effect the basis for that decision is that once the prescriptive right has been established over a servient tenement it is

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not lost by reason of a change in the manner of his exercise. Soertsz, J. agreed, but with much reluctance. The same principle that a servitude acquired by prescription is not lost because of a mere agreed deviation was recognised in *Sinnatamby v. Kathirgamu* (1946, 47. N.L.R. 354).

It will be seen that none of the decisions to which Counsel for the defendant referred dealt with a claim that a servient owner has a right to deviate the right of a servitude acquired by prescription, so that none of them supports Counsel's submission that such a right is recognised by some principle governing the law relating to servitudes.

The reason why (as Voet states) a servient owner has a right to make a reasonable deviation from that chosen by the dominant owner is in my opinion quite a simple one. When a grant *simpliciter* is made and there is no definition by the grantor of the line for the exercise of the right granted, there has necessarily to be some determination of the precise line; because the matter is left open in the grant, both parties continue, after the grant is made, to have rights concerning this determination; the grantee to elect a line and the grantor to offer a convenient alternative. As Voet pointed out, there is no scope for any such determination in the case of a defined grant, because the line for the exercise of the right has already been defined in the grant. In my opinion a servitude acquired by prescription is in this respect indistinguishable from one acquired by a specific grant.

In both these cases the line becomes established simultaneously with the servitude. At the time when a servitude becomes established by prescriptive user the line of the servitude is equally established by that user, and a servient owner has no right to participate in the determination of the line, any more than he has such a right of determination in a case where the determination has already been made in his own grant. In my view therefore a servient owner has in the case of a grant simpliciter a right to determine the line of this exercise of the servitude, only because there has not been an earlier final determination of the line. But in the case both of a defined grant, and of a servitude acquired by prescription, there is such a final determination and therefore no scope for any deviation, save by mutual agreement.

Counsel for the defendants relied heavily on the judgment on *Rubidge v. McCabe and Sons and Others* (1913, Appellate Div. 433). The plaintiffs had admittedly a right of way by prescription over the defendant's farm along the road which had been used since 1887. In 1904 the defendant without notice to the plaintiffs constructed a weir in the vicinity of the place where the road crossed a river. After some negotiations between the parties. it was agreed that the plaintiffs would accept another road crossing the river at a different point, and this alternative road was provided and used between 1904 and 1911. At that stage the defendant built another weir across the river near the new crossing, and it was common ground that this construction rendered it impracticable to cross the road which the plaintiffs had used for seven years. The defendant then offered yet another crossing of the river at a different point, and the plaintiffs agreed to accept this on certain conditions. Ultimately the dispute came to the Courts, which ordered that upon a money payment by the defendant to the plaintiffs, the defendant shall be relieved of the duty to construct a crossing, except a bridge which he must construct and maintain. In the alternative the defendant could provide a new causeway at a point specified in the order which the plaintiffs must use if the resident Magistrate was satisfied that it is safe and practicable.

This statement of the facts in the South African case makes it evident that the Court was concerned with circumstances in which the owner of a servitude acquired by prescription had at various times negotiated and agreed with the servient owner for deviations from the original line of the servitude; in fact during the period 1904 to 1911, the dominant owner had actually used a new line in substitution for the original line of the servitude, concerned some further negotiations for yet another deviation. In this context I must with great respect express my inability to understand why the Court thought fit to make general observations to the following effect:—

> "As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided — and this is a most important proviso — he does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs."
>
> * *
>
> "The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenement. And if that be the legal position it was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them."

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The passage from Voet which I have already reproduced above was cited during the course of the argument, but apart from the statements such as those now set out, there is no reference whatsoever in the judgments to any text which supports those statements of the law. In Ceylon there have been the three judgments of 1912, 1921 and 1935, which purport to apply the Roman Dutch Law, and which clearly declare that a servient owner has no right to deviate the line of a servitude acquired by prescription. In the absence of any contrary authority either in the Roman Dutch texts or in any decisions of our Courts, I am not persuaded of any reason why we should at this stage disagree with Ceylon decisions which are directly in point.

For these reasons I am unable to agree with my brothers that the previous decisions of this Court on the question involved should be over-ruled. In my opinion the plaintiff's action should be dismissed.

Alles, J.

This appeal raises an important question of law on which, unfortunately, the Judges before whom it was argued by eminent Counsel have not been able to reach unanimity. The learned Chief Justice and my brother De Kretser, J. whose judgments I have had the advantage of reading before preparing my own, have adduced reasons for their respective views on a question which is undoubtedly one of difficulty and acknowledged to be such by two previous Chief Justices of the Supreme Court.

The plaintiff, the owner of the servient tenement, instituted this action against the defendants as owners of the dominant tenements for a declaration that the defendants, who it is admitted were entitled to a right of way across the plaintiff's land by right of prescriptive user, were not entitled to the exercise of such a right. The plaintiff was prepared to grant a footway along the southern boundary of his land as an alternative to the existing route and the learned District Judge held, after an inspection of the land, that it was 'fair, just and equitable to permit the plaintiff to offer the alternative track to the defendants which will not cause any inconvenience or hardship or prejudice or any detriment to the defendants but will enable the plaintiff to develop his land which lies on either side of the original footpath.' In the light of this eminently reasonable view of the facts should the law be so intractable as to prevent the plaintiff from obtaining relief in a case in which the Court has held that he is justly entitled to the relief he claims?

The question of law which arises for determination in this appeal is whether, when a servitude has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track from the one over which the right has been acquired, provided the former route is as convenient and serviceable to the owner of the dominant tenement as the latter.

Before examining the decisions of the Ceylon Courts on this question, which have sought to interpret the Roman Dutch Law, I propose to examine that law and consider such decisions of the South African Courts which might be of assistance. It is not disputed that the law has been laid down in the text of Voet at 8-3-8 (Gane's translation at pp. 471 and 472) and I have set down below the relevant law as indicated by Voet and marked it as A, B, C, D and E for the purpose of ready reference.

A — It is common to foot-passage, driving and right of way ..... that, when such a servitude has been granted in **general terms, or has been bequeathed by a testator,** and no part of the farm has been allotted over which it is to be exercised, a choice of such part is enjoyed by the owner of the dominant tenement.

B — The reason for such a right of choice is that, where no part has been selected, the whole farm and every clod of it are deemed to be subject to the servitude.....

C — Nevertheless the power of choice belongs to the owner of the dominant tenement subject to his being obliged to behave civilly in making the choice.....

D — But in the second place also it is settled that he must thereafter pass or drive only by the way which he at first laid out, and that he no longer has the power to vary that way, so that the other parts of the farm beside that over which the servitude has been exercised are for the future deemed to be free, unless liberty to vary was also granted by covenant.

E — **These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot-passage, driving or right of way a space different from that which was originally marked out by choice or by covenant, provided that no prejudice is created thereby to the owner of the dominant tenement.**

In passage 'A' when Voet refers to a servitude granted in general terms or bequeathed by a testator, he is clearly contemplating the creation of a servitude **simpliciter.** It therefore became necessary to

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lay down certain rules whereby the right of the dominant owner to the exercise of the servitude had to be regulated and this had to be done in a manner which would cause the least possible burden on the owner of the servient tenement. The passages marked 'C' and 'D' seek to lay down those rules and bind the dominant owner to his choice which must be exercised by him **civiliter**. The resulting position is that once such a choice is made the rest of the land is free from the servitude. A further consequence of the choice being made by the dominant owner or by agreement between the parties as to the route chosen is, that there cannot be a variation by the servient owner except with consent and the route chosen or agreed upon becomes the only defined track over which the dominant owner can exercise his rights, leaving the rest of the servient tenement unburdened. It seems to me, therefore, that the passage marked 'E'which relates to the rights of the servient owner are quite independent of the rights of the dominant owner set down in the passages marked 'A' 'C' and 'D' in Voet's text.

In the case of a servitude acquired by prescriptive user, the dominant owner uses the land of his neighbour by an unilateral act choosing the track along which he proceeds and using it adversely to the interests of the servient owner for the duration of the prescriptive period. In order to acquire the servitude he has to proceed along a defined track. It would not be sufficient for him to prove that he had the general right to stray all over the land. In the case of a servitude created **simpliciter** the right of the dominant owner arises at the time of the creation of the servitude, be it by grant in general terms or by testamentary disposition, whereas in the case of a servitude acquired by prescription, the right is acquired at the end of the prescriptive period. In both cases the choice of the route is left to the dominant owner — in the one case he exercises his choice lawfully and in the other adversely to the servient owner. In both cases there must be a defined track over which the servitude has to be exercised. If this be a fair analysis of the legal position, I cannot see why the passage at 'E' of Voet's text cannot be made applicable to the case of a servitude acquired by prescription as well. It is significant that although Voet deals with the law of prescription in other Titles (8.4.2, and 3 and 4) in 8.3.8 he makes no reference to prescription when he refers to the right of the servient owner to offer an equally convenient alternative route to the dominant owner. I am of the view that Voet did not make this reference because he intended the principles of the law to be applicable in all cases whether the servitude is created **simpliciter** or acquired by prescriptive user. In either case the dominant owner suffers no prejudice. His legal right is protected and he is offered an equally convenient defined track for the exercise of that right. Needless to say, whether the alternative track is as convenient and suitable to the dominant owner would be a question of fact to be decided in the circumstances of each particular case. The fact that a defined track had been used for the duration of the prescriptive period without interruption would be a cogent factor which the Court is entitled to take into account in deciding this question.

There is another reason which inclines me to the view that the text in Voet 8.3.8, and, in particular the passage at 'E', can be made applicable to a servitude acquired by prescription. When Voet in that passage referred to the right of the servient owner to vary and to allot 'a space different from that which was originally marked out by choice or by covenant' (*quam prius* **electione** *vel conventione designatum fuerat spatium*) he was referring to the selection of the route by choice. In the case of a dominant owner who acquires a prescriptive user over a defined track also there is in fact a selection of the route or track by him.

In regard to the rights of the servient owner the Commentators on the Roman Dutch Law make no distinction whether the servitude is created **simpliciter** or acquired by prescription. In Van Leeuwen's Commentaries (Van Leeuwen's *Roman-Dutch Law* (1881) Book II, Chap. XXI Section 6. p. 294) the Commentator sets down the law stated by Voet and refers to those servitudes where the dominant owner had a choice but does not expand on the nature of the choice or as to how the servitude is created. He also states that the dominant owner is bound by his choice, 'which, however the owner of the *res serviens* may do (i.e. change the route) without inconvenience or hindrance to him who enjoys the servitude.' Lee's Commentary on the Jurisprudence of Holland by Grotius (Cap. XXXV, Section 6. pp. 188, 189) refers to the respective rights of the dominant and servient owners. He agrees that Voet 8.3.8 refers to servitudes created **simpliciter** as distinct from a servitude originally constituted which could only be altered by mutual consent. Lee then quotes a passage from the judgment of De Villiers A.J.A., in *Garden Estates Ltd. v. Lewis*, (1920) A.D. p. 450, to which reference will be made later in the course of this judgment. In the same note Lee makes reference to the leading case of *Rubidge v. McCabe and Sons* (1913) A.D. 441.

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Rubidge v. McCabe and Sons was strongly relied upon by Counsel for the plaintiff in support of the proposition that a servient owner had the right to offer an equally convenient alternative route even when the servitude was acquired by prescription. This was a decision of the Appellate Division of South Africa (Lord De Villiers, C.J., Solomon, J. and De Villiers, J.P.) and was admittedly a case where a servitude of a right of way had been acquired by prescription. Voet 8.3.4 and 8.3.8 was cited by Counsel in the course of the argument and the Appellate Court appears to have accepted the law as stated by Voet in applying it to the servitude acquired by prescription. Lord de Villiers was quite satisfied that the plaintiffs (the owners of the dominant tenement) had acquired a right of way by prescription over the defendants' farm to the main road but all three Judges concentrated on the question whether the divergence of the route suggested by the servient owner did in any way prejudice the dominant owner's rights. In doing so the learned Judges applied the law as stated in Voet.

At p. 441 de Villiers, C.J. stated this —

> 'As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement **the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided** — and this is the most important proviso — **he does not by such diversion** make the use of the road less convenient or more expensive to the plaintiffs'

Solomon, J. took the same view at p. 445 when he said

> 'The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of the right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it **was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them'**

and dealing with the alternative routes suggested by the defendant the same Judge said — at p. 448—

> 'As already stated, I am satisfied that neither of these in its present condition is such a road as the plaintiffs can be compelled to take. But the question remains whether it is not possible to improve both or either of them, so as to render them as safe, practicable and convenient to the plaintiffs as the road which crossed the river at the point T, and which they had used from 1904 to 1911'

De Villiers, J.P. in agreeing to the substitution of an alternative route said at p. 451 —

> 'There has not been any serious dispute about the law applicable to the case. The plaintiffs and their predecessors have from time immemorial enjoyed a right of way over the farm now owned by the defendant, and the defendant was not entitled to interfere with that right of way without their consent.....
>
> It is therefore, clear that the plaintiffs are in a position to demand that the defendant should provide them with a right of way across his property to the main road to Graaff-Reinet which is equally suitable to the road they had enjoyed before he constructed his second weir.'

The decision of the Appellate Court, therefore, establishes, in my view the proposition of law for which Counsel for the plaintiff respondent contends in this case. There is nothing in the judgment to indicate that the alternative right of way was decided by mutual consent and not in the exercise of the right of the servient owner to offer an equally convenient route. *Rubidge v. McCabe and Sons* was cited with approval by the Appellate Division in *Gardens Estate Ltd. v. Lewis*. This was a case where a servitude constituted in favour of the dominant owner and his heirs was definite and not created **simpliciter** and it was held that the Gardens Estates Syndicate, who were the successors of the dominant owner did not have the right to deviate the pipeline without the consent of the servient owner. De Villiers AJA who delivered the judgement of the Court stated:-

> 'A definite servitude having originally been constituted, it could only be altered by mutual consent. In this respect a **servitude as constituted** differs from a **servitude created simpliciter.** In the latter case according to Voet 8.3.8, the owner of the dominant tenement has the election where to lay the line, which he must however exercise civiliter. If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement would have the right to do so provided the new route is as convenient as the old one (*McCabe v. Rubidge* 1913 A.D. 441). When Voet, line 50 says that the owner of the servient tenement has the right to point out another route to that which has been agreed upon (*vel conventione designatum fuerat*) he speaks of servitudes created simpliciter. It follows that the Gardens Estate Syndicate had no right to deviate the pipe-line as it did, and the appellant having assumed liability for it in the declaration is responsible for this illegal act'

Although the learned Judge was dealing with a servitude that was constituted and not subject to alteration except by mutual consent, his reference to *McCabe v. Rubidge* can only mean that when the

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right of the servient owner to offer an alternative route arises for consideration in an appropriate case there is no difference whether the servitude has been created **simpliciter** or whether the servitude has been acquired by prescription. This view has been endorsed by Lee in his Commentary to the Institutes referred to earlier.

The case of *Rubidge v. McCabe and Sons* has been referred to in several texts on the Roman Dutch Law and is a leading case on the point. Reference has already been made to Lee's note in his Commentary to Grotius' Jurisprudence of Holland. In Lee's Introduction to Roman Dutch Law (3rd Ed. p. 172)he states the principles by which the direction of a way is it be determined and cites *Gardens Estates Ltd. v. Lewis* and *Rubidge v. McCabe* in regard to the servient owner's rights, making no distinction between the servitude created simpliciter and servitude acquired by prescription. In the Principles of South African Law by Wille (5th Ed.) p. 222) the same two cases are cited in support of the servient owner's right to divert the route. In Hall and Kellaway on Servitudes (1942) p. 122, these two cases are again referred to in connection with the rights of the servient owner. Maasdorp in his Institutes of South African Law (Vol. 11. p. 137) dealing with Water Servitudes, in support of the right of the owner of the servient tenement to alter the course of the furrow, provided the new route which he selects is as convenient as the former one, relied on these two cases.

From a consideration of the Commentaries of the Roman Duth Law and the Roman Dutch Law texts, it appears to me that in South Africa the Courts have concentrated on the fundamental principle that a servitude should be so used as to throw the least possible burden on the servient tenement. One important method by which this object could be achieved was by permitting the servient owner to offer as equally convenient and suitable route to the dominant owner in an appropriate case. It would also appear from the decisions of the South African Courts that in South Africa as far as the servient owner's rights were concerned, a servitude acquired by prescription was equated to the servitude **simpliciter.**

Although the decision in *Rubidge v. McCabe* was delivered in 1913, this decision appears to have been considered in Ceylon only thirty seven years later. In *Thambipillai v. Nagamanipillai* (1950) 52 N.L.R. 225 at 227, Gratien, J. quoting this decision seemed to take the view that it was possible for a slight deviation (for the convenience and concurrence of the parties) of a defined track over which prescriptive rights had been acquired. Had the decision in the South African case been brought to the notice of the learned Judges of our Courts before that year, the Ceylon decisions might have taken a different course.

In Ceylon, it seems to me, that the underlying principle that should be followed is laid down in the dictum of Justice Sampayo in *Costa v. Livers* (1912) 16 N.L.R. 26 at 27, where that distinguished Judge said, 'that the essence of the servitude is the right of way over the servient tenement and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over which the way lies, but the incorporeal right of servitude'. The correctness of this dictum has never been questioned although several learned Judges have subsequently referred to it in the course of their judgments.

Some of the decisions of the Supreme Court in Ceylon appear, however, to have taken the view that the law as stated at Voet 8.3.8 has no application to a servitude acquired by prescription. An early case in which the question arose was in 1912 in *Karunaratne v. Gabriel Appuhamy* (1912) 15 N.L.R. 257. The observation of Lascelles, C.J., though obiter, are however entitled to the highest respect. After explaining the law as laid down in Voet 8.3.8 the learned Chief Justice states as follows:—

> 'These principles are readily applicable to a system of law under which real servitudes were created only by agreement between the parties, and they appear to be limited to the case where the right of way was granted in general terms without specifying the exact course which it should follow. **In the system of law which prevails in Ceylon the rights of way are acquired by user under the Prescription Ordinance and the course or track over which the right is acquired is necessarily strictly defined.** How far the principles of the Roman Dutch Law to which I have referred are applicable to a case where the **right to pass over a defined track has been acquired by prescription is a question of some difficulty:** but so far as the present appeal is concerned the questions are purely academic.'

It will be noted that the learned Chief Justice inclines to the view that the principles set out in Voet 8.3.8 will not apply to a servitude obtained by prescriptive user although he choses to leave the question open. When Lascelles, C.J. referred to the system of law prevalent in Ceylon he no doubt had in mind the provisions of the Prescription Ordinance. But the law of Prescription existed in South Africa as well at the time the decision in *Rubidge v. McCabe and Sons* was delivered.

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The authority that was strongly relied upon by Counsel for the defendants however, was the decision of Schneider, J. in *Madanayake v. Thimotheus* (1921) 3 C.L.R. 82 where the facts were very similar to the facts to the present case and where the same proposition of law was enunciated. The trial Judge in giving judgment in favour of the servient owner held that the deviation was 'practically as serviceable as the former route.' After citing Voet *in extenso* the learned Judge explains the law there stated. Dealing with the concluding passage in Voet's text where the servient owner is given the right to offer an alternative route, provided it does not prejudice the owner of the dominant tenement, Schneider, J. makes the following observation —

> 'The reason for this **must be the same** as that given by Voet why the owner of the dominant tenement should have the right of election, namely, that by its creation the servitude is a burden on the whole land.....'

I am in agreement with my brother de Kretser, J. that this reason does not bear critical examination. The reason given by Voet for the election by the dominant owner has no relevance to the right of the servient owner to offer the alternative route. Once the dominant owner makes his choice over a defined track the rest of the land is free of the servitude. Therefore the servient owner's right to offer the alternative route from out of his unburdened land is independent of and quite distinct from the rights of the dominant owner which had to be regulated in a manner to cause the least possible burden on the servient owner. When Voet set down the passage at 'E' of 8.8.3 he merely sought to emphasise that what he had stated earlier in that Title did not in any way affect the servient owner's right to offer an equally convenient alternative track. In my view this right he was entitled to exercise whether the servitude was created **simpliciter** or acquired by prescriptive user. The only exception to this rule would be when the servitude is created by a grant in which case the servient owner is bound by the terms of the grant. (*Gardens Estates Ltd. v. Lewis* (supra))

In *Fernando v. Fernando* (1929) 31 N.L.L.126, a Bench of two Judges (Fisher, C.J. and Drieberg, J.) followed the decision of Schneider, J. in *Madanayake v. Thimotheus* but the learned Chief Justice who delivered the judgment of the Court did not make a critical analysis of the reasons given for the opinion expressed by Schneider, J.

With respect, therefore, I am unable to agree with My Lord the Chief Justice that these three decisions have settled the law on the point in Ceylon. There are two other decisions of our Supreme Court — *Hendrick v. Sarnelis*, (1940) 41 N.L.R. 519 and *Thambapillai v. Nagamanipillai* (1950) 52 N.L.R. 225 at 27, which Counsel for the defendant has cited in support of his case and must be considered. I will deal with these decisions after considering the dicta in the decisions of our Courts which seem to support the plaintiff's contention.

The decision in *Karunaratne v. Gabriel Appuhamy* was delivered on 5th June, 1912 and it is not unlikely that when Sampayo, J. delivered his judgment in *Costa v. Livera* on 29th July of the same year the learned Judge was not aware of the views of Lascelles, C.J. In *Costa v. Livera* the parties admitted the existence of the servitude and Sampayo, J. took the view that for the purposes of prescription the benefit of the possession of the old route attached to the new route. The case was however remitted to the trial court for a consideration of the evidence on the lines suggested by Justice Sampayo.

Sampayo, J's views in *Costa v. Livera* are not inconsistant with his decision in the later cases of *Kandiah v. Seenitamby* (1913) 17 N.L.R. 29. In that case the question that arose for decision was whether a right of servitude existed and the Judge held that Voet 8-3-8 had no application in the circumstances of the case. He however agreed with Lascelles, J. in *Karunaratne v. Gabriel Appuhamy* and Wendt, J. in C.R. Mallakam 16,080 that the evidence to establish a prescriptive servitude of way must be precise and definite. In the circumstances there was no necessity for the learned Judge to refer to his earlier decision in *Costa v. Livera*. Ennis, J. in *Morgappa v. Casie Chetty* (1913) 17 N.L.R. 51, also held that in the case of a track claimed by prescriptive user, the track must be strictly defined, and distinguished *Costa v. Livera* because in that case the existence of the right of way was admitted. The view expressed by Sampayo, J. in *Costa v. Livera* was followed by Koch and Soertsz, JJ. in *Dias v. Fernando* (1935) 37 N.L.R. 304. where the dominant owner had used a definite track for seven or eight years. Thereafter it became necessary to effect a deviation by the construction of some steps abutting on the main road as a result of some improvements being effected to the road by the authorities. The question that arose for determination was whether the new defined track could be claimed by the dominant owner without a notarial agreement or without user for the prescriptive period. Koch, J. followed the reasoning of Sampayo, J. in *Costa v. Livera* and held that a servitude, being essentially an incorporeal right over a servient tenement and the

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particular route affecting only the manner of its exercise and the incorporeal right being not immovable in its nature, a deviation in the particular route by an arrangement between the parties did not affect such incorporeal right, which continued to exist and could be exercised over the substantial track without the necessity for a notarial instrument. Soertsz, J. though agreeing with Koch, J. had doubts about the correctness of the principle, a doubt which was shared by Gratien, J. in the later case of *Thambipillai v. Nagamanipillai.* Soertsz, J. felt 'that the incorporeal right and the particular track are inseparable and that the incorporeal right once acquired had no existence independent of the track. In other words the right does not exist in the abstract.' His view was that when a new track was substituted for the old one, it seemed incomplete to say that the change affected only the maner of exercising the right without a new incorporeal right was created. With all respect to Justice Soertsz, I cannot see that a new incorporeal right has been created. Once the period of prescription was completed, an incorporeal right to traverse over the land of the servient owner came into existence. This right was inseparable from the track over which the dominant owner travelled for the duration of the prescriptive period. By the servient owner offering an equally convenient defined track the incorporeal right which was vested in the dominant owner became merged in the new defined track and the incorporeal right did not exist in the abstract but existed in conjunction with the new defined track. The decision in *Costa v. Livera* was considered by Cannon and Jayetilleke, JJ. in *Sinnatamby, v. Kathirgaman* (1947) 47 N.L.R. 354. Jayetilleke, J. who, as Counsel, successfully argued for the dominant owner in *Costa v. Livera* held that when a right of way has been acquired by prescripton and a new route substituted by agreement for the old route the benefit of the old possession would attach to the new route.

In *Dias v. Fernando* and *Sinnatamby v. Kathirgaman* there was a mutual agreement between the parties to alter the route and the deviation consisted of a portion of the old track and part of the new track, whereas in the present case, except for a minor portion of the track which was over the land of one Ramanayake, who is not a party to this action, the entire portion of the alternative track offered by the servient owner lies over the land of the plaintiff. There was also no agreement between the parties, but the plaintiff relied on his legal right to offer the alternative track. If the Roman Dutch Law made no distinction between a servitude created *simpliciter* and a servitude acquired by prescription in regard to the rights of the servient owner, I do not see in principle any difference between an agreed deviation and a deviation offered only by the servient owner. In either case the deviation must proceed on the basis of a legal right that it is possible to make such a deviation. The principle is based on the dictum of Sampayo, J. in *Costa v. Livera* followed in the later decisions in *Dias v. Fernando* and *Sinnatamby v. Kathirgaman.* The question that arose for decision in *Hendrick v. Saranelis* was identical with the question that was before Sampayo, J. in *Costa v. Livera* and Koch, J in *Dias v. Fernando.* Howard, C.J. while realising the difficulty in reconciling the decisions which discussed the problem, refused to follow the decision of Koch, J. in *Dias v. Fernando* and took the view that the dictum of Sampayo, J. was no authority for the proposition accepted by Koch, J. He follows the decisions in *Madanayake v. Thimotheus* and *Karunaratne v. Gabriel Appuhamy.* The reason why the learned Chief Justice considers Koch, J's reasons to be faulty is because Koch, J. states that 'if the views in *Karunaratne v. Gabriel Appuhamy, Fernando v. Fernando, Madanayake v. Thimotheus, Andiris v. Manuel* and *Morgappa v. Casie Chetty* are carefully examined it will be found that the correctness of De Sampayo's opinion has never been questioned: The learned Chief Justice in connection with this passage, states that scrutiny of the reports of the cases mentioned by Koch, J. indicates that *Costa v. Livera* is not referred to in *Karunaratne v. Appuhamy, Fernando v. Fernando, Andiris v. Manuel* and *Madanayake v. Thimotheus.* 'It is therefore difficult to understand,' says he, 'how Koch, J. could draw any deduction as to the soundness of the decision in *Costa v. Livera* from the fact that Sampayo, J.'s opinion was not questioned.'

Costa v. Livera could not be referred to in *Karunaratne v. Gabriel Appuhamy* for the obvious reason that the judgment in the latter case was delivered prior to Sampayo, J's judgment in *Costa v. Livera, Andiris v. Manuel* (1909) 2 S.C.D. 69, was a criminal appeal decided in 1909 six years before *Costa v. Livera* saw the light of day; it is a misdirection of fact to say that Schneider, J. did not refer to *Costa v. Livera* in *Madanayake v. Thimotheus* and there was no necessity for the learned judges in *Fernando v. Fernando* to refer to *Costa v. Livera* in their judgments, because they followed *Madanayake v. Thimotheus* without question. Therefore the reasons of the learned Chief Justice for failing to consider the dictum of Sampayo, J. in *Costa v. Livera* does not bear examination. What Koch, J. sought to maintain was, that in the cases

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referred to by him in *Fernando v. Dias*, the dictum laid down in *Costa v. Livera* has been unshaken even though some of these decisions were prior to 1912 and others subsequent to that decision.

The observations of Gratien, J. in *Thambipillai v. Nagamanipillai* at p. 226 are obiter because the issue in that case was whether a servitude was acquired by prescription. The evidence was to the effect that the defined route only existed for two or three years and that for the rest of the prescriptive period the right had been exercised in a general way and not along a particular track. Here too when the learned Judge cites *Kandiah v. Seenitamby* and *Morgappah v. Casie Chetty* in support of the proposition that the substitution of one track for another has no application in cases where a servitude is claimed by virtue of prescriptive user, the learned Judge is not quite accurate, for, these decisions, as I stated earlier only support the proposition that in order to establish a servitude by prescription, there should be a well defined track in existence.

I have endeavoured to discuss the Roman Dutch law and the South African decisions which appear to be relevant to the question at issue. I have also discussed the decisions of our Courts where the learned Judges of this Court have considered this difficult problem. Before I conclude I desire to summarise my findings in support of the view that the plaintiff's action in this case is entitled to succeed.

The paramount consideration to be taken into account is that the servitude must be exercised in a manner which will cause the least possible burden on the servient owner and one method by which that object can be achieved is by granting the servient owner the right to offer an equally convenient route to the dominant owner. The law as laid down in Voet 8.3.8 in regard to the rights of the servient owner is applicable to servitudes created *simpliciter* and servitudes acquired by prescriptive user. This view is supported by an examination of the text in Voet 8.3.8, the principles of the Roman Dutch law found in the Commentaries and the South African texts and also in the decisions of the South African Court of Appeal.

The principles that have been considered by the learned Judges of the South African Court of Appeal appear to be that the servitude should be exercised, to borrow the words of Solomon, J. in *Rubidge v. McCabe and Sons* at p. 448 in a manner that would 'satisfy the legal claims of the owner of the dominant tenement' and also 'meet the convenience of the owner of the servient tenement'. In my view this is an eminently reasonable attitude having regard to the paramount consideration that the servitude should be exercised in a manner which will cause the least burden on the owner of the servient tenement. If such be the case, why should not the owner of the servient tenement offer an equally convenient alternative route to the dominant owner which does not prejudice him in any way? For the same reason why should the servient owner by being deprived of this right in the case of a servitude acquired by prescription have his land burdened for ever by this fetter — a burden which will bind him and his heirs for all time? There may be a variety of legitimate reasons why the owner of a servient tenement may not have been able to develop his land and avoid the dominant owner from obtaining a right of way by prescriptive user — lack of funds, absence from the Island, transfers as a public servant from one station to another, to mention a few. In later years he may contemplate developing his land either for an agricultural purpose or a housing estate or a residence for himself. Why should such a owner be condemned for ever to carry a burden over a part of his land? If concessions can be allowed to a servient owner in the case of a servitude created *simpliciter*, there is more cogent reason why such concessions should be allowed in the case of a servitude acquired by prescriptive user.

In Ceylon it has been held that in order to establish a servitude by prescription there must be a defined track (*Karunaratne v. Gabriel Appuhamy*, *Kandiah v. Seenitamby* and *Morgappa v. Casie Chetty*) but the possession by the dominant owner of the old route can be utilised for the purpose of proving prescription over the new route when the deviation is created by mutual consent (*Costa v. Livera*, *Fernando v. Dias* and *Sinnatamby v. Kathirgaman*). If a defined route by prescriptive user can be established by mutual agreement, there is no reason in principle why the servient owner should not be permitted to offer an equally convenient defined route which causes no prejudice to the dominant owner, when the law gives him such a right.

The decisions in *Madanayake v. Thimotheus*, *Fernando v. Fernando* and *Hendrick v. Sarnelis* should be overruled as they have been wrongly decided.

I take the view that the learned trial Judge was justified in the view he took in giving judgment in favour of the plaintiff. With changing social condi-

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tions and the need for developing one's own land to its fullest extent it would in my view, be a denial of justice to the servient owner, to hold otherwise.

I would dismiss the appeal with costs.

de Kretser, J.

The plaintiff in this case admitted that the defendant had acquired by right of prescriptive user a right of way over his land Galabodawatta along the track A, B, C, D, E, F shown on Plan 7111 of 22.6.63 marked X and filed of record. Plaintiff claimed that as owner of the servient tenement he was entitled to deviate the right of way along the route E, B, Q, R, B, A shown on the same plan.

The trial Judge who inspected these routes was satisfied that the route offered was 'not less convenient or more expensive to the defendant and that it was equally practicable to the defendants except that it was a little more distant by some yards'. He was satisfied that if the route was allowed, it would enable the plaintiff to develop his land fully.

The question of law that then arose on his finding of fact was, 'given a right of way acquired over a definite track by prescription has the owner of the servient tenement the right to assign a different track provided that the latter is as serviceable as the other?

That question was directly before Justice Schneider in the case of *Madanayake v. Thimotheus* (1921) 3 C.L. Rec. 82) who unhesitatingly answered it in the negative.

An examination of the case of *Madanayake v. Thimotheus* shows that the trial Judge in coming to the conclusion that the owner of the servient tenement was entitled to alter the route, relied on the following passage from Voet:

> 'Quae tamen non impediunt, quo minus domino praedii 'servientis' mutare liceat, et aliud, quam prius electione vel conventione designatum fuerat spatium ad iter, actum viam assignare; si modo, nullum indepraedii dominantis domino praejudicium generetur.' (Commentarius ad Pandectas) (VIII-3-8).

In dealing with the appeal Schneider, J. was of the view that this passage appearing as it does in Voet 8.3.8. with the passages in which Voet is dealing with how the route over which the servitude is to be exercised is determined in those cases where the incorporeal right of Servitude is granted or bequeathed in general terms, has no application outside that context.

It is to be observed that Voet himself gives the reason for the need for selection as follows:

> 'The reason ..... is that then no part has been pointed out, the whole farm and every particle of soil on the farm is supposed to be subject to the burden of the servitude.'

Voet points out that once the owner of the dominant tenement has made his selection, ... 'he has not afterwards the power of changing it; so that every part of the land other than that on which the servitude is exercised is for the future considered unburdened.'

The passage quoted above which gives the right to the owner of the servient tenement to alter the route, contains no reason given by Voet as to why it should be so, and Schneider, J. hazards the opinion' "the reason for this must be the same as that given by Voet why the owner of the dominant tenement should have the right of election, mainly that by its creation the servitude is a burden upon the whole land" That reason in my view does not bear examination for, with the selection of a route by the owner of the dominant tenement the rest of the land is free from the servitude. It appears to me rather that Voet, in putting in this passage after setting out the principles that guide the selection of the route where the grant or bequest is general in nature, wants to emphasize, that in no way is there taken away the inherent right of the owner of the servient tenement to claim that the fetter over his land should be exercised in the way finds least oppressive. That is why in the words of Voet 'nothing in this prevents the owner of the servient tenement from making a change, and fixing on some other part of his property for the exercise of the right of passage, or of driving, or of way, than that determined on previously, either by election or by the agreement; provided only that this change in no way prejudices the owner of the dominant tenement' Now what difference would it make that the right of servitude has become vested in the dominant tenement not in consequence of a selection made under a general grant, but by the user of a particular track for the period necessary in terms of the prescriptive ordinance?

It is now settled law that it is a prerequisite to the acquisition of a right of way by prescription that a well defined and identifiable course or track should have been adversely used by the owner of the dominant tenement for over ten years, but the fact that that is how dominant tenement became vested with the servitude does not make the continued use of the track thereafter anything more than the manner in which the servitude now vested is exercised. This aspect of the matter was

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first pointed out by De Sampayo, A.J. in *Costa v. Livera* (1912) (16 N.L.R. 26) when he said 'After all the essence of the servitude is the right of way over the servient tenement, and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over which the way lies but the incorporeal right of servitude.'

As Lee in his Introduction to Roman Dutch Law 3rd ed. page 172 — citing as authority Van *Heerden v. Coetzee* 1914 A.D. at page 172 says:

'The principle is general that the owner of the dominant property must keep strictly within the terms of the servitude'. It is therefore not strange that the owner of the dominant tenement cannot exercise the right of way obtained by prescription over any other part of the land. That results from the fact that by the use of the particular track which gave birth to the servitude he had already made his choice of where he wanted the route and he had no right over any other part of the land. It will be seen therefore that he is in no worse position than the owner of the dominant tenement who has obtained his right by a general grant or bequest and has exercised his right of selection. which selection he is bound by. But all this does not affect in my opinion, the right of the owner of the servient tenement to ask that in the exercise of the right, as little burden as possible should be cast on the servient tenement.

It appears then to me that there is no good reason that can be urged why it should not be open to the owner of the servient tenement with that object in view, to ask that the manner in which the servitude is exercised, namely the route should be altered in such a way that while it causes no prejudice to the owner of the dominant tenement, it results in less oppression to the servient.

The object of the owner of the dominant tenement is to be able to go across the servient land, and if that object is preserved to him by the offering of a route in regard to which the finding of fact is that it is one which would cause him no more inconvenience, it is difficult to understand on what footing he could resist the change.

It is of importance to note that in South Africa, as far back as 1913 in the case of *Rubige v. McCabe* (S.A.L.R. 1913, A.D. 433) in dealing with a servitude of right of way which the Court was satisfied had its origin in prescriptive user, Lord de Villiers, C.J. laid down the law as follows:

"The legal position is therefore, that a servitude exists, the plaintiffs' farms being dominant tenements and the defendant's form servient tenement. As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement the defendant has the right after due notice to the plaintiffs, to divert the course of the road provided— and this is a most important proviso — he does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs.' and Solomon, J. who agreed with him laid down the law as follows:— 'The evidence, in my opinion does not establish that there was a public road over the farm, but rather that a servitude of right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them."

This statement of the law has never been questioned so far as I have been able to ascertain in South Africa.

In Ceylon the decision in *Madanayake v. Thimotheus* was followed in *Fernando v. Fernando* (1929, 31 N.L.R. 126) by Fisher, C.J. with whom Drieberg, J. agreed. In following the judgment of Schneider, J. in *Madanayake v. Thimotheus* Fisher, C.J. said as follows:—

'The appellant's Counsel mainly relied upon certain passages from Voet in Book VIII C. 3 S. 8 in support of his contention. These passages have no reference to a right of way acquired by prescription. They are set out in the judgment of Schneider, J. in *Madanayake v. Thimotheus* and the learned Judge says in this judgment that they 'put it beyond any manner of doubt that the writer is speaking of only those servitudes which are created in a particular way, namely, where the right is granted in general terms without mention of the route over which it is to be exercised. The sole question, therefore is whether the right acquired is over the track used in process of acquiring it. In my opinion it is. User of a definite track is the only way in which a right of way over the land of another can be acquired by prescription (see *Karunaratne v. Gabriel Appuhamy* and *Kandiah v. Seenitamby*) and in the absence of any authority to the contrary it seems to me that the necessary and obvious consequence is that the right acquired is over the definite track.

While it is beyond question that in Voet 8.3.8 Voet is dealing with the grant of a servitude *simpliciter* and in such a case how the route is to be

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selected and by whom, the question whether, because Voet makes mention in that context as follows:

"These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot passage, driving or right of way a space different from that which was originally marked out by choice or by convenant, provided that no prejudice is created thereto the owner of the dominant tenement."

It follows that the right of the servient owner so set out is limited only to cases in which the grant is *simpliciter*, has not been gone into in *Fernando v. Fernando* and has been taken for granted.

I have already set out why the reasoning of Schneider, J. on this point does not appeal to me. In the result in my opinion *Fernando v. Fernando* carried the matter no further.

The other decisions in Ceylon cited at the argument, commencing with *Costa v. Livera* (1912, 16 N.L.R. 26), *Dias v. Fernando* (1935, 37 N.L.R. 304), *Hendrick v. Saranelis* (1940) 41 N.L.R. 519), *Thambipillai v. Nagamapillai* (1950, 52 N.L.R. 225). are all concerned with the question whether a notarial document was necessary to give legal validity to a change of route where, by mutual consent there was substituted a new route for an original route acquired by prescriptive user. They appear to me to be of little asistance in coming to a conclusion as to whether the owner of the servient tenement is entitled as of right to change the route.

After drafting the main portion of this judgment I had the privilege of reading the draft judgment of My Lord The Chief Justice and it is a matter of regret to me that I find myself unable to agree with it. In the course of his judgment he says.

"In my view therefore a servient owner has in the case of a grant *simpliciter* a right to determine the line of this exercise of the servitude only because there has not been an earlier final determination of the line. But in the case both of a defined grant and of a servitude acquired by prescription there is such a final determination and therefore no scope for any deviation, save by mutual agreement."

With respect, with the selection of the line by the owner of the dominant tenement there is a line determined as final so far as the dominant owner is concerned as where the line is fixed in the grant itself or in the acquisition of the right of servitude by prescriptive user. I think it necessary to repeat that in the grant *simpliciter*, once the owner of the dominant tenement has made his selection in accordance with the rules set out by Voet, the line for the exercise of the servitude is established and in the establishment of that line the wishes of the owner of the servient tenement play no part. The owner of the servient tenement cannot change the line where it is fixed by grant even if he offers a route as convenient as the earlier one for the reason that as Voet points out in 8.3.8. the route has been precisely picked by the grant that creates the servitude. In such a case, the owner of the servient tenement would not be able to derogate from the grant given by one who had the right to burden the servient tenement in a manner which was pleasing to the grantor. In the case of the grant *simpliciter* he has no such handicap and can from time to time offer a route which he finds more convenient for the use he wishes to make of his land provided the route causes no prejudice to the dominant owner.

He has that right because the Roman Dutch Law is that all rights of way must be exercised so as to burden the servient property as little as possible vide-the authorities given by Lee 3rd ed. on Roman Dutch Law page 172. It appears to me that the fact that the owner of the dominant tenement has obtained his servitude by the prescriptive use of a particular track, is no bar to the owner of the servient tenement's right to have the track altered to one which is as convenient to the dominant owner. What is 'as convenient' is a question of fact, and as to why the owner of the dominant tenement went along that particular track that resulted in his obtaining a servitude of a right of way will probably have a bearing on that question. In my opinion, the decisions in *Madanayake v. Thimotheus* and *Fernando v. Fernando* must be over-ruled, and the appeal in the instant case from the decision of the District Judge that the plaintiff is entitled to deviate the path on the proposed route which the District Judge has found will not "cause any inconvenience, hardship, prejudice or detriment to the defendant but will enable the plaintiff to develop his land" must be dismissed with costs.

I make my order accordingly.

Appeal dismissed.

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Present: **Weeramantry, J. and Thamotheram, J.**

M. T. FOENANDER *v.* ATTORNEY-GENERAL

S. C. No. 624/70 — *D. C. Colombo No.* 70213/*M*

In the matter of (1) *An application under Chapter LX of the Civil Procedure Code* (*Cap.* 101) *of the Legislative Enactment of Ceylon for leave to appeal and* (2) *In the matter of an appeal notwithstanding lapse of time.*

Argued on: 9th December, 1970
Decided on: 16th January, 1971

Civil Procedure Code — Section 765—Whether absence beyond seas constitutes "sufficent cause for not preferring an appeal or making an application within prescribed period".

Held: (1) That where the other Condition's of Section 765 of the Civil Procedure Code are satisfied the period that elapses while a petitioner is away from the island may not be considered as delay on his part provided he satisfies the Court that he had sufficient cause for not preferring the appeal within the time prescribed or for the delay in making the application owing to such absence.

(2) That the words "sufficient cause" in the Indian Limitation Act has been interpreted to recieve a liberal construction so as to advance substantial justice when no negligence nor inaction, nor want of bona fides is attributed to the appellant.

Texts cited: Chitaley & Annaji Rao, The Indian Limitation Act, Vol. 1, p. 283.
For India, see section 13 of the Indian Limitation Act and for Ceylon see section 13(e) of the Prescription Ordinance (Cap. 68).
Lindely, 12th ed. p. 323.
Charlesworth on Mercantile Law, 9th ed. p. 249.

Referred to: *Krishna v. Chathappan*, (13 Mad. 269 at 271, F.B.)

W. D. Gunasekera, for the plaintiff-appellant.

E. D. Wickremanayake, Crown Counsel for the Attorney-General.

Weeramantry, J.

This is an application for leave to appeal notwithstanding lapse of time.

The decision sought to be appealed against is one upon a claim by the plaintiff-appellant against the Attorney-General arising from the deduction of certain allowances from his monthly pension.

The appellant was receiving this pension in respect of his services as a member of the staff of the Clerk of the House of Representatives for a period of 26 years from 1935 to 1961. Subsequent to his retirement he had taken employment as a temporary stenographer under the Ceylon Ceramics Corporation on a wage of Rs. 10/- per day. The plaintiff served this Corporation from 1962 to 1966.

In 1968 the Secretary to the Treasury and Director of Pensions informed the appellant that since he had been paid an inclusive consolidated casual rate he was not entitled to living allowances on his pension and that it has been decided to recover a sum of over Rs. 8,000/- overdrawn by him as allowances with his pension from 1962 to 1966. Recovery was to be by the deduction of 25% of the aggregate of pension and allowances from August, 1968. These deductions amount to Rs. 140/- per month and the decision is thus one which would be applied over a period of several years.

In these circumstances the plaintiff had prayed for a declaration that the Crown was not entitled to deduct this sum and for a declaration that he was entitled to the usual allowance and pension drawn by him up to 1968 without any deductions.

The learned District Judge held against the plaintiff on the basis of the principle that a person receives his pension under the minute on pensions out of the bounty of the Crown and that a claim to a pension is not one that is justiciable in a court of law.

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It is against this judgment that the plaintiff proposes to appeal and our attention has been drawn on his behalf to the circumstances that members of the staff of the Clerk to the House of Representatives constitute by virtue of the Parliamentary Staffs Act (Cap. 384) a separate service. While section 9(2) of that Act makes the minute on pensions applicable to the holder as though such holder were a public servant or a public officer, it is submitted that the fundamental principle that pensions are paid out of the bounty of the Crown, the principle which underlies the decisions on this minute, would not be applicable to persons who are not members of the public service.

The decisions on this matter hitherto would appear to relate to persons who are strictly within the public service, and the question whether members of Parliamentary staffs are equally unable to make claims in regard to their pensions is not a question that has so far been determined by our Courts.

Further, the basis on which the deduction has been made by the Secretary to the Treasury and the Director of Pensions is that the sum paid to the petitioner by the Corporation included allowances, but the officials of the Corporations who gave evidence were unable to state how this sum of Rs. 10/- per day was made up and what its living allowance component was.

Another circumstance which may merit consideration is the deduction by the Crown, on the basis that allowances cannot be recovered twice over, of an allowance which quite clearly exceeds the allowance component of his remuneration at the Corporation. As Corporation pay would presumably have been around Rs. 250/- per month whereas his pension was Rs. 560/-, the allowance on the pension would therefore have been far greater than any allowance he may have received from the Corporation. The basis therefore upon which the deduction was made would appear to be a matter on which argument is possible.

The learned District Judge has further held that he accepts the evidence of the plaintiff that he was not informed that the wage of Rs. 10/- per day that he was being paid included allowances. These circumstances would afford the plaintiff an additional ground for canvassing the basis of the decision to withhold the allowances attached to his pension. The very quantum to be recovered seems attended with some uncertainty on the evidence of the Crown witnesses themselves.

From what has been stated it would appear that the petitioner has a good ground of appeal.

It is also not contested that nothing has occurred since the date when the decree or order which is appealed from was passed, to render it inequitable to the judgment creditor that the decree or order appealed from should be disturbed.

It remains then, in terms of section 765 of the Civil Procedure Code, to examine whether this Court is satisfied that the petitioner has been prevented by causes not within his control from filing his appeal in time.

Plaint was filed in December, 1968 and answer in April, 1969. It has been submitted on behalf of the petitioner, without contradiction from the Crown, that the trial date was fixed for August 1969, that is, only four months from filing answer, because the petitioner was intending to emigrate to Australia. After the conclusion of the trial in August 1969, he left Ceylon with his wife in September 1969, and judgment was delivered in November.

It is the petitioner's position that he first settled down in Brisbane and moved thereafter to Melbourne. He did not hear about the judgment till a few days before his return to Ceylon because he was moving from place to place and he lost contact with his proctor and letters sent by the latter did not reach him for some time. He returned to Ceylon in the middle of June, 1970 and this application was filed on 15th August. The petitioner has stated in his affidavit, and has also submitted documents in support thereof, that his wife was suffering from cancer and was under treatment in Ceylon even prior to their departure to Australia. Diagnosis tickets of the Cancer Institute and of the General Hospital have been submitted in support, showing that she was under treatment in February and March, 1969,

The decision of the plaintiff to migrate to Australia was taken because of his wife's illness and his desire to have her looked after by their children who were in Australia. However the plaintiff's expectations of securing employment there did not materialise and in view of this and the news that the judgment has been adverse to him he had decided to return to Ceylon.

On his return to Ceylon he states that he lost no time in instructing his proctor to make this application. It is true that there has been a delay of nearly two months between his return to the Island and the filing of this application. There are however extenuating circumstances in the present case arising from the continued serious illness

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of the petitioner's wife who returned to this country along with him and also because he had returned to the Island to make his home here once more, abandoning his earlier intention of residing permanently in Australia. A person returning in these circumstances after altering his entire plans for the future must necessarily have numerous matters to attend to in connection with his readjustment to life in this country. These circumstances, against the background of his wife's illness, seem to be circumstances sufficiently unusual and compelling to satisfy the Court that they were causes not within his control.

In regard to the period of his absence from Ceylon subsequent to the judgment, that is from November, 1969 to June, 1970 we accept his explanation that the combined circumstances of his absence beyond the seas and his change of residence from time to time, including a move from Brisbane to Melbourne, sufficiently explain his delay in taking action. In a case involving a sum of over Rs. 8,000/- and a substantial deduction from his pension over a period of several years, we do not think the petitioner would have been so indifferent to the result of this case that he would have lost interest in the decision.

Counsel have not been able to refer me to any cases under section 765 where this Court has considered the question of absence beyond the seas. The Indian Civil Procedure Code afford, us no guidance, for it contains no provision on this matter. The provision dealing with this matter in India would appear to be contained in section 5 of the Limitation Act of 1908 which provides that any application for review of a judgment or for leave to appeal may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies Court that he had sufficient cause for not preferring the appeal or making the application within such periods.

It would appear that under this provision sufficient cause has been interpreted to receive "a liberal construction so as to advance substantial justice when no negligence, nor inaction nor want of bona fides is imputable to the appellant" *Krishna v. Chatahppan*, (13 Mad. 269 at 271, F.B.) and that this view has been generally followed, Chitaley & Annaji Rao, *The Indian Limitation Act*, Vol. 1, p. 283.

Even under this section counsel has not referred me to any specific decision relating to absence beyond the seas, but in the law of Limitation, absence beyond the seas is of course generally recognised as affording ground for interruption of prescription. For India, see section 13 of the Indian Limitation Act and for Ceylon see section 13(e) of the Prescription Ordinance (Cap. 68). It would appear not unreasonable in all the circumstances of the present case to consider that the period that elapsed while the petitioner was away from the Island should not be reckoned as delay on his part.

For all these reasons we are satisfied that in the circumstances of the present case the petitioner was prevented by causes not within his control from complying with the provision requiring him to file his appeal within a space of ten days. This requirement being once satisfied the grant of leave to appeal becomes a matter for the discretion of the Court, and having regard to the circumstances mentioned we consider this an appropriate case for exercising this discretion in his favour. Leave to appeal notwithstanding lapse of time is accordingly granted.

There will be no costs of this application.

Thamotheram, J.
I agree.

Leave to appeal granted.

Present: **de Kretser, J. and Wijayatilake, J.**

K. ANDIRIS *v.* DON FRANCISKU THOMARATNA

S. C. Application 293/69 — *Writ of Quo Warranto*

Argued and Decided on: 21st September, 1969.

Quo Warranto — Election as Member of Village Council,— Application for Writ to have election declared null and void prior to Member taking office— Preliminary objection that it does not lie Village—Communties Ordinance (Cap. 257), Section 11(1).

*For Sinhala translation, see Sinhala section, Vol. 22, p. 7

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The Respondent was declared duly elected a Member of a Ward of the Village Council on 22.3.1969 (nomination day) to hold office in terms of Section 11(1) of Cap. 257 of the Legislative Enactments as from 1.7.1969.

The Petitioner, a ratepayer of the said Council, by his application for a Writ of Quo Warranto dated 19.5.1969, prayed for a declaration that the election of the Respondent was null and void.

The affidavit of the Respondent averred that the 1st meeting of the newly elected council was on 18.7.1969 at which the Respondent was elected Chairman.

The Petitioner submitted that immediately after the Respondent was declared elected by the Presiding Officer he addressed those present and promised to perform his duties to the best of his ability etc.

On a preliminary objection to the hearing of the application,

Held: (1) That the Writ of Quo Warranto does not lie in the circumstances, as at the time the rule *Nisi* in these proceedings was issued the Respondent had not attended any meeting of the Council or done any act showing that he had acted in or accepted office.

(2) That the words used in his said address on the day he was elected Chairman viz. 18.7.1969 pointed to no more than a statement of his intention to do when in due course he took his seat in the Council and there was enough time to decide that it was wiser not to use the rights his election gave him.

(3) That a mere claim to be admitted to office is not sufficient to grant a Writ of Quo Warranto; there must be a possession or user as well as a claim.

Cases followed: *De Zoysa v. Kulatilleke*, 46 N.L.R. at 143.

Cases cited: *Re Armstrong* (1856) 25 L.J.Q.B. 238
Dharmartne v. the Commissioner of Elections et al. (1950) 52 N.L.R. 429

Text Cited: *Halsbury* Vol. 11 (Simonds Ed.) Page 148.

Nimal Senanayake, *M. W. Amarasinghe*, for the petitioner.

H. W. Jayewardena, Q.C., with *G. M. S. Samaraweera*, for the respondent.

de Kretser, J.

The petitioner, a Ratepayer of the Weeraketiya Village Council, makes this application dated 19.5.1969 for a Mandate in the nature for a Writ of Quo Warranto seeking to have the Election of the respondent as the Member for Ward 2 Muruthawela of the Weeraketiya Village Council declared null and void.

On Nomination Day the 22nd of March, 1969 the respondent was declared the Member for this Ward, there being no other nomination. The petitioner claims that the respondent was disqualified for election in that the respondent was as from 23.12.1964 an elected member for Ward 21 of the Mideniya Village Council. He submits that as from that date there has been no Election for Members to the Mideniya Village Council nor has such Council been dissolved. He also avers that the respondent has always lived at Raluwa Medamulana within the Electoral Area of the Mideniya Village Council.

The respondent has filed his Affidavit denying the correctness of these statements of fact.

It is not necessary at this stage to make a finding on the facts as Counsel for the respondent has taken the objection *in limine* that the Application for Quo Warranto does not lie in that it was made on 19.5.1969 by which date all that had happened was that on 22.3.1969 the Respondent had been declared duly elected to hold office in terms of Section 11(1) of Cap. 257 of the Legislative Enactments as from the 1st day of July, 1969. He relied on the Case of *De Zoysa v. Kulatilleke* reported in 46 N.L.R. at page 143 where Wijewardene, J. held that the Writ of Quo Warranto will not be granted to set aside an Election where at the time the rule *Nisi* issued the respondent had not attended any Meeting of the Council or done any act showing that he had acted in or accepted the office.

The averment in the affidavit of the respondent that the 1st Meeting of the newly Elected Council took place on 18th July, 1969 and that it was at that Meeting that the respondent sat and voted and was also elected Chairman is not challenged.

Counsel for the petitioner submitted that the fact that immediately after the declaration made by the Presiding Officer that respondent was elected,

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the respondent addressed those present and promised that he would perform his duties as the member of the Ward to the best of his ability and would serve the Ratepayers equally well irrespective of whether they were his supporters or not and also announced his intention to contest the Chairmanship in order to bring honour to them, would suffice to indicate that he had accepted the office.

It appears to me that these words said in the elation of having been elected pointed to no more than a statement of what he intended to do when in due course he took his seat in the Council and that there was plenty of time for him to decide that it was wiser not to use the rights his election gave him between the time he said all this and the earliest time he could take his seat to assume his term of office in July, 1969.

As was pointed out *In Re Armstrong* (1856) 25 L.J.Q.B. 238 the Writ of Quo Warranto does not lie unless the Court is satisfied that the person proceeded against has been in actual possession and user of the office.

Halsbury Vol. 11 (Simond's Ed.) Page 148 points out that a mere claim to be admitted to office was not sufficient; there had to be a possession or user as well as a claim. In the instant case the respondent could not be the Member for Ward 2 until July, 1969 for Section 11(2) of Cap. 257 provided that his predecessor continued in office until that time.

Swan, J. pointed out in *Dharmaratne v. the Commissioner of Elections et al.** that where a person has been irregularly elected as a member of a local body but had not yet assumed office the proper remedy to have his election set aside is not by Quo Warranto.

I uphold the preliminary objection and dismiss the Application with Costs fixed at 25 Guineas.

Wijayatilake, J.
I agree.

Application dismissed.

* (1950 52 N.L.R. 429)

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

A. L. MALHAMY & ANOTHER *v.* E. S. ANGAMMANA*

S. C. No. 36/57(*F*) — *D. C. Ratnapura Case No.* 4804

Argued on: 23rd January, 1970
Decided on: 26th January, 1970

Evidence Ordinance, Section 114, *illustration* (*f*) — *When Court may refuse to apply presumption under this section.*

Held: That section 114 of the Evidence Ordinance is a provision under which a court **"may"** and not **'shall'** presume certain facts to exist in certain circumstances. A court may refuse to apply the presumption if the particular facts of the case do not warrant it.

Where a Village Headman summoned to give evidence was present in Court on several postponed dates of trial, but was absent on the date on which the trial took place as the summons taken out on him had been returned unserved, and the case proceeded to trial notwithstanding an application for postponment supported by both parties, and where an entry of a complaint made in the Headman's diary and signed by the plaintiff, who summoned him, was produced in support of his evidence,

Held: That the Court was justified in not applying the presumption under Section 114 of the Evidence, Ordinance that the witness was not called as he would not have supported the plaintiff's story.

Referred to: *Santiapillai v. Sittampalam*, 36 C.L.W. 49.

H. W. Jayewardene, Q.C., with *G. D. C. Weerasinghe*, for the defendants-appellants.
Sam P. C. Fernando, for the plaintiff-respondent.

*For Sinhala translation see Sinhala section, Vol. 22, p. 9

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Tennekoon, J.

The plaintiff-respondent sued the defendants-appellants for the recovery of a sum of Rs. 5,726/88 as due to him on account of the hire of a Ruston Hornsby Engine and Pump to be used by the defendants for purposes of gemming. The position taken up by the defendants-appellants (hereinafter referred to as the defendants) was a total denial of the whole transaction; their position, further, was that the plaintiff had brought this action in order to harass and humiliate them. The main evidence led in support of the plaintiff's case was that of the plaintiff himself. For the defence the second defendant gave evidence denying that he and his fellow-defendant had hired any engine or pump from the plaintiff. The learned District Judge believed the evidence of the plaintiff and gave judgment for him in the sum prayed for with costs.

At the hearing of the appeal Counsel for the defendants submitted that the learned District Judge had misdirected himself on certain matters. The plaintiff in his evidence had stated that when he found that the defendants were not paying what was due to him, he went to the Village Headman and made a complaint to him; that the Headman took down his complaint in his diary which included a reference to the number of the Engine he hired to the defendants; that he signed this complaint himself; that thereafter the Headman went with him and another person Telenis de Silva (also called as a witness) to the land where the defendants were carrying on gemming operations; that he himself pointed out his Engine on that land and the number thereon, and that the Headman himself had checked up the number of the Engine. Counsel for the appellants submitted that the only independent evidence available to the plaintiff was that of the Headman who, not having been called by the plaintiff, it must be presumed would not have supported the plaintiff's story. The provisions of section 114 of the Evidence Ordinance read with illustration (f) *prima facie* support Counsel's contention; but this is a provision under which a court **'may'** and not **'shall'** presume certain facts to exist in certain circumstances. A court may refuse to apply the presumption if the particular facts of the case under consideration do not warrant it. It is evident from the record in this case that the plaintiff had summoned the Village Headman on the numerous dates of trial for which this case had been fixed before it was ultimately heard on 16th December, 1966 and that he had been present in court on those dates. The case having been ultimately fixed for trial on 16.12.66, an application for a postponement made by the defendants and agreed to by the plaintiff was refused by the District Judge on the ground that "it was the 8th date of trial." On the day, viz. 16.12.66, the case was taken up for hearing and the hearing completed; the Headman was not in attendance as a witness. The summons which the plaintiff had got out on him had been returned with the report that it could not be served because the Headman was not at home but was out gemming. In this situation the plaintiff presented his case without the oral evidence of the Headman. However, he produced the complaint made by himself to the Headman which had been entered in the latter's diary over the plaintiff's own signature. This entry completely corroborated the plaintiff with regard to that part of his evidence in which he said that he made a complaint to the Headman giving the details of his transaction with the defendants. Having regard to all these facts, I do not think that it would be proper to presume in this case that the Headman if called would not have supported the plaintiff's case. In a somewhat similar situation, where it appeared that a witness summoned to give evidence was present in court on several postponed dates of trial, but was absent on the date on which the trial took place, owing to his absence from the Island, this court refused to apply the presumption under section 114(f) of the Evidence Ordinance. See *Santhiapillai v. Sittampalam*, 36 C.L.W. 49.

Counsel for the appellants also submitted that the learned District Judge misdirected himself when he said in his judgment that it was for the defence to call the Headman if **they** wished the court to disbelieve the plaintiff's evidence; while I agree that the learned District Judge was wrong in placing such a burden on the defendants. I do not think that this error is a sufficient ground for disturbing the strong findings of fact which he has made in favour of the plaintiff based as they are largely on an assessement of the credibility of the witnesses on either side.

The appeal is dismissed with costs.

Alles, J.

I agree.

Appeal dismissed.

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Present: **Samerawickrame, J.**

MOHAMED HAMEEM & ANOTHER *v.* FOOD & PRICE CONTROL INSPECTOR, COLOMBO

S. C. 629-630/'68 — *M. C. Colombo South* 82564/*A*

Argued on: March, 7 1969
Decided on: 17th August, 1970

Price Control—Conviction for selling variety of artificial silk called Hipolon in excess of controlled price —Hipolon not mentioned among the categories of artificial silk mentioned in the charge — Should conviction be upheld?

The two accused were convicted of having sold in excess of the controlled retailed price two yards of Hipolon (C.W.E. made in Japan), a piece good of artificial silk described in the charge as coming with in the categories of artificial silk referred to in the relevant price order and as "consisting of crepe, sateen, taffeta, haircord, muslin and sheer crepe other than furnishing fabrics and dyed nylon taffeta 48" in width and dyed nylon sheers 44"/45" in width.

Held: That in the absence of evidence that the material sold by the appellants fell within any of the categories of artificial silk set out in the charge as being the piece goods of artificial silk the price of which was controlled, the conviction could not be sustained.

Colvin R. de Silva, with *Harischandra Mendis*, *P. Tennekoon* and *C. Sandrasagaram*, for the *accused-appellants*.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Samerawickrame, J.

The first and second accused-appellants were convicted of offences by reason of contravention of the Control of Prices (Imported Textiles and Imported Manufactures of textile materials) Order No. 5 of 1966.

The charge alleged that the Order was in operation fixing the maximum controlled retail price above which piece goods of artificial silk (including Rayon and cellulose, Synthetic fibre and spun glass and other man made fibres) consisting of crepe, sateen, taffeta, haircord, muslin and sheer crepe other than furnishing fabrics and dyed nylon taffeta 48" in width and dyed nylon sheer 44"/45" in width shall not be sold and that the two appellants had sold two yards of Hipolon (C.W.E. made in Japan) a piece good of the above mentioned artificial silk, in excess of the controlled retail price.

Learned counsel for the appellants submitted that the offence set out in the charge does not exist and secondly, that in any event the charge had not been proved. I am of the view that the charge is in order and that if evidence was available that the material sold by the appellants fell within any category of goods of artificial silk referred to as being the subject matter of the Price Order the charge would have been made out. There is however, no evidence that Hipolon is either Crepe, Satin, Taffetta, Haircord, Muslin or Sheer crepe. The evidence in the case was that Hipolon, the material which had been sold by the appellants, was artificial silk but there was no evidence that it fell within any of the categories of artificial silk set out in the charge as being the piece goods of artificial silk the price of which was controlled. Learned Crown Counsel submitted that the Price Order applied to piece goods of artificial silk and that proof that the material sold was artificial silk was sufficient. The terms of paragraph 2 of schedule B of Price Order No. 5 of 1966 do not support this contention. Moreover, the charge set out that the Order related to piece goods of artificial silk consisting of crepe, satin, taffetta, haircord, muslin and sheer crepe. I am, therefore, of the view that the second submission of counsel for the appellants, namely, that the charge has not been proved must succeed. I set aside the conviction and sentences passed on the first and second accused appellants and acquit them.

Convictions set aside.

* For Tamil translation See p. 1 Tamil Section

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Present: **Wijayatilake, J.**

WILLIAM & ANOTHER *v.* THE QUEEN

S. C. 495/'70

Application for transfer of M. C. Vavuniya Case No. 45226 *from the Northern Circuit to the Midland or Western Circuit.*

Argued and decided on: 8th July, 1970

Transfer of murder case — Application for transfer from one Circuit to another by accused who are Sinhalese — Offence committed in predominantly Tamil area— Victims Tamils — Sinhala speaking jury resident in Tamil area elected by accused — Likelihood of jury being subconsciously influenced — Absence of allegation of racial or communal issue —

Where an application for the transfer of a case from the Northern Circuit to the Midland or Western circuit was made on behalf of the accused, who are Sinhalese, on the ground

(*a*) that the deceased victims were all Tamils

(*b*) that the incident occurred in a predominantly Tamil area

(*c*) that the accused feared that they would not have an opportunity of a fair and impartial trial, as it is very likely that the jurors, although a Sinhala speaking jury being resident in a Tamil speaking area, would be subject to moral and other pressures subconsciously,

Held: That in the absence of any allegation that there is a racial or communal issue in the case, it would be unjust and unfair to question the integrity of the Sinhala speaking jury elected by the accused on the above facts.

H. L. de Silva with *Jayatissa Herat*, for the petitioners.

S. W. B. Wadugodapitiya, Crown Counsel for the Attorney-General.

Wijayatilake, J.

Mr. de Silva, learned counsel for the petitioners submits that this is a fit case to be transferred either to the Midland Circuit or Western Circuit as there is a reasonable apprehension that a fair and impartial trial cannot be had in the Northern Circuit. It would appear that the petitioners who are the accused in this case are Sinhalese and the three deceased who happened to be the victims were all Tamils. Mr. de Silva has referred me to a series of cases. 1925 A.I.R. Lahore 101, 1928 A.I.R. Lahore, 460, Volume 25 India Law Reports, (Calcutta) 727., Section 586 of the Indian Criminal Procedure Code and Chitaley — Criminal Procedure Code (1946) 2770.

Counsel for the petitioners also submits that this incident occurred in Mankulam which is predominantly a Tamil area and that the accused fear that they would not have an opportunity of a fair and impartial trial, as it is very likely that the jurors, although the accused have elected a Sinhala speaking jury, would be influenced by the fact that the victims were all Tamils. Mr. de Silva concedes that the facts in this case do not raise a communal or racial issue. Be that as it may, he submits that the accused entertain reasonably the fear that the jurors may be influenced by the fact that all the deceased were Tamils. I have gone through the petition and it is significant that there is not a single averment that there is a racial or communal issue in this case.

In these circumstances I think it would not be correct for this Court to anticipate that there would be such an issue worrying the minds of the jury who happen to be empanelled in this case.

Mr. Wadugodapitiya, Crown Counsel has drawn my attention to the judgment of Soertsz J. in 41 N.L.R. 369 and to a judgment of de Kretser, J. (Senior) in 38 N.L.R. 332. In my view on the averments on this petition, it does not appear to me that a fair and impartial trial cannot be had in the Northern Circuit, particularly in view of the fact that the petitioners have elected to be tried by a Sinhala speaking jury.

Mr. de Silva submits that even though the petitioners have elected a Sinhala speaking jury as these jurors would be from a predominantly Tamil area they will be subconsciously subject to

For Tamil translation see p. 3 Tamil section.

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moral and other pressures by the fact that they are resident in a Tamil speaking area and thereby the petitioners would be deprived of a fair and impartial trial.

In my opinion it would be quite unfair and unjust to question the integrity of a Sinhala speaking jury in these circumstances. Perhaps if this case is transferred to another Circuit which is predominantly a Sinhala area, a similar allegation could be made that the accused have chosen such a circuit in order to gain an unfair advantage. I do not think there is any substance in the fears expressed by Mr. de Silva in the light of the facts in this case.

I would accordingly refuse the application.

Application refused.

Present: **de Kretser, J. and Wijayatilake, J.**

N. M. NAINA MARIKAR *v.* ABDUL RAHIM DADA & ANOTHER

S. C. No .439(*F*)/1966 — *D. C. Colombo No.* 126/*RE*

Argued on: 22nd October, 1969
Decided on: 15th February, 1970

Rent Restriction Act, No. 12 *of* 1966, *Section* 4(1) — *Does it apply to actions for ejectment of tenant on the ground of sub-letting.*

Held: That the provisions of section 4(1) of No. 12 of 1966 are not applicable to a pending action in which a landlord claims the right to eject a tenant on the ground of sub-letting.

Cases referred to: *Martin Silva v. Mahasoon*, 70 N.L.R. p. 6.
Charles Fernando v. De Costa, 69 N.L.R. at p. 281
Jamaldeen v. Manaff, 70 N.L.R. 236.
Moosa v. Amir, 69 N.L.R. 44
Deen v. Halim, 70 N.L.R. 401

C. Ranganathan, Q.C., with *A. Sivagurunathan*, for the plaintiff-appellant.

No appearance, for the defendants-respondents.

de Kretser, J.

The plaintiff filed this action on 13.12.63 against the 1st defendant to have him ejected from premises No. 80, 3rd Cross Street, Colombo on the ground that the 1st defendant sub-let the premises to the 2nd defendant without the written consent of the plaintiff in breach of Section 9 of the Rent Restriction Act. Admittedly the rent of the premises in question is Rs. 476.25 per month and the premises are "business premises" and governed by the Act. By consent, at the trial the preliminary issue (4) Can the plaintiff maintain this action against the defendant in view of the provisions of Section 4 of Act No. 12 of 1966 which came into operation on the 10th of May 1966? was raised.

The learned District Judge (Mr. S. Kulatilleke) in an interesting Judgment answered this issue in the negative and dismissed the plaintiff's action with costs on 11.9.66 for he found the argument, that because Section 4(1) A refers to any action for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies, therefore the proceedings in all pending actions where the standard rent is over Rs. 100/00 a month should be declared null and void, irresistible. The plaintiff has appealed.

Mr. Ranganathan, Q.C. Counsel for the appellant has cited the case of *Moosa v. Amir* reported in 69 New Law Reports at page 44 in which Sirimane, J. before whom the same argument was urged found that "there was much to be said for it," but preferred the submission made by Mr. Ranganathan Q.C. who had appeared for the respondent in that case that the provisions of Section 4 were meant to apply to pending actions filed in contravention of Section 12 A — i.e. actions relating to premises where the standard rent is below Rs. 100/00 a month.

Mr. Ranganathan also cited the case of *Deen v. Halim* reported in 70 N.L.R. at page 401 in which Abeysundere, J. pointed out that while it was correct that actions instituted on any of the grounds specified in Section 12A were not specifically saved by any provision in Section 4 of the amending Act, Section 4 of the amending Act should not be interpreted in such a way as to render ineffective Section 12 A which by virtue of the provision of the said Section 4 is deemed

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to have come into operation on 20.7.62. "If" said Abeysundere, J., "Section 4 is held to apply even to an action instituted on any of the grounds specified in Section 12A, it will have the effect of deeming that action to be null and void, and the effect thereof will be that Section 12A is rendered ineffective". He held that Section 4 of the amending act must be interpreted as not applying to an action instituted on any of the grounds specified in Section 12A.

Tambiah, J. came to a similar conclusion in *Martin Silva v. Mahasoon* reported in 70 N.L.R. at page 6.

This interpretation has the advantage that it gives effect to "the will of the legislature" as set out in the statement of Legal Effect of the Act when it was presented in Parliament as a Bill on 24.4.66 which reads as follows:—

> "All actions which are instituted at or after that date for the ejectment of tenants and which are pending on the day immediately preceding the date of which this Bill will be law will be deemed to have been null and void if the Landlord was not entitled to institute such an action by reason of the retrospective effect of the provisions of Clauses 2 and 3 of this Bills."

Counsel also brought to our notice the case of *Charles Fernando v. De Costa* 69 N.L.R. at page 281 in which Abeysundere, J. with Tennakoon J. agreeing held that Section 4(b) of 12 of 1966 does not apply to a pending action in which ejectment is claimed under Section 12A(1)(a) of the principal Act on the ground that rent has been in arrears for three months or more after it became due. And the case of *Jamaldeen v. Manaff* 70 N.L.R. 236 in which Sirimane, J. held that the retrospective operation of the provisions of Section 4(1) of 12 of 1966 is not applicable to a pending action in which a Landlord claims the right to eject a tenant on the ground of sub-letting.

I am in respectful agreement with the decision in *Moosa v. Amir* which I have referred to in the course of this order. I am of the view that the Trial Judge should have answered the preliminary issue in the affirmative.

The appeal is allowed and the case is sent back to the District Court for trial on the other issues. The plaintiff will be entitled to costs of the trial of the preliminary issue and the costs of this appeal.

Wijayatilake, J.

This appeal raises an important question of interpretation of Section 4 of the Rent Restriction Act. The action was filed on 13.12.1963. and the learned Additional District Judge answered the preliminary issue in the negative and dismissed the action with costs on 11.9.66.

Mr Ranganathan, learned Counself for the appellant submits that Section 4 of the Act 12 of 1966 is restricted to cases where the ejectment is sought on grounds other than those mentioned in Section 2 and 3 of the Act and therefore the learned Trial Judge was wrong in giving an unnecessarily wide interpretation to Section 4. He has drawn our attention to a series of judgments of this Court on the question at issue which were delivered after the judgment in question. Furthermore, he submits that the rent of these premises being over Rs. 100/- per month it is quite clear that Section 4 read with Sections 2 and 3 of the Act 12 of 1966 does not have any application to support the contention of the defence. In *Moosa vs. Amir* 69 N.L.R. 44 Sirimane, J. held that where a decree for ejectment on the ground of subletting was entered on11.5.65 against a tenant in respect of premises the standard rent of which was over Rs. 100/- that pending actions are not covered by the provisions of Section 4 of the Act 12 of 1966; and that Sections 2 and 3 of the amending Act in no way affect the provisions of Section 9 of the principal Rent Restriction Act No. 29 of 1948 restricting sub-letting of premises. See also the judgment of Sirimane, J. in *Jamaldeen v. Manaff* 70 N.L.R. 236 where he held that the retrospective operation of Section 4(1) of Act 12 of 1966 is not applicable to a pending action in which a landlord claims the right to eject on the ground of sub-letting. In the case of *Charles Fernando v. de Costa* 69 N.L.R. 381 Abeysundera, J. (with Tennekoon, J. agreeing) held that Section 4(b) of Act No. 12 of 1966 does not apply to a pending action in which ejectment of a tenant is claimed under Section 12 A (1)(a) of the principal Act on the ground that the rent has been in arrears for three months or more after it has become due. See also the judgments of Tambiah, J. in *Martin Silva v. Mahasoon* 70 N.L.R. 6 and the judgment of Abeysundere, J. in *Deen v. Halim* 70 N.L.R. 401 where they held that Section 4 of Act No. 12 of 1966 must be interpreted as not applying to an action instituted on any of the excepted grounds specified in Section 12 A. Accordingly, it is not applicable to an action seeking to eject a tenant on the ground of his being in arrears of rent for a period of more than three months.

With great respect I agree with the judgment of Sirimane, J. in *Moosa v. Amir* supported as it is by the other judgments referred to above. I agree with my brother de Kretser, J. that the preliminary issue should be answered in the affirmative and I concur with the Order made by him.

Appeal allowed and sent back.

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

THE BOARD OF DIRECTORS, CO-OPERATIVE WHOLESALE ESTABLISHMENT

v.

P. RATNAYAKE

S. C. 126/69 — *Labour Tribunal Case* 12/1204

Argued on: 23rd March, 1970
Decided on: 29th April, 1970

Industrial Disputes Act, section 31D(2) — *Dismissal of employee for misconduct — Absence of evidence of misconduct at Labour Tribunal inquiry — Relevance of written statement of representative — Burden of proof — Tribunal to act judicially in its approach to the evidence.*

The applicant-respondent was dismissed from service for misconduct after a domestic inquiry. Before the Tribunal the employer-appellant led only the evidence of their Internal Audit officer who conducted the preliminary investigations into the allegations of misconduct. The applicant-respondent led no evidence on his own behalf, but had set out the circumstances in which the alleged act of misconduct was committed, in the statement made to the Tribunal through a friend who represented him. The President took cognizance of this statement in arriving at his findings.

Held: (1) That in ascertaining the facts of a case, the Tribunal must act judicially in its approach to the evidence and must therefore not decide the issues purely on averments in a statement of the nature referred to above, made by a representative of the applicant, the truth of which could not be tested.

(2) That in the circumstances of the present case the employer-appellant had not made out a *prima facie* case against the applicant-respondent and therefore the stage had not been reached for the latter to offer an explanation.

Cases referred to: *The Ceylon Transport Board v. Ceylon Transport Workers' Union*, (1968) LXXV C.L.W. 33
Ceylon Transport Board v. Gunasinghe, (1968) LXXVI C.L.W. 75

Lakshman Kadirgamar, for the employer-appellant.

Applicant--respondent absent and unrepresented.

Silva, S.P.J.

This is an appeal on a question of law made by an employer under section 31D(2) of the Industrial Disputes Act, Cap. 131, as amended by Act 62 of 1957, against an order made by a Labour Tribunal to reinstate the applicant-respondent to his substantive post on the ground that the dismissal of the applicant was unlawful and unjustified.

The applicant-respondent was employed under the Co-operative Wholesale Establishment as a cashier in April 1961. He had last served as Acting Stores Manager at the Weligalla Branch Stores and, while he was employed in that capacity, he was interdicted from work with several other employees in September, 1965. The Trade Union to which the applicant belonged made representations to the employer and while practically all the interdicted officers were reinstated the employer refused the reinstatement of the applicant. The reason for this adverse decision in respect of the applicant was that while he was yet under interdiction he with one Somapala had gone to the Kandy Co-operative Wholesale Establishment Depot and written out some 50 cash memos and removed 100 verties from the reserve for their own use. At an inquiry held regarding this allegation the applicant was found guilty and in consequence his services were terminated with effect from 15.9.1965.

Before the Tribunal the appellant led evidence of the Internal Audit officer who conducted the preliminary investigation into the allegation referred to, namely, the writing out of cash memos while under interdiction and removing 100 verties from the reserve. No witnesses were however called to prove the circumstances under which the orders were written out and the verties were removed. In coming to the conclusion that a case of dishonest removal of the verties was not established against the applicant the President observed:—

> "None of the persons referred to by him and whose oral evidence was vital to the charge of dishonest removal was called before this Tribunal. In short almost all the evidence of this witness on the material charge, namely

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the dishonest removal of the 'verties' from the Kandy Store (with which incidentally the applicant had no official connection since he was not working there) is hearsay and does not in my opinion establish a *prima facie* case against the applicant."

It is important to note that the original interdiction had no relation to the dismissal of this officer which resulted from his act of writing out 50 cash memos and removing 100 verties from the reserve, and the appeal is from that order of dismissal.

It was submitted before the Tribunal on behalf of the employer-appellant that the applicant-respondent did not give any evidence before the Tribunal nor call any witnesses on his behalf to explain his conduct in writing the memos and that, in the absence of such evidence by way of explanation, the applicant should be held to be guilty of the charge of removing the verties for his own use although in fact they were paid for. The President however rejected this submission for the reason that, although the applicant did not give evidence nor call any other witnesses, he had set out in a statement made to the Tribunal by a friend who represented him that he wrote out the cash memos at the request of the Stores Manager of the Kandy Branch where he happened to be present at the time.

The main argument of Counsel for the appellant in this Court was that the President erred in law when he relied on such a statement made to the Tribunal, before the commencement of the inquiry proper, to the effect that the applicant merely wrote out the cash memos at the request of the Stores Manager when he happened to be there having gone to purchase some goods for himself other than the verties which formed the subject matter of the charge which resulted in his dismissal. Counsel further submitted that the Tribunal did not act judicially when it decided the main issue on a statement of that nature made by a representative of the applicant the truth of which could not be tested. His contention was that a finding of a Tribunal must be a judicial finding based upon evidence. He further submitted that in this case the Tribunal could have properly come to such a conclusion only if the applicant and/or anyone on his behalf had placed any evidence before it, but that in the absence of any evidence, the issue on which he has made a finding could not have been judicially decided on a statement made by a representative of the applicant. In support of his contention he cited before me two cases. The first of them was *The Ceylon Transport Board v. Ceylon Transport Workers' Union*, 75 C.L.W. 33, where Tennekoon, J. held that section 31C(1) of the Industrial Disputes Act must not be read as giving the Labour Tribunal a power to ignore the weight of evidence or the effects of cross-examination, and that the President of the Tribunal must decide all questions of fact "solely on the facts of the particular case, solely on the evidence before him and apart from any axtraneous considerations'" Secondly, Tennekoon, J. expressed the view that a Tribunal must act judicially in its approach to the evidence and that it is only after the facts have been so ascertained that the next stage, which is to make an order which is just and equitable on the facts so found, is entered upon. Counsel also referred me to a judgment of Weeramantry, J. in the case of *Ceylon Transport Board v. Gunasinghe*, 76 C.L.W. 75, in which he expressed his concurrence with the views expressed by Tennekoon, J.

I myself respectfully agree with the observations made in these two cases and have no doubt that if a situation arises in which a Tribunal has to make a decision as to whether an explanation offered by either party should be accepted as being reasonable or not it is incumbent on the Tribunal to base its decision on the evidence placed by the party which has the burden so to do and not on any statement made by Counsel or anyone else as representing a party. If in this case the stage had been reached when the applicant had to explain an act which *prima facie* contained all the ingredients of dishonesty, I should have accepted the submission made by Counsel on behalf of the employer-appellant. I am of the view however that in this instance the stage I referred to had not arisen. For, on the appellant's part he was content to lead the evidence of an Internal Audit officer of the Co-operative Wholesale Establishment who held a domestic inquiry as to how he came to his own conclusions which resulted in the dismissal of the applicant. The Tribunal was therefore correct in holding that, so far as the question of satisfying himself as to the correctness or otherwise of the dismissal was concerned, there was hardly any direct evidence placed before him. The Audit Officer had no first hand knowledge of any of the matters pertaining to the charge regarding which he testified to. It is important to bear in mind that in deciding the question as to whether the dismissal of the applicant was right or wrong the Tribunal was not bound by the opinion of some other party on whose finding the applicant was dismissed. The Tribunal must be satisfied on the evidence placed before it whether the dismissal was justified or not. Far from leading the evidence of persons in the C.W.E. who were immediately associated with the alleged dishonest

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transaction of the 100 verties, such as the Manager who was in charge of the Stores, the Cashier who accepted the payment and any other person through whom the goods were checked and passed, the employer chose to keep all these witnesses out of the Tribunal. On a perusal of the cross-examination of the Audit Officer referred to, it seems to me that the employer had good reason not to call any of these witnesses. For, it transpired in cross-examination that from his investigations it did not appear that the applicant himself had taken from the counter the relevant Cash Memo Book in which the 50 orders were written; that the Cash Memo Book had been taken over from the counter by the Manager and handed over to the applicant; that cash had been paid for the articles mentioned in the memos; that the Cashier had stated to him that the Stores Manager had paid for the goods purchased; that the sales girl had stated that she gave the Bill Book to the Stores Manager; and that, according to the document E.51, a sales girl Miss Karunaratne had received the goods. He stated further that he had occasion to make adverse comments in regard to this transaction against a number of other employees of the C.W.E. In this state of the evidence which tended to incriminate the Manager and the other employers, the Tribunal was left with only an admission that the applicant did enter the memos in question, and two contradictory statements by his representative in regard to the receipt of the verties by the applicant but there was no evidence that he had removed them. Even without any explanation on the part of the applicant a reasonable inference that can be drawn from the actual evidence led is that the applicant was made use of by some other party or parties whom I have mentioned earlier to write out 50 memos. The evidence does not lead to the irresistible inference that the applicant knew the purpose of the 50 memos or that he had anything to gain by entering them up. It is necessary that, before an allegation of this nature which results in a person's dismissal is brought home to him, there should be stringent proof from either direct or circumstantial evidence. Such evidence is lacking in this case,

It appears to me therefore that no *prima facie* case of dishonest removal of the verties by the applicant was made out before the Tribunal and in the absence of such a *prima facie* case the stage was not reached for the applicant to offer an explanation by placing evidence of himself or anyone else on his behalf. It is only if that stage was reached that the submission of Counsel could have prevailed. The argument advanced by Counsel for the appellant therefore, while it is sound in principle, is somewhat academic in the circumstances. Even if the learned President has committed an error of law in that regard therefore it is not one which affects the correctness of the decision ultimately reached by him. The appeal is accordingly dismissed.

Appeal dismissed.

Present: **Sirimane, J.**

H. W. PATHINAYAKE *vs.* KARMIKA SAHA SAMANYA KAMKARU SAMITIYA

S. C. 16/*De Novo*/69 — *L. T. G*/1136

Argued on: 13th March, 1971
Decided on: 20th March, 1971

Labour Tribunal—Termination of services—Order for reinstatement of workman with back wages—Order for continuing damages in default of reinstatement — Legality of such order— Industrial Disputes Act, sections 31(C), 31D(2) and 40.

The Labour Tribunal,while holding that the dismissal of a workman by the employer was not justified and ordering his reinstatement with back wages, added that in the event of the failure to reinstate, continuing damages were to be on the basis of Rs. 160/- per month from the 1st October, 1965.

Held: That such an order for continuing damages is not justified under the provisions of Section 31C of the Industrial Disputes Act, as it would have the effect of penalising the employer twice over which would not be just or equitable.

G. G. Mendis, with (*Miss*) *S. M. Senaratna*, and *D. C. Samerawickrame*, for the respondent-appellant.

No appearance, for the applicant-respondent.

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Sirimane, J.

This is an application by the employer against an order of a Labour Tribunal.

On the evidence led, the learned President has held that the dismissal of the employee was not justified ,and it cannot be said that he erred in law in reaching that conclusion. That finding must, therefore, be affirmed.

He has ordered reinstatement of the employee and awarded him a sum of Rs. 1,970/- as "back wages" for a period of one year. I see no legal ground for interfering with these orders.

The learned President has added at the end of his order.

> "In the event of the failure to re-instate, continuing damages are to be on the basis of Rs. 160/- per month from 15th October, 1965."

The legality of this part of the order has been strongly challenged.

Section 31(C) of the Industrial Disputes Act, Chapter 131 gives very wide powers to a Labour Tribunal to make an order which is just and equitable; but such an order must be in consonance with the scheme of the Act itself .

Once an order for reinstatement is made, it must be assumed that the employer will carry out that order, subject, of course, to the limited right of appeal granted by section 31(D(2).

If the employer fails to obey the order, provision is made in the Act to punish him, for an offence under the Act. (vide section 40(Q)).

To anticipate a non-compliance with the order for re-instatement, and award "continuing damages", would have the effect of penalising the employer twice over, and this in my view would not be just or equitable. I have reminded myself of the fact that an appeal by an employer would result in some hardship to an employee during the pendency of the appeal, but that kind of disadvantage is inevitable whenever a right of appeal is granted.

I do not think that an order such as the one complained of, which appears to be directed at discouraging appeals by an employer, was contemplated by the legislature when it enacted section 31(C).

I delete that part of the order relating to "continuing damages" referred to above.

Subject to this variation, the appeal is dismissed.

Order varied and appeal dismissed.

Present: **Alles, J.**

K. P. GILBERT POLICE SERGEANT *vs.* P. KANDIAH (SON OF POOCHI) & SIX OTHERS

S. C. 418 — 424/69 — *M. C. Nuwara Eliya* 34738

Argued on: 13rd March, 1971
Decided on: 21st March, 1971

Criminal Procedure Code—Accused convicted of summarily triable charges and of indictable charges at one trial — Magistrate's failure to assume jurisdiction under section 152(3) *— Are such proceedings illegal? — Is it permissible for the Supreme Court to separate the illegal trial and sustain conviction on summarily triable Counts?*

Courts Ordinance, section 36 *— Powers of appellate jurisdiction of Supreme Court in such cases — Are they sufficient to uphold conviction of summary charges only where no prejudice to either party — Whether such joinder amounts to error of law.*

Seven accused were convicted by the Magistrate on four charges. Three of these were offences triable summarily and the other (rioting) was triable only by indictment.

On appeal it was submitted on their behalf that in view of the decisions in *Ramasamy v. Gunaratne*, 72 N.L.R. 187 and *William v. Inspector of Police, Mirigama*, 72 N.L.R. 406, that the trial was illegal and this was not curable under section 425 of the Criminal Procedure Code and that therefore, the proceedings should be quashed and a re-trial ordered on the charges summarily triable.

A contrary view was expressed in *Joseph v. Woolter*, 72 N.L.R. 213 where it was held that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction of the summarily triable count.

Without deciding which of these conflicting views is correct,

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Held: (1) That the appellate jurisdiction of the Supreme Court is quite sufficient to enable the conviction on the summary charges to be upheld even if the learned Magistrate wrongly tried the charge of rioting.

(2) That at most, such a joinder would be an error of law and under section 36 of the Courts Ordinance, it is open to the Supreme Court, in appropriate circumstances, to uphold a conviction, if the error has not prejudiced the substantial rights of either party.

(3) That the conviction of the appellants under section 144 of the Penal Code for rioting should be set aside and the convictions and sentences on the summary counts should be affirmed.

Per **Alles, J.:** "If the prosecution wishes the non-summary charges to be tried with the summary charges, the most desirable course would be for the Magistrate to assume jurisdiction under section 152(3) of the Criminal Procedure Code and try both the summary and non-summary charges at one trial, mindful of the fact that the sentences that can be imposed by him cannot exceed his punitive powers — vide *Madar Lebbe v. Kiribanda*, 18 New Law Reports, page 376."

Cases referred to: *Ramasamy* v. *Gunaratne* (1968) 72 N.L.R. 187
William v. *Inspector of Police, Mirigama* (1969) 72 N.L.R. 406
Joseph v. *Wootler* (1969) 72 N.L.R. 213
Madar Lebbe v. *Kiribanda* (1915) 18 N.L.R. 376

M. Tiruchelvam, Q.C., with *C. Ganesh*, for the accused-appellants.

K. W. D. Perera, Crown Counsel, for the Attorney-General.

Alles, J.

In this case the seven appellants were charged in the Magistrate's Court of Nuwara Eliya, on count 1, with being members of an unlawful assembly, the common object of which was to cause hurt to Jayasundera, the Assistant Superintendent of Sheen Estate, Pundalu Oya (section 140); on count 2, with rioting (section 144); and on count 3, with causing hurt to Jayasundera with a sharp-cutting instrument (section 315/146).

In the alternative, on count 4, the 7th accused-appellant was charged with voluntarily causing hurt to Jayasundera with a knife (section 315).

On count 5, all the appellants were charged with wrongfully restraining Jayasundera from proceeding along the Sheen Estate road (section 332); and on count 6, all the appellants were charged with causing damage to Jayasundera's car (section 410).

At the close of the case, the learned Magistrate found all the accused guilty on counts 1 and 2 and on count 5. The 7th accused-appellant, in addition, was found guilty on count 4.

All these offences, except the charge of rioting, are offences triable summarily by the Magistrate. The charge of rioting is only triable on indictment.

Learned Counsel for the appellants did not seek to canvass the facts but argued that, in view of certain decisions of this Court, the trial was illegal, and submitted that the proceedings should be quashed and a re-trial ordered on the summary charges before another Magistrate.

The evidence that has been accepted by the learned Magistrate discloses that there was a strike on the estate on 10th August, 1967. According to Jayasundera, at about 3.45 p.m. on that day, the strikers surrounded the office in a threatening attitude. Fearing a breach of the peace, Jayasundera summoned the Police, who dispersed the crowd.

On the following day, when Jayasundera went to the field in connection with his work, in the company of Krishnaswamy, he was obstructed by a large crowd of labourers, and in that crowd he identified the seven appellants. There were large stones placed across the road preventing him from proceeding along the estate road, and he was forced to bring his car to a halt. Krishnaswamy got off the car in an attempt to persuade the labourers to allow Jayasundera to proceed, but failed in this attempt. According to Jayasundera, the 1st accused-appellant came up to the car and rudely told him that he would not allow him to proceed unless Jayasundera gave them a letter to get work in the upper division. Jayasundera's reply was that he was no longer in charge of the upper division and therefore could not accede to this request. The second -appellant reprimanded Jayasundera for having refused his father work. The third-appellant was shouting at the top of his voice that the crowd would not allow Jayasundera to leave the place. The fourth-appellant, who was a woman, incited the mob and told them that Jayasundera had got down the Police the previous evening in order to have them shot. In the meantime the labourers from the lower division had come on the scene and removed the stones, and Jayasundera

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was able to proceed some distance. Then the seventh-appellant inserted his head and shoulders into Jayasundera's car and cut him with a pruning knife. Jayasundera also noticed at that time the fifth appellant sitting on the road and preventing him from proceeding in his car, and the sixth appellant throwing stones; but he was unable to say whether the stones struck his car or not.

The learned Magistrate was amply satisfied that Jayasundera's version of the incident was true and held that the prosecution had proved the case beyond reasonable doubt. Jayasundera's evidence was supported by that of Krishnaswamy on all material points, but the learned Magistrate was prepared, even in the absence of Krishnaswamy's evidence, to act on the evidence of Jayasundera. In convicting the appellant the learned Magistrate has taken a very serious view of the case, and imposed sentences of two weeks' rigorous imprisonment on count 1, two weeks' imprisonment on count 2, and two months' rigorous imprisonment on count 5 — sentences to run consecutively. In addition he sentenced the seventh appellant to serve a period of three months' rigorous imprisonment on count 4.

In view of the strong findings of fact against the appellants, the question that presently arises is whether the convictions of the appellants should be set aside, because the non-summary charge of rioting has been added to the summary charges. There are conflicting decisions of this Court as to whether such a joinder amounts to an illegality which vitiates the entire trial, or whether it is possible to separate the convictions on the indictable charge from the convictions on the summary charges. In *Ramasamy v. Gunaratne*, 72 New Law Reports, page 187, Pandita-Gunawardena, J. held that such a joinder vitiates the entire proceedings, *ab initio*, and that the failure of the Magistrate to assume summary jurisdiction under section 152(3) of the Criminal Procedure Code was an illegality, which was not curable under section 425 of the Code. This same view was followed by Wijayatileka, J. in *William v. Inspector of Police, Mirigama*, 72 New Law Reports, page 406, who held that such a joinder resulted in the trial being illegal *ab initio*. A contrary view was taken by de Kretser, J. in *Joseph v. Wootler*, 72 New Law Reports, page 213, where the learned Judge held in appeal that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction on the remaining summarily triable count.

In my view, it is not necessary, having regard to the circumstances of the instant case, to decide which view is correct. I am of the opinion that the appellate jurisdiction of this Court is quite sufficient to enable the conviction on the summary charges to be upheld even if the learned Magistrate wrongly tried the charge of rioting. At most such a joinder would be an error of law, and under section 36 of the Courts Ordinance it is open to the Supreme Court, in appropriate circumstances, to uphold a conviction in any particular case if the error has not prejudiced the substantial rights of either party.

The evidence that has been led in the present case establishes that the appellants, among others, congregated on the estate road with the object of using violence. The convictions of the appellants on the summary charges would indicate that the learned Magistrate accepted the evidence of Jayasundera that violence was used by the appellants. It, therefore, seems to me that the inclusion of the charge of rioting has not in any way prejudiced the appellants. Indeed the appellants did not even consider it of sufficient importance to raise it as a ground in the petition of appeal. True it is that the learned Magistrate had no jurisdiction to try the offence of rioting; and I set aside the conviction of the appellants under section 144 of the Penal Code, and affirm their convictions and sentences on the summary counts. The appellants, therefore, will serve two weeks' rigorous imprisonment on count 1, two months' rigorous imprisonment on count 5, which sentences will run consecutively; and the seventh appellant in addition will serve a period of three months' rigorous imprisonment on count 4.

Subject to these variations, the appeals of the appellants are dismissed, and the convictions on the summary charges affirmed.

In conclusion, I would wish to observe that in view of the conflicting decisions of this Court, to which reference has already been made, it would be salutary if the prosecuting authorities and the Magistrates examine plaints which contain summary and non-summary charges before a trial commences. If the prosecution wishes the non-summary charges to be tried with the summary charges, the most desirable course would be for the Magistrate to assume jurisdiction under section 152(3) of the Criminal Procedure Code and try both the summary and non-summary charges at one trial, mindful of the fact that the sentences that can be imposed by him cannot exceed his punitive powers — vide *Madar Lebbe v. Kiribanda*, 18 New Law Reports, page 376.

Conviction on non-summary count set aside.

Conviction on summary counts affirmed.

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

MACKWOODS LIMITED

v.

TEA, RUBBER, COCONUT & GENERAL PRODUCE WORKERS' UNION

S. C. 31/70 *Labour Tribunal* 2/32092

Argued and decided on: 14th February, 1971
Reasons delivered on: 16th March, 1971

Labour Tribunal — Workman dismissed on a charge of theft or of aiding and abetting it — President holding dismissal not justified — Misdirection in not taking into consideration a statement made by workman to Police and admitted by him — Admissibility of such confession in civil proceedings.

The President of a Labour Tribunal having failed to consider a statement which the workman had made to the police, because he overlooked it or thought, it was inadmissible being a confession to a Police officer, ordered his re-instatement stating that there was no evidence that he had any hand in the theft or aided and abetted in the commission of the theft on the ground of which he was dismissed.

Held: (1) That there was clear evidence in the said statement that the workman had aided and abetted the commission of the theft.

(2) That a confession made to a Police officer is not inadmissible in a civil proceeding.

Lakshman Kadirgamar, with *P. Ramanathan*, for the employer-appellant.

T. Joganathan, for the applicant-respondent.

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

In this case the President of the Labour Tribunal ordered the re-instatement of a workman who had been employed as a lorry driver by the applicant Company. The President has rightly stated that the main issues for consideration were whether the workman was guilty of theft or whether he aided and abetted in the commission of theft. He made order in favour of the workman for the reason thus stated:— "There is no evidence for me to conclude that he had any hand in the theft or aided and abetted in the commission of the theft."

It is apparent that the President either overlooked a statement which the workman made to the Police, or else thought that statement to be inadmissible as being a confession made to a Police officer. Such a confession is not inadmissible in a civil proceeding.

In that statement, the workman clearly admitted that the labour contractor's representative, one Kitchel, whose duty it was to load and unload tea chests on and from the lorry which the workman drove, had made a certain suggestion after some tea chests had been loaded on the lorry for transport to the appellant's stores. That suggestion was "since these chests are not weighed again, we can remove some tea from these chests". The workman further admitted that he agreed to this suggestion, that he drove the lorry to some place, that there some tea was put into gunny bags, and that Kitchel took away the gunny bags. There was also evidence that when the workman drove the lorry to the appellant's store, the tea chests appeared to have been tampered with; they were therefore weighed and a shortage was discovered. The appellant at first denied making the statement, but in cross-examination he said "I made a statement to the Police on 20th May. That was the statement that was read out to me today."

There was thus clear evidence that by driving the lorry to the place at which tea was stolen from the chests, and by agreeing to the suggestion that the tea be removed, the workman did aid and abet the commission of the theft. But for the grave mis-direction that there was no such evidence, the President would necessarily have held that the dismissal of the workman was justified. For these reasons, I set aside the order of the Tribunal with costs fixed at Rs. 105/-.

Order set aside.

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Present: **Samerawickrame, J.**

V. ARUMUGAM *v.* S. VALLIAMMA *

S. C. 63/'67 — C. R. Colombo 77635

Argued on: 9th September, 1968
Decided on: 21st December, 1969

Power of Attorney — Attested in India — Signed before Magistrate in India — Absence of designation of office under signature — Validity of Power of Attorney.

Where it was admitted that the power of attorney bore the signature of the plaintiff and further that it bore

(*a*) the seal in Tamil which was apparently the Seal of the Magistrate's Court,

(*b*) the attestation by the Attache of the High Commissioner of India in Ceylon that it had been signed by the Sub-Divisional Magistrate, Tuticorin,

Held: That it was sufficient authority for the plaintiff's attorney to proceed with the case, though the designation of his office was omitted under the said Magistrate's signature.

W. D. Gunasekera, for the applicant-appellant.

D. R. P. Goonetilleke, with *C. Dahanayake*, for the defendant-respondent.

Samerawickrame, J.

This is an appeal from an order made in an inquiry into an application for the withdrawal of a sum of about Rs. 700/ lying in deposit to the credit of the case. The application was made by an attorney of the plaintiff. The defendant-respondent challenged the validity of the power of attorney on the grounds that it was not a genuine document and that it had not been duly executed. He obtained an examination of the document by a handwriting expert but at the inquiry, the allegation that the power of attorney did not contain the genuine signature of the plaintiff was abandoned and counsel for the defendant-respondent challenged the document on the sole ground that the power of attorney was not duly executed. Once it was admitted that the power of attorney bore the signature of the plaintiff, I do not think that it was necessary for the court to have been unduly critical in its examination of the power of attorney. The learned Commissioner of Requests states that the signature of the Sub-Divisional Magistrate, Tuticorin does not contain under it the designation of his office. The power of attorney however bore a seal in Tamil which was apparently the seal of the Magistrate's Court and the Attache of the High Commission of India in Ceylon has attested to the fact that it has been signed by the Sub-Divisional Magistrate, Tuticorin.

I am of the view that the power of attorney was sufficient authority for the application made by the attorney on behalf of the plaintiff. I set aside the order of the learned Commissioner and make order allowing the application for the withdrawal of the money.

I find that there was an earlier abortive application which failed for want of proof of the power of attorney which was then put forward. There also appears to have been further proceedings and the time of the court appears to have been applied to this matter of the withdrawal of the sum of money on several occasions. The time of the court as well as expense to parties could have been avoided if the plaintiff had, when he decided to have his elder brother appointed to act for him as attorney for the purpose of this case, furnished him with a power of attorney duly executed in accordance with the provisions of the law applicable thereto which are not very intricate. In the circumstances, I make no order as to costs in respect of either the appeal or the inquiry in the Court below.

Set aside.

For Tamil translation see Tamil section Vol. 1, p. 7

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Present: **De Kretser, J.**

T. K. MENDIS *v.* THE RIVER VALLEYS DEVELOPMENT BOARD*

S. C. 59/69 — L. T. No. 1/27312 Colombo

Argued on: 11th October, 1969
Decided on: 12th December, 1969

Industrial Disputes Act, section 31B(5) — Workman's services terminated by employer — Action filed in District Court for relief— Later application made to Labour Tribunal under section 31B(1)—Order that application to Labour Tribunal be taken up after action in District Court decided — Application to withdraw action allowed and action dismissed— Thereafter in application to Labour Tribunal objection under section 31B(5) that Tribunal had no jurisdiction as remedy already sought in District Court — Objection upheld— Appeal.

The applicant, a clerk, filed action in the District Court on 28.2.1966 praying for relief against his employer for wrongfully terminating his services. Pending this action, on 20.3.1966 he applied to the Labour Tribunal praying substantially for the same relief.

On 29.3.1967 when it was brought to the notice of the Tribunal that an action was pending in the District Court the President made order that the parties should move after the "D.C. Case is finalised."

On 13.6.1968 Counsel for the plaintiff (applicant) in the District Court case moved to withdraw the action without prejudice to his right to make an application to the Labour Tribunal. Counsel for the defendant objected to any reservation of a right to the plaintiff and stated that the law would take its own course. The Court allowed the plaintiff's application and dismissed the action with costs.

On 26.9.1968 when the matter came-up in the Labour Tribunal, on an objection taken by Counsel for the employer, that in terms of Section 31B(5) of the Industrial Disputes Act, the Tribunal had no jurisdiction to hear and determine the application in view of the fact that the plaintiff had sought his remedy in the District Court, the President upheld the objection. The applicant appealed.

Held: (1) That what Section 31B(5) provides is not that a workman cannot seek his remedy under the Act and any other legal remedy also but that he cannot obtain both.

(2) That the appellant is not barred by section 31B(5) from proceeding with the application before the Labour Tribunal as there had been no final order or adjudication on the remedy sought in the District Court.

Case referred to: *The United Engineering Workers' Union* vs. *Devanayagam* (1967) 69 N.L.R 289

W. E. M. Abeysekera, with *Gamini Wanigasekera*, for the appellant.

H. W. Jayawardena, Q.C., with *Paul Perera* and *Neville de Alwis*, for the employer-respondent.

De Kretser, J.

The applicant was a clerk in the services of the River Valley's Development Board. He was informed by letter dated 1.2.66 that his services had been terminated in view of his absence from duty, as from 3.3.66. He thereupon on 28.2.66 filed action No. 1546/Z in the District Court of Colombo.

The prayer for relief was as follows:

"Wherefore plaintiff prays for judgment and decree:—

(*a*) declaring the purported termination of plaintiff's services by the defendant is wrongful, null and void,

(*b*) declaring the plaintiff as an employee and entitled to continue in employment in the service of the defendant and entitled to draw his salary and emoluments to which he is entitled,

(*c*) for an injunction, permanent and interim, restraining the defendant, its officers, servants, agents from withholding the plaintiff's salary and emoluments and an enjoining order to the same effect to accompany the service of summons till the hearing and determination of this action or application,

(*d*) for costs and for such other and further relief as to this Court shall seem meet."

*For Sinhala translation see Sinhala section Vol. 22 p. 12

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On 13.6.68 Mr. Advocate E. B. Wikramanayake Q.C., who appeared for him moved to withdraw the action without prejudice to his right to make an application to the Labour Tribunal if so advised. Mr. Advocate Kadirgamar who appeared for the defendant stated that while he had no objection to the plaintiff withdrawing the case he was not consenting to any reservation of any right to the plaintiff to apply to the Labour Tribunal. He stated that the Law would take its course.

The District Judge allowed the application of the plaintiff and dismissed the action with costs.

In point of fact on 29.4.66 T. K. Mendis had already filed an application in the Labour Tribunal in connection with the termination of his services. His prayer there was as follows:—

"Wherefore, applicant prays that the Tribunal be pleased to:—

(i) Order reinstatement of the applicant in his post as clerk Grade VII,

(ii) Make order granting the back pay emoluments from date of dismissal or termination till applicant is reinstated,

(iii) Grant costs and such other and further relief as to the Tribunal shall seem meet.

The applicant states that the statement herein contained are true and correct."

On 29.3.67 when it was brought to the notice of the Tribunal that there was an action pending in the District Court the parties moved that the application in the Labour Tribunal should be taken up after the District Court adjudication was over, the President made order that the parties should move after the "D.C. Case is finalised".

The matter next came up in the Labour Tribunal on 26.9.68 and then Mr. Kadirgamar revealed what he had meant when he said in the District Court that the Law would have to take its course for he now took the objection that in terms of section 31B(5) of the Industrial Disputes Act the Tribunal had no jurisdiction to hear and determine the application in view of the fact that plaintiff had sought his remedy in the District Court.

Section 31B(5) of the Act reads as follows:—

"Where an application under sub-section (1) is entertained by a Labour Tribunal and proceedings therein are taken and concluded the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which the application relates and

Where has he first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under sub-section (1)."

The President upheld the objection and ruled that "the applicant cannot have and maintain this application before this Tribunal under Act. This application is accordingly rejected."

The applicant has appealed from that order.

Counsel for the respondent adopting the language of Lord Guest and Lord Devlin in the dissenting judgment of the Privy Council in *Devanayagam's Case*, 69 N.L.R. at 303 where their Lordships were discussing the functions of the Labour Tribunal, submitted "the workman has to make his choice between the remedy afforded by the Act and any other legal remedy he may have; he cannot seek both."

With respect it appears to me that it would be more correct to say he cannot obtain both for Section 31B(5) provides that it is where "the application under Sub-section 1 is entertained by a Labour Tribunal and proceedings **thereon are taken and concluded**" that "the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates."

It appears to me that when the section goes on to read "and where he has first resorted to any other legal remedy he shall not **thereafter** be entitled to the remedy under Sub-section 1" it contemplates the situation where he has resorted to the other legal remedy and proceedings thereon had been taken and concluded for there can be no reason why there should be a difference as to the stage at which the proceedings in the seeking of one remedy should operate as a bar to the obtaining of relief in the other. It appears to me it is not the filing of the plaint or the application as the case may be that is the bar but the fact that there has been a final order or an adjudication on the remedy sought that operates as the bar to the seeking of another remedy in the same or any other forum. What is forbidden is the obtaining of more than one remedy in connection with the same subject-matter in separate proceedings and not the seeking of them.

It appears to me that when it is brought to the notice of the Judge or to the President that there is not only a plaint filed in Court but also an application filed in the Labour Tribunal in respect

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of the same matter to rule that what is before him should await the result of the remedy sought elsewhere or to ask the party concerned to make up his mind as to which he is going on with, and it appears to me that it would be equally open to a workman who has been seeking his remedy in two forums, it may be inadvertently, to ask permission to withdraw the application made in one in order to seek his fortunes in the other.

In the instant case the applicant withdrew his action in the District Court with the object of seeking his remedy in the Labour Tribunal. It appears to me therefore that the President should hear and adjudicate on it. I set aside the order made by the President and direct him to entertain, hear, and adjudicate on the application made. The applicant will be entitled to the costs of this appeal which I fix at Rs. 105/-.

Set aside and sent back.

Present: **Wijayatilake, J.**

INSPECTOR OF POLICE (FORESHORE), COLOMBO *vs.* MATHIYAPARANAM

S. C. 385/69 *with Application* 34/70 — *Colombo J. M. C.* 38732

Argued and decided on: 9th July, 1970

Customs Ordinance, Section 101(1) — *Accused convicted of an offence committed at Korteboam Street, Kotahena within Customs premises—Evidence for prosecution referring to Aluthmawatta Road—No evidence that Korteboam Street is within Customs premises or that limits of Port of Colombo correspond to limits of the Customs premises — Is conviction sustainable?*

The 2nd accused was convicted of handling certain articles in the Customs premises as contemplated under section 101(1) of the Customs Ordinance. The charge stated that the offence was committed at Korteboam Street in Kotahena within the Customs premises whereas the evidence for the prosecution showed that it took place at Aluthmawatta Road. There was no evidence whatever to show that Korteboam Street, in Kotahena is within the Customs premises or that the limits of the Port of Colombo correspond to the limits of the Customs premises.

Held: That the prosecution had failed to establish the charge that the accused committed the offence **within** the Customs premises as defined in the Customs Ordinance.

Followed: *Jinadasa v. Foreshore Police*, 73 N.L.R. 45

Not followed: *Joseph v. I.P. Police (Foreshore), Colombo*, 72 N.L.R. 357

A. H. C. de Silva, Q.C., with *Mano Devasagayam*, for the 2nd accused-appellant in the appeal and for the 2nd accused-petitioner in the application.-

Tivanka Wickremasinghe, Crown Counsel, for the respondent in the appeal and in the application.

Wijayatilake, J.

Mr. A. H. C. de Silva, learned Queen's Counsel appearing for the 2nd accused submits that the prosecution has failed to establish that the 2nd accused did handle the articles in question — five mercury B.P.C. bottles — in the Customs premises as contemplated under Section 101(1) of the Customs Ordinance. As would appear from the evidence led for the prosecution the 1st accused had been on Aluthmawatta Road and he had introduced his hand through a hole in a wall of the Port of Colombo and taken out these articles and it was only thereafter that the 2nd accused who was also outside this wall, appears to have handled them. Mr. de Silva submits that whilst the evidence refers to Aluthmawatta Road there is no evidence whatever to show that the particular street referred to in the charge namely Korteboam Street in Kotahena is within the Customs premises. He has referred me to the judgment of De Kretser, J. in S.C. 934/68 J.M.C. 37659 of 5.3.69 which was followed by Tennekoon, J. on 25.3.70—vide *Jinadasa v. Foreshore Police*, 73 N.L.R. 45 where they held that it is incumbent on the prosecution to prove that the incident did take place **within** the Customs premises as defined in the Customs Ordinance.

*For Sinhala translation, see Sinhala section, Vol. 22, p. 11

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in the absence of any evidence to show that the limits of the Port of Colombo correspond to the limits of the Customs premises.

Mr. de Silva has referred me to the defintion of 'Customs premises' and to the schedule giving the boundaries of the Customs premises of Colombo as appearing in the Customs Ordinance, volume IV subsidiary. He has also referred me to the judgment of Pandita-Gunawardena, J. in *Joseph v. I.P. Police* (Foreshore, Colombo) 72 N.L.R. 357 where he has taken a different view in the light of Section 148 of the Customs Ordinance, chapter 235 where it is laid down that in any information or other proceeding for any offence against this Ordinance the averment that such offence was committed within the limits of any Port or of the territorial waters of Ceylon shall be sufficient, without proof of such limits, unless the contrary be proved. Pandita-Gunawardene, J. appears to have treated the Customs premises in Colombo as identical with the Port of Colombo. Tennekoon, J. in his judgment as I have already referred to, has discussed the conflicting views taken by De Kretser, J. and Pandita-Gunawardene, J. and he has adopted the former. With great respect I agree with the judgments of De Kretser, J. and Tennekoon, J.

Learned Crown Counsel concedes that the prosecution has not led evidence to show that either of these accused was **within the Customs premises** as defined in the Customs Ordinance. He has also drawn my attention to the fact that while the charge refers to Korteboam Street, the evidence refers to Aluthmawatte Road. Clearly this conviction cannot stand.

I would accordingly set aside the conviction and sentence of the 2nd accused and acquit him.

Accused acquitted.

Present: **Wijayatilake, J.**

GERALD NANAYAKKARA *v.* K. D. P. HETTIARATCHI & ANOTHER

S. C. 113/69 — *Labour Tribunal* 1/31693

Argued and decided on: 22nd February, 1971

Labour Tribunal — Termination of workman's services held not justified— Award of compensation made in lieu of reinstatement — Appeal from award on ground that it is inadequate — Factors to be taken into consideration in computing such award — Is failure to consider basis of computation a matter of law?

Holding that the termination of the applicant's services is not justified the President of the Labour Tribunal awarded a sum of Rs. 3,255/- as compensation in lieu of reinstatement.

It was contended in appeal on behalf of the applicant that the sum awarded was inadequate in the circumstances of the case and that the learned President has failed to give consideration to certain material factors in his computation. His counsel cited the following passage from the judgment of *S. S. Shetty v. Bharat Nidhi Ltd.*, 1958 S.C.R. India, p. 442.

"That the monetary value of the benefit of reinstatement is to be computed not on the basis of a breach of the employment nor on the basis of a tort alleged to have been committed by the employer by reason of the non-implementation of the direction for reinstatement contained in the award. The computation has to be made by the Industrial Tribunal having regard to all the circumstances of the case, such as, the terms and conditions of employment, the tenure of service, the possibility of termination of the employment at the instance of either party, the possibility of retrenchment by the employer or resignation or retirement by the employee and even of the employer himself ceasing to exist, or of the employee being awarded various benefits including reinstatement under the terms of future awards by Industrial Tribunals in the event of industrial disputes arising between the parties in the future."

His Lordship approved the principles set out in the above case and—

Held: (1) That, having regard to all the circumstances of the cases the award should be increased by Rs. 1,000/- as the President has failed to give consideration to all the material factors.

(2) That the failure to consider the basis of computation of the monetary value of the benefit of reinstatement amounts to a question of law.

Case referred to: *S. S. Shetty v. Bharat Nidhi Ltd.*, 1958, S.C.R., India 442

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G. G. Mendis, for the applicant-appellant.

L. W. Athulathmudali, with *N. T. S. Kularatne*, for the employers-respondents.

Wijayatilake, J.

In this case the learned President has held that the termination of the applicant's services is not justified, but having regard to the circumstances he has however held that the relief of reinstatement will not be appropriate and therefore suitable compensation would be just and equitable. He has accordingly awarded a sum of Rs. 3,255/- as compensation.

Mr. Mendis, learned counsel for the appellant submits that the sum awarded is utterly inadequate in the circumstances of the instant case and he strenuously submits that the learned President has conspicuously failed to give the basis of his computation in awarding this sum. He has drawn my particular attention to the judgment of *S. S. Shetty v. Bharat Nidhi Ltd.*, Supreme Court Report, India 1958 page 442 where it was held—

> "That the monetary value of the benefit of reinstatement is to be computed not on the basis of breach of the employment nor on the basis of a tort alleged to have been committed by the employer by reason of the non-implementation of the direction for reinstatement contained in the award. The computation has to be made by Industrial Tribunal having regard to all the circumstances of the case, such as, the terms and conditions of employment, the tenure of service, the possibility of termination of the employment at the instance of either party, the possibility of retrenchment by the employer or resignation or retirement by the employee and even of the employer himself ceasing to exist, or of the employee being awarded various benefits including reinstatement under the terms of future awards by Industrial Tribunals in the event of industrial disputes arising between the parties in the future."

In the order made by the learned President he has not set out any of these items. Counsel accordingly contends that this is an arbitrary figure without any relation to the facts.

The applicant had been appointed Assistant Manager of Premasiri Stores, Colpetty on 22.11.58 on a monthly salary of Rs. 100/- and he had continued to be in service till 28.5.67 when he was drawing a salary of Rs. 465/- per month, on which date he was dismissed. At the time of dismissal he was 47 years of age. Counsel further submits that the applicant in various ways has been of great assistance to the proprietor in his advancement both in his business and otherwise and the treatment meted out to him ultimately is not at all justified. He states that a sum of about Rs. 15,000/- would be an appropriate figure on the basis of the principles set out in the Indian case aforementioned.

Mr. Athulathmudali, learned counsel for the respondent submits that the appeal does not raise a question of law, as the President is not bound by the Evidence Ordinance. He submits that the sum awarded is quite adequate and the President is not bound to set out in his order the various heads which are referred to in the Indian case. The principal matter which has to be taken into consideration is the liability of the employer to pay and the conduct of the employee. It would appear according to the employer, the applicant had taken a loan of Rs. 1,650/-. He received the full Provident Fund benefits. At the time of his wedding he had been given a gift of Rs. 750/- and every year he had a month's salary as bonus and also a suit. He also states that the capital of this firm was only Rs. 30,000/- in 1953 and on 1.4.67 the 1st respondent transferred it to his brother the 2nd respondent for a sum of Rs. 49,000/-. He stresses the fact that although the learned President had held that the termination of services was not justified, he had come to the conclusion that it would not be in the interests of this firm to reinstate the applicant. This is a feature to be kept in mind when computing the compensation.

In my opinion the preliminary objection taken by Mr. Athulathmudali that this appeal cannot be entertained is without merit, as the failure to consider the basis of computation would amount to a question of law. I have given my anxious consideration to the principles set out in the Indian case with which I agree with respect, and in all the circumstances I think it would meet the ends of justice and equity if a further sum of Rs. 1,000/- is added to the Award made by the learned President. I make order accordingly.

Subject to this variation the appeal is dismissed. I make no order as to the costs.

Varied.

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Present: **Weeramantry, J.**

M. S. A. GAFFOOR *v.* OSWIN DE ALMEIDA

S. C. No. 91/1969 — *L. T. No.* 8/16599

Argued on: 22nd June, 1970
Decided on: 16th January, 1971

Industrial Disputes Act—Definition of 'employer'—Partnership—Change of composition of partnership—Representation that workman's interests would be conserved—Does new partner take over liabilities incurred by old partnership—Joint liability—Distinction between liability of a partner and a co-owner.

The co-owners of an estate employed the respondent, in 1946, representing to the respondent that they were carrying on business of running the estate as partners. The Appellant became a shareholder in 1960. By letter A1 he informed the respondent *inter alia*, that he would see that his interests as Superintendent were conserved fairly and squarely. The services of the respondent were terminated in 1962. He made application to the Labour Tribunal and was awarded compensation in respect of the termination of his services, gratuity and Provident Fund benefits.

Held: (1) That the appellant's liability for the period 1960 to 1962 is based on the principle of implied contract or implied agency.

(2) That the appellant's liability to pay terminal benefits for the 14 years of service which preceded his acquisition of an interest in the estate is based on two factors, namely:

(*a*) Letter A1 by which the appellant has assured the rights that have already accrued to the respondent.

(*b*) The absence of a fresh contract of service when the Management changed its composition.

Per **Weeramantry, J.**—" Had the relationship between the owners been one of co-ownership, there may have been substance in the submission of learned counsel for the appellant that the claim would be exigible against one co-owner only *pro rata* and that one co-owner could not be sued in regard to the entirety, in consequence of the difference between the Roman-Dutch concept of joint liability and the English concept."

Texts cited: *Lindley*, 12th ed. p. 323.
Charlesworth—Mercantile Law, 9th ed. p. 249.

M. Tiruchelvam, Q.C., with *S. Ponnambalam* and *K. Kanag-Isvaran*, for the employer-appellant.

P. Vimalachanthiran with *Nihal K. M. Perera*, for the applicant-respondent.

Weeramantry, J.

This appeal is against an order requiring the appellant to pay to the respondent certain sums as compensation in respect of termination of services, gratuity and Provident Fund benefits.

The respondent was employed since 1946 as Superintendent of Udukelle Estate, Polgahawela upon a letter of appointment A3 of 24th March, 1946 by which he was promised *inter alia* a Provident Fund contribution of 15% and, in the event of termination of services as a result of changes of management or otherwise, a payment of two months salary for every year of service and a reasonable compensation for loss of career. This estate was owned by several persons at the time of his appointment and the correspondence between the employers and the employee at the time would appear to indicate that the co-owners of the estate represented to the respondent that they were carrying on the business of running the estate as partners. Thus the letter A3 spoke of one of the owners as the Managing Partner and the letter A5 by which this Managing Partner confirmed his appointment on 23rd August, 1946 said that all partners had agreed to abide by the conditions and terms laid down in his letter of appointment.

It is clear from these documents that when the respondent entered the service of the estate he did

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basis that his employers were carrying on the estate as partners.

The present appellant came into the picture on 8th November, 1960 consequent upon a purchase by him of a one-third of two-fifth share. By his letter A1 he informed the respondent that he, the appellant, had from that day "taken over the management of this estate." By the same letter he indicated to the respondent that he, the appellant, should be considered for the purpose of management as the one shareholder of the estate who would be directly responsible to the other shareholders. He also went on to assure the respondent that he would see that his interests as Superintendent **were conserved** "fairly and squarely" and called upon him to follow his directions on all matters. The services of the Superintendent were terminated in 1962 and it is from that termination that these proceedings have arisen.

The point is now taken on behalf of the appellant that he is only a co-owner in respect of a small fractional share and that these proceedings cannot be maintained against him alone nor any order made against him alone. It is submitted further that in any event no order can be made against him in respect of the period of service of the respondent prior to 1960.

I would commence by referring to the definition of the term 'employer' in section 48 of the Act. As defined in section 48 of the Act 'employer' includes "any person who on behalf of any other person employs any workman." If, therefore, the appellant was acting on behalf of the other co-owners or partners, whichever the case may be, in employing or continuing the employment of the respondent he would fall within the definition of employer as contained in the Act.

It has been stated that it would not be just and equitable to make an order against a person who is a co-owner or a partner inasmuch as the sanctions attaching to the order would not fairly be said to attach to a person who has only such a fractional interest. On this point, however, I would observe that the co-owner or partner who is so rendered liable may have rights of contribution against other co-owners or partners who have so permitted him to act or held him out as their agent whether expressly or impliedly, but that as far as the present Act is concerned the respondent would be entitled to look to the appellant as the employer within the definition contained in the Act.

A distinction must be made between the liability of the appellant for the period prior to 1960 and the period between 1960 and 1963. In regard to the latter period I think that on the principle of implied contract or implied agency the appellant was acting for his co-owners or co-partners and there is no question but that liability must attach to him. In fact so much was in effect conceded by learned Queen's Counsel appearing for him.

On the other hand in regard to the earlier period, we have this difficulty that the appellant whether co-partner or co-owner, acquired this status only in 1960 and would not ordinarily have incurred liability to pay terminal benefits in respect of the 14 years of service which preceded his acquisition of an interest in the estate. The first circumstance, however, which would appear to support the respondent in attaching liability to the appellant is the appellant's own letter A1 wherein he assures the respondent that he will see that his interests as Superintendent are **conserved** 'fairly and squarely'. This sentence has been understood by the President to mean that the appellant was thereby assuring the respondent that if he served as suggested in the letter, the rights that had already accrued to him in respect of his previous service would be conserved. It is not possible for me to say that the President has misconstrued this letter and I see no ground to hold that the letter meant otherwise.

Moreover, as the President has observed, the applicant continued as Superintendent without termination of services and payment of terminal benefits, and this assumption of a continuance of services rather than a termination followed by a fresh contract seems to be the basis on which both parties proceeded. Had there in fact been a termination there would have been rights which the respondent could have directly asserted in terms of A3.

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It has been urged again that where there is a partnership and there is a change in the composition of the partnership by the introduction of a new member, the old partnership comes to an end and a new partnership arises in law. It has been submitted on behalf of the appellant that this new partnership would not be responsible for the liabilities of the old partnership unless such liabilities have been taken over. Such taking over of liabilities may however be express or implied and the circumstances of the present case, having regard to the continuance of the services of the respondent without termination of his services under the old partnership and without payment of any retirement benefits at such time, would appear to be suggestive of an implied assumption by the new partnership of the liability of the old partnership towards the respondent in regard to his earlier period of service. Lindley, 12th ed. p. 323. Moreover the appellant's letter A1 wherein he undertakes responsibility for conserving the respondent's rights would appear to be an express assumption of liability in respect of obligation already incurred towards the respondent.

If in fact the business were not a partnership business but was a co-ownership in regard to the estate, then by one person becoming a co-owner he does not take over the liability of the former owners in regard to the entire property. However, having regard to the documents to which I have already referred wherein the basis on which the respondent was employed was that he was serving a partnership and having regard to the fact that at the time the appellant acquired an interest in this estate no contrary intimation was given to the respondent I think it would be a reasonable inference that it was as an employee of a partnerhsip that the appellant continued his services after the appellant acquired his interests in the business. The decision whether the business in question is carried on in partnership or co-ownership is a mixed question of fact and law. In so far as questions of fact are concerned the President's findings have been reached after very careful consideration and even if such questions were appealable I would see no reason to interfere with them; and in so far as questions of law are involved the President has guided himself by correct legal principles, regarding the differences between co-ownership and partnership. I do not consider therefore that any sufficient reason has been made out to justify this court in departing from the President's findings.

It has been urged on behalf of the respondent that there is on the part of partners a joint liability and therefore that in the case of partnership it would be permissible for an employee having claims against all the partners to choose anyone of them against whom to enforce his claim. In support of this contention he has cited Charlesworth on Mercantile Law, 9th ed. p. 249. On an application of this principle in any event if the respondent had a claim against all the partners. he could decide to make that claim against the appellant alone as one of them. This is in consequence of the notion of joint liability in English law by which each of the persons jointly liable is liable to the entire extent of the claim.

Had the relationship between the owners been one of co-ownership, there may have been substance in the submission of learned counsel for the appellant that the claim would be exigible against one co-owner only *pro rata* and that one co-owner could not be sued in regard to the entirety, in consequence of the difference between the Roman-Dutch concept of joint liability and the English concept. However, it is not necessary to go into this matter further in view of the finding of the President, which I accept, that the relationship here was one of partnership rather than co-ownership.

For these reasons I consider that no ground has been made out for any interference with the order of the President, and I dismiss this appeal with costs.

Appeal dismissed.

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FROM THE SUPREME COURT OF CEYLON

Present: **Lord Hodson, Lord Guest, Lord Upjohn, Lord Donovan and Lord Gardiner**

CARUPPIAH SANDANAM *v.* MOHAMED ISMAIL MOHAMED JAMALDEEN & OTHERS

Privy Council Appeal No. 33 *of* 1969

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

Delivered on: 23rd February, 1971

Specific performance — Notarial agreement to sell land to be allotted in pending Partition action within three months of entering of Final Decree for Rs. 3,000/- *— Part consideration of Rs.* 2,000/- *paid before execution of agreement—Balance Rs* 1,000/- *to be paid at execution of conveyance—If vendors failed or neglected to complete conveyance refund of Rs.* 2,000/- *and further payment of Rs.* 2,000/- *as liquidated damages — Before Final Decree receipt of balance Rs.* 1,000/- *acknowledged in writing — After Final Decree possession of divided lot given to purchasers who erected buildings — Purchasers preparing deed of conveyance — Vendors neglecting to sign — Action for specific performance—Obligations of Vendor— Roman Dutch law.*

By a notarially attested agreement dated 18.7.1956 the defendants respondents (Vendors) agreed to sell to the plaintiff appellant (Purchaser) certain land which was to be allotted to them in lieu of their undivided shares in a land in a Partition action then pending.

The relevant clauses of this agreement were:

(1) "The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the Purchaser sell and transfer unto the Purchaser whatever divided share or shares (together with the buildings and plantations and everything thereon) the Vendors will be allotted in the said partition action . . . for the price of Rs. 3,000/- at any time within three months of the entering of the Final Decree in the said partition action No. P 1119."

Clause 2 provided that out of the said price of Rs. 3,000/- a sum of Rs. 2,000/- shall be paid by the Purchaser before the execution of the agreement and the balance Rs. 1,000/- at the time of executing the conveyance in favour of the Purchaser.

Clause 3 provided for forfeiture of the Rs. 2,000/- if the plaintiff failed to complete the purchase.

Clause 4 provided for the refund of the Rs. 2,000/- paid as advance together with a further sum of Rs. 2,000/- as liquidated damages and not as a penalty in the event of the Vendors failing or neglecting to complete the conveyance.

Before the Final Decree was entered on 18.12.1957 allotting a divided block to the defendants, one of the Vendors borrowed Rs. 500/- from the Purchaser and a further sum of Rs. 500/- subsequently for which said two sums the Purchaser received a receipt dated 10.2.1957 acknowledging the receipt of the full consideration for the transfer under the agreement.

The Vendors permitted the Purchaser in 1959-60 to enter upon the land they agreed to sell and erect buildings with their knowledge and acquiescence.

On 30.10.1961 Proctor for Purchaser prepared a deed of transfer and invited the Vendors, to execute the transfer and on the latter's failure and neglect to do so, this action was filed praying for specific performance of the agreement.

The issue before the Judicial Committee depended on the construction of Clause 4 aforesaid.

The Purchaser contended that the Vendors were under Clause 4 entitled to refuse to accept the final payment of Rs. 1,000/- and to refuse to complete the transaction on paying Rs. 4,000/- to the Purchaser. But that since they had accepted the final Rs. 1,000/- Clause 4 cannot operate.

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The Vendors' reply was that the Purchaser may have paid the final Rs. 1,000/- prematurely, but the agreement continue in existence in each and every part and operate to the full when the time for completion arises. This contention appealed to the Supreme Court.

Held: (1) That having accepted the final instalment, the Vendors must be taken to have accepted the position that they were under a duty to complete the bargain, for, payment of liquidated damages of Rs. 2,000/- in terms of the said clause would no longer be adequate according to the agreement of the parties.

(2) That, therefore as far as Clause 4 is concerned, Their Lordships agreed with the learned District Judge that it is no longer applicable and the Purchaser is entitled to specific performance.

(3) That by Roman Dutch Law the obligation is upon the Vendor to pass transfer and for this purpose he may appoint his own conveyancer although the Purchaser may by the terms of the contract be compelled to pay the costs of the transfer. (Vide *James v. Liquidators of the Amsterdam Township Co* (1903) Transvaal Reports 653 and Wessels Law of Contract in South Africa, 2nd Edition, p. 1105 Sections 4500.)

(4) That accordingly, under Clause 1 of the said agreement the obligation was upon the Vendors to prepare and tender the conveyance, within the three months stipulated, and, as the purchase price has long since been paid, to deliver it upon payment of the costs of its preparation.

Cases referred to: *Abdeen v. Thaheer* (1958) A.C. 116; LVI C.L.W. 58
James v. Liquidators of the Amsterdam Township Co. (1903) Transvaal Reports 653.

Text cited: Wessel's *Law of Contract in South Africa*, 2nd edition p. 1105 Sections 4500.

E. F. N. Gratiaen, Q.C., with *Eugene Cotran*, for the appellants.

David Hands, for the respondents.

Lord Upjohn:

This is an appeal from the Supreme Court of Ceylon (H. N. G. Fernando, C.J. and G. P. A. Silva, J.) who allowed an appeal from V. Siva Supramaniam District Judge in the District Court of Kandy who made an order for specific performance of an agreement dated 18th July, 1956 whereby the three defendants (respondents to this appeal) agreed to sell to the plaintiff (appellant in this appeal) certain land which should be allotted to them in lieu of their undivided shares in certain land in a Partition Action No. P1119 then pending in the same District. It will be convenient to refer to the three defendants/respondents as the Vendors and to the plaintiff/appellant as the Purchaser.

The Vendors' mother was also a party to the agreement and to the Partition Action but she died subsequently and the Vendors became entitled to all her rights and obligations in the agreement and Partition Action and it is not necessary to mention her further.

A Final Decree was made in the Partition Action on 18th December, 1957 and by admission of the parties entered on the same day when certain land being Lot E on a plan referred to in the Decree was allotted to the defendants and the sole question before their Lordships' Board is whether the Purchaser is by virtue of the agreement of 18th July, 1956 entitled to specific performance of the agreement with the Vendors to sell this land to him. Their Lordships must set out the relevant clauses of this agreement.

> "1. The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed at the cost and expense of the Purchaser sell and transfer unto the Purchaser whatever divided share or shares (together with the buildings plantations and everything thereon) the Vendors will be allotted in the said partition action . . . for the price or sum of Rupees Three Thousand (Rs. 3,000/-) at any time within three months of the entering of the Final Decree in the said partition action No. P. 1119. . . .
>
> 2. Out of the purchase price of Rupees Three Thousand (Rs. 3,000/-) a sum of Rupees Two Thousand (Rs. 2,000/-) shall be paid by the Purchaser to the Vendors at or before the execution of these presents (the receipt whereof is hereby admitted and acknowledged by the Vendors) and the balance sum of Rupees One Thousand (Rs. 1,000/-) shall be paid at the time of executing the deed of conveyance in favour of the Purchaser."

Clause 3 provided for forfeiture of the Rs. 2,000/- if the plaintiff failed to complete the purchase and clause 4 was in these terms:

> "4. In the event of the Vendors failing or neglecting to complete the conveyance in terms of these presents the Vendors shall refund to the Purchasers the sum of

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Rupees Two Thousand (Rs. 2,000/-) paid as advance as aforesaid together with a further sum of Rupees Two Thousand (Rs. 2,000/-) as liquidated damages and not as a penalty."

This agreement was notarially executed as required by the Prevention of Frauds Ordinance.

It follows that the conveyance was due to be prepared and executed and the balance of Rs. 1,000/ paid on or before the expiry of three months from 18th December, 1957.

Had nothing intervened it was not in dispute in the Courts below or before their Lordships' Board that by the law of Ceylon based on the Roman-Dutch law when the completion date arrived the Vendors by virtue of clause 4 had the option either to complete the transaction and receive the balance of the Purchaser's money or to refuse to complete upon the terms of refunding to the Purchaser his deposit of Rs. 2,000-/ together with a further sum of Rs. 2,000/- as liquidated damages. This was clearly settled by the judgment of their Lordships Board in *Abdeen v. Thaheer* (1958) A.C. 116.

But in fact much did intervene before the date of completion. One of the Vendors, Mr. Haniffa, was anxious to get married so on 28th August, 1956 he borrowed Rs. 500/- from the Purchaser and later on after some further correspondence the Purchaser paid to Mr. Haniffa a further sum of Rs. 500/-.

It is clear that these two payments were treated by all parties as together being the payment of the final Rs. 1,000/- due under the agreement for the Purchaser received a receipt dated 10th February, 1957 in these terms-

"Received the sum of Rupees five hundred (Rs. 500/-) being balance due to us for land referred to in the agreement dated 18 July 1956 attested by Mr. M. W. R. de Silva of Gampola. We undertake to give the transfer to Mr. Sandanam the 1/6th share of the land, named Konakkahena as per partition case No. 1119 D. C. Gampola, without any consideration as we received the full consideration of Rs. 3,000/- (Three Thousand)."

Then in 1959-60 the Vendors permitted the Purchaser to enter upon the land they agreed to sell to him and with their knowledge and acquiescence erect buildings thereon at a cost of over Rs. 25,000/-.

Matters dragged on, no one evidently was in any great hurry; the Vendors had their money and the Purchaser was in possession developing the land. Ultimately the Proctors for the Purchaser prepared a deed of transfer and by letters dated 30th October, 1961 they invited the Vendors to attend at their offices on 9th November next to execute the transfer. The Vendors failed or neglected to do so and so the Purchaser commenced these proceedings in December of that year.

In both Courts below the question of estoppel by reason of the payment of the Rs. 1,000/- by the Purchaser and with the knowledge and acquiescence of the Vendors his entry into possession and expenditure of money on the land was much debated but before their Lordships' Board Counsel for the Purchaser recognised some difficulties in his way in successful reliance on estoppel and did not pursue this point before them.

In the Supreme Court the learned Chief Justice dealt in his judgment with the submission that the receipt on 10th February, 1957 amounted to a distinct subsequent agreement varying the original agreement (an almost conclusive point under English law), but he held that the Prevention of Frauds Ordinance prevented the proof in evidence of the receipt as a subsequent agreement and this submission failed. Counsel for the Purchaser accepted this view and did not rely on the receipt for this purpose.

The issue before their Lordships' Board was therefore the short one which depended upon the construction of clause 4 of the agreement. The Purchaser contends that clause 4 contemplates a situation when the final payment due under the agreement has not been paid. At that stage the Vendors are entitled to elect to refuse to accept the final Rs. 1,000/- and to refuse to complete the transaction on paying Rs. 4,000/- to the Purchaser. But if they accept payment of the final Rs. 1,000/- the position (he says) is changed and clause 4 cannot operate according to its tenor for repayment of Rs. 4,000/- in lieu of completion will not give to the Purchaser the liquidated damages of Rs. 2,000/- for which he has contracted if the Vendors refuse to complete.

The Vendors' answer is even shorter. The Purchaser may have paid the final Rs. 1,000/- prematurely but the agreement continues in existence in each and every part and operates to the full when the time for completion arises. This contention in substance appealed to the Supreme Court.

Their Lordships cannot agree with the Vendors' submission nor with the decision of the Supreme Court which really depended upon the applicability

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of *Abdeen v. Thaheer* (*supra*). With all respect to their judgment *Abdeen v. Thaheer* no longer applied for the conduct of the parties made it clear that clause 4 could no longer operate. Having accepted the final instalment the Vendors must be taken to have accepted the position that they were under a duty to complete the bargain, for payment of liquidated damages of Rs. 2,000/- would no longer be adequate according to the agreement of the parties.

Their Lordships are of opinion that the position was accurately stated by the learned District Judge towards the end of his judgment. Having briefly referred to the terms of clause 4 he said:

> "That clause does not refer to the refund of any sum received by them subsequent to the date of the agreement, and if that clause is to be given effect to the defendants would be liable to refund only Rs. 2,000/- although they have in fact received Rs. 3,000/- from the plaintiff. That, certainly, could not have been the intention of the parties. For the above reasons, I hold that the substituted obligation contained in clause 4 has become inapplicable, and the plaintiff is entitled to enforce specific performance of the obligation on the defendants to execute a transfer of the property."

Their Lordships therefore agree with the learned District Judge that so far as clause 4 is concerned it is no longer applicable and the Purchaser is entitled to specific performance.

But their Lordships must deal with an entirely separate point depending upon clause 1 of the agreement which was raised for the first time in the Supreme Court.

The Court held that under clause 1 of the agreement it was the duty of the Purchaser to demand a conveyance. If he failed to do so within the period of three months from 18th December 1957 then he could not maintain any action for specific performance or even for liquidated damages, a proposition which Counsel for the Vendors was not prepared to support.

But the Supreme Court did not have the advantage of the arguments presented to their Lordships nor the citation of authority to which their Lordships were referred and will now consider. By Roman-Dutch Law the obligation is upon the Vendor to pass transfer and for this purpose he may appoint his own conveyancer although the Purchaser may by the terms of the contract be compelled to pay the costs of the transfer. This was clearly established by the case in the Supreme Court of the Transvaal in *James v. Liquidators of the Amsterdam Township Co.* (1903) Transvaal Reports 653 and in Wessels Law of Contract in South Africa 2nd edition p. 1105 § 4500 the author said:

> ". . . but where immovables are sold and transfer has to be given, it is the active duty of the seller to pass the transfer, and for that purpose he can appoint his own conveyancer even though the purchaser has undertaken to pay all the expenses of transfer"

and he cites *James'* case (*supra*).

It seems to their Lordships clear that clause 1 of the agreement to which they have already referred did not in any way alter the rights of the parties, for grammatically it must read "The Vendors shall by a valid and effectual deed of conveyance which shall be prepared and executed *by them* at the cost and expense of the Purchaser..." for as *Innes C.J.* pointed out in *James' case* (*supra*) only the Vendor can pass the transfer.

Accordingly it is clear that the obligation was upon the Vendors to prepare and tender the conveyance, and as the purchase price had long since been paid, to deliver it upon payment of the costs of its preparation. But the Vendors were in default in failing to tender the conveyance within the stipulated period of three months and not the Purchaser. The Purchaser was of course entitled to waive any condition as to time and accordingly in their Lordships' opinion he is clearly entitled to specific performance of the agreement. Subsequently to the Judgment and Order of the Supreme Court on the Purchaser's action they heard and determined the Vendors' counter claim asking for the Purchaser's ejectment from the land and for damages. During the hearing their Lordships intimated that they would not hear argument on these issues until they had determined the main appeal and in the circumstances it has become unnecessary for them to do so.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the decree of the Supreme Court discharged and the decree of the District Court restored save that for the date of execution of the Deed of Transfer therein there be substituted a date agreed between the parties or settled by the District Court in default of such agreement. There will be no order as to the costs of the appeal to the Supreme Court or of this appeal.

Appeal allowed.

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Present: **Samerawickrame, J. and Pandita-Gunawardene, J.**

MAILAPITIYE GUNASIRI THERO *v.* WATINAPAHA DHAMMANANDA THERO

S. C. 201/'67*F* — *D. C. Kandy* 6700/*L*

Argued on: 14th, 15th, 16th & 17th November, 1970.
Decided on: 22nd November, 1970

Buddhist Eccelesiastical Law—Viharadhipathi—Deed of dedication—Words given different rendering in translation— Judge's failure to consider adequately matters relevant to the determination of the issues — Delay between end of hearing and delivery of judgment.

Plaintiff sought a declaration that he was the duly constituted Viharadhipathi of a temple. In deciding whether there was a valid oral dedication or whether there was a valid dedication duly made only on execution of deed P5, the learned District Judge was influenced by the presence of the words "hereby dedicates" in the translation of the deed of dedication. On an examination of the original it appeared that the English rendering of the words should read "have dedicated".

Held: (1) That in the circumstances a finding based on the words "hereby dedicates" cannot be sustained.

Held further: (2) That where a Judge fails to consider many matters relevant to the determination of issues, the judgment should be set aside and the case be sent back for re-trial.

Per **Samerawickrame, J.** "The learned District Judge has failed to consider adequately many matters relevant to the determination of issues 11 and 12 and also to the questions to what extent the *Kathikawathas* were binding and whether their provisions operate to control the succession to the office of Viharadhipathy in respect of temples held by members of the Ramanna Nikaya."

H. W. Jayawardena, Q.C., with *S. S. Basnayake* and *G. M. S. Sameraweera*, for the plaintiff-appellant.

No appearance, for the defendant-respondent.

H. Deheragoda, Solicitor-General with *N. Sinnetamby*, Crown Counsel, as *amicus curiae*.

Samerawickrame, J.

In this action the plaintiff sought a declaration that he was the duly constituted Viharadipathi of the vihare and premises called and known as Kusumachetiyārāmaya situated at Peradeniya. His action was dismissed and he has appealed from the judgment delivered against him.

The first point taken up by learned counsel for the appellant was that the judgment was invalid because the learned trial judge had ceased to be a judicial officer at the time he wrote the judgment and at the time the judgment was pronounced as prior to that and at such times he held office and was functioning as, a Commissioner of Assize. We are indebted to the learned Solicitor-General who appeared on notice to assist Court in respect of this preliminary point and addressed an argument to us in support of the validity of the judgment. However, as we are able to dispose of this appeal on other grounds, we do not think it necessary to make a finding on this point.

In view of the order that we propose to make it is expedient to refrain from going into the matters in dispute between the parties and expressing an opinion upon them.

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The first matter that arose for consideration was whether there was a valid oral dedication on 25.10.1926 or whether there was a valid dedication only on the execution of deed p5 on 17.10.1927. The learned District Judge took the view that there was a legal and valid dedication only on the execution of deed P5. In coming to this finding he was largely influenced by the fact that in the operative part of P5 there appeared the words "hereby dedicates" according to the English translation that has been produced. We find those words in the translation but at the argument before us we looked at the original document which is in Sinhala. We find that the English rendering of the words appearing there should read "have dedicated". It would appear therefore that one ground on which that finding of the learned District Judge was made was without foundation.

In his judgment the learned District Judge comments on the fact that while the defence called two important office-bearers of the Nikaya in regard to the rule of succession in the Rāmañña Nikāya, the plaintiff failed to call such evidence. Learned counsel for the appellant submitted that the relevant issues were raised only after the plaintiff's case was closed and that the learned District Judge had overlooked this fact. The relevant issues Nos. 11 and 12 are as follows:-

"(11) Is the mode of succession to vihares dedicated to the Ramanna Sect —

(*a*) by appointment by the temple of competent bhikkhus attending the funeral of a deceased Viharadhipathy; or

(*b*) where there is no such appointment as set out in (a) above, by the Karaka Sabha of the Nikaya?

(12) If the answer to issue 11(a) and/or (b) is in the affirmative, has the plaintiff any right to this Vihare by right of succession to his teacher alone without an appointment as set out in issue 11?"

These issues were raised after the other witnesses for the defence had given evidence and just before the defendant who was the last witness called by the defence gave evidence and on the last date of trial. The defence relied on two *Kathikāvathas* of the Rāmañña Nikāya which were spoken to by the two office-bearers called by the defence. One of the *Kathikāvathas* purported expressly to exclude the rule of succession known as the *Sisyānu Sisya Paramparāwa* rule.

The learned District Judge has failed to consider adequately many matters relevant to the determination of issues 11 and 12 and also to the questions to what extent the *Kathikāwathas* were binding and whether their provisions operate to control the succession to the office of Vihārādhipathy in respect of temples held by members of the Rāmañña Nikāya.

The decision of this case rested in some respects on findings of fact in respect of which the impressions made by the witnesses on the learned trial judge were important. It is unsatisfactory that there should have been a delay of about eleven months between the end of the hearing and the delivery of judgment. The learned District Judge was in no way to blame for the delay which appears to have been due to the failure of the defendant to tender the documents produced by him in time. The learned District Judge has noted this fact and though he held in favour of the defendant, awarded him only two-thirds of the taxed costs.

For the reasons set out above the judgment cannot stand. We set it aside and send the case back for a fresh trial. The plaintiff-appellant will be entitled to costs of appeal. The costs of the proceedings which have been rendered abortive will be costs in the cause but the defendant-respondent will in any event not be entitled to more than two-thirds of the taxed costs in respect of such proceedings.

Pandita-Gunawardene, J.

I agree.

Set aside and sent back.

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Present: **G. P. A. Silva, S.P.J. and Samerawickrame, J.**

SUMANASIRI *v.* TILAKERATNE BANDA

S. C. No. 31 *(F)* 1967 — *D. C. Kandy* 6437

Argued on: 21st January, 1971
Decided on: 9th March, 1971

Kandyan Law Declaration and Amendment Ordinance, sections 4 *and* 5(1)(*d*) — *Revocation of deed of gift — Mere description of deed as "by way of gift absolute and irrevocable" — Are these words sufficient to satisfy the conditions necessary for irrevocability prescribed by section* 5(1)(d)?

Effect of condition appended to deed of gift that "the donee shall and will" render assistance etc.

A Kandyan deed of gift contained the following words: "I, N. Rankiri of Gurugama ..... hereby give grant convey, transfer, set over and assure unto the said donee, his heirs, executors, administrators and assigns by way of gift absolute and irrevocable all those lands and premises described in the Schedule.....

There was also appended to this deed a condition "that the donee shall and will render assistance during the period of her natural life and after her death bury her remains decently according to the customs of the Buddhist religion."

The Donor subsequently revoked this gift and on the same day conveyed her interests to the appellant. The donee on the original gift transferred the interests which he purported to possess on that gift to the plaintiff four days after the revocation.

The rival claims of the plaintiff and the appellant came up for adjudication in a partition action and the learned District Judge held that the deed of revocation was not effective to revoke the original gift and held in favour of the plaintiff.

Held: (1) That the description of the said gift as "absolute and irrevocable" is not sufficient to satisfy the condition for irrevocability prescribed by section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance which provides that a renunciation of a Kandyan gift is not valid unless the deed expressly contains a special clause of renunciation expressed in the particular manner stated in that section.

(2) That, therefore, the said deed of gift is revocable, and the appellant, acquired a good and valid title to the land as against the plaintiff.

Followed: *Tikiri Banda Dullewa v. Padma Rukmini Dullewa*, 71 N.L.R. 289 (P.C.); 75 C.L.W. 97

Held Further: (3) That the aforesaid condition appended to the original deed of gift that the donee shall and will render assistance etc, takes away the effect of the words "by way of gift absolute and irrevocable". This view is confirmed by the recital in the said deed of revocation that the said donee failed and neglected to render the donor the succour and assistance in consideration of which the latter gifted the land.

W. D. Gunasekera, with *W. S. Weerasooriya*, for the 1st added defendant-appellant.

T. B. Dissanayake, for the plaintiff-respondent.

G. P. A. Silva, S.P.J.

This was a partition action in which the only contest was regarding the interests which the plaintiff claimed through one Rankiri who was alleged to have gifted her interests upon a deed of gift No. 10850 dated 13.2.1947 to Kalu Banda, the plaintiff's immediate predecessor in title. The first added defendant, who is the appellant, claimed the interests of Rankiri as against the plaintiff-respondent on the ground that the said deed of gift was revocable and that the said Rankiri in fact revoked it by deed No. 15248 of 16.9.1970 and thereafter, by deed No. 15249 of the same date, conveyed her interests to him. The learned District Judge held that the said deed of revocation No. 15248 was not effective to revoke the original deed of gift to Kalu Banda, the plaintiff's predecessor

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in title, and that therefore the first added defendant-appellant got no title to the land on deed No. 15249. The present appeal is against this order.

The contention of the appellant is that any deed of gift can be revoked in terms of Section 4 of the Kandyan Law Declaration and Amendment Ordinance (chapter 59), subject to the exceptions contained in Section 5. Section 5(1)(d) provides one of the exceptions to Section 4 and precludes a gift given after the commencement of the Ordinance from being revoked when the right to cancel or revoke it has been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. Counsel also relied on the most recent Privy Council case of *Tikiri Banda Dullewe v. Padma Rukmini Dullewe and Another*, 71 N.L.R. 189,* in which the Privy Council held that a renunciation of a Kandyan gift is not valid unless the deed expressly contains a special clause of renunciation expressed in the particular manner stated in Section 5(1)(d). They held further that an adjectival description of the gift as irrevocable in a deed would not satisfy the condition for irrevocability prescribed by this section and that where only such words are contained in a deed of gift, such a deed is subsequently revocable by the donor. The relevant wording in this deed of gift No. 10850 dated 17.2.1947 is as follows: "I, N. Rankiri of Gurugama..... hereby give, grant, convey, transfer set over and assure unto the said donee, his heirs, executors administrators and assigns by way of gift absolute and irrevocable all those lands and premises described in the schedule hereto and of the value of Rupees Two thousand Rs. 2000/-) of lawful money of Ceylon. It would therefore appear that this deed marked P5 does not conform to the requirements laid down by the Privy Council in this case. Moreover there is appended to this deed a condition that the donee shall and will render to the donor all needful assistance during the period of her natural life and after her death bury her remains decently according to the customs of the Buddhist religion. Even the ordinary implication of this condition is that the deed would be of no force or avail if the condition is not satisfied. Apart from not conforming to the requirement laid down by the Privy Council therefore, I think that this condition not merely whittles down but entirely takes away the effect of the words "by way of gift absolute and irrevocable." If there was any doubt on this matter, the subsequent deed of revocation No. 15248 of 1.6.1950 (1D4) in which Rankiri recited that the donee Kalu Banda failed and neglected to render her the succour and assistance in consideration of which she gifted the land, removes such doubt and confirms that she intended the earlier gift on P5 to be revocable. If that be the position, when Kalu Banda on 5.6.1950, four days after this deed of revocation, transferred the interests which he purported to possess by virtue of the deed of gift by Rankiri to him, he in fact had no interests to transfer as the said deed of gift had already been revoked by Rankiri. In these circumstances, if P5 was intended to be a deed of gift, the only question for consideration is whether it is revocable or irrevocable and the factual consideration which influenced the learned District Judge as to whether the condition in the deed could not be fulfilled due to any default on the part of the donee or due to the conduct of the donor or the first defendant does not arise.

Counsel for the respondent, apart from pointing to the description of the gift in deed P5 as being absolute and irrevocable was unable seriously to argue that if the deed was in fact a deed of gift, it was irrevocable. He however sought to argue that the transaction in the instant case was not a gift within the meaning of the Kandyan Law Declaration and Amendment Ordinance. A "gift" is defined in Section 2(a) of the Ordinance as meaning a voluntary transfer, assignment, grant, conveyance, settlement or other disposition inter vivos of immovable, property, made otherwise than for consideration in money or money's worth. The submission of the Counsel is that when a property is given to someone subject to a condition that the donee performs certain services, if a money value can be placed on such services, then the transaction would cease to be a gift within this definition. If this submission is correct, the question whether the gift which is the subject matter of deed P5 is revocable or not does not arise and the respondent would be entitled to succeed.

There are however many obstacles in the way of accepting this submission. In the first place, the deed P5 describes the transaction as a gift even though the adjectives 'absolute' and 'irrevocable' are used to qualify the nature of the gift and the word is repeated later on is the clause: "To have and to hold the said lands and property hereby gifted and conveyed....." On the face of it one is entitled to conclude that what is conveyed by the deed is a gift. Secondly, the consideration in the deed is set out as: "the natural love and affection which I have and bear unto Ratnayake Mudiyanse-

* 75 C.L.W. 97

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lagegedera Kalu Banda." It is significant that the donor Rankiri does not use here words such as "In consideration of the grantee undertaking to render me all needful assistance during the period of my natural life." By using the words "In consideration of the natural love and affection which I have and bear....." at the forefront of the deed and by omitting such other words as I have set out above which would point to the performance of services as the consideration, we are precluded from giving to this deed the interpretation which Counsel for the respondent contends for. Thirdly, even in the clause where the deed is made subject to a condition, there is no suggestion of the transaction being of no force or avail if the condition is not fulfilled. Had there been any words to that effect there might have been some basis for considering that the transaction was not a gift but was something in the nature of a conditional transfer for a consideration which was assessable in money value, the amount being what is stated in the deed. Fourthly, if the clause setting out the condition proceeded to estimate the services to be rendered in terms of a pecuniary value, there would have been some justification for a court to give the words a construction favourable to the submission of counsel and to hold that the transaction was not meant to be a gift within the meaning of the definition in the Ordinance.

This is not all. There is yet another consideration which militates against our acceptance of the contention of counsel for the respondent. Our experience in these courts has shown that the inclusion of a clause containing the words that a gift is subject to the donee rendering all necessary succour and assistance to the donor or words to that effect is not at all uncommon in deeds of gift in the Kandyan provinces. That being so, the words used in the condition attaching to the present deed would seem to lack any special significance, and is little more than the expression of a hope or an expectation, in conveying the gift.

For all the above reasons it seems to us that the transaction which formed the subject of P5 is a gift such as is contemplated by the Ordinance. In view of what we have stated earlier, in the absence of specific words in the deed showing an intention on the part of the donor to renounce his right to revoke the gift we are compelled to take the view that the deed was revocable. We therefore hold that the learned District Judge was in error in coming to the conclusion that the deed of gift P5 was irrevocable and that the plaintiff had acquired a good title to the land in question on the subsequent deeds. As the gift conveyed by P5 was thus revoked, the first added defendant whose claim was based on a deed subsequent to the deed of revocation acquired a good and valid title to the land as against the plaintiff. The plaintiff having thus not acquired a title to the subject matter of the litigation, his action must fail. We accordingly set aside the judgment and interlocutory decree entered by the District Judge and make order dismissing the plaintiff's action. The appellant is entitled to his costs in this court and in the court below.

Samerawickrame, J.

I agree.

Set aside.

Present: **De Kretser, J.**

N. SIRISENA *v.* O.I.C., POLICE STATION, AMBALANGODA

S. C. 961/69 — *M. C. Balapitiya No.* 56612

Argued on: 19th October, 1970
Decided on: 19th February, 1971

Criminal Procedure Code, section 440—*Witness making two contradictory statements—Conviction for perjury in open court — Magistrate's power to punish summarily for contempt of court — Need to give reasons.*

Held: That a Magistrate cannot convict for a contempt of Court under section 440 of the Criminal Procedure Code unless he is able to hold that any particular statement is false. He should record what, in his opinion, was the statement the witness made, knowing or believing it to be false.

Cases referred to: *Sivakolantu v. Chelliah*, (1910) 13 N.L.R. p. 289.
Sub-Inspector of Police v. Peris Singho, (1935) 14 C.L.Rec., 220.
Anthony Rajah v. The Queen, (1961) LIX C.L.W., 45.

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Chula de Silva, for the appellant.

Tivanka Wickramasinghe, Crown Counsel, for the Attorney-General.

De Kretser, J.

The appellant in this case was called as a witness for the Prosecution when the Police charged one B. Abeysinghe with causing the death of a person by name P. de Zoysa by driving a lorry rashly and negligently.

The witness was one who had given evidence before an unofficial Magistrate who had held an inquiry at the scene of accident.

The learned Magistrate who was conducting the non-summary inquiry found that this witness contradicted the evidence he had given at the inquiry before the unofficial Magistrate on six different points. At the end of his evidence he drew the attention of the witness to these matters and "asked him to show cause why he should not be dealt with under Section 440 of the Criminal Procedure Code, as in my opinion he has given false evidence within the meaning of Section 188 of the Penal Code". He had no cause to show. The Magistrate fined him Rs. 50/- in default 1 month R.I. The witness asked for time to pay and the application was refused.

The matter now comes before me in consequence of an appeal by the witness who was so fined.

As far back as 1910, Wood Renton, J. in the case of *Sivakulantu v. Chelliah* reported in 13 New Law Reports at page 289 pointed out that a Magistrate has no power to punish summarily as for a contempt of Court a witness for making two contradictory statements. That is a power given to a judge of the Supreme Court or to a District Judge. The learned judge pointed out that a Magistrate cannot convict for a contempt of Court under Section 440 of the Criminal Procedure Code unless he is able to hold that any particular statement is false. In the words of Wood Renton, J.:— "It is the duty of the Court acting under Section 440 of the Code not only to confront the person charged with the specific statements on which the Court is relying, but also to find which of these statements is or are false."

In 1935, in the case of the *Sub-Inspector of Police v. Peris Singho*, 14 Ceylon Law Recorder, 220, Soertsz, J. pointed out that under Section 440, a witness is not liable for contempt of Court on the footing that he has made contradictory statements. He also pointed out that the section requires a Magistrate to give his reasons for his conclusion that the witness has given false evidence.

In 1961, in the case of *Anthony Rajah v. The Queen*, 59 Ceylon Law Weekly, 45, Basnayake, J. held that the offence of perjury under Section 440(1) of the Criminal Procedure Code is not committed "unless the Court, being a subordinate Court, finds that a witness made a particular statement knowing or believing it to be false and the Court records its finding and gives reasons. The Magistrate should record what in his opinion was the statement the witness made, knowing or believing it to be false."

At the time Wood Renton, J. delivered the judgment in *Sivakulantu v. Chelliah*, the Magistrates of Ceylon were drawn from the Ceylon Civil Service and did not have the advantage of any legal training. Wood Renton, J. said:—

> "In my opinion the only way to ensure the correct application of the powers under Section 440 of the Code of Criminal Procedure in the courts of first instance is to let it be clearly and widely understood that any flaw in their exercise will be fatal to a conviction."

Today, the Magistrates of Ceylon are legally trained officers, drawn from the ranks of Advocates and Proctors of the Supreme Court. It is therefore distressing to find that when in addition there are the decisions of the Supreme Court to guide them that errors of this sort continue to be perpetrated.

The conviction and sentence are set aside and the appeal is allowed.

Appeal allowed.

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Present: **Samerawickrame, J.**

K. PERUMAL *v.* K. KARUMEGAM

S. C. Application No. 211/'68 — *M. C. Matale* 24721

Argued on: 20th August, 1968 & 12th September, 1968
Decided on: 18th August, 1969

Maintenance — Order in respect of a child— Subsequent decree for divorce after ex-parte trial in the District Court on the ground that the mother had been pregnant at the time of marriage unknown to her husband — Whether magistrate's order for maintenance may be cancelled upon the decision of the civil court — Decisions of Indian Courts whether applicable — Whether section 41(2) *of Evidence Ordinance extends to grounds upon which a divorce is granted.*

A child was born to the applicant-respondent six months after her marriage to the defendant-petitioner, who disputed paternity. The applicant-respondent made an application for maintenance and obtained an order in her favour in the Magistrate's Court. This order was affirmed in appeal. Thereafter the defendant-petitioner obtained a decree in the District Court after an ex-parte trial, annulling his marriage to the applicant-respondent on the ground that unknown to him she had been pregnant at the time of their marriage. In his present application the defendant-petitioner seeks to have the order for maintenance set aside by reason of the judgment in the nullity proceedings before the District Court.

Held: (1) That there is no provision under our law empowering a Magistrate to cancel an order for maintenance following a decision in a competent civil court.

(2) That Indian authorities, based as they are upon a special provision in the Indian Criminal Procedure Code (Section 489(2)) which empowers a magistrate to vary or cancel an order consequent upon a decision of a competent civil court in India, are not applicable in the absence of such a provision in Ceylon. Cases decided before section 489 (2) was introduced into the Indian Code were cases where the petitioner had obtained a declaration in a civil case that the child was not his and not merely an incidental finding in a matrimonial action. Further the jurisdiction under our Maintenance Ordinance is not auxiliary to that possessed by the Civil Court as is the case in India.

(3) That while section 41(2) of the Evidence Ordinance renders conclusive the order of the District Court as to the nullity of the marriage on all persons, it does not extend its application to the grounds upon which such order was made as against strangers.

(4) That as the child for whose benefit the order for maintenance was made was not a party to the nullity proceedings before the District Court, the child is not bound by the finding on pregnancy unknown to the petitioner at the time of marriage.

Cases referred to: *U Arzeina v. Ma Kyin Shwe and Another*, (1940) A.I.R. Rangoon 298.
Nga Po Thein v. Ma Me San & Another, (1922) A.I.R. Upper Burma 20.
Bo Gyi v. Ma Nyein, (1919) A.I.R. Lower Burma 7(2).
Tenne v. Ekanayake, 63 N.L.R. 544
Kanhya Lal v. Radha Churn, 7 W.R. 338.

P. Edussuriya, for the defendant-petitioner.

Sarath Muttettuwegama, with *I. S. de Silva*, for the applicant-respondent.

Samerawickrame, J.

The applicant-respondent had obtained an order that the defendant-petitioner should pay maintenance for her child. The child was born on the 14th of June, 1964 a little over six months after the marriage between the applicant-respondent and the defendant-petitioner. The defendant-petitioner disputed paternity and after an inquiry, at which evidence was heard on behalf of both parties, the

*For Sinhala translation, see Sinhala section, Vol. 22, p. 15

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learned Magistrate made order for maintenance in respect of the child. The order was affirmed upon an appeal to this Court. The defendant-petitioner thereafter obtained a decree from the District Court, after an *ex-parte* trial at which he alone gave evidence, annulling his marriage with the applicant-respondent on the ground that at the time of the marriage his wife was pregnant and that he was not aware of the pregnancy. The defendant-petitioner has now made the present application to this Court to have the order for maintenance in respect of the child cancelled and set aside.

Counsel for the defendant-petitioner cited Indian cases in which orders for maintenance had been cancelled in view of subsequent decrees in civil cases granting declarations of non-paternity and of non-liability in consequence to pay maintenance — vide *U. Arzeina v. Ma Kyin Shew and Another*, A.I.R. (1940) Rangoon 298, and *Nga Po Thein v. Ma Me San and Another*, A.I.R. (1922) Upper Burma 20. Section 488 of the Indian Criminal Procedure Code empowers a magistrate to make an order for maintenance and section 489(2) empowers a magistrate to cancel or vary the order. That provision is as follows:—

> "Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

Apart from the fact that there is express provision empowering a magistrate to cancel or vary an order in consequence of a decision of a competent civil Court, under the Indian Specific Relief Act there is provision for declarations of non-paternity and consequent non-liability for payment of maintenance. In suits to obtain such declarations the child concerned would necessarily be a party. There is no provision under our law corresponding to section 489(2) of the Indian Criminal Procedure Code authorising a magistrate to cancel an order for maintenance following a decision of a competent civil Court. Some of the earlier cases in India however had been decided before the year 1923, when, by an amendment, the provision in section 489(2) was introduced into the Criminal Procedure Code of India. In the case of *Bo Gyi v. Ma Nyein*, A.I.R. (1919) Lower Burma 7(2), it was held that the jurisdiction conferred by section 488 is auxiliary to that possessed by a civil Court and before enforcing an order for maintenance made under that Section a magistrate is bound to take into consideration any subsequent order of a civil Court which would disentitle a wife to maintenance. In that case, as well as in all the other cases which I have had the opportunity of examining, it appeared that the petitioner had obtained a declaration in a civil case that the child was not his and not merely an incidental finding in a matrimonial action for divorce or nullity to which the child was not a party. Nor is the jurisdiction under the Maintenance Ordinance auxiliary to that possessed by the civil Court as in the case of that under section 488 of the Indian Criminal Procedure Code for since the enactment of the Maintenance Ordinance a civil action for maintenance is no longer available — vide *Tenne v. Ekanayake*, 63 N.L.R. 544 at 546.

Learned Counsel for the defendant-petitioner submitted that in view of section 41(2) of the Evidence Ordinance the order of the District Court declaring the marriage between the defendant-petitioner and the applicant-respondent null and void on the ground that the applicant had concealed her pregnancy from the petitioner at the time of marriage, was a judgment *in rem*. Section 41(2) however, makes final and conclusive only that part of the order which confers or takes away any legal character. It would, therefore, be conclusive on the question as to whether or not a marriage existed between the defendant-petitioner and the applicant-respondent. It would not however be conclusive in respect of the ground upon which a finding on that question is made. In respect of a decree for divorce it was stated in the full Bench decision in the case of *Kanhya Lal v. Radha Churn*, 7 W.R. 338, "It is conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife

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but it is not conclusive nor even prima facie evidence against strangers that the cause for which the decree was pronounced existed." The finding of pregnancy of the applicant-respondent at the time of marriage unknown to the defendant-petitioner is therefore, not binding on persons who were not parties to the action and accordingly not binding on the child of the applicant-respondent. Though the applicant-respondent was the person who applied for maintenance, the application was made for the benefit of her child.

It appears to me that the defendant-petitioner has failed to put before this Court sufficient grounds for the cancellation of the order for maintenance made in respect of the applicant-respondent's child. The application is accordingly dismissed with costs.

Application dismissed.

Present: **Thamotheram, J.**

K. M. A. NALINEE RAJARATNE *v.* H. P. N. RAJARATNE & ANOTHER

Habeas Corpus Application 34/'69

Argued on: 18th December, 1970
Reasons delivered on: 13th January, 1971

Habeas Corpus application by mother of twenty five years — Custody of Female infant child — Divorce action pending — Court informed through counsel that reconciliation impossible — Interests of child paramount.

Where a young mother of twenty five years sought the custody of her infant daughter of 18 months from her husband, who had filed a divorce action and who informed court through counsel that reconciliation is impossible.

Held: That it is in the interests of the infant female child that she be restored to the custody of her mother the petitioner.

L. M. A. Silva, for the petitioner.

Peter Mendis, for the respondent.

Thamotheram, J.

The petitioner, Nalinee Rajaratne, filed a Habeas Corpus application on 22.2.69 for the custody of her infant child. The application was forwarded to the Magistrate of Gampaha for inquiry and report. The Magistrate made his recommendation recommending that her application be dismissed.

In the meantime, an application was made that the matter be heard before the Supreme Court itself. The matter was argued before me on the 18th of December.

It is not necessary for me to consider the allegations and counter allegations made in this case. None of them could be accepted as proved. The petitioner is a young woman of 25 years who seeks to have the custody of her infant female child who is now 18 months.

I have to keep in mind two principles, first, that so long as the bond of matrimony subsists, the father as the natural guardian has the preferential right to the custody of the child born in marriage; secondly, that in all questions of custody of children the interests of children stand paramount. I do not think it is irrelevant to the question of the custody of the child in this case that the respondent has filed a divorce action and has through his Counsel informed Court that a reconciliation is impossible. I am of the view that in the interests of the infant female child, that she

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be restored to the custody of her mother, the petitioner.

I make order accordingly allowing the application of the petitioner. The Magistrate when he implements this order, will question the parties and make a suitable order entitling the respondent to have access to the child.

Application allowed.

Present: **Sirimane, J. and Wijayatilake, J.**

A. F. ABEYASURIYA *v.* W. M. A. DIONIS APPU & OTHERS

S. C. 176/67 (*Inty*) — *D. C. Matara* 3036/*P*

Argued and decided on: 24th April, 1970

Partition Act section 22(2) — New parties disclosed by a defendant — Whom should the trial Judge order to issue notices as a general rule?

Held: That in partition cases where a defendant discloses new parties, the trial Judge should as a rule, order the defendant who disclosed the new parties to issue notices on them under the proviso to section 22(2) of the Partition Act.

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

No appearance, for the defendants-respondents.

Sirimane, J.

This was a partition action filed as far back as 1961. In 1965 an intervention by the 40th defendant had been allowed by Court. In his statement of claim the 40th defendant disclosed five new persons who were alleged to have rights in the land, and they have been added as 41 — 45 defendants. The learned District Judge had made order that notices should be issued on the parties disclosed but he had not specified as to who should issue those notices.

In cases where defendants disclose new parties, trial Judges should, as a rule, order the defendant who disclosed the new parties to issue notices on them under the proviso to Section 22(2) of the Partition Act.

In this case that Court should have ordered the 40th defendant, and not the plaintiff, to issue notices on the parties that he had disclosed. The journal entries show however that in fact five notices had been tendered for issue, probably by the plaintiff according to learned counsel for the appellant. Four of the parties disclosed had in fact been served with those notices. The address of the fifth person i.e. the 41st defendant was given only as "Badulla" by the 40th defendant who disclosed him. This address is obviously insufficient to effect service of notice on the defendant. There seems to have been much delay in finding out the detailed address of the 41st defendant and the only person who could have furnished that address was the 40th defendant.

The learned District Judge dismissed the plaintiff's action acting presumably under Section 71 of the Partition Act on the ground that he had not prosecuted the action with reasonable diligence. We do not think that the plaintiff should have been penalised in this matter. Journal entry 50 shows that the plaintiff's proctor had tendered notices for service on the added defendants even at a later stage whilst the person who disclosed the parties appears to have remained inactive.

*For Sinhala translation see Sinhala section Vol. 22 p. 17

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The order dismissing the plaintiff's action is set aside. In view of the long delay it is desirable that all parties should now have notice of the action and a direction should be given to the 40th defendant to furnish the address of the 41st defendant and see that notice is served on him. There will be no order as to costs.

Wijayatilake, J.
I agree.

Set aside and sent back.

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

U. R. ABEYSENA *v.* THE REGISTRAR OF MOTOR VEHICLES

S. C. Application No. 171/70

In the matter of an Application for a Mandate in the nature of a Writ of Mandamus under Section 42 of the Courts Ordinance.

Argued and decided on: 22 February, 1971

Motor Traffic Act (Cap. 203)— Registration of owner of motor vehicle on change of ownership— Has the Government Agent power to prevent registration of new owner?

Held: (1) That under the Motor Traffic Act, the Registrar of Motor Vehicles is bound to register the new owner of a motor vehicle upon a change of ownership if the conditions and requirements of that Act relating to the matter of such registration are complied with.

(2) That a Government Agent has no power under the Heavy Oil Motor Vehicles Taxation Ordinance or the Motor Traffic Act to prevent the registration of a new owner of a motor vehicle.

Sepala Munasinghe, for the petitioner.

S. Sivarasa, Crown Counsel for the respondent.

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

The petitioner in this case purchased a private motor car bearing Registration No. 3 Sri 3211 from the registered owner of the car on 5th October, 1969. He then made an application in due form to the Registrar of Motor Vehicles for the registration of a Finance Company as the absolute owner of the car and of himself as the registered owner. This application was refused by the Registrar solely on the ground that the Government Agent, Kegalle, had "instructed me (the Registrar) not to effect any transfers in respect of this vehicle."

The reason for the issue of this instruction by the Government Agent was that the previous owner of the car had failed to pay moneys due from him as Heavy Oil Tax in respect of another vehicle No. 22 Sri 4889, and that some time prior to 23rd March, 1969 a distress warrant had been issued in M. C. Kegalle No. 60063, apparently for the seizure and sale of both vehicles.

Learned Crown Counsel who appeared for the Registrar quite properly admitted that the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249) confers no power on a Government Agent to prevent the registration of a new owner of a motor vehicle, and also that the Motor Traffiic Act confers no power to refuse such registration in pursuance of an instruction from a Government Agent. Under the Motor Traffic Act, the Registrar is bound to register the new owner of a motor vehicle upon a change of ownership, if there has been compliance with the conditions and requirements **of that Act** which govern the matter of such registration. Hence the refusal of registration in this case was contrary to law.

* For Tamil translation See p. 11 Tamil Section

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I make no observation upon the question whether the distress warrant issued by the Magistrate of Kegalle for the seizure and sale of this motor vehicle is enforceable despite the fact that the present petitioner is entitled to the registration which he seeks.

For these reasons, we made order on 22nd February, 1971 directing the issue of the Mandate for which the petitioner prayed in this application. The petitioner will be entitled to costs fixed at Rs. 105/-.

G. P. A. Silva, S.P.J.

I agree.

Application allowed.

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

T. M. KIAS *v.* DON DELIS SINGHO

S. C. 64/68 (*R.E.*) — *C. R. Colombo* 87382

Argued and decided on: 7th November, 1970

Rent Restriction Act No. 12 *of* 1966, *section* 4 — *Effect on execution of decree entered prior to commencement of the Act.*

Held: That a cause is pending until the judgment is satisfied and section 4 of Rent Restrict Act No. 12 of 1969 prevents execution of decree obtained prior to the date of the Act coming into operation.

Case referred to: *G. V. Martin Silva v. Mahasoon* (1967) 70 N.L.R. 6.

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem* and *M. T. M. Sivardeen* for the plaintiff-appellant.

Siva Rajaratnam, with *Clarence de Silva*, for the defendant-respondent.

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

The only question which arises in this case is whether Section 4 of the Rent Restriction Act No. 12 of 1966 has the effect of preventing the execution of a decree for ejectment which was entered prior to the date of the commencement of that Act. The argument of counsel for the appellant is that sub-section (c) of that section is surplusage if the expression "pending action" in paragraph (a) has its ordinary meaning, namely that an action is to be regarded as pending so long as the decree has not been executed or satisfied. Counsel contends that for this reason the expression should be given a different meaning. It seems to me that paragraph (c). just like paragraph (b) has been enacted purely as a matter of greater caution to make certain that past decrees will not be executed.

I agree with the view stated by Justice Tambiah in *G. V. Martin Silva v. Mahasoon*, 70 N.L.R. page 6 that a cause is pending untill the judgment is fully satisfied.

The appeal is dismissed with costs.

Appeal dismissed.

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Present: **Weeramantry, J.**

ABDULRAHEEM HADJIAR SINNAPILLAI & ANOTHER
v.
MEERALEBBEPEDY MOHAMED MUSTAPHA & THREE OTHERS

Election Petition, No. 4 of 1970—Electoral District — No 94 Nintavur.

Argued on: 1st, 2nd and 3rd September, 1970.
Decided on: 18th September, 1970.

Election petition—Security required under rule 12 of the Ceylon (Parliamentary Elections) Order in Counil as amended by Act No. 9 of 1970 — Interpretation of words "any such ground" in the rule — Allegation of a corrupt practice in petition — Failure to join person against whom such allegation made, Section 80A(1)(b) — Effect of non-compliance therewith — Section 80(d) — Whether relief of scrutiny available where candidate for whom seat is claimed is dead.

Held: (1) That in determining the quantum of security required to be deposited (under rule 12 as amended), in respect of an election petition, a construction which would lead to the requirement of an absurdly large deposit should be avoided. Rule 12 requires that a deposit of Rs. 5,000/- be made in respect of "the first charge constituting a distinct ground on which the petitioner relies" and "..... a further sum of two thousand five hundred rupees in respect of each additional charge constituting any such ground". An interpretation that the words "any such ground" in the latter part of the rule could relate back to the "distinct ground" referred to in the earlier part, though literally possible, may well lead to a prohibitive amount of security being required in a situation where a petition contains a large number of separate charges each based upon a common "ground" or principle of evidence.

Although such an interpretation may serve a purpose in discouraging frivolous charges being included in petitions, it is not to be presumed that the legislature could have set out to achieve this object by rendering impossible the case of a *bona fide* petitioner who had numerous genuine charges to make. Such a construction though possible should accordingly be avoided for the reason that it would lead to absurdity. In the result, the words "any such ground" should be taken to refer to grounds other than the first ground upon which a charge is preferred in an election petition.

(2) That where a certain allegation of fact is relied upon by the petitioner, which affords him relief under more than one principle of law, only a single deposit of security is required in respect of such an allegation as it is neither justifiable nor in consonance with the object of the legislature to require that security should be tendered in respect of an allegation as many times over as the relief following therefrom.

(3) That where the statute itself does not prescribe the sanction for a non-compliance with a particular provision, as is the case with section 80A(1)(b), (which requires the joining as a respondent a person against whom an allegation of a corrupt practice has been made, the effect of a non-compliance with such a provision must be gathered from the general principles of statutory interpretation. According to these principles, mandatory provisions in matters of a procedural nature, particularly where a person is given certain rights but is required to follow a specific procedure in the assertion of those rights, are considered imperative rather than directory. However there are other considerations which may supervene and alter the character of a particular statutory requirement. In the present case, one such consideration is the fact that not merely the petitioner but also the entire electorate has an interest in an election petition which is meant to ensure that only the candidate who had received the majority of lawful votes would represent his constituency. The electorate ought not to be penalised by the dismissal of the petition, for the default of a petitioner even in the disregard of a mandatory provision of law, unless the particular provision is one dealing with a matter of fundamental importance.

(4) In the present case, the allegation of a corrupt practice to which section 80 A (1) (b) applies is one of 195 such allegations made in the petition for the purpose of showing that the elected candidate did not in fact have a majority of lawful votes. As the majority was 75, the one allegation in question is, in the context of the entire petition, of such minor importance that much injustice would result

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if the petition itself were to be dismissed as a result of the non-joinder of that one individual. Further this objection on the ground of non-joinder is in the circumstaces of this case purely incidental and subsidiary and does not go to the root of the petition.

(5) That furthermore, the main purpose of joining as a party, a person alleged to have committed a corrupt practice is to enable him to defend himself at the hearing of the petition itself. Counsel for the petitioner has however stated at the very outset that he does not propose to lead evidence on that particular allegation. There would then be no matter in respect of which that party would be called upon to defend himself.

(6) That where a defect in an election petition, is of a purely formal nature, and is not one of substance, the petition ought not ordinarily to be dismissed for such reason. Where petitions have been dismissed for non-compliance with a statutory provision, both in England and Ceylon, they have in each case been dismissed on account of some substantial defect.

(7) That although the legislature may not have in the provisions of section 80(d) contemplated a situation where a seat would be claimed for a candidate who had died after the election but before the election petition was filed, it would not be justifiable to place upon the words "where the seat is **claimed** for an unsuccessful candidate" so literal an interpretation as to prevent a petitioner from claiming a seat for a deceased candidate. Section 80(d) must be read in its context and in accord with the normal principle that whatever declaration a court may make can relate only to the date of the election.

(8) That even if there is no machinery in the Order-in-Council to provide for a purely fortuitous circumstance such as death all that a Court is concerned with is the making of the declaration if the basis on which such declaration is sought is adequately established by the petitioner. The administrative machinery which would have to be set in motion consequent to such a declaration is not a difficulty which faces the Court. The petitioner would accordingly be entitled to claim the seat.

Per **Weeramantry, J.** "I would like to observe finally that in regard to all preliminary objections of this nature an important consideration to be borne in mind, to which I have already adverted, is the principle that election petitions are not a matter between party and party in which technicalities should be permitted to defeat the object of the petition. This principle has been fully accepted and recognised by this Court....."

Cases referred to: *Kaleel v. Themis*, (1956) 58 N.L.R. 396.
Rajapakse v. Kathirgamanathan (1965) 68 N.L.R. 14.
Wijesekera v. Perera (1966) 68 N.L.R. 241.
Tilakawardena v. Obeysekera (1931) 33 N.L.R. 65
Perera v. Jayawardena (1947) 49 N.L.R. 1. (D.B.)
Liverpool Borough Bank v. Turner (1861) 2 De G.F. & J. 507.
Howard v. Bodington (1877) 2 P.D. 211.
Young v. Figgins 19 L.T. 499.
Aron v. Senanayake (1936) 38 N.L.R. 133.
Cooray v. Fernando (1953) 54 N.L.R. 400.
Williams v. Mayor of Tenby (1879-80) L.R.C.P.D. 135 at 137.
Piyadasa v. Hewavitarne (1936) 40 N.L.R. 421
Jagan Nath v. Jaswant Singh (1954) A.I.R. S.C. 210.
Bombay City case, Reported in Khanna's Indian Election cases, 1923-24, vol. II p. 75.
The Saharanpore case reported in I India Election Petitions by Jagath Narain, p. 66.
Karnal (South) General Constituency, reported in Indian Election Cases by Daobia, 1935-50, vol. II p. 80.
Welimada Election Petition, (S.C. 1 of 1970) 79 C.L.W, 17
Liversz v. Kannangara (1943) 45 N.L.R. 55.
District Burgh of Wigtown case, 2 O'M. & H. 215.
County of Tipperary case, 3 O'M. & H. 19.
Athlone case, 2 O'M. & H. 186.
Peiris v. David Perera (1969) 72 N.L.R. 232
Don Alexander v. Leo Fernando (1948) 49 N.L.R. 202.
Saravanamuttu v. R. A. de Mel (1945) 49 N.L.R. 529
Rambukwella v. Silva (1924) 26 N.L.R. 231
Hereford case, 1 O'M. & H. 194.
Norwich case, 1 O'M. & H. 91.

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Texts cited: Halsbury, *Laws of England*, 3rd ed. vol. 14 pp. 244, 310.
Maxwell, *Interpretation of Statutes*, 11th ed., pp. 197-8.
Rogers on *Elections*, 20th ed. vol. 2 p. 515.
Nanakchand, *Law of Elections*, p. 501
Electoral Rules of 1936 reproduced at p. 1863 of Nanakchand — Rule 107.

E. R. S. R. Coomaraswamy, with *P. Nagendra*, *Hanan Ismail*, *C. Chakradaran*, *S. C. B. Walgampaya*, and *N. Abdul Rahuman*, instructed by I. A. Cader, for the petitioners.

N. Satyendra, with *Varuna Basnayake*, instructed by Azad Rahim, for the 1st respondent.

Mervyn Fernando, Senior Crown Counsel, with *N. Sinnatamby*, Crown Counsel, for the 2nd and 3rd respondents.

Fourth Respondent in person.

Weeramantry, J.

Three preliminary objections have been taken to this election petition by the 1st respondent. They are:

(*a*) that the quantum of security deposited is insufficient and does not satisfy the requirements of Rule 12(2) of the Parliamentary Elections Order-in-Council as amended by Act 9 of 1970;

(*b*) that the petition does not comply with the mandatory requirement of section 80 A (1)(b) of the Order-in-Council;

(*c*) that the petitioners are not entitled in law to seek relief in this petition in veiw of the death of Mohamed Ismail Lebbe Mohamed Abdul Majeed, the candidate in whose favour a declaration is sought that he was duly elected and ought to have been returned.

I shall deal with each of these objections in turn.

The petitioners have deposited as security in this case a sum of Rs. 7,500/-.

Rule 12(2) states that "the security shall be an amount of not less than five thousand rupees in respect of the **first charge** constituting a **distinct ground** on which the petitioner relies and a further amount of not less than two thousand five hundred rupees in respect of **each additional charge** constituting **any such ground.**"

It is submitted on behalf of the first respondent that the quantum of security that should have been deposited in this case was a sum of twelve thousand five hundred rupees on the basis that the petition contains three additional charges each requiring a sum of two thousand five hundred rupees over and above the sum of five thousand rupees required on the initial charge.

Counsel for the first respondent presented his argument on this matter in two alternative ways. In order to set out his position it is necessary to refer at this point to the terms of the petition itself.

The petitioner states that the first respondent, M. M. Mustapha, one M. I. M. A. Majeed and the fourth respondent I. L. H. M. Cassim were candidates at the election held for the electoral district of Nintavur and that the Returning Officer returned the first respondent as being duly elected, the majority of the first respondent over Majeed being 75 votes. Majeed, the candidate referred to, is stated to have died on 9th June 1970, nine days prior to the date of filing of the petition which is 18th June, 1970.

The petition goes on to aver in paragraph 6 that the unsuccessful candidate Majeed had a majority of lawful votes.

In paragraph 7 the petitioner avers that about 193 electors whose names are on the electoral register died before the date the polls were held, but votes had been cast against their names by unknown persons and the votes of those dead persons having therefore been impersonated, should be struck off on a scrutiny.

In the same paragraph the petitioner further states that the vote of Athambawa Kalandar was personated by one Seynulabdeen, and that the vote of one Avva Umma was personated by a person unknown to the petitioner.

The next paragraph, paragraph 8, avers miscount of votes in that —

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(a) invalid votes were counted in favour of the first respondent (b) votes which should have been counted in favour of Majeed were counted in favour of the first and fourth respondents (c) at the end of the count it was found that Majeed led the first respondent by over 500 votes. Thereafter five bundles of ballot papers of fifty votes each were detected and transferred from trays containing Majeed's votes and added on to the first repondent's trays as they were votes in favour of the first respondent that had been inadvertently placed in Majeed's trays. The first respondent thus had a majority over Majeed (d) Majeed and his counting agents then called for a recount. At the purported recount the composition of ballot papers in favour of the first respondent was checked, but no check, sorting or count whatsoever was made of the ballot papers in favour of Majeed or of the fourth respondent. (e) the majority at the first count varied from the majority at the purported recount (f) the ballot papers issued did not tally with the ballot papers counted in the ballot boxes. (g) The purported recount was not in law or in fact a recount that Majeed and his agents called for.

The last paragraph of the petition, paragraph 9, averred that the first respondent did not have a majority of lawful votes.

On these averments the petitioners pray for the following reliefs:

(*a*) for a scrutiny and recount of votes (b) that it might be determined that the first respondent was not duly elected or returned (c) for a declaration that Majeed was then duly elected and ought then to have been returned and would have been declared to have been duly elected and returned (if Majeed had been alive) or in the alternative (a) for a declaration that the election and return was void.

Upon these averments, it was urged on behalf of the first respondent that the following charges forming distinct grounds are contained in the petition:

(1) the charge that invalid votes were counted in favour of the first respondent, contained in paragraph 8(a); (2) the charge that votes which should have been counted in favour of Majeed were counted in favour of the first and fourth respondents, contained in paragraph 8(b); (3) the charge that there was no recount in law or in fact contained in paragraphs 8(d) and (g) read together. In other words counsel for the first respondent sought to extract from paragraph 8 of the petition three charges forming distinct grounds.

In addition, paragraph 7 of the petition which contained an allegation that 193 electors who were dead had votes cast against their names, was stated to be a further charge which constituted a ground in terms of Rule 12(2) thus totalling four charges on distinct grounds.

I now proceed to outline an alternative basis on which it was sought to reckon the number of charges contained in the petition at a total of four.

The petitioner has in his petition prayed for all the grounds of relief which are available under section 80, namely, the declaration that the election was void, the declaration that the return of the first respondent was undue, the declaration that Majeed was duly elected and ought to have been returned and the prayer for scrutiny.

In regard to the first of these, a declaration that the election was void, it was submitted that the grounds on which an election may be avoided are set out in section 77. When therefore a declaration is sought that the election is void, the grounds on which such declaration is sought would be found in one or other of the sub-sections of section 77.

It is submitted that the facts which have been set out in the petition may well bring it within grounds (a) and (b) of section 77, for (i) by reason of the 193 votes cast in the names of dead persons the majority of electors may have been prevented from electing the candidate whom they preferred and (ii) the various details set out in paragraph 8 may well amount to allegations of non-compliance with the provisions of the Order relating to elections which non-compliance affected the result of the election. On this latter point reference is made in particular to sub-paragraph (a) of paragraph 8 which it is submitted is an averment of non-compliance with section 49, paragraph (d) which is said to be a non-compliance with section 48(7), paragraph (f) which is submitted to be a non-compliance with sections 40, 44 and 47, and paragraph 9 which is said to be a non-compliance with section 48(7). All these it is submitted are allegations of non-compliance with the provisions of the Order which would draw the petitioner's case within section 77(b).

On this basis, then, two charges are said to be made out which constitute distinct grounds under Rule 12(2).

Furthermore it is submitted that a recount and a scrutiny are different reliefs which depend upon different grounds. A recount is based on the fact that there has been no count in law, that is a miscount. It is not referred to in the provisions of Order-in-Council, and the grounds on which it may be sought are to be found in the Common law (Halsbury, 3rd ed. vol. 14 pp. 244, 310). It is a ground which has been held by this Court to be a

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valid ground on which an election judge may grant relief under sections 80(b) and (c) of the Order-in-Council (*Per* Pulle, J. in *Kaleel v. Themis*, (1956) 58 N.L.R. 396). It is submitted that a scrutiny, on the other hand, is a different relief, based on entirely different grounds and arises from the terms of the Order-in-Council itself. Reference is made in this connection to *Rajapakse v. Kathirgamanathan*, (1965) 68 N.L.R. 14, where Tambiah, J. held that a clear distinction should be drawn between a recount and a scrutiny.

It is further submitted that the word 'ground'in Rule 12(2) is not confined to a ground specified in the Ordinance itself and may well refer to a ground for relief which derives from and is found in the Common law — a matter which would appear also from section 80(d) which assumes that a seat may be claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, although there is no express provision in the Ordinance setting out that a seat may be so claimed.

Consequently it is urged that if there is an allegation of a miscount — and in fact there is such an allegation in paragraph 8 — that is by itself a ground on which the petitioner would be entitled to a recount and to relief under sections 80 (b) and (c), as distinct from a scrutiny.

On the basis of these submissions there are therefore two further charges which constitute distinct grounds making a total again of four charges.

I shall examine each of these alternative bases in turn with a view to considering whether there are in fact more than two charges in respect of which security ought to be given.

In order to do this it becomes necessary to examine the exact meaning of Rule 12 (2) of the present Order-in-Council which constitutes a departure effected by Act 9 of 1970 from the position prevailing earlier. Under Rule 12 (2) as it was prior to the amendment, the position was much simpler, namely, that if the number of charges in any petition shall exceed three, security additional to the minimum sum of five thousand rupees was required to an amount of two thousand rupees in respect of each charge in excess of the first three.

This provision would appear to have been the subject of an authoritative interpretation by a Divisional Bench of this Court in *Wijesekera v. Perera*, (1966) 68 N.L.R. 241. In that case the Court considered the provisions of section 77(a) and pointed out that although numerous instances were set out in that sub-section, there was only one ground therein contained, namely, the ground that the majority of the electors were or may have been prevented from electing the candidate of their choice. The adverbial clause, it was pointed out, referred to the manner or the circumstances in which electors can or may be prevented from electing the candidate they prefer, but the ground on which relief was available was but one, ibid, at p. 249. In the case of section 77(c) on the other hand the Court observed, ibid, at pp. 250-51. that it contained not a single ground of avoidance but several such grounds because the allegation that a candidate committed a corrupt practice was one ground, while the allegation that he committed an illegal practice was another. A corrupt practice was a term of art employed to denote a number of distinct election offences such as treating, undue influence and bribery, and therefore the expression 'employed' in paragraph (c) of section 77 was only the equivalent for a comprehensive list of all those distinct offences, the commission of any one of which was a ground of avoidance. Consequently the Court concluded that paragraph (c) contained several **distinct grounds** each involving a **distinct charge.**

The allegation of facts bringing a case within the ambit of a ground or principle of relief was thus held to be a charge, but within the same ground or principle of relief there might be several separate and distinct allegations. What the Divisional Bench required was that there should be a distinct charge which brought in a distinct ground, in contradistinction to the view of the trial judge in that case that "every one of the grounds set out in section 77(a) constituted a separate and distinct charge."

In view of the observations of the Divisional Bench in that case, it was probably decided in the interests of clarity to recast Rule 12(2) and it is presumably for that reason that we find in that Rule as it now prevails the expression "charge constituting a distinct ground", phraseology drawn from the decision under examination.

From all this it would appear that according to the most authoritative interpretation of Rule 12 prior to the present amendment, the terms 'charge' and 'ground' were not synonymous in their use in the context of Rule 12 but that the word 'ground' seems to mean the principle of avoidance, that is, the principle on which avoidance is based. The word 'charge' on the other hand constitutes the allegation of fact which gives rise to the operation of that principle.

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Mr. Satyendra has submitted — and rightly in my view — that, although the Divisional Bench case has settled the law in regard to the Rule as it stood earlier, it is not a binding authority on the construction of the present Rule, which must be construed according to its plain meaning and that, therefore, I should not consider myself bound by the decision of the Divisional Bench. While I agree that the Divisional Bench was construing a statutory provision couched in different terms, I cannot however shut my eyes to the fact that the situation of absurdity adverted to by this Court, (*Wijesekera v. Perera*, (1966) 68 N.L.R. 241 at 254). as resulting from the suggested construction of the earlier rule is the same situation of absurdity that would result upon the construction now contended for. It would be salutary to bear in mind in this connection the principle that where the consequence of one of two possible interpretations of a statutory provision would be to lead to an absurdity, that interpretation should be avoided (Maxwell, *Interpretation of Statutes*, 11th ed., pp. 197-8).

In particular I would draw attention to the judgment of Drieberg, J. in *Tilakawardena v. Obeysekera* (1931) 33 N.L.R. 65 at 68, where it was pointed out that the suggested construction may well involve a petitioner in the necessity of depositing a fantastically large sum upon a petition containing a number of separate allegations on which relief was sought. For example although in the *Hereford* (1 O'Malley and Hardcastle, 194) and *Norwich* (ibid, p. 91), cases in England the courts required security in a sum of £. 1,000/- only, upon an application of the computation contended for, sums of Rs. 367,000/- and Rs. 199,000/- respectively would have had to be deposited. Drieberg, J. there observed "whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery,," and this view was followed also by a Divisional Bench of this Court in *Perera v. Jayawardena* (1947) 49 N.L.R. 1.

It has been urged before me that though the legislature imposed security which may appear prohibitive in such circumstances, its object may well have been to give expression to its discouragement of frivolous charges and of successful candidates being inconvenienced or blackmailed through petitions containing charges which the petitioner could not hope to prove. I am not inclined to accept this submission for, although the legislature may well have intended this objective, it is not to be presumed that it would have set out to achieve this discouragement by rendering impossible the case of the *bona fide* petitioner who had numerous genuine charges to make. We have all known of petitions containing a large number of allegations of this nature, in respect of which petitioner did have a certain amount of evidence but all of which they may perhaps have been unable to prove. In the ultimate analysis, the object of all this procedure is to maintain the purity of elections, and I do not consider justifiable an interpretation which can in many a conceivable case effectively defeat this object.

Now, under Rule 12, there must be a deposit of five thousand rupees **in respect of the first charge constituting a distinct ground** and a further sum of two thousand five hundred rupees **in respect of each additional charge constituting any such ground.** What is the meaning of the word 'such' in the expression 'such ground'? Mr. Satyendra submits as an alternative argument in support of his contention, that the word 'such' relates back to the word 'distinct' and that "any such ground" therefore means "any distinct ground". He submits that it would not be justifiable to read "any such ground" as "any **other** distinct ground." Consequently, if there is a charge which constitutes in law a distinct ground, that is, which falls within a principle on which relief would be available, and there is another charge which also brings into operation the same principle (as for example two separate acts of bribery) each one of them would require separate security.

Whatever be the result following from a literal interpretation of the Rule as it now stands, I am not prepared to place upon it a construction that would lead to so absurd a result, as to require half a million rupees by way of security, where, for example, there are ten averments of bribery and ten of intimidation by each of persons with candidate's knowledge — and this the legislature could not possibly have intended.

I pass now to the alternative basis on which it is urged that the quantum of security is inadequate, namely, the ground that, quite apart from the number of separate allegations that have been made, there are at least four principal grounds of relief which have been invoked. This position renders necessary a consideration of the question whether where particular allegations of fact afford relief under more than one principle of law, security should be required over and over again merely because the allegation gives rise to more than one principle of relief. One may well visualise a case where there is only one allegation of fact such as the allegation of bribery of 25 voters by an agent of the candidate, in an election where the successful candidate had a majority of ten. It may well be

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said of such a case that it falls within each one of the principles of relief set out in sections 77(a), 77(c) and 80(d). I think it would be neither justifiable nor in consonance with the object of this legislation to require that in such an instance security should be given thrice over in respect of that allegation.

Consequently in regard to the claim that 193 dead persons were impersonated, the fact that it brings the case within section 77(a) and at the same time within section 80(d) — if that indeed be the case — does not attract to that allegation the requirement of double security. The same applies to the other supporting arguments adduced in this connection.

For these reasons I would reject the submission that there are four principles or grounds of relief which have been invoked upon the averments in the petition.

Viewed in any way the petition would appear to contain a maximum of two charges constituting distinct grounds, namely the charges set out in paragraph 7 of the petition and those set out in paragraph 8 — if indeed the latter can be said to be "charges constituting a distinct ground." I therefore agree with Mr. Coomaraswamy's contention that the security deposited in this case is sufficient even if a view unfavourable to him be taken on the latter question.

I pass now to the second of the grounds of objection to this petition, namely, that the petitioner is guilty of a failure to comply with an imperative provision of the Statute. This is the requirement under section 80(A) of joining as a respondent Seinulabdeen against whom an allegation of a corrupt practice has been made. Seinulabdeen it is said in the petition was guilty of the offence of personation. Personation which is defined in section 54 under the head of corrupt practices is punishable as a corrupt practice under section 58.

Consequently, Seinulabdeen is a person whose joinder was mandatory in terms af section 80(A).

I should here observe that at the very commencement of the hearing of this case, Mr. Coomaraswamy who appeared for the petitioner, intimated to Court that he did not propose to include this item in the list of votes to be filed under Rule 7 and that he would not be leading evidence on that item or relying thereon in support of his claim for a scrutiny. While saying this he also conceded that in terms of Rule 80(A) Seinulabdeen should have been made a respondent to his petition.

The position of Mr. Satyendra is that Mr. Coomaraswamy's statement that he is not proceeding with that particular item does not end the matter, inasmuch as there is an imperative statutory duty placed by law upon the petitioner and he has failed to comply with that imperative duty. Consequently he submits that the petition must be looked upon as one failing to comply with a requirement essential to its validity and must therefore be rejected.

The requirement that persons against whom such allegations are made should be joined as parties respondent is new. Under the former law the position was that a person who was found guilty of such a practice at the election was, under section 82, afforded an opportunity to appear and show cause against being reported to the Governor General.

There were obvious disadvantages resulting from that provision, such as that the election judge would be required to determine over again the question whether that person had committed a corrupt practice, a matter on which he would already have made his observations in his judgment. To avoid this and other difficulties, the law was amended so as to require the joinder of that person, with a view to enabling the allegations against him as well to be inquired into inter partes as an integral part of the petition itself.

It is submitted by Mr. Commaraswamy that such an inquiry formed only a subsidiary purpose of the election petition, its main purpose being the determination whether the election should be avoided and the unsuccessful candidate declared duly elected. He submits, consequently, that non-compliance with a provision ancillary to such a subsidiary purpose ought not to result in the dismissal of the entire petition.

Mr. Satyendra submits, however, that whether a purpose be principal or subsidiary, it is equally a purpose of the Legislature, and that if any legal consequence is to follow from non joinder, that consequence should follow without this Court attempting to distinguish between the relative degrees of importance of the different purposes which the Legislature may have had in mind.

It becomes necessary then to examine whether there are any principles of statutory interpretation which may guide us in regard to the legal effect of non compliance with a mandatory statutory provision when the Statute itself does not prescribe the sanction for non-compliance.

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It would appear from the text books on statutory interpretation that this question whether mandatory provisions of this nature result in the invalidity of an act committed in disobedience of them, has been the subject of many decided cases. In this connection a distinction must be drawn between prescriptions affecting the performance of a duty and those relating to a privilege or power, Maxwell, *Interpretation*, 11th ed. p. 364. Thus for example cases of statutes imposing mandatory requirments upon public authorities, are distinguishable from statutes which, while giving particular rights to persons, require them to follow a certain procedure in the assertion of these rights. In the former case violation of the mandatory provisions would appear not to produce the result of invalidity in the act so performed, for it would work hardship to the public and perhaps to those very persons for whose benefit it is ordained that such act should be performed. On the other hand where a person seeking certain advantages for himself is required to follow a certain form, it would appear that compliance with forms so prescribed has generally been treated as a condition precedent to such persons being enabled to claim that right. To quote Maxwell:

> "Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirement were essential and imperative." ibid.

Moreover it would appear that mandatory provisions in matters of a procedural nature are generally considered imperative rather than directory, Maxwell, *Interpretation*, 11th ed. p. 367.

On an application of these principles, it would appear that Seinulabdeen should ordinarily have been joined as a respondent on pain of the petition itself being rendered invalid by his non-joinder. The general principles of statutory interpretation would appear in the normal case to point to such a result.

There are, however, in the present case, certain other factors which would appear to prevent such a result from supervening.

In the first place we cannot lose sight of the principle that in an election petition it is not merely the petitioner and the respondent who are interested parties, but that it is a matter in which the entire electorate has an interest. To this principle I shall advert in somewhat greater detail at a later point in this judgment. To penalise a petitioner who has not complied with a matter of such a limited scope as concerns Seinulabdeen's alleged corrupt practice, may then result in the entire electorate being deprived of the right which it would normally enjoy of depending upon the petition to win for itself its undoubted right of representation by a candidate who had received the majority of lawful votes. The Court should where possible lean against an interpretation which tends to deprive the public of this right. Indeed Maxwell in his discussion of this principle makes an exception to the rule of construction laid down by him in cases where injustice or inconvenience would result to others who have no control over those exercising the duty, Maxwell, ibid, p. 369, if such requirements were treated as essential or imperative. It is true this observation is made by Maxwell in the special context of performance of a public duty, but I would consider this exception to be equally applicable to the extraordinary instance of a case such as an election petition in which a person such as an elector has rights though he may not be in control of the petition at all. Such persons who have not themselves been guilty of the disregard of a mandatory provision, ought not to be penalised by the dismissal of the entire petition unless the disregard is in regard to a matter of a fundamental nature. For example a rule may be so fundamental that in the event of non-compliance with it there is manifestly no petition at all. Examples of such a purported petition would be one filed after the prescribed period of time has elapsed or without making the successful candidate himself a respondent as for example in *Rajapakse v. Kathirgamanathan* (1965) 68 N.L.R. 14. In order to decide whether the disregard is of such a nature as to result in total invalidity the whole scope and purpose of the Statute must be regarded, Maxwell, *Interpretation of Statutes*, 11th ed. p. 264. If inconvenience or injustice results to innocent persons without promoting the real aim and object of the legislature, then as Maxwell says, ibid, an intention to invalidate is not to be attributed to the Lagislature. As Maxwell says, ibid:

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an

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implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment." Lord Campbell, *Liverpool Borough Bank v. Turner* (1861 2 De G. F. & J. 507; Lord Penzance, *Howard v. Bodington* (1877) 2 P.D. 211.

Now, in regard to the present objection, I think it is legitimate to inquire whether it goes to the root of the petition or is purely incidental and subsidiary.

It will be seen that an allegation is made in paragraph 5 that 193 dead persons have been impersonated. The same paragraph goes on to state two specific instances, of which Senulabdeen's impersonation is one. In this context it will be seen that the allegation that Seinulabdeen was guilty of this corrupt practice constitutes only a very small if not infinitesimal aspect of the petitioner's case.

Moreover the main purpose of requiring the joinder of such a person is to enable that person to defend himself, an opportunity he formerly had when he was added subsequent to the hearing of the petition but which is now a right given to him in the context of the petition itself. If the petitioner does not propose to lead evidence on that charge, there is no matter in respect of which Seinulabdeen would be called upon to defend himself, and in fact upon such a course being followed there would be a distinct advantage to Seinulabdeen rather than any prejudice. In this context it seems clear that in the case of an allegation of this nature where the requirement of joinder of the party in question is so essentially subsidiary to that of the main petition, there would be much injustice in a dismissal of the entire petition for non compliance with this requirement.

One can well visualise cases where the requirement that the party be joined is bound up with the object and purpose of the petition itself quite apart from the subsidiary purpose of giving that person an opportunity of being heard. It is not necessary for me here to state where the line need be drawn, but it seems clear to me that the allegation against Seinulabdeen in this case is of such minor importance in the context of the entire petition that it certainly falls on that side of the line wherein non-joinder does not result in total invalidity.

The matter of Seinulabdeen's corrupt practice cannot of course be inquired into in the absence of the necessary joinder of Seinulabdeen, but since it is no longer the petitioner's intention to pursue this matter, this question does not arise.

In this connection Mr. Coomaraswamy referred me to the English case of *Young v. Figgins* where Baron Martin, relying on Rule 60 of the English Parliamentary Elections Rules, refused to dismiss an election petition on the grounds of a purely technical objection observing that he should not allow such formal objections to defeat the petition, 19 L.T. 499. It is true that this judgment of Martin, B. is in very cursory terms and does not occupy more than three or four lines of the Law Report. It is true also that this is a judgment of a single Judge and that more than one judgment of this court, *Aron v. Senanayake*, (1936) 38 N.L.R. 133; *Cooray v. Fernando* (1953) 54 N.L.R. 400. has distinguished this case and proceeded on the basis of a different English decision, namely the decision in *Williams v. Mayor of Tenby*, (1879-80) L.R.C. P.D. 135 at 137, where an objection regarding service was upheld so as to defeat a petition.

However the decision in *Williams v. Mayor of Tenby* is clearly distinguishable from the decision in *Young v. Figgins*. In *Young v. Figgins* it was only a party other than the candidate, namely the Returning Officer, who should have been joined, and was according to the Rules "deemed to be a respondent" and on whom notice should have been served. But for the rule by which he was "deemed to be a respondent" there would have been no need to join the Returning Officer, for no substantial relief was claimed against him. In *Williams v. Mayor of Tenby* on the other hand, non-compliance was in regard to the respondent himself, namely the successful candidate. No notice had been served on him as required by law and the petition was accordingly dismissed. It will straightaway be seen that this was no formal defect but a defect so substantial that there could not conceivably be a hearing of the petition, without due notice to him. *Williams v. Mayor of Tenby* is therefore not a case of a formal defect.

In regard to defects of a formal nature the decision in *Young v. Figgins* would therefore still be the decision applicable and it is significant that it is cited by Halsbury, 3rd ed., vol. 14, p. 288, as authority for the proposition that "no proceedings upon an election petition can be defeated by any formal objection."

In the Ceylon cases on this question, commencing with the judgment of Akbar, J. in *Aron v. Senanayake* (1936) 38 N.L.R. 133, the failure to comply with an imperative provision was one relating to matters of substance and not to matters purely formal, and therefore Akbar, J. and the judges who subsequently relied on his decision, Maartensz, J.

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in *Piyadasa v. Hewavitarne* (1936) 40 N.L.R. 421; Swan, J. in *Cooray v. Fernando* (1953) 54 N.L.R. 400, quite understandably preferred to follow *Williams v. Mayor of Tenby* as stating the law applicable. Their preference for *Williams v. Mayor of Tenby* cannot however be looked upon as any authority for the rejection of the principle embodied in *Young v. Figgins* that an election petition ought not to be defeated by a formal objection. Our Courts have, in fact, on no occasion that I am aware of, registered their express dissent from such a principle.

I do not propose to enter here upon an examination of the question whether Rule 60 of the English Parliamentary Rules, (Vide Rogers on Elections, 20th ed. vol. 2 p. 515, is part of our law by virtue of section 86(2) of the Order-in-Council but it would suffice to observe that this rule gives effect to a salutary principle and that if the defect is of a purely formal nature and is not one of substance a petition ought not ordinarily to be dismissed for such reason, under our law as well.

Mr. Coomaraswamy in support of his contention that failure to observe a mandatory provision does not entail dismissal of the entire petition has drawn my attention to the Indian decisions under an Indian Election rule which states that if the petitioner, in addition to calling in question the election of the returned candidate, also claims to be duly elected, he must make respondents to this petition all the candidates nominated at the election, (Vide Nanakchand, Law of Elections, p. 501; see also the similar rule for Madras under Electoral Rules of 1936 reproduced at p. 1863 of Nanakchand — Rule 107). It would appear that the Indian courts have ruled that if this provision is not complied with, the petitioner cannot be declared to be elected even though the election of the respondent be avoided and have ruled that the entire petition should not be dismissed, (vide Nanakchand, p. 501). In this connection he has referred me to the case of *Karnal (South) General Constituency*, (Reported in Indian Election Cases by Doabia, 1935-50, vol. II, p. 80,) where it has been held that although on account of the petitioner's omission to implead all the candidates who had been nominated at the election, the petitioner could not claim a declaration that he himself was duly elected, yet there was no authority for ruling that the entire petition must fail on account of the failure to join all the nominated candidates as respondents. This was a decision by the Punjab Elections Commission. So also in the *Bombay City case* (Reported in *Khanna's Indian Election cases*, 1923-24 Vol. II p. 75) it was held that where a declaration is claimed that the petitioner has been duly elected, such claim is separate and distinct from that by which the election of the returned candidate is called in question. As the returned candidate alone need be joined when no claim for the seat is made, the petition was held to be good in so far as it calls in question the election of the returned candidate only. I do not think however that it would be safe to rely too heavily upon these Indian decisions because, as Mr. Satyendra has pointed out, other considerations also become applicable under the Indian law which obscure the exact principle underlying these cases. He refers me in this connection to a judgment of the Supreme Court of India, the case of *Jagan Nath v. Jaswant Singh*(1954) A.I.R. S.C. 210. This is a decision under section 90 of the Representation of the People Act 1951 which corresponds in terms to the section we have been considering. It would appear from this decision that in India certain provisions of the Civil Procedure Code relating to amendment of pleadings are rendered applicable to election petitions, Vide sections 81, 85 etc., of the Representation of the People Act; also Rule 13 of the Punjab Rule of the power to bring in the Civil Procedure Code. In fact in a case where the court took the view that applicability of the Civil Procedure Code was limited to the conduct of the inquiry and not to the petition itself, (*The Saharanpore case* reported in 1 India Election Petitions by Jagath Narain, p. 66), it was held that failure by the petitioner claiming a seat for himself to join as respondents to the petition all other candidates who were nominated at the elections rendered the petition liable to be dismissed. Moreover the Indian Statute is not one which is entirely silent on the sanction for non compliance, for it would appear to contain certain express provisions relating to dismissal. I would therefore prefer to avoid drawing any guidance from the Indian cases, although but for the matters pointed out by Mr. Satyendra, I might have been inclined to hold that they pointed to a principle, that the entire petition ought to to be dismissed for failure to comply with a mandatory statutory provision. I am not therefore taking the Indian decisions into consideration in arriving at my decision on this matter.

There are certain other decisions to which I should refer relating to non-compliance with certain imperative provisions of Statute, where the Statute itself does not provide what consequence is to follow from such non-compliance. Maxwell refers to the case of failure to sign a nomination paper as an example of invalidity following upon

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non-compliance, Maxwell, *Interpretation of Statues*, 11th ed. p. 365, and we have in Ceylon the recent decision of Alles, J.in the *Welimada Election Petition** S.C. 1 of 1970, to the same effect. The statutory provision under consideration in that case was section 28 of the Election Order-in-Council which states that the written consent of the candidate must be annexed to or endorsed on each nomination paper. However under the Ceylon Statute there is a feature which may perhaps suggest that a sanction is contained in the Ordinance even by implication, for section 31(1)(b) states that a ground of objection to a nomination paper may be that the nomination paper does not comply with or was not delivered in accordance with the provisions of the order, thereby perhaps implying that that would be a ground of rejection. Moreover in any event it would also fall within the principle adverted to in connection with the next case discussed.

In *Liversz v. Kannangara* (1943) 45 N.L.R. 55, failure by a candidate for election to the Municipal Council to deposit a sum of two hundred and fifty rupees with the Returning Officer, although in fact this sum had been deposited with the Municipal Treasurer, was held to a non-compliance with the provisions of section 30 of the Municipal Council (Constitution Amendments), so as to render nomination bad. This case involves no doubt a rejection on grounds which appear somewhat technical but was a case where an individual, namely the candidate, had failed to follow an imperative procedure prescribed for claiming a right and falls directly within the principle stated by Maxwell of rigorous observance of such provisions as a precondition to the enjoyment of that right.

These and other decisions would appear to indicate that our courts have in appropriate cases, where the Statute is silent on the effect of non-compliance, visited non-compliance with the penalty of total invalidity, but each one of these decisions is distinguishable, and for the reasons I have set out, the present is certainly not such a case.

In regard to Mr. Coomaraswamy's statement that he does not propose to lead evidence in regard to the alleged act of personation by Seinulabdeen, Mr. Satyendra submits that whatever Mr. Coomaraswamy may say at this stage cannot amount to an amendment of the petition, the power of amendment being confined within certain well-defined limits. He submits that the period for amendments to the petition has now elapsed, for amendments can only be effected, in his submission, by virtue of section 83(2) which requires amendments to be within the time within which the petition questioning the return may be presented. That period of time having now elapsed, he submits that rights have accrued to parties and those rights cannot be affected by the statement of Mr. Coomaraswamy that he does not propose to lead evidence upon a particular charge.

Mr. Satyendra submits further that inasmuch as Seinulabdeen had a right to be made a respondent to this petition he became entitled in law to all the rights of respondent. Among these are for example the right to file a recriminatory case given to respondents by Rule. 8. Since Seinulabdeen had the right to be added he had the right to file a recriminatory petition and he cannot be deprived of this right by a change of position at the trial. So also it is submitted he would have certain other rights, as for example in regard to costs.

Mr. Coomaraswamy on the other hand submits that the respondents referred to in Rule 8 is not anyone who happens to be made respondent but the candidate who has been made respondent to the petition. He submits that for example a Returning Officer who has been made a respondent cannot, merely because he has been made respondent, file a recriminatory petition. Likewise although under the present Statute Seinulabdeen has the right to be added, it was never the intention of the legislature to give a person against whom such a purely incidental allegation has been made the right to file a recriminatory petition.

He submits further that the power to amend is given not only by section 83 but also by section 80(C) which permits the particulars of a corrupt or illegal practice to be amended or amplified in such a manner as may in the opinion of the Election Judge be necessary to ensure a fair or effective trial. This power is one given by Act 9 of 1970 in view of the fact that by virtue of that Act the petition itself is required to contain the particulars of corrupt or illegal practice which were earlier required to be tendered at a later stage as particulars under former Rule 5. Since particulars must now be included in the petition, he submits that the legislature has expressly provided for amendment or amplification of these particulars, and it is his submission that what he is now seeking to do is precisely what has been expressly permitted by Rule 80(C).

It would appear that under the former law the petitioner could at the trial stage intimate to the Election Judge that he was not proceeding with

*79 C.L.W. 17

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certain of the matters contained in his particulars and there is nothing to indicate that the Legislature intended to deprive a petitioner of this position which was available to him under the earlier law. Moreover in any event the petitioner is required to file, six days before the day appointed for trial, a list of votes objected under Rule 7, and when he does this there is nothing to prevent his leaving out from that list at that stage any matter on which he is not ready with proof. Consequently in relation to a charge of such an incidental nature I do not think a petitioner is precluded from deciding to lead no evidence on it, and to drop it, and all the more so in a case where the party concerned has not already been joined.

The rights of Seinulabdeen in relation to such matters as security or a recriminatory petition, arise only if and when he has been made a respondent. Rightly or wrongly he has not been made a respondent as yet, and therefore those rights have not as yet accrued to him. Consequently there is no deprivation of any rights vested in him when it is sought to delete that portion of the petition which deals with a charge against Seinulabdeen.

In the light of these views it is not necessary to launch upon a detailed examination of the various decisions that have been cited at the argument relating to the amendment of petitions.

I come now to the third ground of objection formulated at the argument, namely, the objection that with the death of the candidate placed second at the poll the right to ask for a scrutiny ceases to exist.

It must be noted first of all that the objection taken on this ground is not an objection to the entirety of the petition but only a limited objection in relation to so much of the petition as prays for an order for a scrutiny and for a declaration that Majeed was then duly elected and ought then to have returned — that is, a portion of prayer (a) and the whole of prayer (c) to the petition. The rest of the relief sought is not affected by this submission.

The argument is based on the terms in which the relief of scrutiny is provided for in paragraph 80(d), for the language of the statute is that this relief may be sought "where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes."

Based upon this phraseology, the argument is advanced that such relief only lies "where the seat is claimed for an unsuccessful candidate", and not otherwise.

It is submitted that it is a pre-condition to the grant of relief under this sub-section that there should be in existence an unsuccessful candidate for whom the seat may be claimed. Since the Court cannot now make a declaration awarding the seat to the candidate in question, it is submitted that this court would not stultify itself by making futile declarations awarding a seat to a person who is now not alive.

A further argument is that the relief in fact sought, namely a declaration that Majeed was **then** duly returned and ought **then** to have been returned can only be granted upon an adaptation of section 80 to meet a situation which was never in the contemplation of the legislature.

The rules made under the Order-in-Council do in certain matters make provision for the eventuality of death. Rule 27 provides that a petition shall be abated by the death of a sole petitioner or of the survivor of several petitioners. Rule 28 provides however for a procedure by which the petition may be continued despite the death of the petitioner. This is no doubt in recognition of the principle that the petition is not to be considered as a proceeding purely between the two or more parties thereto but that it is a matter of vital interest to the electorate or the public at large. Again rule 29 provides for the eventuality of the death of a respondent and here again the rule provides that the mere fact of death does not bring the petition to an end. There is no such express provision, however, in regard to the eventuality of death of a candidate for whom the seat is claimed.

I do not think it would be justifiable to proceed upon too literal an interpretation of the words "where the seat **is claimed** for an unsuccessful candidate." Section 80(d) must be read in its context and in accordance with the normal principle that whatever declarations a court may make can relate only to the date of the election. A court cannot today say that a particular person **is** the validly elected member of Parliament for a particular seat, for numerous circumstances may be visualised which might well, between the date of election and the date of such declaration, operate so as to deprive a person who was the duly elected member on the date of the election, of his rights as such prior to the date of the declaration. A member may, for example, incur an automatic forfeiture of his seat by reason of conviction of an illegal practice under section 72, or a member may render himself incapable of continuing as such by reason of his acceptance of an office incompatible with his position. All that this Court

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can do is to make a declaration in regard to the proper result of the election, and that declaration must necessarily operate as at the date of the election. What the Court is now invited to do is not to declare that Majeed **is** the member of Parliament but that he **was** duly elected and ought to have been returned. That indeed is the phraseology of section 80(c) and in this case prayer (c) to the petition is in the terms of section 80 (c) with additions of the word "then", though indeed these additions are superfluous.

It is true there is no machinery in the Order-in-Council to provide for such a situation as the order which the petitioner invites this Court to make, as the Order-in-Council does not contemplate a court declaring as having been duly returned a person who has since died and who had in fact died even before the petition. However, all that this Court is concerned with is the making of the declaration which is sought, if the basis on which such a declaration is sought is adequately established by the petitioner. The administrative machinery that would have to be set in motion consequent upon such a decision is not a difficulty which faces this Court. That, if indeed it is a difficulty at all, is a difficulty which concerns other functionaries and I have no doubt that in the event of this Court declaring that Majeed was at the date of the election the duly elected member and ought to have been returned, the law would not be without the necessary equipment for meeting that situation.

Furthermore, the right of the electorate to be represented by the candidate who procured the majority of lawful votes ought not in my view to be defeated by the purely fortuitous circumstance that the candidate has happened to die between the date of the election and the date of the order of the court. A literal reading of the Statute should yield in such a case to a reading more in consonance with its general object, which is to secure representation of an electorate upon the principle that the majority of lawful votes determine who is to represent it in the legislature.

In this connection Mr. Coomaraswamy has referred me to two interesting English cases. The first of these is the case of *District Burgh of Wigtown* 2 O'M & H. 215, where an election was sought to be avoided on the basis that the unsuccessful candidate, the Rt. Hon. George Young, had in fact secured more votes than the successful candidate. The Rt. Hon. George Young since the election had been appointed and had taken his seat as one of the Lords of the Session. The prayer was in these terms: "that the respondent was not duly elected as returned, and that his election and return were and are wholly null and void, but that the Rt. Hon. George Young was duly elected and ought to have been returned as member of Parliament for said *Wigton District of Burgh* ....." ibid, at p. 230. Claims for a declaration that a candidate no longer able to take his seat ought to have been returned are not therefore without precedent. Lord Ormidale who heard the petition declared that the respondent was not duly elected and added a special report stating that as Mr Young is now one of the Lords of Session, the seat was not now claimed for him.

The other case to which Mr. Coomaraswamy referred me is the case of the *County of Tipperary* 3 O'M. & H. 19. This dealt with the converse case, namely the death of the candidate who had been returned. Mr. Justice Lawson there observed "The principle of our law is that there should be no wrong without a remedy, that a right once vested cannot be devested except by something of the same efficacy as that which created it. But if it be true that the power of the House of Commons to inquire into an allegation of an undue election ceased upon the death of the person in whose favour the return was made, it followed that a candidate who claimed the seat would (although he presented a petition claiming the seat within the time allowed by law) be left absolutely without remedy, if the accident occurred of the death of his opponent immediately after the election. A wrong done to him by the erroneous decision of the returning officer would thus be left without remedy, and a right vested in him to be declared the sitting member would be devested by an accident over which he had no control." 3 O'M. & H. 19 at 21. There is reference to the principle here to which I have adverted earlier that such an unfortunate fortuitous circumstance ought not to deprive parties of their remedies nor entire electorates of their right to be properly represented.

Mr. Justice Morris goes on to point out,

> "the palpable absurdity and injustice that would result from such a state of things, a fallacious view, arising, as my brother Lawson has well explained, from considering this as a personal action and not the assertion of a right *in rem* to which the maxim *actio personalis moritur cum persona* is inapplicalbe ....." ibid, at p. 30..

He refers also ibid, at p. 29, to the *Athlone case*, 2 O'M. & H. 186, where by an error on the part of the Returning Officer there was a double return but it was held that the present member had a clear majority of votes over the other person returned. Morris, J. asked the question "Would he have lost his right to petition and the seat he

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now holds by the death of Mr. Ennis, had it taken place pending the petition or before the petition was filed?" 3 O'M. & H. 19 at 30.

Another argument adduced in support of the objection is that as I observed in *Peiris v. David Perera* (1969) 72 N.L.R. 232 at 247-8.:

> "the provisions of section 80(d) do not afford a relief in themselves but only a means towards obtaining relief, for a scrutiny by itself, without more, gives no redress at all."

If therefore the relief which the scrutiny is intended to lead to, is one which is not now available — namely the claim of the seat for the unsuccessful candidate — it is submitted that the scrutiny serves no purpose and would not be granted.

I have already indicated why the relief sought in the present case is relief which in my view the Court is empowered to grant. Consequently the prayer for a scrutiny will not be futile but will, if it is successful, lead to a declaration in regard to the true result of the election at the time it was held. That is the point of time with which this Court is concerned at this inquiry and it is the point of time to which all orders now made will relate back.

I would like to observe finally that in regard to all preliminary objections of this nature an important consideration to be borne in mind, to which I have already adverted, is the principle that election petitions are not a matter between party and party in which technicalities should be permitted to defeat the object of the petition. This principle has been fully accepted and recognised by this Court and I should refer to the judgment of Nagalingam, J. in *Don Alexander v. Leo Fernando* (1948) 49 N.L.R. 202, where he observed that,

> "once an election petition is presented the matter ceases to be one exclusively between the petitioner and the respondent. In fact it becomes a matter in which the whole electorate, not to say the whole country, has an interest and any order disposing of the application should therefore be made from the larger standpoint of the state".

Again in *Saravanamuttu v. R. A. de Mel* (1945) 49 N.L.R. 529 at 532, Dias, J. observed that,

> "in a proceeding such as this certain fundamental rights of the citizen are involved. Therefore an election petition inquiry is not merely a contest between two litigants. It is a matter in which the whole electorate, not to say the whole country, has a vital interest."

As Bertram, C.J. indicated in *Rambukwella v. Silva* (1924) 26 N.L.R. at 253-4,

> "In the trial of an election petition the public interest has also to be guarded. It is not an investigation in which the petitioner and sitting member alone are concerned. The voters also have rights as well as the candidates. The electorate is entitled to have the result of the election declared according to law."

In accordance with these principles and for the reasons I have set out I overrule the preliminary objections to the hearing of this petition. The petitioner will have the costs of these proceedings.

Preliminary objections overruled.

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

A. W. ASONCHINA & ANOTHER *v.* R. L. H. BABUN APPU

S. C. 557/67 (*F*) — *D. C. Tangalle* 1178/*L*

Argued and decided on: 28th February, 1971

Conditional Transfer by M to defendant — Within period of redemption settlement before Debt Conciliation Board — Extension of time for repayment and re-transfer — Transfer of M's rights to plaintiffs to obtain re-transfer and in settlement order—Plaintiffs duly tendering money and claiming re-transfer— Refusal by defendant — Action to enforce — Court dismissing action on ground that Debt Conciliation Board gave relief to M, not to assignee — Debt Conciliation Board Ordinance — Section 30 *— Effect.*

By deed P1 dated 29.6.1964, one M. transferred a land to the defendant for Rs. 2,500/-, subject to a condition that the latter "shall re-transfer the land within a period of six years on repayment of the said sum.

Within this period of redemption on an application to the Debt Conciliation Board for relief an amicable settlement was arrived at and according to which *inter alia*, if the debtor (M) made payments due in terms of the settlement before 31.12.1965 the creditor should transfer the property back to M.

*For Tamil translation, see Tamil section, Vol. 1, p. 14

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Thereafter M. transferred to the plaintiffs his right to obtain a re-transfer in terms of P1 and the rights in the said settlement Order. The plaintiffs duly tendered the sum of Rs. 2,500/- and claimed a re-transfer, but the defendant refused which resulted in this action, which was dismissed by the learned District Judge on the ground that the settlement as recorded gave relief only to M, the original debtor and it could not be extended to his assigns.

Held: (1) That the learned District Judge has erred in dismissing the action as the only effect of the settlement was to extend the time of fulfilment of the condition to re-transfer and not to alter the position of P1 that the re-transfer be made to M and his heirs ..... assigns.

(2) That section 30(2) of the Debt Conciliation Board Ordinance is a statutory recognition of the validity of the alteration as to the time for re-transfer mentioned in the settlement.

(3) That in the absence of any condition in the settlement that the relief given is personal to M., the purchaser from M. is entitled to rely on the terms of P1 as altered by the settlement only in respect of the period specified therein.

W. D. Gunasekera, for the plaintiffs-appellants.

Ananda Karunatilake, for the defendant-respondent.

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

In this case one Madiris had by P1 executed on 29.6.1958 transferred a land to the present defendant for a sum of Rs. 2,500/-, subject to the condition that the defendant shall re-transfer the land within a period of six years to the vendor to his heirs, executors, administrators and assigns on repayment of the said sum of Rs. 2,500/-. Thus the right to claim a re-transfer could have been exercised at any time before 29th June, 1964.

It appears that well before the expiration of the redemption period Madiris had made an application to the Debt Conciliation Board. In proceedings upon that application Madiris and the defendant had come to an amicable settlement which was approved by the Board. The principal provision of the settlement was that:

> " If the debtor makes the payments due in terms of the settlement, that is before 31st December 1965, the creditor will transfer the property back to the debtor."

After this settlement Madiris by the document P3 transferred to the present plaintiffs his right to obtain a re-transfer in terms of P1 and of the order made by the Debt Conciliation Board. Thereafter the plaintiffs duly tendered a sum of Rs. 2,500/- to the defendant and claimed a re-transfer. The present action is based on the refusal to execute the transfer.

The learned District Judge has dismissed the action on the ground that the settlement recorded by the Debt Conciliation Board gave relief only to the original debtor Madiris and that that relief cannot extend to an assignee of Madiris.

It will be seen that the only effect of the settlement was to extend the time of fulfilment of the condition for re-transfer, and not to alter the position in P1 that the re-transfer be made to Madiris "or to his heirs, ... or assigns". Section 30 sub-section (2) of the Debt Conciliation Board Ordinance provides that a settlement shall be valid and effectual for all purposes, notwithstanding anything to the contrary in the Prevention of Frauds Ordinance. In this way there is a statutory recognition of the validity of the alteration as to time, which was made by the settlement in the clause for re-transfer.

Considering that the right which Madiris had under P1 was one recognised and enforceable as an interest in land, it could have been sold against him in execution and if so sold the purchaser could have exercised that right against the defendant. Similarly in our opinion a voluntary purchaser would have the same right. If of course the creditor had wished to insert in the settlement a condition that the relief given by the settlement should be personal only to the debtor, such a condition could perhaps have been incorporated in the settlement. But in the absence of any such condition the purchase from Madiris was entitled to rely on the terms of P1 which had been altered by the settlement only in respect of the period specified therein.

For these reasons we set aside the order dismissing the plaintiffs' action. Decree will be entered in favour of the plaintiffs as prayed for with costs. But we make no order as to the costs of appeal.

Thamotheram, J.

I agree.

Order set aside.

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

WELUN RANASINGHE *v.* DON LEYARIS JAYATILLAKE

S. C. 513/66(*F*) — *D. C. Kalutara* 1083/*M.R.*

Argued on: 3rd and 4th June, 1969
Decided on: 20th June, 1969

Landlord and Tenant — Premises subject to Rent Restriction Act — Tenant suing landlord for over-payments made during 1962-1964 *— Application in* 1964 *to Rent Restriction Board to fix rent — Notice on landlord who was absent on inquiry date — Rent fixed at* 58.82 *per month—Landlord informed of the amount fixed—Claim of tenant based on difference between* 58.82 *and Rs.* 100/- *per month and assessment rates paid during the period — District Judge not accepting Board's determination — Validity of his reasons.*

The plaintiff sued the defendant, his landlord to recover a sum of money alleged to have been over-paid as rent for the period 1.1.1962 to 30.9.1964. The plaintiff proved that he paid during this period a sum of Rs. 100/- per month as rent and Rs. 158.73 as assessment rates.

In 1964, the plaintiff applied to the Rent Control Board to fix the rent of the premises in terms of Section 4 of Rent Restriction Act. The landlord was not present at the inquiry held on 5.11.1964 though notice thereof was given to him.

The Rent Control Board determined that the rent of the premises in question is Rs. 58/82 per month apparently under section 16A of the Rent Restriction Act as amended by Act No. 10 of 1961. The claim of the plaintiff was an amount representing the difference between Rs. 100/- and Rs. 58/82 determined by the Board, as the authorised rent.

The learned District Judge declined to accept the Board's determination of Rs. 58/82 during a period prior to its order on 5.11.1964 for two reasons

(*a*) that the form of D1, being the Board's office copy of the notice sent to the defendant informing the Board's order that the monthly rent payable is Rs. 58.82 is not due compliance with the Board's duty to send the defendant a copy of its order under section 20(13).

(*b*) that the case of *Ranasinghe v. Fernando*, 53 N.L.R. 163, applied to the case and consequently the rent fixed by the Board did not apply to the premises prior to the date of the fixation.

Held: (1) That a notice in the form D1 adequately satisfies the object of section 20(13), which is only that the parties must have authentic notice of the contents of an order affecting them.

(2) That the learned trial Judge has erred in applying the decision in *Ranasinghe v. Fernando* as that case related to premises which came under paragraph (c) of section 5(2), that is where the standard rent is declared to be the agreed rent until there was a fixation by the Board; whereas in the present case the authorised rent had been fixed by reference to the assessment in 1941.

(3) That the purpose of section 16A, which authorised the determination of the authorised rent, is not that the Board alters the authorised rent from one amount to another, but that it determines the authorised rent in terms of the relevant provisions of the Act.

(4) That if the correctness of the amount determined by the Board is not contested and if no evidence is offered to show that the true authorised rent is different from the amount determined by the Board, a Court must accept and act upon the determination.

(5) That therefore the plaintiff has established that the authorised rent for the relevant period was Rs. 58.82 per month and that he has made the over-payments claimed in the plaint.

Distinguished: *Ranasinghe v. Fernando*, 53 N.L.R. 0. 163.
Referred to: *William v. Somasunderam*, 71 N.L.R. p. 459.

Nimal Senanayake, with *Neil Dias*, for the plaintiff-appellant.

J. W. Subasinghe, for the defendant-respondent.

*For Sinhala translation see Sinhala section Vol. 22 p. 19

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

The plaintiff instituted this action for the recovery of a sum of money alleged by him to have been over-paid to his landlord the defendant as rent for the period 1st January, 1962 to 30th September, 1964. The premises are situated within the limits of the Town Council of Matugama and the plaintiff proved that he had during this period paid a sum of Rs. 100/- per month as rent together with Rs. 158/73 as assessment rates on the premises.

In October, 1964 the plaintiff made an application to the Rent Control Board of Matugama requesting the Board to fix the rent of the premises "in terms of section 4 of the Rent Restriction Act". Notice of this application was given to the landlord and an inquiry was held on 5th November 1964, at which however the landlord was not present. The Board apparently realised that the plaintiff's application was intended to be one for the order under section 16A of the Rent Restriction Act as amended by Act No. 10 of 1961, which provides as follows:—

> "16A. The board may, upon an application made in that behalf by the landlord or the tenant of the premises by order determine the amount of the authorised rent of the premises."

It will be seen (as I had occasion to remark in the case of *William v. Somasunderam* ..... 71 N.L.R. p. 459) that section 16A provides not for a fixation of the authorised rent but for a determination of the amount of the authorised rent. Section 16 of the principal Act originally provided that the landlord must supply the tenant on request with a statement of the standard rent, and the amount of any claimed permitted increase. It is clear that the Legislature considered this provision to be insufficient in the tenant's interest because of possible inaccuracy in a statement so supplied by the landlord. The deficiency was supplied by the new section 16A. under which a tenant can have the amount of the authorised rent more certainly calculated and determined by the Rent Control Board. The tenant will thus be in a position to assure himself that he does make correct payments of rent to his landlord.

The Rent Control Board in this case determined that the rent of the premises in question is Rs. 58.52 per month. The learned District Judge had two reasons for not accepting the Board's determination and I shall now consider these.

The defendant marked in evidence as D1 the Board's office copy of the notice which was sent to the defendant by the Board after the inquiry held on 5th November, 1964. In this copy, which is signed by the Secretary of the Board, the defendant was quite clearly informed of the Board's order that the monthly rent payable to the landlord of the premises is Rs. 58.82. From the terms of D1 the learned District Judge has inferred that the notice which the Board sent to the defendant was identical with D1, and has further held on this footing that a notice in the form of D1 is not due compliance with the Board's duty to send to the defendant a copy of its order.

Sub-section (13) of section 20 requires that every order made by the Board shall be reduced to writing and signed by the Chairman, and further that a copy of the order shall be transmitted to each party. A very strict construction of this sub-section might justify the opinion that the copy of an order sent to a party must be a duplicate, and must itself bear the signature of the Chairman, and I must concede that this case has revealed the need for Rent Control Boards to be advised as to the form and manner in which the requirements of the Act must be observed. Nevertheless I am satisfied that a notice in the form D1 adequately satisfies the object of sub-section (13), which is only that the parties must have authentic notice of the contents of an order affecting them. I hold therefore that the defendant did receive in the communication D1 what was substantially a copy of the Board's order.

As stated above, the order of the Board was made on 5th November 1964, but the claim of the plaintiff in this action was that he had over-paid rent each month from 1962 until September 1964, in an amount representing the difference between Rs. 100/- and the sum of Rs. 58.82 determined by the Board. The learned Judge has however

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declined to accept the Board's determination of Rs. 58.82 as being the authorised rent during a period which was prior to the date of the order. The Judge here purported to apply a judgment in the case of *Ranasinghe v. Fernando* (53 N.L.R. p. 163). This case related to premises to which paragraph (c) of section 5(2) of the Act applies. According to the judgment in that case it was not one in which the authorised rent of the premises had been fixed by reference to the assessment in November 1941, and thus it was one to which paragraph (c) of sub-section (2) of section 5 applied. Under that paragraph, the standard rent is declared to be the agreed rent or else an amount fixed by the Board on application to it. In that case therefore, until there was a fixation by the Board, paragraph (c) made the agreed amount the standard rent, and the amount fixed by the Board became the standard rent only after the Board actually fixed it. In another words, the Board under that paragraph alters what was previously the amount of the standard rent. On these grounds Gratiaen, J. held that the rent fixed by the Board did not apply to the premises prior to the date of the fixation.

The case is clearly distinguishable from one to which section 16A of the Act implies. The purpose of section 16A is not that the Board alters the authorised rent from one amount to another, but that it determines what is the authorised rent in terms of the relevant provisions of the Act. In the present case, the premises were during the relevant period assessed for rates by the Town Council, and accordingly the annual value of the premises as so assessed was the criterion by reference to which (in terms of section 5(1)(a) etc.) the authorsied rent is to be ascertained. There is no allegation that the Board in determining Rs. 58.82 to be the authorised rent, erred in any manner in reaching its determination, and in any event the plaintiff was entitled to rely on the presumption of regularity. It must be assumed therefore that the Board's determination was reached upon due consideration of section 5(1)(a) of the Act and other provisions relevant to the ascertainment of the authorised rent.

It thus appears that the objection that the Board's determination of November, 1964 is not evidence of the amount of the authorised rent for a past period, is at best purely technical. The provisions of the Act relating to the standard rent of assessed premises and to permitted increase of the standard rent are such that there is little possibility that the authorised rent of any premises at any time can be higher than the amount which was the authorised rent at any earlier period. On the contrary, the only apparent possibility is one quite unfavourable to a landlord, namely that the authorised rent of premises say in 1962 or 1963 may be **lower** than the amount which a Rent Control Board may determine under section 16A in 1964.

The amendment of the principal Act by Act No. 10 of 1961 contains no provision which expressly indicates the purpose of a determination under section 16A by a Rent Control Board. But I note that such a determination is made in an order of the Board, section 20(3), that parties must be given an opportunity to be heard, that notice of the Board's order must be given to the parties, and that the order is subject to appeal to a Board of Review. In these circumstances it is fair to assume that the Legislature intended that a determination under section 16A should at least be *prima facie* evidence of the authorised rent of premises. If the correctness of the amount determined by the Board is not contested, and if no evidence is offered to show that the true authorised rent is different from the amount as determined by the Board, a Court must accept and act upon the determination. The establishment of two statutory tribunals, the decisions of the second of which are declared to be final and conclusive, must merely eliminate the need for a Court to make a fresh determination of the authorised rent of premises in a case where no evidence

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is offered to challenge the correctness of the Board's determination.

I hold for these reasons that the plaintiff established that the authorised rent for relevant period was Rs. 58.82 per month and accordingly that overpayments were made as claimed in the plaint.

The appeal is allowed and judgment will be entered for the plaintiff in a sum of Rs. 1,513.67 and for costs in both Courts.

Weeramantry, J.

I agree.

Appeal allowed.

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

NICHOLAPILLAI ANTHONIPILLAI *v.* ANTHONIPILLAI GEORGE RAJASOORIAR

S. C. Application No. 676/69

In the matter of an Application for a Mandate in the nature of a Writ of Quo Warranto on A. G. Rajasooriar of Beach Road, Jaffna.

Argued and decided on: 19th September, 1970
Reasons delivered on: 12th June, 1971

Quo Warranto, Application for — Local Authorities Election Ordinance, section 9 *— Amended Act No.* 9 *of* 1963, *section* 4 *— Disqualification for election if already a member of another local authority — Does Quo Warranto lie?*

This is an application for a Writ of Quo Warranto on the Respondent, who,admittedly, was at the time of his election as a member of the Jaffna Municipal Council, already a member of the Village Council of Pulopallai.

Held: That in view of the provisions of section 9 of the Local Authorities Election Ordinance as amended by section 4 of Act No. 9 of 1963,which expressly provides that a person is disqualified for election, if he is already a member of another local authority, the respondent's election as a member of the Jaffna Municipal Council is null and void."

Distinguished: *Sundara Banda v. Pathirana*, 73 N.L.R. 100.
Martin Perera v. Madadombe, 73 N.L.R. 25.

K. N. Choksy, with *M. Devasagayam*, for the petitioner.

H. W. Jayewardena, Q.C., with *C. Chellappah*, for the respondent.

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

The respondent to this application was a candidate at an Election of members of the Jaffna Municipal Council. After that Election was held, he was declared to have been elected as the member for Ward No. 1 of the Council.

Section 9 of the Local Authorities Elections Ordinance (Cap. 262), as amended by section 4 of Act No. 9 of 1963, provides that a person shall not at any time be qualified to be elected as a member of a local authority, if such person at that time "is a member of any other local authority." It is not contested in this case that the respondent was, at the time of his election as a member of the Jaffna Municipal Council, already a member of the Village Council of Pulopallai. *Prima facie*, therefore he was disqualified for election to the Jaffna Council.

Counsel for the respondent has argued, however, that the Writ of Quo Warranto will not lie against

*For Sinhala translation see Sinhala section Vol. 22 p. 19

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a person who was disqualified for election at the time of his election. Counsel relied on two recent decisions of this Court.

In *Sundara Banda v. Pathirana* (73 N.L.R. 100) it was held that the Writ will not lie to remove from office a person elected as a member of a Village Council on the ground that he was not ordinarily resident within some Ward of the village area. The judgment relied on the fact that although the requirement of "ordinary residence" is prescribed in section 8 of Cap. 262, section 9 does not provide that a person who does not fulfil that requirement is disqualified from being elected as a member of a local authority. For this reason the Court was of opinion that "the Legislature does not appear to have regarded non-qualifications under section 8 as a ground on which an election shall be declared void".

The present case is however different, for section 9 (as amended in 1963) expressly provides that a person is disqualified for election if he is a member of another Local Authority.

In *Martin Perera v. Madadombe*, 73 N.L.R. 25, this Court held that the Writ will not lie on the ground that an election of a member of a Local Authority was procured by general undue influence and/or general treating. Thus there did not arise in that case the question whether or not the Writ will lie in cases where it is sought on the ground that a person is disqualified from membership by section 9. The judgment states that sections 9 and 10 make it manifest that a person who is disqualified by section 9 cannot lawfully hold a seat or office as a member of a Local Authority, and that the jurisdiction to oust such a person must undoubtedly be exercised if a Court is satisfied that no alternative or effective procedure is provided by Statute Law. The arguments during the present hearing did not establish that there is such an effective alternative.

For these reasons we made order declaring the election of the respondent to be null and void.

Thamotheram, J.

I agree.

Application allowed.
Election declared void.

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

THE MULTI-PURPOSE CO-OPERATIVE SOCIETY LIMITED *v.* K. I. GUNATILLEKE

S. C. 194/68 *Inty.* — *D. C. Kalmunai* 645/*M*

Argued on: 18th February, 1971
Decided on: 26th February, 1971

Co-operative Societies Ordinance (*Cap.* 124), *section* 53(1) — *Action for damages filed in District Court for wrongfully and maliciously terminating membership — Does this dispute come within section* 53(1) *of the said Ordinance? — Jurisdiction of District Court.*

Held: That the question whether a member of a Co-operative Society has been wrongly deprived of his membership is one which must be determined by the process of arbitration in terms of section 53(1) of the Co-operative Societies Ordinance.

Cases referred to: *Karunatilleke v. Abeywira* (68 N.L.R. at p. 503).
Sanmugam v. Badulla Co-operative Stores Union Limited (54 N.L.R. 16).

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, and *S. C. B. Walgampaya*, for the defendant-appellant.

U. C. B. Ratnayake, with *M. K. Ratnayake*, for the plaintiff-respondent.

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

The plaintiff, who was a member of the defendant Co-operative Society, alleged in his plaint that the defendant "wrongfully and maliciously and without any manner or reason" terminated his membership of the Society. Averring that he had thereby suffered pain of mind and loss of reputation and deprivation of his rights and privileges as a member, the plaintiff claimed damages in a sum of Rs. 2,500/-.

The learned trial Judge has answered in the affirmative the following preliminary issue:

> "In view of section 53(1)(b) of the Co-operative Societies Ordinance, Chapter 124, does this Court have jurisdiction to entertain this action?".

The ground of this answer is that the action appears to be one based on delict, and that such an action is in the language of the judgment in the case of *Karunatilleke v. Abeywira* (68 N.L.R. at p. 503) "an ordinary civil dispute within the traditional jurisdiction of the Courts" and one "ordinarily determined by the Courts and not intended to be the subject of awards". The passage thus relied on occur in that part of the judgment which stressed the fact that the dispute in that case concerned the existence of an implied contractual liability and the duty to perform it, and held that such a dispute is within the traditional jurisdiction of the Courts, and could not be the subject of a reference to arbitration under section 53.

The present action is no doubt one based on delict, in that the plaintiff alleges a wrongful and malicious act of the Society which has caused him *injuria*. But the subject of the dispute is whether or not the Society wrongly terminated the plaintiff's membership, and that termination can only be wrongful if the membership was terminated in breach of the rules of the Society. Earlier observations in the same judgment refer to such disputes:—

> "As between a society and its members, disputes can well arise as to the construction and effect of the rules governing relations between members inter se and the relations between a society and its members, as to whether a society or a member had acted in breach of the rules, as to the qualification of members to hold office in the society, as to the validity of elections or appointments to office in a society, as to the scope of the business which a society may lawfully carry on, and as to similar matters peculiar to associations of persons. It was clearly the intention of the Legislature that such disputes should be finally decided by the Registrar, in the exercise of his supervisory functions, or by arbitrators appointed by him."
>
> "I have no doubt that the determination by the Registrar or an arbitrator of a dispute affecting any of the matters just mentioned does not involve the exercise of the judicial power of the State."

With respect, these observations should have made it clear that the question whether a member of a Co-operative Society has been wrongly deprived of his membership is one which must be determined by the process of arbitration. In the earlier case of *Sanmugam v. Badulla Co-operative Stores Union Ltd.* (54 N.L.R. 16), this Court had already held that in such an event the jurisdiction of the ordinary Courts is ousted.

The trial Judge doubts whether the present dispute is one touching the "business" of a Society. This point is also dealt with in the observations cited above, which expressly contemplate that disputes as to "matters peculiar to associations of persons" are properly referable to arbitration. Termination of membership is certainly such a matter. Thus the opinion which the learned Judge appears to hold, that the word "business" in section 53 has only the connotation of some commercial or contractual transaction, is contrary to the opinion on which those observations are based.

I hold for these reasons that the preliminary issue must be answered in favour of the defendant Society. The plaintiff's action is dismissed with costs, but in the circumstances I make no order as to the costs of appeal.

Thamotheram, J.

I agree.

Plaintiff's action dismissed.

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Present: **Samerawickrema, J.**

A. L. D. C. DE SILVA *v.* C. VIDANAGAMACHCHI

Application for revision in M. C. Matara Case No. 33031 (119/68)

Argued on: 24th May, 1968
Decided on: 27th June, 1968

Autre fois acquit — Order of acquittal by Magistrate on merits after considering material facts, but before the formal witnesses summoned by prosecution gave evidence — Criminal Procedure Code, Sections 190 *and* 330.

(1) That an order of acquittal entered by a Magistrate on the merits after considering all the material facts of the prosecution case at the virtual end of the porsecution case would be an order of acquittal in terms of section 190 of the Criminal Procedure Code notwithstanding the fact that the technical end of the prosecution case was not reached by reason of the fact that the formal witnesses summoned by the prosecution had not given evidence.

(2) That, such an order is sufficient to support a plea of *autre fois acquit*.

(3) That when the complainant has failed to take steps to have such an order reversed, it must be considered to have the force of an acquittal.

Cases referred to: *L. I. C. de Silva v. V. M. P. Jayatilake*, 67 N.L.R. 169.
Wanigasekera v. Simon, 57 N.L.R. p. 377.

F. N. D. Jayasuriya, with *N. T. S. Kularatne*, for accused-petitioner.

W. D. Gunesekera, with *P. Ediruppuli*, for complainant-respondent.

Samerawickrema, J.

The accused-petitioner has filed this application in revision and at the hearing, learned Counsel appearing on his behalf submitted that two orders made by the learned Magistrate should be set aside; first, the order made by the learned Magistrate assuming jurisdiction under Section 152(3) of the Criminal Procedure Code: second, the order made by the learned Magistrate rejecting the plea put forward by the accused-petitioner that he was not liable to be tried in view of the provisions of section 330(1) of the Criminal Procedure Code.

The accused-petitioner had been charged in M.C. Matara case No. 21876 upon the same facts with the offence of cheating, upon the allegation that he deceived the complainant into the belief that he had an account with the Bank of Ceylon and had sufficient funds in the said account to meet cheque No. A/11 871200 of 31.3.1965, and had thereby fraudulently and dishonestly induced the complainant to accept the said cheque and to deliver to him a sum of Rs. 6,000. In those proceedings, the complainant gave evidence and stated that he cashed the said cheque for the accused petitioner on 31.12.1964 on the understanding with the accused-petitioner that the cheque could be presented to the bank for payment on 1st. He stated that thereafter he was requested to put off presentation of the cheque from time to time. Finally, on 1.4.1968, he gave the cheque to Mr. P P. S. Wijetunge, Notary Public, to put it into his account and the cheque was returned with the endorsement that the cheque leaf was not from a cheque book issued to the accused-petitioner. The complainant's list of witnesses filed in those proceedings shows that apart from the complainant, two other witnesses were cited, namely, the Manager, Bank of Ceylon, Matara, to give evidence regarding advice to customer P. P. S. Wijetunge dated 8.4.1965 in regard to cheque No. A/11 871200 and P. P. S. Wijetunge Esquire, Notary

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Public, Walpola, Matara. These two witnesses were obviously to depose to facts which the complainant had referred to in his evidence but which would have been hearsay had they (not) been supported by the evidence of these two witnesses.

Upon cross-examination, the complainant admitted that the reverse of the cheque which was dated 31.12.1964, bore the date 31.3.1965, that he had prior to the date of this transaction lent money to the accused-petitioner, first on the security of a radio set and thereafter upon promissory notes as well as a mortgage bond. A deed D2 (No. 26050 of 24.3.1966) was put to him which showed in its attestation that the consideration to the transfer was the amount due upon cheque P1. The complainant, who is described by the Magistrate as a veteran Proctor's clerk, pretended that he was not aware of the contents of the deed, though in the attestation to the deed, it is stated that both parties declared in the presence of the Notary that the deed was executed in lieu of the entire money due on cheque No. A/11 817200. At that stage, the learned Magistrate acquitted the accused. He stated that he was quite certain that the complainant knew that when cheque P1 was issued, there was no money in the bank. He also stated that he was convinced that if there was anything due, it is in the nature of a civil case and that he could not find any culpability or any criminal liability proved in the case. He, therefore, acquitted the accused. It would appear, therefore, that the cheque P1 had been given by the accused-petitioner to the complainant as security or as evidence of the debt. In ordinary parlance, it was given so that the complainant might have a hold on the accused-petitioner. From one point of view, if the cheque was made out on a cheque leaf which did not belong to the accused petitioner, the complainant would have even a better hold on him.

When the plea of auterfois acquit under section 330(1) was raised before the learned Magistrate, he held, following the Divisional Bench Judgment in the case of *L. I. C. de Silva v. V. M. P. Jayatilake*, 67, N.L.R. 169, that inasmuch as the Magistrate in the earlier proceedings had made his order before the close of the case for the prosecution, the order was not one of acquittal. On application to this Court, Mr. F. N. D. Jayasuriya submitted that the Divisional Bench Judgment had not dealt with the line of authorities which held that an order of acquittal may be made at the virtual end of the prosecution case where all the facts relied upon by the prosecution had been placed before Court. He further submitted that the order of acquittal made by the learned Magistrate in the earlier proceedings would stand until set aside or reversed by this Court and would have the force of an acquittal.

Mr. W. D. Gunasekera, appearing for the complainant-respondent, submitted that there had been two lines of authorities and that the judgment in the Divisional Bench case referred to by the Magistrate had decided that an order made before the close of the prosecution case was not one of acquittal. Mr. Gunasekera further submitted that by reason of the other two witnesses not giving evidence, the learned Magistrate had failed to appreciate the fact that the accused-petitioner had issued a cheque when he had no bank account. The learned Magistrate does not refer in his order to the fact that the accused-petitioner had no bank account, but I do not think that even if he had adverted to it, it would have affected his order. Be that as it may, the complainant had in evidence referred to the fact that the accused-petitioner had no bank account and that fact was, therefore, before the learned Magistrate when he made his order.

In the proceedings in the earlier case (M.C. Matara No. 21876), though the complainant alone had given evidence, all the facts which the prosecution desired to rely on had been placed before the Court as the only other two witnesses on the complainant's list of witnesses were witnesses who were to give formal evidence in regard to facts which had earlier been deposed to by the complainant. The question, therefore, arises whether the order had not been made at the virtual end of the prosecution case. In the case of *Wanigasekera v. Simon*, 57 N.L.R. page 377, Justice Gratiaen held that a Magistrate may in certain situations

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enter a verdict of acquittal under section 190 of the Criminal Procedure Code even before the case for the prosecution had been closed — provided that the Magistrate is satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused.

In the Divisional Bench case as well as in the case reported in 44 N.L.R. relied on therein, the order in the earlier prosecution dismissing the action had been made on the ground that witnesses for the prosecution were not present and the prosecution was not in a position to proceed with the case. The matter that has been raised and decided in the case decided by Justice Gratiaen would not, therefore, have arisen for consideration. Nevertheless, the reason given for those decisions are that the terms in section 190 of the Criminal Procedure Code require that an order for acquittal should not be made until the end of the prosecution case. If by the end of the prosecution case is meant the formal closing of the case on behalf of the prosecution, then of course the decision delivered by Justice Gratiaen is in conflict with the decision of the Divisional Bench. It is to be noted, however that the judgment in the Divisional Bench case relied on the decision of Justice Gratiaen as authority for another point, namely, that for an order of aquittal a decision on the merits is required.

It was not pointed out that the decision of Gratiaen, J. was erroneous or ought to be overruled on the ground that it held that an order made before the formal closing of the prosecution was an order of acquittal. It may be necessary when an appropriate occasion arises to consider whether the Divisional Bench case has had the effect of overruling the decision in the case decided by Justice Gratiaen. It is however unnecessary for me to consider the matter in view of the decision I arrive at one another point.

It is clear that in the earlier proceedings, which were under consideration in the present case, the learned Magistrate made an order on the merits and that he made the order after all the facts relied on by the prosecution were before Court and that he expressly made an order of acquittal. The word "acquittal" may sometimes be used through inadvertance when it is intended to discharge the accused: even as the word "discharge" sometimes is inadvertently used where the word "Acquittal" is intended. Again, "acquittal" or "discharge "may be used by a Judge without addressing his mind to the question whether he is entitled to make one order rather than the other, but this is not such a case. There can be no doubt that when the Magistrate said "I acquit the accused" which he did in two places in the order, he intended to enter an order of acquittal. I am of the view that an order of acquittal made in those circumstances may not be ignored and fresh prosecution entered on the same facts on the basis that the learned Magistrate had entered an order of acquittal before the formal witnesses (who were to depose to facts which were already before the Magistrate) had given evidence. If the complainant was dissatisfied with the judgment of acquittal, he should have taken steps to have it reversed by this Court. So long as it remains unreversed, it must, I think, be considered to have the force of an acquittal.

I, accordingly, hold that the learned Magistrate erred in rejecting the plea made on behalf of the accused-petitioner under section 330 of the Criminal Procedure Code and I set aside his order and I direct that the accused be discharged.

Accused discharged.

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Present: **G. P. A. Silva, S.P.J., and Samerawickrame, J.**

D. R. FERNANDO *v.* K. A. MAGLIN HAMINE

S. C. No. 417/68(*F*) — *D. C. Colombo No.* 399/*R.E.*

Argued on: 22nd January, 1971
Decided on: 19th May, 1971

Civil Procedure Code, sections 394(2), 398, 547 — *Meaning of the words "Next of kin" in section* 394(2) — *Is widow included in the expression?* — *Substitution of widow in place of deceased defendant* — *Is it valid?* — *Matrimonial Rights and Inheritance Ordinance, section* 26.

The defendant in a tenancy action consented to judgment in a sum of Rs. 6,027/40 as arrears of rent, for ejectment and in a sum of Rs. 138/35 per month as damages from 1.6.1966. If however, the Rs. 6,027/40 was paid in instalments without default before 30.6.1968, satisfaction of decree would be entered and the defendant would be allowed to continue occupation on a fresh contract of tenancy as from 1.7.1968.

The defendant after paying certain instalments and damages as agreed died on 31.5.1967 and the plaintiff, having obtained an order for substitution of the defendant's widow under section 398 of the Civil Procedure Code, issued writ of ejectment against her on 2.12.1967.

On 5.12.1967, the petitioner-appellant, as brother of the deceased defendant, moved to stay execution of decree on the ground *inter alia* that he adiated the inheritance which being less than the administrable value and which consisted of only the business carried on in the premises in question and managed by him. He further averred that the substituted defendant-respondent had deserted the defendant, taking with her their only child, about five years prior to the death of the defendant from whom she was receiving maintenance for the child on an order of Court.

The District Judge held that the substitution of the widow was legally correct and further that on the death of the defendant the substituted defendant went to the premises to take over the assets but the petitioner-appellant did not allow her to do so.

Held: (1) That it could not be said that the learned District Judge misdirected himself in holding that the substitution of the widow as the legal representative of her husband in the execution proceedings was wrong in law.

(2) That the expression "next of kin" in section 394(2) of the Civil Procedure Code includes a widow, who is an intestate heir under the Matrimonial Rights and Inheritance Ordinance No. 5 of 1876.

Per **G. P. A. Silva, S.P.J.** "Considering the stage that this case had reached it seems to me that the application to court should have been made under section 341 of the Civil Procedure Code."

Per **Samerawickrema, J.** (*a*) "I desire to deal with a point raised by learned counsel for the appellant. He submitted that a widow is not a blood relation of the husband and therefore does not fall within the class of next of, in section 394(2) of the Civil Procedure Code. There is no doubt that the proper and primary meaning of 'next of kin' is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of.....The term may however be also used in a sense which would include a spouse."

(*b*) "By reason of a long cursus before the enactment of the Civil Procedure Code and by reason of the fact that section 547 does not require administration in respect of estates of small value, heirs to such intestate estates have and do institute actions to enforce certain rights of the deceased. The widow as an intestate heir under the provisions of Ordinance 15 of 1876, would join in instituting such action along with other intestate heirs. Accordingly where a party to an action dies leaving an estate of small value and it becomes necessary to substitute the 'next of kin who have adiated the inheritance, in place of the intestate, there does not seem to be any reason why the widow along with the other intestate heirs should not be joined as legal representatives of the deceased as they would be entitled to file an action in respect of a right of the deceased intestate."

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Cases referred to: *Elmsley v. Young*, 2 My. & K. 781
Withy v. Mangles, 10 L.J. Ch. 391
Garrick v. Camden, 14 Ves. 372 at 382
Bailey v. Wright, 18 Ves. 236 at 238
In re Gilligan (1950) Probate page 32
Samaradivakara v. De Saram, 14 N.L.R. 321
Loku Appu v. Banda, 7 S.C.C. page 3
Staples v. De Saram, Creasy's Rep. 34 & 28,256 D.C. Galle

Texts cited: Grotius: *Introduction to Dutch Jurisprudence*, 2—18—22
Van Leeuwen in *Roman Dutch Law* (Kotze's trans.) Vol. I p. 385

G. P. J. Kurukulasuriya, with *Mrs. N. Dambawinna*, for the petitioner-appellant.

D. R. P. Goonetilleke, for the plaintiff-respondent.

G. P. A. Silva, S.P.J.

On the 5th of July, 1965, the plaintiff-respondent in this case sued one D. W. M. Fernando (since deceased) for arrears of rent and ejectment from premises No. 203, Galle Road, Wellawatte, in which the defendant carried on a business in groceries and sundries which was duly registered in his name under the Business Names Registration Ordinance in April, 1961. The premises in question came within the purview of the Rent Control Act and, the rent having fallen into arrears for over a month after it became due, the plaintiff on or about 30th March, 1964, gave notice to the defendant to quit and deliver vacant possession of the said premises at the end of 30th June, 1964. The defendant however continued in unlawful occupation of the premises, and, at the time action was instituted, the arrears of rent amounted to Rs. 3043.10. Although the defendant in his answer took up the position that he obtained the premises on rent from one Gamage Jane Perera (whose executrix the plaintiff was) and that he was unaware as to the person who was entitled to receive the rents after her death, at the trial on 28th June, 1966, he consented to judgment in a sum of Rs. 6087.40, ejectment and further damages at Rs. 138.35 per month from 1st June, 1966. The amount due however was to be paid in instalments and it was agreed that, if the defendant made the instalment payments without any default up to 30th June, 1968, satisfaction of decree would be entered and the defendant would be allowed to continue in occupation of the premises in suit on a fresh contract of tenancy as from 1st July, 1968. It is important here to note that the defendant stated to court that he had no sub-tenants and undertook not to sub-let the premises and agreed that if he sub-let the premises or any part thereof, writ was to issue after notice and inquiry.

On 4th July, 1967, the plaintiff filed papers under section 398 of the Civil Procedure Code, stating that the defendant in the case died on 31st May, 1967, and applied for substitution of P. Sumanawathie, the deceased defendant's wife, as the legal representative in order to enable him to take out writ and to take the other necessary legal steps in the case. Considering the stage that this case had reached it seems to me that the application to court should have been made under section 341 of the Civil Procedure Code. She was however substituted and on an application being made by the plaintiff a writ of ejectment was issued against her on 2nd December, 1967.

On 5th December, 1967, the petitioner-appellant, a brother of the deceased defendant, moved the court to stay execution of decree on the ground that the decree could not be enforced by virtue of section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966 and stated that he was a dependant of the defendant and had been managing and carrying on the business of the defendant during the latter's lifetime and had continued to do so after his death, that he had adiated the inheritance and that he was therefore entitled to the tenancy of the premises by virtue of section 18 of the Rent Restriction Act. He also averred that the substituted defendant-respondent, the widow of the defendant, had deserted the defendant taking with her their only child about five years prior to the death of the defendant and that she was receiving maintenance by virtue of an order of court in case No. 31946, Magistrate's Court, Colombo. He therefore contended that she did not adiate the inheritance and that the substitution as defendant on the death of her husband was bad in law. The learned District Judge having inquired into this petition dismissed it holding that the substitution

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of the widow was legally correct, that the petitioner, although a brother of the defendant, was not a member of his household and was therefore disentitled to the tenancy on the death of his brother and further that the deceased defendant's tenancy had been terminated by a valid notice to quit and also by the entering of a decree and his being allowed to remain in the premises was a personal right which could not be passed on to another. The present appeal is from this order.

I shall first deal with the question of the correctness of the substitution of the widow in place of the deceased defendant. It is common ground that the widow was, for some years during the lifetime of the husband, living in separation with his child and that she was in receipt of maintenance for herself and her child from somewhere in 1963, that is, for about four years at the time of his death. It is important to note that the ground of separation was cruelty on the part of the deceased defendant and the proceedings in the maintenance case show that at the inquiry the defendant only stated that he intended to file a divorce case and consented to pay maintenance without prejudice to his rights in the divorce action. There is no evidence however that such a divorce case was filed by the defendant. The evidence at the inquiry into the present application which the learned District Judge presumably accepted was to the effect that the widow went to the premises in question on the death of the husband to take over the assets but that she was not allowed to do so by the petitioner and that she had made a complaint to the Police to that effect. In these circumstances, if she was prevented by the appellant from asserting her rights, I cannot say that the learned District Judge misdirected himself in holding that the substitution of the widow as the legal representative on the death of her husband in execution proceedings was wrong in law. The mere fact of the wife having lived in separation from the husband did not disentitle her and the child from succeeding to any of his rights just as she and the child born to her by the deceased would, upon his death, have been entitled to any properties left by him. This position is further strengthened by the fact that she was living away from him on the ground of alleged cruelty, that she was receiving maintenance on an order of court made after due inquiry and that she had attempted to assert her rights to his assets upon his death.

The learned counsel for the appellant contended that the widow, not being a blood relation of the husband, does not fall within the category of 'next of kin' referred to in section 394(2) of the Civil Procedure Code. Although the term 'next of kin' would ordinarily refer to the nearest blood relations of a deceased person, substitution for whom is under consideration by the court, I do not think that the term would generally exclude the spouse of a deceased person. In a system of law such as ours where the spouse of a deceased person has a prior claim to succeed to the latter's intestate property, according to the Matrimonial Rights and Inheritance Ordinance, the surviving spouse should in my view be regarded as 'next of kin', if not in preference to, at least on equal terms with the nearest blood relations.

There is another reason which persuades me to take a view unfavourable to the appellant. The petitioner-appellant's evidence that he was carrying on business in the said premises with the deceased brother did not impress the learned District Judge nor, I must say, does it impress me. Apart from his mere statement that he so carried on business, he admitted that he was not a partner; the Certificate of Registration of the business contained only the name of the original defendant; the appellant was living at Ratmalana while the deceased lived in the premises in question; the appellant was not a man of means and had no other employment and was paid about Rs. 5/- a day for assisting the deceased in the business. Perhaps more important than all this is the fact that when the deceased consented to judgment in this case he stated that he had no subtenants and undertook not to sub-let the premises but was silent as to whether he had a brother carrying on business with him, when he had an opportunity to inform the court of this fact if indeed that was the position. This evidence, in my view, did not help to dislodge the rights that the widow had on the death of her husband nor to establish any right to the tenancy of the premises on his part, even if such a right could have accrued to anybody at all, having regard to the stage that the tenancy case had reached at the time that the defendant died. It is also significant that, although the defendant died on 31st May, 1967, the appellant, if the right contended for in fact accrued to him, did not take any steps in court to have himself substituted until December, 1967, particularly when he should have known that instalment payments were due to be paid every month in default of which writ could have issued in terms of the decree. Considered from this angle too, therefore, the substitution of the widow as the legal representative of the original defendant was properly done for the purpose of execution proceedings.

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In these circumstances, it is unnecessary to deal with the questions of law that may have arisen had the appellant been one who came within the purview of section 18 of the Rent Restriction Act.

The appeal is accordingly dismissed with costs.

Samerawickrame, J.

I agree.

Samerawickrame, J.

I agree with the judgment of G. P. A. Silva, S.P.J. but I desire to deal with a point raised by learned counsel for the appellant. He submitted that a widow is not a blood relation of the husband and therefore does not fall within the class of next of kin in section 394(2) of the Civil Procedure Code. There is no doubt that the proper and primary meaning of 'next of kin' is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of — vide *Elmsley v. Young*, 2 My. & K. 781, and *Withy v. Mangles*, 10 L.J. Ch. 391. The term may however be also used in a sense which would include a spouse. As far back as 1807, Lord Eldon in *Garrick v. Camden*, 14 Ves. 372 at 382, said, "It is competent to and required from the Court to look through the whole will; and to see, whether from the whole an intention is manifested to include the wife amongst those who are to be taken more strictly as next of kin a description *prima facie* excluding her."

In *Bailey v. Wright*, 18 Ves. 236 at 238, it was said by the Master of the Rolls, "The question before the Court is not, whether the husband can in any case or for any purpose be, as he has sometimes been called, the next of kin of his wife; but, whether according to the true construction of this settlement it was intended, that the husband should take under that denomination. In the cases, where the husband has been spoken of as next of kin of his wife, the only thing in question was his right to administer; and that right has frequently been called his right as next of kin."

In *In re Gilligan* (1950) Probate page 32 it was held that 'next of kin' in the Wills Act, 1837 (7 Will. 4, and I Vict. c. 26) section 18 was intended to include a widow.

In the Roman Dutch Law the term 'next of kin' appears to have been sometimes regarded as synonymous with heirs *ab intestato*.' The reason for this may have been that the closest blood relations or next of kin succeeded on an intestacy. Van Leeuwen in Roman Dutch Law (Kotze's trans.) Volume I page 385 says, "It is a common opinion that by the expression nearest relations is meant not the very nearest to the exclusion of others, but all those who together succeed by law *ab intestato*, because the words, those of the family, of the house, of the blood, and the like, are considered to mean the nearest relations: And under the terms nearest relations without distinction are reckoned those who are such by succession *ab intestato* and not those nearest in degree." Grotius: Introduction to Dutch Jurisprudence, 2—18—22, is: — "Friends or relatives or heirs by blood mentioned by last will are understood to be meant in the same succession as they would inherit according to the law of the land, unless there was any manifest token of a contrary intention."

In 1876, before the Civil Procedure Code was enacted, by the Matrimonial Rights and Inheritance Ordinance a widow became an intestate heir in respect of half share of her husband's estate. In *Samaradivakara v. De Saram*, 14 N.L.R. 321, the Privy Council considered a *fideicommissary* provision under which property devolved on the "lawful heirs" of the devisees. It was held that the widow would take. Lord De Villiers said, "The question still remains whether the first plaintiff, as the surviving spouse of Edwin, in entitled to any share in the properties bequeathed to him. Under the Roman-Dutch law she would not have been one of his heirs *ab intestato*, but the 26th section of the Ceylon Ordinance No. 15 of 1876 enacts that 'when any person shall die intestate as to any of his or her property, leaving a spouse surviving, the surviving spouse shall inherit one-half of the property of such person.' It is clear from the 25th and subsequent sections that the object of that portion of the Ordinance was to regulate the course of intestate succession, and to fix the share to which the heirs *ab intestato* should be respectively entitled."

The term 'next of kin' may, in a particular context, be used to include a widow who is an intestate heir. The relevant part of section 394 (2) provides, *inter alia*, for legal representatives to represent a plaintiff or defendant to an action who has died leaving an estate which is less than Rs. 2,500/- in value and is exempted from administration. A widow who is an intestate heir in respect of a half share under Act, 15 of 1876, appears eminently to be a suitable person along with the other heirs to be legal representatives in place of such a dead party. *Prima facie*, therefore, 'next of kin' in the provision should be given a meaning which would include her.

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There is another approach which supports this interpretation. In the Roman-Dutch law there were no executors or administrators and the heir represented an intestate in every way. He could file action to enforce a right of his intestate. After the introduction of executors and administrators the administration of the estate of a deceased was vested in them and it was only an executor or administrator who could institute an action in respect of a right of the intestate. The position has been set out in the judgment of Clarence, J. in *Loku Appu v. Banda*, 7 S.C.C. page 3, thus:— "The administrator appointed by a court of justice to represent the estate of a deceased person has, it hardly needs to be said, no place in Roman-Dutch Law. He is an importation from England. By the Charter of 1801 the Supreme Court was empowered to grant probates and letters of administration. By the Charter of 1833 the same power was committed to the district court, in whom, under the Ordinance No. 11 of 1868, it still resides. It has been held by this Court that the general effect of this is to abrogate the old Roman-Dutch Law as to representation of deceased persons, and to substitute the English Law concerning executors and administrators, with this difference, that the administrator here, unlike the administrator in England, takes everything, including what in England could be called real property. See *Staples v. De Saram*, Creasy's Rep. 34 and 28,256 D.C. Galle, Vanderstraaten, 273."

The decision in the case of *Loku Appu v. Banda* (supra) which was that of a Full Court was that where intestate estates are small it is not necessary to take out administration and that in such cases the heirs of the intestate had been recognised by a long series of judicial decisions of the Courts as being the representatives of the intestate estate and were the proper persons to sue and be sued. Numerous actions have been filed by and against heirs of an intestate where the estate was small in respect of certain claims such as recovery of land or debts.

Whether it was by way of recognition of the existing position of the heirs of intestate estates that are small or otherwise the provisions of the Civil Procedure Code have recognised that administration is not necessary in the case of estates under Rs. 1,000/- in value before 1930 and under Rs. 2,500/- after that year — vide section 547 of the Civil Procedure Code. Again, where a party to an action dies leaving an intestate estate of such small value sections 338 and 394(2) permit persons other than executors or administrators to be substituted in his place, namely, next of kin who have adiated the inheritance.

By reason of a long cursus before the enactment of the Civil Procedure Code and by reason of the fact that section 547 does not require administration in respect of estates of small value, heirs to such intestate estates have and do institute actions to enforce certain rights of the deceased. The widow as an intestate heir under the provisions of Ordinance 15 of 1876, would join in instituting such action along with other intestate heirs. Accordingly where a party to an action dies leaving an estate of small value and it becomes necessary to substitute the 'next of kin who have adiated the inheritance,' in place of the intestate, there does not seem to any reason why the widow along with the other intestate heirs should not be joined as legal representatives of the deceased as they would be entitled to file an action in respect of a right of the deceased intestate.

I am therefore of the view that "next of kin" in section 394(2) of the Civil Procedure Code includes a widow who is an intestate heir under Ordinance No. 15 of 1876.

Appeal dismissed.

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

WITHANA APPUHAMYLAGE SOMAPALA *v.* S. B. PILAPITIYA, SUB-INSPECTOR OF POLICE

S. C. No. 784/69 — *M. C. Negombo No.* 16358

Argued on: 5th March, 1970
Decided on: 26th April, 1970

Identification of accused — Hearsay evidence forming link in the chain of evidence regarding identification — Plaint filed on basis of description given by the Grama Sevaka — No subsequent identification — Failure of Magistrate to probe real issue.

The police, upon receiving information that one Sompala of Barawawila was unlawfully distilling spirits, proceeded to Barawawila where they saw a person seated by a still. Upon seeing the police, the said person ran away and was seen by

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the police thereafter only at the trial of this case. The police officers thereafter obtained from the Grama Sevaka of the area the full name and address of a "Somapala of Barawawila" and filed the present action against the accused. The Grama Sevaka did not give evidence, nor was there any evidence to show the connection between

(i) the name and address given by the Grama Sevaka

(ii) "Somapala of Barawawila "given by the informant to the police and

(iii) the person who was seen by the police on the day of the raid.

Held: That in view of the absence of any evidence which would have helped to determine whether the man whom the police saw near the still was the identical person whose particulars were given by the Grama Sevaka and of the failure of the learned Magistrate to probe into this aspect, the conviction could not stand.

M. Kanakaratnam, for the accused-appellant.

S. L. Gunasekera, Crown Counsel, for the Attorney-General.

G. P. A. Silva, S.P.J.

The evidence on which the appellant was convicted in this case consisted of that of Pilapitiya, Sub-Inspector of Police, Divulapitiya, and Police Constable Weeraratne attached to the same Police at the time of the alleged detection.

The Sub-Inspector's evidence was that, having received certain information of unlawful distillation of certain spirits by one Sompala of Barawawila, he proceeded in a land rover to the Barawawila village. Having stopped the land rover at a bend, he walked to the right side along the road and along a foot-path which led to the Barawawila stream. At a distance of about 40 yards from the stream he saw a still in operation and saw the accused squatting by the base barrel which was on fire. He watched for about one or two minutes when the accused who suddenly got up noticed the Police Officers and crossed the stream and ran along a paddy field. As the accused got up and attempted to run away he ordered him to stop by calling out his name. He did not pay heed to the Sub-Inspector's order, and then the Sub-Inspector rushed to the still and ordered the rest of his party to give chase. Then he again saw the accused running away along a paddy field at a distance of about 75 yards. The Police Constable gave chase and after some time informed him that the accused had escaped. Admittedly, the accused was a person who was not known to this Sub-Inspector. He obtained the full name of the accused from the Grāma Sevaka of the area. The Grāma Sevaka however was not one of the party. As to how the Grāma Sevaka came to give the full name of the accused without at the same time knowing that it was this accused whom the Inspector and/or the other witness, Police Constable Weeraratne referred to is not known. All that the Sub-Inspector was able to say in cross-examination was that he went to the Grāma Sevaka the next day and told him to give him particulars of Somapala of Barawawila, at the same time admitting that he did not know how many Sompalas there were in Barawawila. Further, neither the Sub-Inspector nor Police Constable Weeraratne knew the accused to bear the name Somapala. Yet they asked the Grama Sevaka to furnish them with the full name of Somapala. Even if this evidence is fully accepted, the request to the Grāma Sevaka can only be understood on the basis that both the Sub-Inspector and the Police Constable assumed that the person whom they saw near the still was Sompala of Barawawila about whom some earlier information was received. For their clear position was that each of them had seen the accused in the village but did not know his name and had not met him in any particular connection. That was why, when they received information that one Somapala of Barawawila was indulging in illicit distillation, they did not have any particular person in mind whom they identified as Sompala. The situation is rendered even more difficult because Sompala is a very common name in our villages. The Sub-Inspector did not even give a description of the accused to the Grāma Sevaka, nor of his size nor colour. The accused was not a person whom the Sub-Inspector had met in any connection before. He could not remember even having seen the accused in any case. He had not visited the accused. All that he was able to say was that he had seen him in his rounds in the village, which evidence alone is hardly sufficient in a criminal case where the question of identity was hotly contested before the Magistrate. The evidence of the Police Constable did not go any further. He received information that one Sompala of Barawawila was distilling unlawful spirits and passed it on to the Sub-Inspector and he more or less repeated the evidence of the Sub-Inspector in regard to the alleged

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detection. While the Sub-Inspector remained near the still the Constable gave chase for about 75 yards and lost sight of the accused. This can only mean that the acccused was running ahead of the Constable at some considerable distance without meeting him face to face. The opportunities for identification therefore were meagre even in the case of the Constable. So far as acquaintance with the accused was concerned his evidence does not show that he was in any better position than the Sub-Inspector. Asked whether he knew the accused before, he replied in the affirmative, but when questioned further as to how he knew him, his answer was "generally I know him". He admitted however that he could not remember whether he had talked to him and that he did not know his house, nor did he remember any day when he had met him. He also did not know the number of persons by the name of Somapala in Barawawila village, nor that the accused was Sompala.

In this state of the evidence when the question of the identity of this accused was seriously in issue, it was incumbent on the prosecution to have called either the informant who could have enlightened the Court as to who Sompala was or at least called the Grāma Sevaka in order to satisfy the Court as to how he was able to give the particulars of this identical Somapala to the Police. Even if the Grāma Sevaka had been called it is doubtful whether he would have helped to fix the identity of the accused as, in the circumstances testified to by the Sub-Inspector, the Grama Sevaka not having been given even a description of the accused, he would only have furnished the full name of a Somapala whom he himself would have suspected to be an unlawful distiller. As it is, it seems to me that the learned Magistrate has failed to appreciate this important missing link regarding the identity of the accused which was the vital issue in the case. There is thus no direct evidence as to what transpired between the Sub-Inspector and the Grāma Sevaka and as to what the mental process was by which the Sub-Inspector and the Grāma Sevaka — who was not a member of the raiding party — arrived at the decision that the accused Vithana Appuhamilage Somapala was the identical person who was distilling the unlawful brew. What the Grāma Sevaka communicated to the Sub-Inspector would in the circumstances amount to hearsay. That the learned Magistrate has failed to appreciate the importance of this omission is proved by the fact that he has not even referred to this crucial issue in the course of his judgment. He has merely set out the charges, narrated the evidence of the Sub-Inspector and the Police Constable and stated as follows:—

> "I have considered all the evidence in the case carefully. The prosecution witnesses impressed me as truthful witnesses. They gave their evidence in a convincing manner. The evidence of Pilapitiya is corroborated by the evidence of Weeraratne on all meterial points. I therefore believe and accept the evidence of the prosecution witnesses."

The only examination he did of the accused's evidence was to say that the accused admitted that the Police are not angry with him and could give no reason as to why they should bring a false case against him and that if the accused was falsely implicated he would have expected him to make representations or complaints to the authorities but that the accused had not said so in evidence, and for these reasons he disbelieved the evidence of the accused.

It seems to me that there is an over simplification by the learned Magistrate of the evidence of the prosecution and the defence and an omission to probe the real issue. It would also appear that the Police did not even take the precaution of questioning the accused before plaint was filed. There is no evidence that either the Sub-Inspector or the Police Constable, after obtaining the particulars of the full name of the accused, either called him up or went to meet him with a view to satisfying himself as to whether the man he saw near the still distilling the illicit brew was the same person whose full name the Grāma Sevaka had given them. They met the accused for the first time therefore after the plaint was filed before the Magistrate. Having thus filed the plaint against the person whom the

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Grāma Sevaka must have imagined to be identical with the person whom the Police Officers saw near the still, when he later appeared in Court in obedience to the summons, it is most unlikely that the two Police Officers would have stultified themselves and exposed themselves to severe criticism by informing the Magistrate that the man they saw near the still was a different person, even if he was in fact not the same person. It is also possible that the Police Officers who only saw a man running away from the still would have made an honest mistake as to the identity of that person with the accused. Thus all the available evidence is hardly sufficient to satisfy a Court beyond reasonable doubt that the person who distilled the illicit brew was this accused Somapala.

In these circumstances the various steps in the process of identification of the accused and the conversation between the Sub-Inspector and the Grāma Sevaka, which led to the final decision that the man whom the Police Officers saw near the still was the identical person whose particulars the Grāma Sevaka furnished to the Police Officers, assumed great importance. The absence of the Grāma Sevaka's evidence and any other evidence which would have helped to determine this question and the failure of the learned Magistrate to give his mind to that aspect must necessarily vitiate the conviction of the accused.

I accordingly set aside the conviction and sentence and acquit him.

Accused aquitted.

Present: **Samerawickrema, J.**

T. P. WILLIAM *v.* INSPECTOR OF POLICE, GAMPAHA*§

S. C. 1263/'68 — *M. C. Gampaha* 18069/*A*

Argued on: 21st March, 1969
Decided on: 18th April, 1970

Control of Price Act — Charge of selling beef in excess of the controlled price — Applicability of price order to the location of offence — Judicial notice — Proof as to whether beef imported or local — Proof as to weight.

The accused-appellant was convicted for having sold beef in excess of the controlled price at Belummahara which was alleged to be situated with in the Colombo District (outside the Colombo Municipal limits). In appeal objection was taken to the conviction on the grounds that

(*a*) there was no proof that Belummahara fell within the Colombo administrative district to which the relevant price order referred;

(*b*) there was no proof that the beef was not imported beef; and

(*c*) the certificate of weighing relied on was not proved.

Held: (1) That judicial notice of the situation of Belummahara could be taken by virtue of section 57 of the Evidence Ordinance by reference to the "Alphabetical and Numerical list of Villages in the Western Province" compiled by the Department of Census and Statistics, being a work published by authority, where Belummahara is stated to fall within the Colombo Administrative district.

(2) That the oral evidence in the case as to the condition of the stall and the carcasses found therein provided *prima facie* proof that the beef was not imported beef;

(3) That although the certificate issued by the Revenue Inspector was inadmissible as it had not been proved, there was oral evidence to establish that the portion of beef sold weighed only $14\frac{3}{4}$ ounces, and therefore the accused contravened the Price Control Regulations.

Cases referred to: *Hassan v. Inspector of Police, Panadura*, 72 N.L.R. 449.

*For Sinhala Translation, see Sinhala section, Vol. 22. p. 27. §For Tamil translation see Tamil section p. 17

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F. W. Obeyesekera, for the accused-appellant.

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

Samerawickrame, J.

The accused-appellant appeals against a conviction for having sold beef in excess of the controlled price at Belummahara which is stated to be a place within the Colombo District (excluding the Colombo municipal limits).

Learned counsel for the appellant submitted that there was no proof that Belummahara fell within the Colombo administrative district (outside the Colombo municipal limits) to which the Price Order referred to in the charge applied. Dealing with this submission the learned magistrate has stated, "In regard to the third submission that there is no evidence that Belummahara where the beef stall is situated is within the Colombo District and not within the limits of the Colombo Municipality, I think that I would be entitled to take judicial notice of the fact in the ordinary course of official conduct and administration that this place is only a couple of miles away from Gampaha town, and is not a place within the Colombo Municipality. Similarly I could take judicial notice of the fact that the town of Gampaha itself, being within the Administrative District of Colombo, Belummahara which lies more towards Colombo is a place within the Colombo District." I am of the view that the learned magistrate was right in taking judicial notice of the situation of Belummahara but the proper mode of doing so has been indicated in a recent decision. In the case of *Hassan v. Inspector of Police, Panadura*, 72 N.L.R. 449, Weeramantry, J., held that a compilation by the Department of Census and Statistics known as An Alphabetical and Numerical List of Villages in the Western Province, being a work published by authority was an appropriate book of reference which, in terms of section 57 of the Evidence Ordinance, the Court may consult and act upon where necessary. On reference to that compilation I find that the village Belummahara falls within Meda Pattuwa, Siyane West Korale. It appears from item 1 in column I of the first schedule to the Administrative Districts Act No. 22 of 1955 (Cap. 392) that Siyane Korale West (Meda Pattuwa) falls within the administrative district of Colombo.

The next submission made by learned counsel for the appellant was that there was no proof that the beef was not imported beef. The decoy stated in evidence that the accused cut a piece of beef from one of the chunks found hanging in the stall and gave it to him. Sub-inspector of Police Wimalasena stated that he noticed bowels, hide and hoofs of cattle in the stall and some chunks of beef with blood dripping down from them and that there were fresh stains like blood on the floor of the stall. I think there is *prima facie* evidence that the beef was fresh beef and not imported beef.

Learned counsel also submitted that the learned magistrate had relied on a certificate of weighing issued by the revenue inspector, Urban Council, Gampaha. The revenue inspector was not called as a witness and the certificate issued by him does not appear to me to be admissible in evidence. Sub-Inspector Wimalasena however stated that he produced the accused and the parcel of beef before the inspector of weights and measures and that the beef was weighed by the inspector in the presence of the accused and of the inspector and the beef was found to weigh 14¾ ounces. There was therefore evidence of the weight of the beef sold by the accused-appellant.

The appeal is accordingly dismissed.

Appeal dismissed.

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Present: **Weeramantry, J.**

R. V. RANASINGHE *v.* B. WIJENDRA, INSPECTOR OF POLICE, S.C.I.B., FORT, COLOMBO

S. C. No. 333/70 — *J. M. C. Colombo No.* 44232

Argued on: 24th June, 1970
Decided on: 9th October, 1970

Penal Code, section 386 — *Charge of dishonest misappropriation — When misappropriation takes place? — Initial innocent taking followed by subsequent dishonest charge of intention necessary — Distinguished from theft and cheating.*

Held: (1) (After reviewing all the authorities) That in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offence of theft and other offences which may be committed.

(2) That to view this matter, otherwise may result in obscuring the line of demarcation between criminal misappropriation and such offences as theft and cheating.

Per **Weeramantry, J.** "It would appear that the offence of dishonest misappropriation of property was created in our Penal Code by way of a conscious departure from the principles then prevalent under the English criminal law. Dishonest misappropriation was a new offence which, as Gour observes, *Indian Penal Code*, 8th ed. vol. 4 p. 2824, was carved out of theft, and laid down a rule at variance with the English law which looks only to the intention at the time the property is obtained *ibid.* p. 2825; Ratanlal & Thakore, *Law of Crimes*, 20th ed. p. 1024."

Cases referred to: *Georgesy v. Seyado Saibo* (1902) 3 Browne 88.
Kanavadipillai v. Koswatte (1914) 4 Bal. N. 74
Gratiaen Perera v, The Queen (1960) 61 N.L.R. 522
Attorney-General v. Menthis (1960) 61 N.L.R. 561
Cartwright v. Greene (1802) 8 Ves. 405
Merry v. Greene and Dewes (1841) 10 L.J.M.C. 154
Maynes v. Coopper (1956) 1 All E.R. 450

Texts referred to: Gour's *Indian Penal Code*, 8th ed. vol. 4 p. 2824
ibid p. 2825
Ratanlal & Thakore, *Law of Crimes*, 20th ed. p. 1024
Kenny, 19th ed. section 289
(1956) 72 L.Q.R. at 183
Gour: *The Penal Law of India*, 5th ed. p. 1345, section 4712

P. Ramanathan, for the accused-appellant.

T. Wickremasinghe, Crown Counsel, for the Attorney-General.

Weeramantry, J.

The accused-appellant in this case has been charged on two counts. On the first count he is charged with having aided and abetted an unknown person to deceive one Sompala by falsely representing to him that that person was in possession of three cartons of cigarettes available for sale and that he (the unknown person) was at Ceylinco building with the cigarettes, thereby dishonestly or fraudulently inducing Sompala to deliver to the accused a sum of Rs. 20/-, an offence punishable under section 403 of the Penal Code.

On the second count he was charged with dishonestly misappropriating this sum of Rs. 20/- belonging to Sompala thereby committing an offence punishable under section 386.

Somapala, whose evidence has been accepted by the learned Magistrate, has stated that on the

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day in question a person whom he had known earlier told him that he could buy cigarettes at a reduced rate through the account of a person who was running a canteen and suggested that Somapala should give him some money with which cigarettes could be so purchased for Sompala. Acting on this representation Somapala borrowed Rs. 20/- and took it to the Ceylinco building where that person brought the accused to him. The accused at that time had a parcel in his hand. The accused gave him the parcel and Somapala gave the accused a sum of Rs. 20/- consisting of two ten rupee notes. Somapala took the parcel away and on opening it, found it to contain cardboard boxes filled with pieces of paper.

The position of the accused was that he had met one Perera at Ceylinco House and that Perera had given him a parcel to hold it for a while. He waited for about five minutes holding the parcel and then Perera asked for the parcel and handed the parcel to Somapala. He denied any knowledge of the fraud.

It is difficult to understand why the accused who was according to his own evidence a businessman earning an income of Rs. 400/- per month from the sale of stationery, should waste his time holding a parcel for Perera not knowing what it contained or the nature of the transaction. The learned Magistrate has quite rightly accepted the version of the prosecution and rejected the accused's story.

The only question which arises for consideration upon this appeal is a question of law raised in regard to the second count. It is submitted that the charge of misappropriation cannot be maintained upon these facts inasmich as misappropriation presupposes an initial innocent taking with a guilty state of mind following only thereafter. Upon the facts of this case on the other hand it seems clear that at the time the accused received the sum of Rs. 20/- he was already a guilty participant in the scheme of fraud.

There are conflicting authorities on this point.

In 1902 Middleton, J. held (*Georgesy v. Seyado Saibo* (1902) 3 Browne 88) that before there could be a conviction under section 386 of the Penal Code there must first be an honest possession of the property and then a subsequent change of intention. This view was repeated in 1914 by Pereira, J., *Kanavadipillai v. Koswatte* (1914) 4 Bal. N. 74, who observed that there could be no criminal misappropriation unless the possession of the thing alleged to have been appropriated was come by innocently and retained by a subsequent change of intention. For many years thereafter the correctness of this view of the law would appear to have been assumed, for we see that in 1960 Sinnetamby, J. with whom Weerasooriya, J. agreed, stated that to constitute misappropriation the authorities seem to suggest that there must be an initial honest possession followed by a dishonest conversion, *Gratiaen Perera v. The Queen* (1960) 61 N.L.R. 522. It was not necessary however for the purposes of that case to consider this question further. However, Sinnetamby, J. sitting alone in a case decided a week later, went into the matter in somewhat greater detail and concluded that in order to constitute criminal misappropriation of property it was not necessary that there should be an initial innocent taking followed by a subsequent dishonest change of intention, *Attorney-General v. Menthis* (1960) 61 N.L.R. 561. He held that if the initial taking of the property was itself dishonest, then too the offence was made out.

The case before Sinnetamby, J. was a case of the misappropriation of cattle which according to the facts as found by the Magistrate had been let loose by the herdsman to whom they had been entrusted by the owner. At the time they were taken by the accused they were grazing on pasture land at 10.45 p.m. and Sinnetamby, J. observed that the cattle may well have strayed at the time they were taken possession of by the accused. They could not therefore be said to have been in the possession of the herdsman at the time the accused took them, for there was nothing to show that the pasture land was enclosed or was under the control of the herdsman or was even the private property of the owner or the herdsman. Consequently this was a case where the cattle had not been taken from the possession of any person and what Sinnetamby, J. held was that "if the initial taking of the property **not in the possession of anyone** is dishonest then too the offence of criminal misappropriation is made out."

The present case is not a case where the sum of Rs. 20/- was not in the possession of anyone at the time it was taken. The judgment of Sinnetamby, J. does not therefore assist us in deciding a case such as the present. Where, as in the present case, a person at the time he takes over property from another already entertains a guilty state of mind, the question still arises whether the offence of criminal misappropriation is committed at all. Other offences such as theft or cheating may well be committed in such circumstances,and in accordance with the principles accepted and assumed in our case law until the decision in *Attorney-General v. Menthis*, I would incline to the view that one of

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such offences rather than the offence of criminal misappropriation is the offence committed in this case.

It would appear that the offence of dishonest misappropriation of property was created in our Penal Code by way of a conscious departure from the principles then prevalent under the English criminal law. Dishonest misappropriation was a new offence which, as Gour observes (*Indian Penal Code*, 8th ed. vol. 4 p. 2824), was carved out of theft, and laid down a rule at variance with the English law which looks only to the intention at the time the property is obtained, (*ibid*, p. 2825; Ratanlal & Thakore, *Law of Crimes*, 20th ed. p. 1024). Under English law an innocent taking followed by conversion consequent on a subsequent change of intention did not fall within the ambit of the offence of larceny. Moreover, according to the English law if the original intention was innocent a subsequent dishonesty would be insufficient to convert the legal possession into an illegal one so as to attract even any other head of penal liability. If the case was not one of guilty taking initially, it was regarded as one of non-criminality — that is the act constituted either a theft or was not punishable criminally at all and was a purely civil wrong, (Ratanlal & Thakore, *ibid* Gour, *Indian Penal Code*, 8th ed. vol. 4 p. 2825. In the words of Kenny, 19th ed. s. 289, "Under the ancient principle a taking could not be larceny if the intention to steal was not formed until later."

The English law ran into a degree of confusion in consequence of the fact that taking meant the acquisition of possession, for it became entangled in the complex question of what constitutes legal possession. The inconsistencies resulting from this position are illustrated by Kenny who refers to a number of cases where seemingly opposed decisions were reached owing to the difficult legal questions involved in determining whether there was an innocent acquisition of possession. For example in *Cartwright v. Greene* (1802) 8 Ves. 405, the purchase at an auction of a bureau which, unknown to both vendor and purchaser, contained money in a secret drawer was held to have obtained legal possession of the money, but forty years later in *Merry v. Greene and Dewes* (1841) 10 L.J.M.C. 154, a purchaser at an auction of a bureau was treated as not acquiring possession of the money discovered in a secret drawer.

There were several similar conflicts leading to a somewhat bewildering state of the law. Indeed the resulting anomalies in the English law were so great that they have not in fact been fully corrected, as Sinnetamby, J. points out in *Attorney-General v. Menthis*, even by the Larceny Act of 1916. In *Attorney-General v. Methis* reference is made to the English case of *Maynes v. Coopper* (1956) 1 A.. E.R. 450, as exposing the unsatisfactory state of the English law even at this date. In that case the recipient of an extra sum of money which had somehow found its way into his pay packet appropriated it upon subsequently forming a dishonest intention. It was held however that the offence of larceny had not been committed and much academic discussion followed upon that decision. Indeed such cases were condemned as a public scandal because the Courts were reluctantly compelled to allow dishonesty to go unpunished, see (1956) 72 L.Q.R. at 183.

It is not unreasonable to infer that the deliberate departure from the principles of English law, represented by the creation of this offence of criminal misappropriation, was the result of a consciousness of the inadequacy of the existing English law and the existence of a lacuna in regard to cases of innocent taking followed by a subsequent dishonest intention. Such inconsistencies as those revealed by *Cartwright v. Greene* and *Merry v. Greene and Dewes* must also have been known at the time the Indian Penal Code was presented to the Legislative Council in 1856 and passed in 1860, and certainly long before our Penal Code was passed in 1883. All these considerations would serve to indicate that the offence contemplated by section 386 was one of innocent taking followed by a subsequent dishonest intention, the case of an initial dishonest taking having already been provided for by the offence of theft.

This indeed would appear to be the understanding of this offence in India as well. Thus Ratanlal & Thakore, *Law of Crimes*, 20th ed. p. 1023, begin their comment on this section with the observation that "criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact, with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property **which is already without wrong in the possession of the offender.**" The authors go on to point out that in this respect the Penal Code is at variance with the English law according to which the intention of the accused only at the time of obtaining possession is taken into account.

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So also the original texts of the Penal Law of India by Sir Hari Singh Gour himself would appear to draw this distinction. It is there stated, 5th Ed. p. 1345, section 4712: "The question whether the act is theft or misappropriation depends upon when the dishonesty began — was it before or after the thing came into possession. This is a point of division as much between the two offences of theft and criminal misappropriation in the Code, as between criminal misappropriation and a civil wrong under English Law." This absence of wrongful initial taking is stressed again, *ibid*, section 4713, for he observes in a later passage that in theft the initial taking is wrongful but in criminal misappropriation it is indifferent and may even be innocent but becomes wrongful by a subsequent change of intention or from knowledge of some new fact with which the party was not previously acquainted. The word 'indifferent' in this passage would appear to refer to a neutral state of mind — that is where the doer has not affirmatively formed a wrongful intention at the time of taking.

Later editions of this celebrated work by other editors seem to depart however from the view of the distinguished author, for the 8th edition states (p. 2830) that it is difficult to say that misappropriation cannot be committed if the accused had a dishonest intention at the moment of taking possession of the article. I would prefer on this point to follow the view expressed by Sir Hari Singh Gour himself.

It is my view upon a review of all the authorities that in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offences of theft and other offences which may be committed. To view this matter otherwise may result in obscuring the line of demarcation between criminal misappropriation and such offences as theft and cheating. In the present case since the initial taking was with a guilty mind I consider that the offence of criminal misappropriation has not been made out and I therefore set aside the conviction on this count. The fine of Rs. 50/- or three weeks rigorous imprisonment on count one will stand and so also will the term of one year's rigorous imprisonment under the Prevention of Crimes Ordinance.

Conviction on 2nd Count set aside.

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

M. M. ZANEEK *v.* M. L. M. AHAMED

S. C. 68/68 (*Inty*) — *D. C. Colombo* 53124/*M*

Argued on: 18th and 19th December, 1969
Decided on: 16th January, 1970

Res Judicata—Second action by plaintiff against same defendant for recovery of same sum of money — Principal matters in dispute between parties decided in favour of plaintiff in earlier action, but plaintiff's action dismissed on ground that it was prematurely brought—Are the matters so decided in favour of plaintiff operate as res judicata against the defendant — The Principle involved in such cases.

The plaintiff sued the defendant for the recovery of Rs. 8,000/- averring

(*a*) that the sum had been deposited with the defendant when the former took certain premises on rent from the latter.

(*b*) that this deposit was to be returned on surrendering possession in accordance with the terms of the tenancy agreement.

(*c*) that possession of the premises had been duly surrendered.

One of the issues framed at the trial on behalf of the defendant as No. 12 was whether the payment of Rs. 8,000/- was in contravention of section 18 of the Rent Restriction Act.

* For Sinhala translation, see Sinhala Section Vol. 22, p. 23

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The plaintiff thereupon framed a further issue, viz. "Is the finding of this Court in 44364/M *res judicata* as between the parties on issue 12."

In this action, No. 44364/M, the same plaintiff had sued the defendant for the recovery of the same sum of Rs. 8,000/- on the basis that the deposit was returnable on demand, and the substantial defence in the former case was a denial that the sum of Rs. 8,000/- had been deposited with the defendant.

The learned District Judge in that case rejected this defence and further held on the issues

(*a*) that the defendant demanded and received from the plaintiff the said sum of Rs. 8,000/- to be held as a deposit.

(*b*) that the plaintiff was entitled to a refund of the said sum only after restoring the premises to the defendant.

(*c*) that the payment of the said sum by the plaintiff was not illegal.

(*d*) that the action should be dismissed as it was prematurely brought, the defendant not having surrendered possession.

The learned District Judge in the present case held that the decisions of the issues in the former case operated as *res judicata* precluding the defendant from contesting the principal matters in dispute.

Held: (1) That the issues decided by the Court in the former case in favour of the plaintiff whose suit is ultimately dismissed on another ground, cannot operate as *res judicata*.

(2) That the principle on which this view is based is that once the plaintiff's earlier action was dismissed on the ground that it was premature, there was no need for the defendant to seek by way of appeal a reversal of the finding against him.

Per **H. N. G. Fernando, C.J.** "That being so, it would be manifestly unjust that in the present case the defendant should be held to be bound by a finding of a District Court against which he could not institute an appeal; since the finding lacked the character of being a final order, it cannot operate as *res judicata*."

Cases referred to: *Roweena Umma v. Rahuma Umma* (41 N.L.R. 522)
Shoe Machinery Co. v. Cutlan (1896) 1 Ch. Div. p. 667

H. W. Jayewardena, Q.C., with *F. C. Perera* and *G. M. S. Samaraweera*, for the defendant-appellant.

C. Ranganathan, Q.C., with *S. C. Crossette Tambiah*, for the plaintiff-respondent.

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

The plaintiff in this action sued the defendant for the recovery of a sum of Rs. 8,000/-, averring that the said sum had been deposited with the defendant; the plaint further averred that the plaintiff had at that time taken certain premises on rent from the defendant, and that the sum of Rs. 8,000/- had been deposited on condition that the deposit would be returned to the plaintiff upon his surrendering possession of the premises in accordance with the terms of the tenancy agreement. The claim for the recovery of this sum was based on the fact that possession of the premises had in June, 1961 been duly surrendered to the defendant.

Issues were framed at the trial raising the matters pleaded in these averments. It suffices for present purposes to state that one of the issues (No. 12) framed on behalf of the defendant was whether the payment of Rs. 8,000/- was in contravention of section 18 of the Rent Restriction Act.

The plaintiff thereafter framed this further issue:—

Is the finding of this Court in 44364/M *res judicata* as between the parties on issue (12).

In action No. 44364/M this same plaintiff had sued the defendant for the recovery of the same sum of Rs. 8,000/-, but on the basis that the deposit was returnable on demand, and I set down below the issues framed at the trial of that action, together with the answers of the learned District Judge who tried that action:—

(1) (*a*) In consideration of the tenancy, did the defendant demand and receive from the plaintiff the sum of Rs. 8,000/-?

Yes.

(*b*) Was such sum to be held by the defendant as a deposit?

Yes.

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(*c*) Was such sum to be refunded to the plaintiff if and when demanded by the plaintiff?

The sum of Rs. 8,000/- was to be refunded to the plaintiff when the plaintiff restored possession of the premises to the defendant.

(2) Is the plaintiff entitled to a refund of the said sum of Rs 8,000/-/?

Yes, but after restoring possession of the premises to the defendant.

(3) Even if a sum of Rs. 8,000/- was paid by plaintiff to the defendant was the payment of such sum by the plaintiff illegal ?

No.

(4) If so, can the plaintiff claim a refund of the money?

Does not arise.

Having regard to the answer to issue No. 1(a), that action had necessarily to be dismissed, because the defendant had not then surrendered possession of the premises to the plaintiff.

In the present action, the trial Judge has held that the decisions of the issues framed in the former action are *res judicata*. In other words, the defendant was precluded at the present trial from contesting the principal matters in dispute, it being held against him on the basis of *res judicata*

(*a*) that the deposit of Rs. 8,000/- was in fact made,

(*b*) that the condition of the deposit was that it was returnable upon surrender by the plaintiff of the premises of which he was the tenant, and

(*c*) that the taking of the deposit was not a contravention of the relevant provision of the Rent Restriction Act.

Learned Counsel for the defendant in appeal has argued that the decision in the former action does not operate as *res judicata* in respect of any of these matters.

The substantial defence set up in the former action was the defendant's denial that a sum of Rs. 8,000/- had been deposited with the defendant, and that defence was definitely rejected in the judgment in that action by the finding that the sum had actually been deposited. The question therefore is whether that finding, and the decision on the other issues, now operate as *res judicata*, despite the fact that the plaintiff's action was dismissed.

It seems to me that this same question was decided in the case of *Roweena Umma v. Raluma Umma* (41 N.L.R. 522). That was a partition action in respect of a land which had been the subject of an earlier partition action. In the earlier action two matters were in dispute; **one**, whether a deed of August, 1922 had priority over a deed of September, 1911 by reason of prior registration, and **two,** whether the land was possessed in common. The Court in the earlier action held firstly, that the deed of 1922 did not have priority, and secondly that the land was not possessed in common. In view of the second finding the action had to be dismissed.

When a second action was filed later as between the same parties for a declaration of title to the land, one of the parties set up as *res judicata* the finding in the earlier action that the deed of 1922 did not have priority. This plea was rejected both in the District Court and in the Supreme Court. Keuneman, J. relying on the following proposition which had been upheld by the Courts in India:—

> "Any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground, cannot operate as *res judicata* as against the defendant in a subsequent suit. A finding cannot be conclusive against a party if the decree was not based upon it, but was made in spite of it".

The principle just stated is clearly applicable in the instant case, and it is well to state now the basis of the principle. It is true that in the earlier action between the present plaintiff and the present defendant, the latter set up the substantial defence that the sum of Rs. 8,000/- had never been paid or received, and that nevertheless the Court in the earlier action held against him that the amount had in fact been received. But once the plaintiff's earlier action was dismissed on the ground that it was premature, there was no need for the defendant to seek by way of an appeal a reversal of the finding against him. Indeed Counsel appearing for the plaintiff in the present appeal has perforce to agree that the defendant had no right of appeal against that finding. That being so, it would be manifestly unjust that in the present case the defendant should be held to be bound by a finding of a District Court against which he could not institute an appeal; since the finding lacked the character of being a final order, it cannot operate as *res judicata*.

Counsel for the plaintiff has however relied on a decision of an English Court in the case of *Shoe Machinery Co. v. Cutlan* (1896) 1 Ch. Div. p. 667.

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In that case a patentee claimed damages for an infringement of a patent. Romer, J. held that a finding in an earlier action between the same parties holding the patent to be valid, operated as *res judicata*. Although there was that finding as to the validity of the patent, the earlier action had been dismissed on the ground that the defendant had not infringed the patent. Despite that dismissal however, Romer, J. nevertheless held that the finding as to the validity of the patent did operate as *res judicata*. In order to appreciate the grounds on which the plea was thus upheld, it is necessary to point to two matters. Firstly, there was a declaration in the earlier judgment as follows:—

> "And pursuant to section 31 of the same Act (the Patents, Designs, and Trade Marks Act, 1883) doth certify that the validity of the said patent came into question."

Secondly, the grounds on which Romer, J. relied are stated in the following passage in his judgment in the second action:—

> "It appears to me that it sufficiently appears from this judgment that I did not dismiss this action so far as concerns this patent, and I found the issue of validity and determined it in favour of the plaintiffs, and I ordered the defendants to pay the costs of it. I cannot doubt that if the defendants had chosen to appeal from that part of the judgment they were entitled to have had that appeal heard by the Court of Appeal."

In thus emphasising the fact that in the earlier action costs had been allowed against the defendant because of the finding against him that the patent was valid, what Romer, J. stressed was that when the order for costs was made against him the defendant could, by appealing against that order, have obtained a review of the finding as to the validity of the patent. This right of appeal may have depended either on the mere fact that there was an order for costs against the defendant-appellant based on a finding on a particular issue against him, or else that because of the provisions of section 31 of the Patents, Designs, and Trade Marks Act, 1883, the finding as to the validity of the patent was appealable at the instance of the defendant despite the dismissal of the action against him. It seems to me that very probably the finding was subject to appeal for the second of the two alternative reasons which I have just mentioned. The provision in section 31 does indicate that a finding as to the validity of a patent will have some effectiveness even against a person who is not a party to the particular action, and it seems to follow that such a finding would have a completely binding effect as against a party, if it is a finding on an issue of validity actively disputed between the parties; and it appears that according to the English practice such a finding in a patent case would be subject to appeal.

Counsel for the plaintiff sought to draw an analogy between the *Shoe Machinery Co. case* and the instant case, on the ground that here also the District Judge had in the earlier action refused to order costs in favour of the defendant. Counsel argued that the defendant did have a right of appeal against that refusal, and in that way that the defendant might have obtained a reversal of the findings which were unfavourable to him. I have tried to show however that Romer, J. did not rely merely on the fact that the defendant in the English case could have appealed against the order for costs. He relied on that order to emphasise the circumstance that the issue of the validity of the patent had been actively disputed and definitely decided by the Court, and that it was open to the defendant to have appealed against it. In the instant case however, even if the defendant could have appealed against the refusal of costs, the defendant had no right under our procedure to obtain a reversal of the findings which the plaintiff now seeks to set up as *res judicata*. For these reasons I agree that our Supreme Court in *Roweena Umma v. Rahuma Umma* properly distinguished the *Shoe Machinery Co.* case as being one in which special circumstances existed.

I would hold accordingly that the findings in action No. 44364/M D.C. Colombo do not operate as *res judicata* in the instant case. The appeal is allowed with costs, and the case will proceed to trial upon the issues framed, other than those which raised the plea of *res judicata*.

Samerawickrame, J.

I agree.

Appeal allowed.

END OF VOLUME LXXX

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බී.ඒ.,එල්.එල්.බී,(කැන්ටැබ්)

එස්. එස්. බස්නායක බී.ඒ., බී.සී.එල්. (ඔක්ස්පර්ඩ්)
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වරුන බස්නායක
පී. එච්. කුරුකුලසූරිය,එල්.එල්.බී. (ලංකා)
කේ. කේ. පූර්නානන්ද, බී.ඒ. (ගෞරව)

යූ. ජිනාදරී කුරුකුලසූරිය මෙනෙවිය
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සහකාර කතීෘවරු

1972

දයකමිල මුලදීම ගෙව්වොත්—කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) **රු. 17.50**. පසුගිය කාණ්ඩයක 6 වෙනි කාණ්ඩයේ සිට 58 වෙනි කාණ්ඩය දක්වා (සිංහල කොටස නොමැතිව) මිල **රු. 20.00**. සිංහල කොටසත් සමග 59 වෙනි කාණ්ඩයේ සිට 79 වෙනි කාණ්ඩය දක්වා, කාණ්ඩයක මිල **රු 22.50**.
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විභාගයට එසේ ගැනීමට නියෝග කිරීම — ඉන්පසු දිස්ත්‍රික් උසාවියේ නඩුව ඉල්ලා අස්කර ගැනීම — කම්කරු උසාවියේ අයැදුම විභාගයට ගත් විට 31 (බී) (5) උප-ඡේදය අනුව කම්කරු උසාවියට එය විභාග කිරීමට අධිකරණ බලයක් නොමැති යයි විරුද්ධ වීම — එම විරෝධය පිළිගැනීම සහ අයැදුම ප්‍රතික්ෂේප කිරීම.

ලිපිකරුවකු වූ අයැදුම්කරු විසින් තමා සාවද්‍ය අන්දමින් සේවයෙන් පහ කළේ යයි සේවා යෝජකයාට විරුද්ධව සහන ලබා ගැනීමට නඩුවක් 28.2.66 වැනි දින දිස්ත්‍රික් උසාවියේ පවරන ලදී. මේ නඩුව විභාගයට ගැනීමට පෙර ඔහු විසින් එසේම පිළිසරණ සොයා කම්කරු උසාවියට ද අයැදුම් පතක් ඉදිරිපත් කරන ලදී.

29.3.67 වැනි දින කම්කරු උසාවියට දිස්ත්‍රික් උසාවියේ නඩුව පවතින බව දන්වා එම උසාවිය විභාගකර අවසාන තීරණයක් දෙන තුරු කම්කරු උසාවියේ විභාගය කල් දැමීමට නියෝගයක් ලබා ගන්නා ලදී.

13.6.68 වැනි දින උසාවියේ නඩුව පැමිණිලිකරුගේ නීතිවේදියා විසින් කම්කරු උසාවියේ පිළිසරණ සෙවීමට පැමිණිලිකරුගේ ඇති හිමිකමට හානියක් නොමැති ලෙස ඔහුගේ නඩුව අස්කර ගැනීමට ඉල්ලා සිටියෙන් විත්තිකරුගේ නීතිවේදියා තමාහට නීතියෙන් අයිති හිමිකම්වලට බාධාවක් නොමැතිව කැමැති වූයෙන් එම නඩුව ගාස්තු සමග නිශ්ප්‍රභ කරන ලදී.

මින් පසු 26.9.68 වැනි දින කම්කරු උසාවියේ නඩුව විසඳීමට ගත් විට සේවා යෝජකයාගේ නීතිවේදියා විසින් කම්කරු ආරාවුල් පනතේ 31 වැනි ඡේදයේ (බී) (5) උප-ඡේදයේ ප්‍රතිපාදනය අනුව දිස්ත්‍රික් උසාවිය මගින් පිළිසරණ සොයා නිබුන බැවින් කම්කරු උසාවියට පිළිසරණ ඉල්ලීම පිළිගෙන ඊට සහනයක් දීමට කම්කරු උසාවියට අධිකරණ බලයක් නොමැති බව කියා සිටියෙන් එය පිළිගෙන එම අයැදුම් කම්කරු උසාවියේ විනිශ්චයකාරයා විසින් ප්‍රතික්ෂේප කරන ලදී.

අයැදුම්කරු මේ තීන්දුවෙන් ඇපැල් ගත්තේය.

තීන්දුව: (1) **කම්කරු ආරවුල් පනතේ 31 වැනි ඡේදයේ (බී) (5) උප-ඡේදයේ ප්‍රතිපාදනය වී ඇත්තේ එම ඡේදයේ පළමු වැනි උප-ඡේදයේ අනුව කම්කරු උසාවියක් මගින් පිළිගත් අයැදුම් පතක් එම උසාවිය විභාග කර අවසාන තීන්දුවක් දුන් විටෙක පමණක් එම අයැදුම් පත ඉදිරිපත් කළ සේවකයාට එම කරුණ සම්බන්ධව නැවත නීත්‍යානුකූල පිළිසරණක් සෙවිය නොහැකි බවයි.**

(2) **එම නිසා දිස්ත්‍රික් උසාවියෙහි පිළිසරණ සොයා පැවැරූ නඩුවෙහි අවසාන විභාගයක් හෝ තීන්දුවක් ඇති නොවූ හෙයින් කම්කරු උසාවියට ඉදිරිපත් කළ අයැදුම් පත මගින් සෙවූ පිළිසරණ ලබා ගැනීමට ඉහත කී 31 වැනි ඡේදයෙහි (බී) (5) උප-ඡේදයෙන් තහනමක් නොමැති බවය.**

ටී. කේ. මෙන්ඩිස් එ. ගංගා නිමනහුමි සංවර්ධන මණ්ඩලය 12

ක්වෝ වොරන්ටෝ ආඥාව

ක්වෝ වොරන්ටෝ ආඥාව — ගම්කාර්ය සභාවේ සභිකයකු වශයෙන් තේරී පත්වීම — සභිකයා එම ධුරයේ වැඩ භාර ගැනීමට පෙර තේරී පත්වීම අවලංගු කරවීම පිණිස ආඥාවක් නිකුත් කරන සේ ඉල්ලීම — ගම්කාර්ය සභා ආඥා පනතේ (257 වැනි අධිකාරයේ) 11 (1) වැනි ඡේදය යටතේ එම ඉල්ලීමට ඉඩක් නැතැයි යන මූලික විරෝධතාව.

මෙහි වගඋත්තරකරු ගම්කාර්ය සභා ආඥා පනතේ (257 වැනි අධිකාරයේ) 11 (1) වැනි ඡේදය අනුව ගම් සභික ධුරය 1.7.1969 වැනි දින සිට දැරීම පිණිස නිසි අයුරින් තේරී පත්වුණු බව 22.3.1969 වැනි දින නාම යෝජනා භාරදීමට නියමිත දිනය ප්‍රකාශ කැරිණ.

මෙම තේරී පත්වීම අවලංගු බව ප්‍රකාශ කරන ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කරන මෙන් එම ගම්කාර්ය සභාවේ අය බදු ගෙවන්නකු වන පෙත්සම්කරු 19.5.1969 වැනි දින දනමින් යුතු පෙත්සමකින් ඉල්ලා ඇත.

වගඋත්තරකරු මෙම ගම්කාර්ය සභාවේ සභාපති වශයෙන් තේරී පත්වුණු මෙම ගම්කාර්ය සභාවේ ප්‍රථම රැස්වීම 17.7.1969 වැනි දින පැවැත්වුණු බව වග උත්තර කරුගේ දිවුරුම් පෙත්සමේ දැක්වෙයි.

වගඋත්තරකරු තේරී පත් වී ඇති බවට ඡන්ද පොල භාර නිලධාරියා ප්‍රකාශ කළ වහා ම එහි පැමිණ සිටි අය අමතා, සිය යුතුකම් ශක්ති ප්‍රමාණයෙන් හොඳින්ම ඉටු කිරීම ආදියට ප්‍රතිඥා දුන් බව පෙත්සම්කරු උසාවියට පෙන්වා දුන්නේය.

මෙම අයැදුම් පත විභාග කිරීමේ දී ඉදිරිපත් කළ මූලික විරෝධතාවය පිළිබඳව —

තීන්දුව: (1) **නයිසයි නියෝගය නිකුත් කැරුණු අවස්ථාවේ වගඋත්තරකරු ගම්කාර්ය සභාවේ කිසිදු රැස්වීමකට සහභාගි වීමක් හෝ එම ධුරය භාරගත් හෝ එහි කටයුතු කළ බවක් හෝ පෙන්වන ක්‍රියාවක් කර නැති බැවින් ද, එම තත්වය මත ක්වෝවොරන්ටෝ ආඥාවක් නිකුත් කිරීමට ඉඩ නැත.**

(2) **ඔහු තේරී පත්වුණු දිනයේ ඔහු කළ කතාවේ යොදන ලද වචනවලින් දක්වන ලද්දේ තමා ගම්කාර්ය සභාවේ අසුන නිසි විට ගත් කල කිරීමට අදහස් කරන දේ පිළිබඳ ප්‍රකාශයකට නොවැඩි යමක් නොවන අතර, තේරී පත්වීමෙන් නිමි වන අයිතිවාසිකම් පාවිච්චි නොකිරීම වඩා ඥානවන්ත දැයි තීරණය කිරීමට සැහෙන කල් තිබිණ.**

(3) **නිලයට පත්වුණු බව කීම පමණක් ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කිරීමට ප්‍රමාණවත් නොවේ. නිලය දැරීම හෝ එය පාවිච්චිය ද සිදුවිය යුතුයි.**

කේ. අන්දිරිස් එ. දෙන් ප්‍රැන්සිස්කු තෝමරත්න ... 7

ගම්කාර්ය සභා ආඥා පනත

11 (1) වෙනි ඡේදය 7

ගෙවල් කුලී පාලන පනත

ගෙවල් හිමියා සහ කුලී ගෙවන්නා — ගෙවල් කුලී පාලන පනතට යටත් නිවසක් — 1962 සිට 1964 දක්වා වැඩිපුර ගෙවල් කුලී ගෙවන ලදැයි ගෙවල් කුලී ගෙවන්නා විසින් එය

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ආපසු අයකර ගැනීමට ගෙවල් හිමියාට නඩු පැවරීම — ගෙවල් කුලිය නියම කිරීමට යයි වර්ෂ 1964 ගෙවල් කුලී පාලන මණ්ඩලයට කළ ඉල්ලීමක් — ගෙවල් හිමියාට නිවේදනයක් — පරීක්ෂණ දිනයේ ගෙවල් හිමියා පැමිණ නොසිටීම — ගෙවල් කුලිය මසකට රු: 58.82 ක් බව නියම වීම — ගෙවල් හිමියාට නියම වූ කුලිය කීයදැයි දන්වා යැවීම — පැමිණිලිකරුගේ ඉල්ලීම රු: 100/- සහ රු: 58.82 අතර ඇති අන්තරය සහ ප්‍රස්තුත කාල සීමාවේ ගෙවන ලද වරිපනම් බදු — මණ්ඩලයේ තීරණය දිස්ත්‍රික් විනිශ්චයකාරතුමා නොපිළිගැනීම — ඔහු පෙන්වා දුන් හේතු නීත්‍යානුකූල ද යන්න.

1.1.1962 වැනි දින සිට 30.9.1964 වැනි දින දක්වා තමා විසින් ගෙවන ලද මුදලක් තම ගෙවල් හිමියා වන විත්තිකරුගෙන් ලබා ගැනීමට පැමිණිලිකරුට නඩු පැවරිය. මේ කාලය තුළ මසකට රු: 100/- බැගින් ගෙවල් කුලිය වශයෙන් ද, රු: 158/73 ක් වරිපනම් වශයෙන් ද ගෙවූ බව පැමිණිලිකරු ඔප්පු කළේය.

1964 වර්ෂයේ දී නිවසේ කුලිය ගෙවල් කුලී පාලන පනතේ 4 වැනි ඡේදයේ විධිවිධාන යටතේ නියම කරන ලෙස ඉල්ලා පැමිණිලිකරු ගෙවල් කුලී පාලක මණ්ඩලය වෙත ඉල්ලීමක් ඉදිරිපත් කළේය. මේ සඳහා 5.11.1964 වැනි දින පැවැත්වුණු පරීක්ෂණයට නිවේදනයක් යැවුනු නමුත් ගෙවල් හිමියා පැමිණ නොසිටියේය.

පෙනී යන හැටියට 1961 අංක 10 දරන පනතින් සංශෝධිත ගෙවල් කුලී පාලන පණතේ 16(ඒ) ඡේදයට අනුව ක්‍රියා කරමින් ප්‍රශ්නයට භාජනව ඇති නිවසේ කුලිය මසකට රු: 58.82 කැයි ගෙවල් කුලී පාලක මණ්ඩලය තීරණය කළේය. පැමිණිලිකරුගේ ඉල්ලීම රු: 100 සහ මණ්ඩලය විසින් නියමිත මාසික කුලිය වශයෙන් තීරණය කළ රු: 58.82 අතර ඇති අන්තරය මත මුදලක් විය.

5.11.1964 වැනි දින මණ්ඩලය කළ නියෝගයට කලින් කාලය පිළිබඳව නියමිත මාසික කුලිය රු: 58.82 බව පිළිගැනීම උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා හේතු දෙකක් මත ප්‍රතික්ෂේප කළේය. එනම්:

(ඒ) මසකට නියම කරන ලද කුලිය රුපියල් 58.82 ක් බව කියමින් දෙන ලද මණ්ඩලයේ නියෝගය දන්වා විත්තිකරුට යවන ලද ඩී1 දරන ලිපිය මණ්ඩලයේ කාර්යාලීය පිටපත වූයෙන් ගෙවල් කුලී පාලක මණ්ඩලය 20(1) ඡේදයෙහි ප්‍රතිපාදකයන්ට අනුව එය යැවීමෙන් මණ්ඩලය තම යුතුකම ඉටුකළ බව පෙනී නොයෑම,

(බී) රණසිංහ එ. ප්‍රනාන්දු අතර කියැවී 53 න.නී.වා. 163 පිටුවේ සඳහන් නඩුව මෙම නඩුවට සැසඳීම සහ ඒ අනුව සළකා බලන විට මණ්ඩලයේ නියම කළ කුලිය එසේ නියම කිරීමට පෙරාතුව තිබූ කාල සීමාවකට අදල නොවීම.

තීන්දුව: (1) ඩී1 දරන නිවේදනය පනතේ 20(13) දරන ඡේදයෙහි පරමාර්ථයට සැහෙන ප්‍රමාණයකට අනුකූල වේ. මෙම ඡේදයෙන් කියැවෙන්නේ තමන්ට බලපවත්වන මණ්ඩලයේ නියෝගයක ඇතුළත් කරුණු විශ්වාස කළ හැකි පරිදි පාර්ශ්වකරුවන්ට දැන්වීම අවශ්‍ය බවය.

(2) රණසිංහ එ. ප්‍රනාන්දු යන නඩුව මෙයට අදල කිරීමෙන් නඩුව ඇසූ උගත් විනිශ්චයකාරවරයා අතින් වරදක් සිදුවී තිබේ. එම නඩුව සම්බන්ධ වී ඇත්තේ පනතේ අංක 5(2) දරන ඡේදයේ ඇති කරුණුවලටය. එනම් නියමිත කුලිය දෙපක්ෂය විසින් සම්මුතියකට බැසගත් ගණන වී එය මණ්ඩලයේ නියම කරන කුලිය නියමිත කුලිය බවට පත්වනතෙක් නියමිත කුලිය හැටියට ගණන් ගැනේ. නඩුවෙහි කරුණු එසේ වන අතර දැනට ඉදිරිපත්ව ඇති නඩුවේ කුලිය වර්ෂ 1941 තක්සේරුව ගැන අවධානය යොමුකොට ගෙවල් කුලී පාලන පනතේ හැටියට ගණන් බැලූ විට ලැබෙන නියමිත කුලිය වේ.

(3) අංක 16(ඒ) දරන ඡේදයෙහි පරමාර්ථය ගෙවල් කුලී පාලක මණ්ඩලය විසින් නියමිත කුලිය එක් ගණනකින් තව ගණනකට වෙනස් කිරීම නොවේ. පනතේ කරුණට අදල ඡේදයන්ට අනුකූලව නියමිත කුලිය කෙතෙක් ද යන්න නිගමනය කිරීම එහි පරමාර්ථයයි.

(4) ගෙවල් කුලී පාලක මණ්ඩලය විසින් නියම කරන ලද කුලියෙහි නිවැරැදි බව ගැන අභියෝගයක් ඉදිරිපත් වී නොමැති නම්, එසේම මණ්ඩලය විසින් නියම කරන ලද කුලිය නියමිත කුලියට වෙනස් යැයි සාක්ෂ්‍ය ඉදිරිපත් කර නොමැති නම් මණ්ඩලයේ තීරණය උසාවියක් විසින් පිළිගෙන ඒ අනුව ක්‍රියා කළ යුතුය.

(5) මේ නිසා පැමිණිලිකරු ඒ කාලය තුළ මසකට නීත්‍යානුකූල ගෙවල් කුලිය රුපියල් 58.82 ක් බව ස්ථාපිත කර ඇති අතර ඔහුගේ පැමිණිල්ලෙන් කියා පාන ලෙස ඔහු වැඩියෙන් කුලී ගෙවීම ද කර තිබේ.

වෙළුන් රණසිංහ එ. දොන් ලෙයාරිස් ජයතිලක ... 20

නඩත්තු ආඥා පනත

නඩත්තුව — ළමයකු පිළිබඳ නියෝගයක් — ස්වාමිපුරුෂයා නොදැන සිටිය දී විවාහත් වන අවස්ථාවේ භාර්යාව ගර්භණීව සිටීමේ හේතුවෙන් විවාහය දික්කසාද කිරීම සඳහා පසු අවධියක දිස්ත්‍රික් උසාවියෙන් ලබාගත් තීන්දුවක් — දිස්ත්‍රික් උසාවියේ තීන්දුව අනුව නඩත්තු ගෙවීමට යැයි මහේස්ත්‍රාත්තුමා දුන් තීන්දුව අවලංගු කළ හැකි ද යන්න — ඉන්දියානු නඩු තීන්දු මෙයට අදළ ද යන්න — සාක්ෂ්‍ය ආඥා පනතේ 41(2) වැනි ඡේදය දික්කසාදයක් දීමට හේතුභූත වූ කරුණුවලටත් බලපවත්වන්නේ ද යන්න.

තීන්දුව: (1) බලය ලත් සිවිල් උසාවියකින් දෙන ලද තීන්දුවකට අනුව ක්‍රියා කරමින් නඩත්තු නියෝගයක් අවලංගු කිරීමට මහේස්ත්‍රාත්වරයකුට බලය පැවරෙන ප්‍රතිපාදනයක් අපේ නීතියේ සඳහන්ව නැත.

(2) ඉන්දියානු අපරාධ නඩු විධාන සංග්‍රහයේ විශේෂ ප්‍රතිපාදනයක (489(2) දරණ ඡේදය) ගැබ් වී ඇති පරිදි බලය දරණ සිවිල් උසාවියකින් දෙන තීරණයක ප්‍රතිඵලයක් වශයෙන් නියෝගයක් වෙනස් කිරීමට හෝ අවලංගු කිරීමට මහේස්ත්‍රාත්වරයකුට බලය පැවරීමේ ප්‍රතිඵලයාව මත ගොඩනැගී ඇති ඉන්දියානු නඩු තීන්දු, එබඳු ප්‍රතිපාදනයක් ලංකාවේ නොමැතිකම නිසා මෙම කරුණට අදල නොවෙයි.

(3) සාක්ෂ්‍ය ආඥා පනතේ 41(2) වැනි ඡේදය දිස්ත්‍රික් උසාවියකින් දෙන ලද තීන්දුවක සඳහන් විවාහයෙහි බල රහිත තත්වය තීරණාත්මක බවට පත් කරන නමුත් එම නියෝගය දීමට හේතුභූත වූ කරුණු එබඳු අවාසනාත්මක තත්වයට පත් නොකෙරේ.

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(4) නඩත්තු නියෝගයට ලක් වූ දරුවා වුකලි දිස්ත්‍රික් උසාවිය හමුයෙහි විවාහය බලශූන්‍ය බවට පත් කරවා ගැන්ම සඳහා පැවති පටිපාටිකරයට සහභාගි වූ පක්ෂයක් නුවූ හෙයින් විවාහය සිදු කරන අවස්ථාවේ දී පෙත්සම්කරු නොදැන ගර්භිණිභාවය පැවති බවට දුන් තීන්දුව ළමයා කෙරෙහි බල නොපාන්නේය.

කේ. පෙරුමාල් එ. කේ. කරුමේගම් 15

පළාත් පාලන ආයතන මැතිවරණ ආඥා පනත

ඡේද 9 (4) සහ 10

වර්ෂ 1963 අංක 9 දරණ පනතින් 4 වැනි වගන්තිය ලෙස සංශෝධිත පළාත් පාලන ආයතන මැතිවරණ ආඥා පනත අනුව ක්වෝ වොරන්ටෝ ආඥාවක් සඳහා ඉල්ලුම් පත්‍රයක් — වෙනත් පළාත් පාලන ආයතනයක සභිකයකු තෝරා පත්කර ගැනීමේ නුසුදුසුකම — ඔහුට ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කළ හැකි ද?

මේ ඉල්ලුම් පත්‍රය ඉදිරිපත් කර ඇත්තේ, යාපනේ මහ නගර සභාවේ සභිකයකු ලෙස තේරී පත්වන අවස්ථාව වන විට, පුලොපල්ලෙයි ගම් සභාවේ සභිකයකු ලෙසත් පෙනී සිටිය වගඋත්තරකරු වෙත ක්වෝ වොරන්ටෝ ආඥාවක් ලබා ගනු සඳහාය.

තීන්දුව: වර්ෂ 1963 අංක 9 දරන පනතේ 4 වැනි වගන්තියෙන් සංශෝධිත, පළාත් පාලන ආයතන මැතිවරණ ආඥා පනතේ 9 වැනි වගන්තියේ යෙදීම් අනුව වෙනත් පළාත් පාලන ආයතනයක සභිකයකු ලෙස පත්ව සිටින්නකු තවත් පළාත් පාලන ආයතනයකට තේරී පත්වීමට නුසුදුසුකකු බව පැහැදිලිව පෙන්නුම් කරන අතර, යාපනේ මහ නගර සභාවට වගඋත්තරකරු තේරී පත්වීම හිස් එකක් බව කිව යුතුය.

නිකොලායිපිල්ලේ අන්තෝනිපිල්ලේ එ. අන්තෝනි පිල්ලේ ජෝර්ජ් රාජසූරියර් 19

බෙදුම් පනත

බෙදුම් පනත — 22(2) වගන්තිය — අලුත් පක්ෂ චිත්තිකරු විසින් හෙළි කිරීම — දැන්වීම් නිකුත් කරන ලෙස විනිශ්චයකාරතුමා නියෝග කළ යුත්තේ කාට ද, යන්න.

තීන්දුව: බෙදුම් නඩුවක චිත්තිකරුවකු විසින් අලුත් පක්ෂයන් හෙළි කරන ලද විට, එසේ අලුත් පක්ෂයන් හෙළි කළ චිත්තිකරුට, විනිශ්චයකාරතුමා විසින් නියමයක් වශයෙන්, බෙදුම් පනතේ 22(2) වගන්තියේ අතුරු විධානය යටතේ, ඒ අලුත් පක්ෂයන් වෙත දැන්වීම් නිකුත් කරන ලෙස නියෝග කළ යුතුය.

ඒ. ඇම්. අබේසූරිය එ. ඩබ්ලිව්. ඇම්. ඒ. දියෝනිස් අප්පු සහ තවත් අය 17

මැතිවරණ පෙත්සම

(අ) මැතිවරණ පෙත්සමක පෙත්සම්කරු විසින් වගඋත්තරකරුවන් ලෙස එකතු කළ යුතු අය.

(ආ) මැතිවරණ පෙත්සමක අඩංගු විය යුතු ප්‍රකාශ.

ලංකා පාර්ලිමේන්තු රාජ සභා ආඥා පනත .. 1

මිළ පාලන පනත

මිළ පාලන පනත — පාලන මිලට වැඩියෙන් හරක් මස් විකිණීමේ චෝදනාව මිළ නියෝගය වරද කළ ප්‍රදේශයට අදාළ ද යන බව — අධිකරණ සැලකිල්ල — හරක් මස් මෙරට ඒවා ද පිටරටින් ආනීත ඒවා ද යන්න පිළිබඳ ඔප්පු කිරීම — බර පිළිබඳව ඔප්පු කිරීම.

චිත්තිකාර-ඇපැල්කාර තෙමේ (කොළඹ නගර සීමාවෙන් බැහැර වූ) කොළඹ දිස්ත්‍රික්කය තුළ පිහිටි බැලුම්මහර දී පාලන මිළට වැඩියෙන් හරක් මස් විකිණීම පිළිබඳව වරදකරු කරන ලදී. ඇපැලෙහි දී පහත දක්වෙන හේතූන් මත, වරදකරු කිරීම ගැන විරෝධය දක්වන ලදී.

(අ) අදාළ මිළ නියෝගය බලපාන්නා වූ කොළඹ පරිපාලන දිස්ත්‍රික්කයට බැලුම්මහර ප්‍රදේශය අයත් වන බව ඔප්පු නොකැරිණ.

(ආ) හරක් මස් පිටරටින් ආනීත ඒවා නොවන බව ඔප්පු නොවිණ.

(ඇ) මස් කිරීම පිළිබඳ සහතිකය ඔප්පු නොකැරිණ.

උසාවිය විසින් පහත දැක්වෙන පරිදි තීරණය කරන ලදී.

තීන්දුව: (1) සාක්ෂ්‍ය පනතේ පණස් හත් වැනි වගන්තිය අනුව, ''බස්නාහිර පළාතේ අකාරාදි හා සංඛ්‍යාගත ග්‍රාම නාම ලේඛනය ආශ්‍රය කිරීමෙන් බැලුම්මහර ප්‍රදේශයේ පිහිටීම පිළිබඳව අධිකරණයට සැලකිල්ලට ගත හැකි බව. ඒ ග්‍රාම නාම ලේඛනය වූකලි ජන ලේඛන හා සංඛ්‍යා ලේඛන දෙපාර්තමේන්තුව විසින් ප්‍රකරණය කරන ලද්දක් හෙයින් රජයේ අනුමැතිය පිට පළකැරුණක් වන අතර, බැලුම්මහර කොළඹ පරිපාලන දිස්ත්‍රික්කයට අයත් වන බව එහි සඳහන් කර තිබේ.

(2) මස් කඩයේ ද එහි දක්නට තිබූ මියගිය ගව සිරුරුවල ද තත්ත්වය පිළිබඳව නඩුවේ දී ඉදිරිපත් කළ වාචික සාක්ෂ්‍ය මගින් ඒ හරක් මස් පිටරටින් ගෙන්වන ලද හරක් මස් නොවන බව.

(3) ඔප්පු කරන ලද හෙයින් ආදයම් පරීක්ෂක විසින් ඉදිරිපත් කරන ලද සහතිකය පිළිගත නොහැකි වුව ද විකුණන ලද හරක් මස් ප්‍රමාණයේ බර අවුන්ස දහතරයි තුන්කාලක් වූ බවටත්, එහෙයින් මිළ පාලන රෙගුලාසි ඒ මගින් උල්ලංඝණය වූ බවටත් වාචික සාක්ෂ්‍ය තිබිණ.

ටී. ඩී. විලියම් එ. පොලිස් පරීක්ෂක, ගම්පහ ... 27

රේගු ආඥා පනත

රේගු ආඥා පනත — 101(1) වැනි වගන්තිය — චිත්තිකරු රේගු ස්ථානය තුළ පිහිටි කොටහේනේ ක්‍රෝටබෝම් වීදියේ දී කරන ලදැයි කියන චෝදනාවකට වැරැදිකරු වීම — පැමිණිල්ලේ සාක්ෂිවලින් සඳහන් වූයේ අලුත් මාවත පාර ගැනය — ක්‍රෝටබෝම් වීදිය රේගු ස්ථානය තුළ යයි හෝ කොළඹ වරායේ සීමාවන් රේගු ස්ථානයේ සීමාවන්ට සමාන යයි සාක්ෂි නැතිවීම — වැරැදිකරු බවට පත්කිරීම අනුමත කළ හැකි ද?

රේගු ආඥා පනතේ 101(1) වැනි වගන්තියෙන් කියැවෙන පරිදි රේගු ස්ථානය තුළ යම් භාණ්ඩ කිපයක් නම අතට ගත්තේ යයි දෙවැනි චිත්තිකරු වැරැදිකරු බවට තීරණය

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කරන ලදී. චෝදනාවෙහි සඳහන් වූයේ මෙම වරද රේගු සීමාව තුළ පිහිටි කොටහේනේ ක්‍රෝට්බෝම් වීදියේ දී සිදුකරන ලද එකක් ලෙසය, එසේ වෙතත් පැමිණිල්ලේ සාක්ෂිවල සඳහන් වූයේ එම වරද අලුත් මාවත පාරෙහි සිදුකරන ලද්දක් බවය. කෝටහේන් ක්‍රෝට්බෝම් වීදිය රේගු ස්ථානය තුළ පිහිටි බවට හෝ කොළඹ වරායේ සීමාවන්ට සමාන යයි කිසිම සාක්ෂියක් නොමැත.

තීන්දුව: රේගු ආඥා පනතේ විස්තරකොට ඇති පරිදි රේගු ස්ථානයේ සීමාවන් තුළ චිත්තිකරු මෙම වරද කරන ලදැයි ඔප්පු කිරීමට පැමිණිල්ල අපොහොසත් වී ඇත.

මත්තියපරණම් එ. වෙරළබඩ පොලිසිය, කොළඹ ... 1

ලංකා පාර්ලිමේන්තු රාජ සභා ආඥා පනත

(1946 ලංකා (පාර්ලිමේන්තු) රාජ සභා ආඥා පනත) — 77 (සී) ඡේදය — පාර්ලිමේන්තු මන්ත්‍රීවරයෙක් තේරීම බල ශූන්‍ය යැයි ප්‍රකාශයක් කර ගැනීමට ඉදිරිපත් කළ පෙත්සමක් — පුද්ගලයන් හය දෙනකු විසින් අයථා බලපෑවැත්වීමෙන් දූෂණ ක්‍රියා කලාපයක් කරන ලදැයි චෝදනා — ඔවුන්ගෙන් කිසිවෙක් පාර්ශ්වකරුවන් කිරීමට නොහැකි වීම — එය මැතිවරණ පෙත්සමක් නිෂ්ප්‍රභවීමට හේතුවක් ද? — 1970 අංක 9 දරණ සංශෝධිත පනතේ, 80ඒ (1) (බී) ඡේදය — එම ඡේදය විධානාත්මක ද? — පසු අවස්ථාවක පාර්ශ්වකරුවන් එකතු කිරීමට උසාවියට ඇති බලය.

සිදු වූ ප්‍රමාදය සාදාය කිරීමට පසු අවස්ථාවක කරන ලද ප්‍රයත්න — මේවායින් ප්‍රයෝජනයක් තිබේ ද? — ඉහත කී වර්ෂ 1946 රාජාඥා පනතේ 3 වැනි උප ලේඛනයෙහි තිබූ 4(1) සහ 5 දරණ රීති ඉවත්කරමින් ද, දූෂණාත්මක හෝ නීති විරෝධී ක්‍රියාකලාපයක් ඇති විටෙක එහි සියලු විස්තර දක්වා ඉදිරිපත් කිරීමේ ඇති අවශ්‍යතාවයන් ගැබ්කොට පැන වූ වර්ෂ 1970 සංශෝධිත පනතේ 80ඒ (1) බී දරණ ඡේදය — මැතිවරණ පෙත්සමේ ඇතුළත් වූ යෝජනවල ඇති පැහැදිලි මදිකම ගැන හා ඒවා නිත්‍යතාවයෙන් තොර බව — පසු අවස්ථාවක විනිශ්චයකරුට පෙත්සම සංශෝධනය කිරීමට අවසර දිය හැකි ද?

ඉංග්‍රිසි පාර්ලිමේන්තු මැතිවරණ රීති මාලාවේ 60 වැනි රීතිය — විධි වශයෙන් පමණක් සළකා ඉදිරිපත් කළ විරෝධයක් මත පෙත්සමක් අසාර්ථක නොවිය යුතු බව — මෙම රීතිය අදල වේ ද යන්න — විධානාත්මක පැනවීම් ඉටු කිරීමට නොහැකි වීමේ ප්‍රතිඵලය — පෙත්සම නිෂ්ප්‍රභ කිරීම.

තම පෙත්සමට ඇදු උප ලේඛණයක නම් සඳහන් පුද්ගලයන් හය දෙනකුට විරුද්ධව අයථා බලපෑවැත්වීමේ හේතුවෙන් දූෂිත ක්‍රියා පරිපාටියක් සිදු වී යැයි චෝදනා මුඛයෙන් කියා සිටි පෙත්සම්කරු වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පනතේ 77 (සී) දරණ ඡේදයට අනුව වගඋත්තරකරු ලංකා පාර්ලිමේන්තුවේ මන්ත්‍රීවරයෙක් වශයෙන් පත්වීම බල ශූන්‍ය කරුණකැයි ප්‍රකාශයක් කරන ලෙස ආයාචනා කරමින් මෙම මැතිවරණ පෙත්සම ඉදිරිපත් කළේය. ඉහත නම් සඳහන් පුද්ගලයන් සදෙනා එකී දූෂිත ක්‍රියා පරිපාටිය කරන ලද්දේ වගඋත්තරකරුගේ දැනීම හෝ කැමැත්ත ඇතිව බවත් ඉන් එක් කෙනකු ඔහුගේ නියෝජිතයා බවත් මෙම උප ලේඛනයෙහි වැඩි දුරටත් සඳහන් වී තිබේ.

මෙම උප ලේඛනය සමග පෙත්සමේ හතර වන ඡේදය එකට සම්බන්ධකොට කියැ වූ කල එහි නම් සඳහන් වූ එකී පුද්ගලයන් හය දෙනා යටෝක්ත රාජාඥාවේ 77 (සී) දරණ ඡේදයෙන් ඇති පැනවීමට අදල වන අන්දමින් වගඋත්තරකරුගේ දැනීම හෝ කැමැත්ත ඇතිව ක්‍රියා කළ බව හැඟී යන නමුත් වර්ෂ 1970 අංක 9 දරන සංශෝධන පනතේ 80ඒ (1) (බී) ඡේදයට අනුකූලව එම පුද්ගලයන් හය දෙනාගෙන් එක් කෙනකුවත් වගඋත්තරකරුවන් හැටියට නඩුවට ඇඳා නැත. එපමණකුත් නොව අඩු වශයෙන් නියෝජිතයා වශයෙන් නම් කොට ඇති පුද්ගලයා වත් නඩුවේ පාර්ශ්වකරුවකු කොට සළකා එයට ඇඳීමක් කරන ප්‍රකාශයක් පෙත්සමේ අඩංගු නොවේ.

අනතුරුව එකී හය දෙනාගෙන් එක් එක් අයට පිස්කල් තැනගේ මාර්ගයෙන් භාර දීම සඳහා පෙත්සම්කරු නිවේදන ඉදිරිපත්කොට තිබේ. මේ නිවේදනවල තමා දූෂණ ක්‍රියාපටිපාටියක නිරතව ඇති බව දැනුම් දී ඇත. ඔහුට වැඩිදුරටත් පෙත්සම ඉදිරිපත් කිරීමෙන් පසු දවස් දහයක කාලයක් ඇතුළත වගඋත්තරකරුවන් හැටියට මෙම පුද්ගලයන් එම පෙත්සමේ ඇඳා ඇති බව කියැවෙන ආණ්ඩුවේ ගැසට් පත්‍රයක නිවේදනයක් ද පෙත්සම්කරු පළකෙරෙව්වේය.

පෙත්සමේ තුන්වැනි ඡේදයෙහි චෝදක සඳහන් කර ඇත්තේ පහත පෙනෙන පරිදිය.

''එසේම ඔබේ පෙත්සම්කරු සාමාන්‍යයෙන් බියපත් කිරීමේ හේතුවෙන් හෝ වෙනත් කරුණුවලින් හෝ ඡන්දදායකයන්ගෙන් වැඩි කොටසකට තමන් ඔවුන් වඩා කැමැත්තක් දක් වූ අපේක්ෂකයා තෝරා ගැනීමෙන්, ඔවුන් වැළැක්වීනි. එසේ නැතහොත් ඔවුන් වැළැක් වෙන්නට ඇත.''

චෝදනා මුඛයෙන් කරුණු ඉදිරිපත් කොට තිබූ ඉහත සඳහන් හය දෙනා වගඋත්තරකරුවන් මෙන් නඩුවට ඇඳීමට පෙත්සම්කරුට බැරිවීමේ හේතුව පිළිසරණ කොටගෙන මතු කරන ලද මූලික විරෝධයක දී, පහත සඳහන් පරිදි තීන්දු විය.

තීන්දුව: (1) තේරී පත්වුනු ඡන්දපේක්ෂකයාගේ නියෝජිතයන් යැයි කියා සිටින අය සහ ඔහුගේ දැනුම හා කැමැත්ත ඇතිව ක්‍රියා කරන අයවලුන්ට විරුඬව දූෂණ ක්‍රියා කිරීමේ පරිපාටි පිළිබඳ චෝදනා මුඛයෙන් කියැවෙන කරුණු ඉදිරිපත් වන කලෙක, එවැනි අයවලුන් මැතිවරණ පෙත්සමක වගඋත්තරකරුවන් මෙන් ඇඳීම අවශ්‍ය යැයි වර්ෂ 1970 අංක 9 දරණ සංශෝධන පනතෙහි 80ඒ (1) (බී) ඡේදයෙහි ඇති ප්‍රතිපාදන විධානාත්මක වන අතර රාජාඥා පනතෙහි තුන්වැනි උප ලේඛනයෙහි පෙත්සමක අකාරය ගැබ් වී ඇති හතර වැනි උපදේශාත්මක රීතියක් පමණකි.

(2) මැතිවරණ පෙත්සම ඉදිරිපත් කළ අවස්ථාවෙහි ඉහත කී පුද්ගලයන් ඇඳීමට නොහැකි වීමට ප්‍රතිකර්මයක් කරන කලෙක මෙන් පසුව ඔවුන් ඇඳීමට ගන්නා ලද ප්‍රයත්න නිෂ්ඵල වන නිසා ඉහත කී 80ඒ (1) (බී) ඡේදයෙහි ඇති පැනවීම්වල අවශ්‍යතාවය සපුරාලීමට පෙත්සම්කරුට නොහැකි වී තිබේ.

(3) දූෂණ ක්‍රියා පරිපාටියක් පිළිබඳව 80බී (ඩී) දරණ ඡේදයෙන් අවශ්‍ය වන දිවුරුම් පෙත්සම, ඒ පිළිබඳ ඇති විශ්වාසය පෙන්වීමක් හා ඒ ගැන දැනුම් දීමක් විය හැකිය.

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(4) තුන්වැනි උප ලේඛනයෙහි ඇති 4(1) සහ 5 වැනි රීති ඉවත් කරමින් (මේ රීතිවලින් අවශ්‍ය වූයේ සාමාන්‍ය ලෙස චෝදනා මුඛයෙන් කරුණු දැක්වීම සහ එහි විස්තර සැපයීමට නියෝගයක් නිකුත් වූ කල, පසුව නියම ලෙස ඒ ගැන කරුණු දැක්වීමට ඉඩ ඇති බවය) පැනවුනු වර්ෂ 1970 අංක 9 දරණ සංශෝධන පනතේ 80බී දරණ අලුත් ඡේදයෙන්, දූෂණාත්මක හෝ නීති විරෝධී ක්‍රියා පරිපාටියක් ඇති කල එහි සම්පූර්ණ විස්තරයක් පෙත්සමෙන්ම මුල දී ඉදිරිපත්කොට දැක්වීම අවශ්‍ය යැයි පැන වී තිබේ.

(5) මැතිවරණ පෙත්සමේ ඉහත දක්වන ලද තුන්වැනි ඛණ්ඩයෙන්, ඉහත කී 80බී(සී) ඡේදයෙන් පනවා ඇති ආවශ්‍යකත්වයේ සපුරාලීමක් සිදු වී නැතැයි ගිණිය හැක්කේ එහි ගැබ් වූ හේතු පැහැදිලි මඳ නිසාත්, ඒවා නිත්‍ය තාවයෙන් තොර නිසාත්, වගඋත්තරකරුට තමාගේ නිදහසට කරුණු කීම සඳහා සූදානම් වීමට චෝදනා මුඛයෙන් කියන කරුණුවල විස්තර සෑහෙන තත්වයක නොමැති නිසාය.

(6) මෙබඳු දූෂමාණ චෝදනා ඇතුළත්ව ඇති මෙවැනි ස්වභාවයක පෙත්සමක් මැතිවරණ විනිශ්චයකාරවරයකු විසින් පිළිගැනීම සහ, එසේ පිළිගෙන නඩුව විසඳීමට ඒළඹ ඇති අවස්ථාවේ දී ඒවායේ විස්තර සැපයීමට යැයි නියෝග කිරීම, වර්ෂ 1960 අංක 9 දරණ සංශෝධන පනත පනවමින්, ව්‍යවස්ථා සම්පාදක මණ්ඩලය අකා මකා හැරීමට පරිශ්‍රම දරූ අඩුපාඩුවක් අධිකරණ සම්ප්‍රදයේ අනුසාරයෙන්, නැවත ප්‍රකෘතිමත් කොට ඇතුල් කිරීමක් විය හැකියි.

(7) හුදෙක් විධි වශයෙන් පමණක් මතු කරන විරෝධයක් සළකා මැතිවරණ පෙත්සමක් අසාර්ථක නොවිය යුතු යැයි පනවන ඉංග්‍රීසි පාර්ලිමේන්තු රීති මාලාවේ අංක 60 දරණ රීතිය, රාජාඥාවේ විධානාත්මක ප්‍රතිපාදනයකට අනුකූලව කටයුතු කිරීමට නොහැකි වීමේ හේතුවෙන්, අපේ මැතිවරණ නීතියේ, පාඨ සම්බන්ධයට අනුකූලව බලන විට, සැළකිය යුතු යැයි ගිණිය හැකි විරෝධයකට අදාල නොවේ.

(8) පැවතීගෙන ආ නීති විදියෙහි අඩුලුහුඬුවක් යැයි සැළකෙන යම්කිසිවකට පිළියමක් නියම පරමාර්ථයෙන් ව්‍යවස්ථා සම්පාදක මණ්ඩලය විසින් පැනවුනු සංශෝධන පනතක නියෝගාත්මක ප්‍රතිපාදනයක් ගැන සළකා බලන කල උසාවිය පිට පැවරුනු බලතලයක් නොමැති අවස්ථාවක වගඋත්තරකරුවන් ලෙස ඇඳිය යුතු අයවලුන් පාර්ශ්වකරුවන් ලෙස එකතු කිරීම හෝ මැතිවරණ පෙත්සමක් ඉදිරිපත් කිරීමට නියමිත කාලය අතික්‍රාන්ත වූ විට එය සංශෝධනයක් කිරීමට අවසර දීම හෝ එසේ කරමින් සහනයක් ලබාදීම විනිශ්චයකරුවකුට සුදුසු වූවක් නොවේ.

(9) මේ නිසා අංක 12 දරණ රීතිය අනුව ඇප මුදලක් තැබීමට නොහැකි වූ අවස්ථාවක හැර එහි පැනවීම්වලට අනුකූලව ක්‍රියාකිරීම මගහැරීගිය අවස්ථාවක මැතිවරණ පෙත්සමක් නිශ්ප්‍රභ කළයුතු යයි පැනවීමක් අපේ රාජසභා ආඥා පනතේ සඳහන් නොවූවත් ප්‍රතිපත්තියක් වශයෙන් ද, ප්‍රකාශයට පත් නඩු තීන්දුවල බලය අනුව ද (උපුටා ඇති නඩු වාර්තා කියවා බලන්න) විධානාත්මක පැනවීම් ඉටු කිරීමට නොහැකි වූ අවස්ථාවක එහි ප්‍රතිඵලය වන්නේ මැතිවරණ පෙත්සම නිෂ්ප්‍රභා වීමය.

විණිසුණු කරුණ

විණිසුණු කරුණ — එකම විත්තිකරුට විරුඬව පැමිණිලිකරු විසින් එකම මුදලක් අයකර ගැනීමට දෙවැනි වරට ඉදිරිපත් කළ නඩුවක් — පළමු නඩුවේ දී දෙපක්ෂය අතර විසඳීමට තිබුණු ප්‍රධාන ආරවුල් කරුණු පැමිණිලිකරුගේ වාසියට තීරණය වී තිබීම — නමුත් පැමිණිලිකරුගේ නඩුව යෝග්‍ය කාලයට ප්‍රථම පැමිණිලි කිරීම නිසා නඩුව ඉවත දැමීම — පළමු නඩුවේ දී පැමිණිල්ලට වාසිව තීරණය වූ කරුණු දෙවැනි නඩුවේ දී විභාග කර තීරණය කිරීම නීතියට පටහැනිවේ ද? — මෙවැනි නඩුවල දී අනුගමනය කළ යුතු පිළිවෙත.

පැමිණිලිකරු විසින් රුපියල් 8,000 ක් ආපසු ලබා ගැනීමට ඉදිරිපත් කළ පැමිණිල්ලේ මෙසේ සඳහන් විය.

(අ) පැමිණිලිකරු විසින් විත්තිකරුගේ ගෙයක් කුලියට ගත් අස්ථාවේ දී විත්තිකරු ළඟ රුපියල් 8,000/- ක් තැන්පත් කළ බව,

(ආ) ගෙය කුලියට ගැනීමේ දී ඇති වූ කොන්දේසියක් අනුව ගෙයි බුත්තිය ආපසු බාර දෙන විට එම මුදල ආපසු දීමට පොරොන්දු වීම,

(ඉ) එම ගෙයි බුත්තිය ආපසු බාර දුන් බව,

නඩු විභාගයේ දී විත්තිකරු වෙනුවෙන් අංක 12 වශයෙන් නගන ලද හබ ප්‍රශ්නය නම් ගෙවල් කුලී පාලන ආඥා පනතේ 18 වැනි ඡේදයට පටහැනිව ඉහත කී රුපියල් 8,000/- ගෙවන ලද්දේ ද? යන්න යි.

එවිට පැමිණිලිකරු විසින් ඉන් පැන නගින කරුණක් සේ පහත සඳහන් හබ ප්‍රශ්නය මතු කළේය:—

''මෙම උසාවියේ අංක 44364/එම් දරණ නඩුවේ දී අංක 12 දරණ ඉහත කී හබ ප්‍රශ්නය විසඳී තිබුන නිසා එය නැවත දෙවැනි නඩුවේ දී විනිශ්චයට භාජනය කිරීමට නීතියේ විණිසුනු ප්‍රතිපත්තිය අවහිර වන සේ ක්‍රියාත්මක වේ ද?''

යට කී අංක 44364/එම්. දරණ නඩුවේ දී මෙම පැමිණිලිකරු ම තමා විත්තිකරු ළඟ රුපියල් 8,000/- ක් ඉල්ලූ විටක ආපසු දීමේ පොරොන්දුව පිට තැන්පත් කළ නිසා ඒ මුදල් ආපසු ඉල්ලා සිටියේය. පළමු නඩුවේ දී විත්තියේ නිදහසට ප්‍රධාන වශයෙන් කියා සිටියේ රුපියල් 8,000/- ක මුදලක් විත්තිකරු ළඟ තැන්පත් නොකළ බවයි.

උගත් විනිශ්චයකාරතුමා විත්තියේ නිදහසට ඉදිරිපත් කළ එකී කරුණු ඉවත දමා මෙසේ ද පැමිණිල්ලේ වාසියට තීන්දු කළේය:

(අ) විත්තිකරු විසින් පැමිණිලිකරුගෙන් එම මුදල වූ රු: 8,000/- ඉල්ලා ගත් බව.

(ආ) විත්තිකරුට ගෙයි බුත්තිය පැමිණිලිකරුට ආපසු බාර දීමෙන් පසු පමණක් එම මුදල ආපසු ලබාගන්ට හැකි බව.

(ඇ) එම රුපියල් 8,000/- පැමිණිලිකරු විසින් ගෙවීම නීති විරෝධී නොවන බව.

(ඈ) පැමිණිලිකරු ගෙයි බුත්තිය ආපසු නොදී සුදුසු කාලයට ප්‍රථම මෙම නඩුව ඉදිරිපත් කළ නිසා එය ඉවත දැමිය යුතු බව.

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තීන්දුව (1) පළමු නඩුවේ දී පැමිණිලිකරුගේ වාසියට නඩුවේ හබ ප්‍රශ්න විසඳනු ලැබූ නමුත් අන් කරුණක් මත නඩුව ඉවත දැමූ බැවින් එම විසඳීම් නැවත විසඳීමට නීතියේ විණිසුණු පිළිවෙත අවහිර නොකරයි.

(2) මේ මතය පදනම් වී ඇති මූල ධර්මය නම් පැමිණිලිකරුගේ ප්‍රථම නඩුව නිසි කලට පෙර ගෙනෙන ලද බැවින් ඉවත දැමූ නිසා විත්තිකරුට ඇපැලක් ගෙන ඔහුට විරුඬව තිබුණු කරුණු වෙනස්කරවා ගන්ට අවශ්‍යතාවයක් පැන නොනැගුණු හෙයින්ය.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා; "ඇත්ත වශයෙන්ම ඒ තීරණයට විරුඬව අභියාචනය කිරීමේ අයිතියක් විත්තිකරුට නොතිබුණු බව වර්තමාන ඇපැලෙහි පැමිණිලිකරු වෙනුවෙන් පෙනී සිටි අධිනීතීඥවරයාට පිළිගැනීමට සිදුවිය. කරුණු මෙසේ වන හෙයින් තමනට අභියාචනය කළ නොහැකි දිස්ත්‍රික් උසාවියක තීරණයකින් විත්තිකරු බැඳී ඇති සේ සැලකීම ප්‍රස්තුත නඩුවෙහි දී පැහැදිලි වශයෙන්ම අසාධාරණ වන්නක්ය. තීරණයේ අවසාන නියෝගයක් නොවූ හෙයින් එය විනිශ්චිත කරුණක් විය නොහේ."

ඇම්. ඇම්. සානික් එ. ඇම්. ඇල්. ඇම්. අහමඩ ... 23

සාක්ෂි ආඥා පනත

සාක්ෂි ආඥා පනත, 114 වැනි ඡේදය, (1) ලකුණ දරණ නිදර්ශනය — කිනම් අවස්ථාවල මෙම ඡේදයේ සඳහන් පූර්වානුමැතිය ක්‍රියාවේ යෙදීම නොකළ යුතු ද?

තීන්දුව: සාක්ෂි ආඥා පනතේ 114 වැනි ඡේදයේ ප්‍රතිපාදනය අනුව උසාවියකට යම්යම් සුදුසු අවස්ථාවල දී යම් යම් සිද්ධීන් විද්‍යමාන බවට පූර්ව නිගමනයක් කිරීමට අවසරය තිබේ. එසේ කිරීම අනිවාර්ය නොවේ. යම් නඩුවක කරුණු අනුව එසේ පූර්ව නිගමනයක් කිරීම නොසැහේ නම් උසාවියට එසේ නොකළ හැක.

නඩුවක සාක්ෂි දීමට පැමිණිල්ලෙන් ගම්මුලාදැනියෙක් සිතාසි යවා කල්ගිය නඩු විභාග දින කීපයකදීම ඔහු පැමිණ සිටි නමුත් අන්තිමට විභාගයට නඩුව ගත් දිනයේ දී ඔහුට නිකුත් කළ සිතාසිය භාර නොදී ආපසු එවීම නිසා ඔහු නොපැමිණියේය. එදින විත්ති පක්ෂයෙන් නඩුව කල් දැමීමට ඉල්ලා පැමිණිලි පක්ෂය ඊට සතුටු වූ නමුත් විනිශ්චයකාරතුමා නඩුව විභාගයට ගත්තේය. පැමිණිලිකරු සාක්ෂි දෙමින් තමා විසින් විත්තිකරුවන්ට විරුඬව ප්‍රස්තුත ආරවුල සම්බන්ධ ගම්මුලාදැනියාට කළ තමාගේ අත්සන සහිත පැමිණිල්ල අඩංගු දින පොතේ සටහනක් ද තමාගේ වාචික සාක්ෂිය තහවුරු කිරීමට ඉදිරිපත් කළේය.

තීන්දුව: මේ කරුණු පිට සාක්ෂි ආඥා පනතේ 114 වැනි ඡේදයේ (1) ලකුණ දරණ නිදර්ශනය අනුව සාක්ෂිකාරයා නොකැඳවූයේ ඔහුගෙන් බලාපොරොත්තු සාක්ෂිය පැමිණිල්ලට පිළිසරණ නොවන නිසාය යන පූර්වානුමැතිය විනිශ්චයකාරතුමා විසින් පිළිනොගැනීම යුක්තිසහගතය.

ඒ. ඇල්. මල්හාමි සහ තවත් අයෙක් එ. ඊ ඇස්. අංගම්මන 9

සාක්ෂි ආඥා පනතේ 41 (2) වැනි ඡේදය.

නඩත්තු ආඥා පනත යටතේ 15 වැනි පිටුව බලනු.

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ගරු ජී. ටී. සමරවික්‍රම මැතිවරණ විනිශ්චයකාරතුමා ඉදිරිපිටදී

එච්. පී. විජේවර්ධන එ. ඩඩ්ලි ෂෙල්ටන් සේනානායක*

මැතිවරණ පෙත්සම වර්ෂ 1970 අංක 12

පරීක්ෂණ දින: 1970 අගෝස්තු මස 3 වැනිදා සහ 4 වැනිදා
තීන්දුව දුන් දිනය: 1970 සැප්තැම්බර් 19 වැනිදා

1946 ලංකා (පාර්ලිමේන්තු) රාජ සභා ආඥා පනත — 77(සී) ඡේදය — පාර්ලිමේන්තු මන්ත්‍රීවරයෙක් තේරීම බල ශූන්‍ය යැයි ප්‍රකාශයක් කර ගැනීමට ඉදිරිපත් කළ පෙත්සමක් — පුද්ගලයන් හය දෙනකු විසින් අයථා බලපැවැත්වීමෙන් දූෂණ ක්‍රියා කලාපයක් කරන ලදැයි චෝදනා — ඔවුන්ගෙන් කිසිවෙක් පාර්ශ්වකරුවන් කිරීමට නොහැකි වීම — එය මැතිවරණ පෙත්සමක් නිෂ්ප්‍රභවීමට හේතුවක් ද? — 1970 අංක 9 දරණ සංශෝධන පනතේ, 80A(1)(බී) ඡේදය — එම ඡේදය විධානාත්මක ද? — පසු අවස්ථාවක පාර්ශ්වකරුවන් එකතු කිරීමට උසාවියට ඇති බලය.

සිදු වූ ප්‍රමාදය සාධ්‍ය කිරීමට පසු අවස්ථාවක කරන ලද ප්‍රයත්න — මේවායින් ප්‍රයෝජනයක් තිබේ ද? — ඉහත කී වර්ෂ 1946 රාජාඥා පනතේ 3 වැනි උප ලේඛනයෙහි තිබූ 4(1) සහ 5 දරණ රීති ඉවත්කරමින් ද, දූෂණාත්මක හෝ නීතිවිරෝධී ක්‍රියාකලාපයක් ඇති විටෙක එහි සියලු විස්තර දක්වා ඉදිරිපත් කිරීමේ ඇති අවශ්‍යතාවයන් ගැබ්කොට පැන වූ වර්ෂ 1970 සංශෝධන පනතේ 80A(1)බී දරණ ඡේදය—මැතිවරණ පෙත්සමේ ඇතුළත් වූ යෝජනාවල ඇති පැහැදිලි මදිකම ගැන හා ඒවා නිත්‍යානුකූලයෙන් තොර බව — පසු අවස්ථාවක විනිශ්චයකරුට පෙත්සම සංශෝධනය කිරීමට අවසර දිය හැකි ද?

ඉංග්‍රීසි පාර්ලිමේන්තු මැතිවරණ රීති මාලාවේ 60 වැනි රීතිය — විධි වශයෙන් පමණක් සළකා ඉදිරිපත් කළ විරෝධයක් මත පෙත්සමක් අසාර්ථක නොවිය යුතු බව — මෙම රීතිය අදලවේ ද යන්න — විධානාත්මක පැනවීම් ඉටු කිරීමට නොහැකිවීමේ ප්‍රතිඵලය — පෙත්සම නිෂ්ප්‍රභ කිරීම.

තම පෙත්සමට ඇදු උප ලේඛණයක නම් සඳහන් පුද්ගලයන් හය දෙනකුට විරුද්ධව අයථා බලපැවැත්වීමේ හේතුවෙන් දූෂිත ක්‍රියා පරිපාටියක් සිදු වී යැයි චෝදනා මුඛයෙන් කියා සිටි පෙත්සම්කරු වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පනතේ 77(සී) දරණ ඡේදයට අනුව වගඋත්තරකරු ලංකා පාර්ලිමේන්තුවේ මන්ත්‍රීවරයෙක් වශයෙන් පත්වීම බල ශූන්‍ය කරුණකැයි ප්‍රකාශයක් කරන ලෙස ආයාචනා කරමින් මෙම මැතිවරණ පෙත්සම ඉදිරිපත් කළේය. ඉහත නම් සඳහන් පුද්ගලයන් සදෙනා එකී දූෂිත ක්‍රියා පරිපාටිය කරන ලද්දේ වගඋත්තරකරුගේ දැනීම හෝ කැමැත්ත ඇතිව බවත් ඉන් එක් කෙනකු ඔහුගේ නියෝජිතයා බවත් මෙම උප ලේඛනයෙහි වැඩි දුරටත් සඳහන් වී තිබේ.

මෙම උප ලේඛනය සමග පෙත්සමේ හතර වන ඡේදය එකට සම්බන්ධකොට කියැ වූ කල එහි නම් සඳහන් වූ එකී පුද්ගලයන් හය දෙනා යටෝක්ත රාජාඥාවේ 77(සී) දරණ ඡේදයෙන් ඇති පැනවීමට අදල වන අන්දමින් වගඋත්තරකරුගේ දැනීම හෝ කැමැත්ත ඇතිව ක්‍රියා කළ බව හැඟී යන නමුත් වර්ෂ 1970 අංක 9 දරන සංශෝධන පනතේ 80A(1)(බී) ඡේදයට අනුකූලව එම පුද්ගලයන් හය දෙනාගෙන් එක් කෙනකුවත් වගඋත්තරකරුවන් හැටියට නඩුවට ඇඳා නැත. එපමණකුත් නොව අඩු වශයෙන් නියෝජිතයා වශයෙන් නම්කොට ඇති පුද්ගලයා වත් නඩුවේ පාර්ශ්වකරුවකු කොට සළකා එයට ඇදීමක් කරන ප්‍රකාශයක් පෙත්සමේ අඩංගු නොවේ.

අනතුරුව එකී හය දෙනාගෙන් එක් එක් අයට පිස්කල් තැනගේ මාර්ගයෙන් හාර දීම සඳහා පෙත්සම්කරු නිවේදන ඉදිරිපත් කොට තිබේ. මේ නිවේදනවල තමා දූෂණ ක්‍රියාපරිපාටියක නිරතව ඇති බව දැනුම් දී ඇත. ඔහුට වැඩිදුරටත් පෙත්සම ඉදිරිපත් කිරීමෙන් පසු දවස් දහයක කාලයක් ඇතුළත වගඋත්තරකරුවන් හැටියට මෙම පුද්ගලයන් එම පෙත්සමේ ඇඳා ඇති බව කියැවෙන ආණ්ඩුවේ ගැසට් පත්‍රයක නිවේදනයක් ද පෙත්සම්කරු පළකෙරෙව්වේය.

පෙත්සමේ තුන්වැනි ඡේදයෙහි චෝදක සඳහන් කර ඇත්තේ පහත පෙනෙන පරිදිය.

> ''එසේම ඔබේ පෙත්සම්කරු සාමාන්‍යයෙන් බියපත් කිරීමේ හේතුවෙන් හෝ වෙනත් කරුණු වලින් හෝ ඡන්දදායකයන්ගෙන් වැඩි කොටසකට තමන් ඔවුන් වඩා කැමැත්තක් දක් වූ අපේක්ෂකයා තෝරා ගැනීමෙන්, ඔවුන් වැළැක්වීනි. එසේ නැතහොත් ඔවුන් ටැළැක් වෙන්නට ඇත.''

චෝදනා මුඛයෙන් කරුණු ඉදිරිපත් කොට තිබූ ඉහත සඳහන් පුද්ගලයන් හය දෙනා වගඋත්තරකරුවන් මෙන් නඩුවට ඇඳීමට පෙත්සම්කරුට බැරිවීමේ හේතුව පිළිසරණ කොටගෙන මතු කරන ලද මූලික විරෝධයක දී, පහත සඳහන් පරිදි තීන්දු විය.

තීන්දුව: (1) නේරී පත්වුනු ඡන්දදේක්ෂකයාගේ නියෝජිතයන් යැයි කියා සිටින අය සහ ඔහුගේ දැනීම හා කැමැත්ත ඇතිව ක්‍රියා කරන අයවලුන්ට විරුද්ධව දූෂණ ක්‍රියා කිරීමේ පරිපාටි පිළිබඳ චෝදනා මුඛයෙන් කියැවෙන කරුණු ඉදිරිපත් වන කලෙක, එවැනි අයවලුන් මැතිවරණ පෙත්සමක වගඋත්තරකරුවන් මෙන් ඇඳීම අවශ්‍ය යැයි වර්ෂ 1970 අංක 9 දරණ සංශෝධන පනතෙහි 80A(1)(බී) ඡේදයෙහි ඇති ප්‍රතිපාදන විධානාත්මක වන අතර රාජාඥා පනතෙහි තුන්වැනි උප ලේඛනයෙහි පෙත්සමක ආකාරය ගැබ් වී ඇති හතර වැනි රීතිය උපදේශාත්මක රීතියක් පමණකි.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 1 වෙනි පිට බලනු.

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(2) මැතිවරණ පෙත්සම ඉදිරිපත් කළ අවස්ථාවෙහි ඉහත කී පුද්ගලයන් ඇඳීමට නොහැකි වීමට ප්‍රතිකර්මයක් කරන කලෙක මෙන් පසුව ඔවුන් ඇඳීමට ගන්නා ලද ප්‍රයත්න නිෂ්ඵල වන නිසා ඉහත කී 80A(1)(බී) ඡේදයෙහි ඇති පැනවීම්වල අවශ්‍යතාවය සපුරාලීමට පෙත්සම්කරුට නොහැකි වී තිබේ.

(3) දූෂණ ක්‍රියා පරිපාටියක් පිළිබඳව 80B(d) දරණ ඡේදයෙන් අවශ්‍ය වන දිවුරුම් පෙත්සම, ඒ පිළිබඳ ඇති විශ්වාසය පෙන්වීමක් හා ඒ ගැන දැනුම් දීමක් විය හැකිය.

(4) තුන්වැනි උප ලේඛනයෙහි ඇති 4(1) සහ 5 වැනි රීති ඉවත් කරමින් (මේ රීතිවලින් අවශ්‍ය වූයේ සාමාන්‍ය ලෙස චෝදනා මුඛයෙන් කරුණු දැක්වීම සහ එහි විස්තර සැපයීමට නියෝගයක් නිකුත් වූ කල, පසුව නියම ලෙස ඒ ගැන කරුණු දැක්වීමට ඉඩ ඇති බවය) පැනවුනු වර්ෂ 1970 අංක 9 දරණ සංශෝධන පනතේ 80B දරණ අලුත් ඡේදයෙන්, දූෂණාත්මක හෝ නීති විරෝධී ක්‍රියා පරිපාටියක් ඇති කල එහි සම්පූර්ණ විස්තරයක් පෙත්සමෙන්ම මුලදී ඉදිරිපත් කොට දැක්වීම අවශ්‍ය යැයි පැනවී තිබේ.

(5) මැතිවරණ පෙත්සමේ ඉහත දක්වන ලද තුන්වැනි ඛණ්ඩයෙන්, ඉහත කී 80B(සි) ඡේදයෙන් පනවා ඇති ආවශ්‍යතාවයේ සපුරාලීමක් සිදු වී නැතැයි ගිණිය හැක්කේ එහි ගැඹු වූ හේතු පැහැදිලි මඳ නිසාත්, ඒවා නිත්‍ය තාවයෙන් තොර නිසාත්, වගඋත්තරකරුට තමාගේ නිදහසට කරුණු කිම සඳහා සූදානම් වීමට චෝදනා මුඛයෙන් කියන කරුණු වල විස්තර සැහෙන තත්වයක නොමැති නිසාය.

(6) මෙබඳු දූෂ මාණ චෝදනා ඇතුළත්ව ඇති මෙවැනි ස්වභාවයක පෙත්සමක් මැතිවරණ විනිශ්චයකාරවරයකු විසින් පිළිගැනීම සහ, එසේ පිළිගෙන නඩුව විසඳීමට ඵළඹ ඇති අවස්ථාවේ දී ඒවායේ විස්තර සැපයීමට යැයි නියෝග කිරීම, වර්ෂ 1960 අංක 9 දරණ සංශෝධන පනත පනවමින්, ව්‍යවස්ථා සම්පාදක මණ්ඩලය අකා මකා හැරීමට පරිශ්‍රම දරූ අඩුපාඩුවක් අධිකරණ සම්ප්‍රදයේ අනුසාරයෙන්, නැවත ප්‍රකෘතිමත් කොට ඇතුල් කිරීමක් විය හැකිය.

(7) හුදෙක් විධි වශයෙන් පමණක් මතු කරන විරෝධයක් සළකා මැතිවරණ පෙත්සමක් අසාර්ථක නොවිය යුතු යැයි පනවන ඉංග්‍රීසි පාර්ලිමේන්තු රීති මාලාවේ අංක 60 දරණ රීතිය, රාජාඥාවේ විධානාත්මක ප්‍රතිපාදනයකට අනුකූලව කටයුතු කිරීමට නොහැකි වීමේ හේතුවෙන්, අපේ මැතිවරණ නීතියේ, පාඨ සම්බන්ධයට අනුකූලව බලන විට, සැළකිය යුතු යැයි ගිණිය හැකි විරෝධයකට අදල නොවේ.

(8) පැවතිගෙන ආ නීති විදියෙහි අඩුලුහුඩුවක් යැයි සැළකෙන යම්කිසිවකට පිළියමක් කිරීමේ නියම පරමාර්ථයෙන් ව්‍යවස්ථා සම්පාදක මණ්ඩලය විසින් පැනවුනු සංශෝධන පනතක නියෝගාත්මක ප්‍රතිපාදනයක් ගැන සළකා බලන කල උසාවිය පිට පැවරුනු බලතලයක් නොමැති අවස්ථාවක වගඋත්තරකරුවන් ලෙස ඇඳිය යුතු අයවලුන් පාර්ශ්වකරුවන් ලෙස එකතු කිරීම හෝ මැතිවරණ පෙත්සමක් ඉදිරිපත් කිරීමට නියමිත කාලය අතික්‍රාන්ත වූ විට එය සංශෝධනයක් කිරීමට අවසර දීම හෝ එසේ කරමින් සහනයක් ලබාදීම විනිශ්චයකරුවකුට සුදුසු වූවක් නොවේ.

(9) මේ නිසා අංක 12 දරණ රීතිය අනුව ඇප මුදලක් තැබීමට නොහැකි වූ අවස්ථාවක හැර එහි පැනවීම්වලට අනුකූලව ක්‍රියාකිරීම මගහැරීගිය අවස්ථාවක මැතිවරණ පෙත්සමක් නිශ්ප්‍රභා කළයුතු යයි පැනවීමක් අපේ රාජසභා ආඥා පනතේ සඳහන් නොවූවත් ප්‍රතිපත්තියක් වශයෙන් ද, ප්‍රකාශයට පත් නඩු තීන්දුවල බලය අනුව ද (උපුටා ඇති නඩු වාර්තා කියවා බලන්න) විධානාත්මක පැනවීම් ඉටු කිරීමට නොහැකිවූ අවස්ථාවක එහි ප්‍රතිඵලය වන්නේ මැතිවරණ පෙත්සම නිශ්ප්‍රභා වීමය.

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ගරු සමරවික්‍රම විනිශ්චයකාර තුමා

වගඋත්තරකරු වෙනුවෙන් මතුකර ඇති පළමුවන විරෝධය ලෙසට මෙහි ඇත්තේ අයථා ලෙස බලපෑවැත්වීමේ දූෂණ ක්‍රියා පරිපාටියක යෙදුනු බව මැතිවරණ පෙත්සමේ සඳහන් කර ඇති පුද්ගලයන් වගඋත්තරකරුවන් ලෙස එකතු කිරීමට පෙත්සම්කරුට නොහැකි වී තිබෙය යන්නය.

පනතේ 80ඒ(1) ඡේදයෙන් පහත සඳහන් පරිදි පැනවී තිබේ.

''පෙත්සම්කරුවකු විසින් පහත සඳහන් අයවලුන් තමාගේ මැතිවරණ පෙත්සමෙහි වගඋත්තරකරුවන් ලෙස එකතු කළ යුතුය.

(අ) මන්ත්‍රීවරුන් ලෙස තේරී පත් වූ අපේක්ෂකයන් සියලු දෙනාම හෝ ඉන් යමකු නෝරා ගැනීම අවලංගු බව හෝ අයථා බව කියා සිටීමට අමතරව තමාම හෝ වෙන යම් අපේක්ෂකයකු යථා පරිදි නෝරා ගනු ලැබූ බවට තම මැතිවරණ පෙත්සම මඟින් වැඩිදුරටත් ප්‍රකාශයක් ඉල්ලුම් කරන අවස්ථාවක නම්, පෙත්සම්කරු හැර තරහ කළ සියලුම අපේක්ෂකයන් ද එවැනි වැඩිදුරටත් ප්‍රකාශයක් කරනු නොලබන අවස්ථාවක නම්, මන්ත්‍රීවරුන් ලෙස තේරී පත් වූ සියලුම අපේක්ෂකයන් ද, එසේම,

(ආ) යම් දූෂණ ක්‍රියාවක් හෝ නීති විරෝධී ක්‍රියාවක් සම්බන්ධයෙන් තම පෙත්සමෙහි අන් කිසි අපේක්ෂකයකුට හෝ නැනැත්තකුට විරුද්ධව චෝදනා නගා ඇතහොත් ඒ අන් අපේක්ෂකයන් හෝ නැනැත්නා ද වෙති.''

පෙත්සමට ඇතුළත් වී ඇති උප ලේඛනයක නම් කරන ලද පුද්ගලයන් හය දෙනෙක් අයථා ක්‍රමයෙන් බලපෑවැත්වීමේ දූෂණ ක්‍රියා මාර්ගයක් කරන ලදැයි ද ඉන් කෙනෙක් වන ඩඩ්ලි වීජේරත්න මහතා වගඋත්තරකරුගේ නියෝජිතයෙකු යි ද මැතිවරණ පෙත්සමේ සඳහන් කර තිබේ. යම්කිසිවකු මන්ත්‍රීවරයකු ලෙස පත්කරනු ලැබ දූෂණ ක්‍රියා මාර්ගයක හේතුවෙන් යම්කිසි මන්ත්‍රීවරයකු තේරීමක් අහෝසි කර දැමිය යුතු අන්දම 77(සී) ඡේදයෙහි පහත සඳහන් පරිදි පළ වී තිබේ.

''යම්කිසි අපේක්ෂකයකු මන්ත්‍රීවරයකු ලෙස නෝරා පත් කරනු ලැබීම මැතිවරණ පෙත්සමක දී, මැතිවරණ විනිශ්චයකරුට ඒත්තු යන පරිදි, ඔප්පු කළ හැකි පහත සඳහන් හේතුවලින් යම් කිසි හේතුවක් පිට අවලංගු වූ ලෙස ප්‍රකාශ කළ විටය.

(සී) මැතිවරණය සම්බන්ධයෙන් අපේක්ෂකයා විසින් නැතහොත්, ඔහුගේ දැනුම හෝ කැමැත්ත ඇතිව, නැතහොත් අපේක්ෂකයාගේ යම් නියෝජිතයකු විසින් දූෂණ ක්‍රියාවක් හෝ නීති විරෝධී ක්‍රියාවක් කළ බව'' යනුයි.

ඉහත සඳහන් ප්‍රතිපාදනයට අනුව සළකන කල, තේරී පත් වී ඇති අපේක්ෂකයාගේ නියෝජිතයන් යැයි කියා සිටින ලද පුද්ගලයන් සහ ඔහුගේ දැනීම හා කැමැත්ත ඇතිව කටයුතු කළ පුද්ගලයන් ද, මැතිවරණ පෙත්සමේ වගඋත්තරකරුවන් ලෙස එකතු කළ යුතුය යන්න මාගේ මතයයි.

එහි ඇති උප ලේඛනයත් සමගම මැතිවරණ පෙත්සමේ හතරවැනි ඡේදය එක්කොට කියවන කල එහි නම් සඳහන්ව ඇති පුද්ගලයන් සය දෙනා තේරී පත් කරනු ලැබ සිටින අපේක්ෂකයාගේ දැනීම හා කැමැත්ත ඇතිව කටයුතු කළ බව හැඟී යයි. පෙත්සම්කරුගේ උගත් නීතිවේදියා ප්‍රකාශ කළේ ඩඩ්ලි වීජේරත්න මහතා හැර ඉතිරි පස් දෙනා එහි සඳහන් කරන ලද්දේ 80B(ඩී) දරණ ඡේදයට අනුව දූෂණ ක්‍රියා මාර්ගයෙහි සම්පූර්ණ විස්තර පුවත කීමට බවය. කෙසේ වුවත් මෙම මැතිවරණ පෙත්සමේ වගඋත්තරකරු හැටියට අඩු වශයෙන් ඩඩ්ලි වීජේරත්න මහතා එකතු කළ යුතු බව පැහැදිලිව පෙනේ. පෙත්සම්කරු එම පෙත්සමට ඔහු පාර්ශ්වකරුවකු හැටියට එකතු කොට ඇති බව කිසි තැනක කියා නැත.

පෙත්සම්කරුගේ උගත් නීතිවේදියා පනතේ දෙවැනි උප ලේඛනයෙහි 4 වැනි රීතියෙන් විස්තරවන ආකෘතිය ගැන සඳහන් කරමින් එම ආකෘතිය පාර්ශ්වකරුවන්ගේ නම් අනාවරණය කරන කොටසක් සිරස්තලයේ නොදක්වන බව පෙන්වා දුන්නේය. එය කෙසේ වුවත් පනතේ 80A(1) (බී) දරණ ඡේදයෙහි මේ සඳහා ඉහාම ප්‍රකට පැණවීමක් දක්නට ලැබේ. මේ නිසා 4 වැනි රීතිය උපදෙස් දීමට පමණක් යොදන ලද්දක් සේ පෙනී යයි. මේ නයින් සළකන කල රීතියට අනුව සාරානුකූල ලෙස යෙදීමක් කළ විට (Substantial compliance) එයට ප්‍රමාණවත් වන අතර රාජාඥා පනතේ ප්‍රකටව පනවා තිබෙන පරිදි එයට අනුකූලව සම්පූර්ණ වශයෙන් හරියටම ක්‍රියා කිරීම බැලූ බැල්මට අවශ්‍ය බව සළකා ගතයුතුය.

ඇත්ත වශයෙන්ම කියතොත් පෙත්සම්කරු තමාගේ පෙත්සමේ සිරස්තලයෙහි පාර්ශ්ව කරුවන් ගෙනහැර දක්වා තිබේ. ඔහු පෙත්සම්කරු තමාම යැයි නම් කොට තේරී පත් වී ඇති අපේක්ෂකයා වගඋත්තරකරු යැයි ද දක්වා ඇත.

පෙත්සම උසාවියට ඉදිරිපත්කොට සිව් දිනකට පසු පිස්කල් නිලධාරියාගේ මාර්ගයෙන් ඒ පුද්ගලයන් හය දෙනාට එසේ පෙත්සමක් උසාවියට ඉදිරිපත්කර ඇති බවත්, ඒ තැනැත්තා දූෂණ ක්‍රියා මාර්ගයක් කළ තැනැත්තකු හැටියට එහි නම් කර ඇති බවත් නිවේදනය කෙරෙන දැන්වීම් උසාවිය වෙත භාර දී තිබේ. ඉන්පසු අවස්ථාවක එහෙත් පෙත්සම උසාවියට භාර දී දස දිනක් ඇතුළත ආණ්ඩුවේ ගැසට් පත්‍රයේ ද නිවේදනයක් ඔහු විසින් පළකොට තිබේ. එම ප්‍රකාශයෙහි ගැබ් වී ඇති අනික් කරුණු අතර, මෙම පුද්ගලයන් එම මැතිවරණ පෙත්සමෙහි වගඋත්තරකරුවන් හැටියට එකතු කොට ඇති බව ද ප්‍රකාශ වී තිබේ. මෙම පියවර ගෙන ඇත්තේ — විශේෂයෙන්ම ගැසට් පත්‍රයෙහි නිවේදනය කිරීමේ පියවර පෙත්සම්කරු විසින් ගෙන ඇත්තේ — මැතිවරණ පෙත්සම උසාවියට ඉදිරිපත් කරන අවස්ථාවෙහි පෙත්සම්කරු විසින් තමා අතින් කෙරෙන ලද පැහැර හැරීම අවබෝධ කරගත් පසුව එය සාධ්‍ය කිරීමට (to remedy) ගත් ආයාසයක් වශයෙන් යැයි මට පෙනී යයි. මේ නිසා රාජාඥා පනතේ 80(A)(i)(බී) ඡේදයෙහි පැනවීම් වලට අනුකූලව පෙත්සම්කරුට ක්‍රියා කිරීමට නොහැකි වී තිබේ යැයි මම නිගමනය කරමි.

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ආඥා පනතේ 80(A)(i) ඡේදයට සමාන පැනවීමක් වර්ෂ 1951 ඉන්දියානු ජනතා නියෝජිත පනතේ 82 වැනි ඡේදයෙහි දක්නට ලැබේ. එහි 85 වැනි ඡේදය කලින් තිබුණු පරිදි ගත්කල අනික් යම් යම් පැනවීම්වලට අනුකූලව කටයුතු කිරීමට නොහැකි වූ අවස්ථාවක මැතිවරණ පෙත්සමක් නිෂ්ප්‍රභ කිරීම පිණිස යම් යම් ප්‍රතිපාදන ඇතුලත් වී ඇතත් 82 වැනි ඡේදයට අනුකූලව කටයුතු නොකෙරුනු කල එබඳු පෙත්සමක් නිෂ්ප්‍රභ කිරීමට ප්‍රතිපාදනයන් පැනවී නැත. එම පනතෙහි 90 වැනි ඡේදයෙන් ඉන්දියානු සිවිල් නඩු විධාන සංග්‍රහයේ දක්නට ලැබෙන සම්ප්‍රදය මැතිවරණ පෙත්සම් විනිශ්චය කිරීමේ දී ද අදල වන බව වැඩිදුරටත් පැනවී තිබේ. එම නඩු විධාන සංග්‍රහයෙහි පළමුවන ආඥාවේ 9 වැනි රීතියේ පැන වී ඇති තවත් කරුණු ඇතුළුව මෙසේ ද කියා තිබේ. එනම්: පාර්ශ්ව කරුවන් එකතු නොකිරීමේ හේතුවෙන් නඩුවක් අසාර්ථක නොවිය හැක. එහි වැඩි දුරටත් එම විධාන සංග්‍රහයේ පළමුවැනි ආඥාවේ 10 වැනි රීතියෙන් නඩුවේ ඕනෑම අවස්ථාවක නඩුවට එකතු කළ යුතු පාර්ශ්වකරුවකු එකතු කිරීමට ඉඩ සැලසී තිබේ. *ජගන් නාත් එ. ජස්වන්ත් සිං* 1954 ස.ඉ.වා., ශ්‍රේ:අ: 211 අතර කියැවුනු නඩුවෙහි තරඟ කරන එක් අපේක්ෂකයකු එකතු නොකිරීමෙන් ඇති වූ ප්‍රතිඵලය ඉන්දියාවේ ශ්‍රේෂ්ඨාධිකරණය විසින් සලකා බලන ලදි. එසේ සළකා බලන ලද්දේ අපේ රාජාඥා පනතේ 80 A(i)(ඒ) ඡේදය උල්ලංඝණය කිරීමේ හේතුවෙන් මැතිවරණ පෙත්සමකින් එසේ කරන ලද අසුනට අයිතිවාසිකම් කියා සිටි අවස්ථාවකය. එහි දී සිවිල් නඩු විධාන සංග්‍රහයේ නීතිරීති මෙබඳු අවස්ථාවක අදල වනු ඇතැයි යන පැනවීම ගැන ද, එසේම පාර්ශ්වකරුවන් එකතු කිරීම පිළිබඳව එහි ඇති පැනවීමට අනුව කටයුතු නොකළ කලෙක මැතිවරණ පෙත්සමක් නිෂ්ප්‍රභ කිරීමට භාජන වේ යැයි කියා පැනවීමක් නොමැතිවීම ගැන ද ශ්‍රේෂ්ඨාධිකරණය සඳහන් කළේය. මෙසේ සඳහන් කරමින් ඒ න්‍යායෙන් සළකන කල එවැනි අඩුලුහුඩුවක් මැතිවරණ පෙත්සමක් බිඳ වැටීමට තරම් විනාශකාරී නොවන බව නිගමනය කළේය. එසේ නිගමනය කරමින් එයට හේතු දැක් වූ අධිකරණය එහි සාමාන්‍ය රීතිය විදහා දැක් වූ අතර එම නඩුවට එබඳු ක්‍රියාමාර්ගයක් අදල නොවන්නේ මන්ද යන්න ගැන හේතු දැක්වූයේ පහත සඳහන් පරිදිය.

''මැතිවරණ නීතියෙහි සඳහන් අවශ්‍යතාවයන්ට ඉතාම උග්‍ර ලෙස අනුකූලතාවය දැක්විය යුතුය යන සාමාන්‍ය නීතිය දැන් මනා සේ ප්‍රතිෂ්ඨාපිත වී තිබේ. එමතු ද නොව මැතිවරණ තරඟයක් පිළිබඳ ඇති ආරවුල සාමාන්‍ය නීතියෙන් දැක්වෙන නඩුවක් හෝ සාධාරණත්වය මත ගොඩ නැගුණු නඩුවක් නොවන අතර එය පොදු නීතියෙහි ඇතුළත් නොවන එහෙත් ප්‍රකට ලෙස ලිඛිත නීති සම්ප්‍රදයක ඇතුළත් නඩුවක් පිළිබඳ ක්‍රියා පරිපාටියක් නිසා ඒ පිළිබඳව පොදු නීතියෙන් ආරෝපිත කිසිම බලයක් අධිකරණයට නොමැති බවත් එසේම ස්ථාපිත වී ඇත්තේය. මැතිවරණයකින් දිනූ අපේක්ෂකයකුගේ ජයග්‍රහණයට ආවාට ගියාට ඇඟිලි නොගැසිය යුතු බවත් ඒ හේතුව නිසා එබඳු ඇඟිලි ගැසීමක් පතන මැතිවරණ පෙත්සම නීතියෙන් පැන වී ඇති අවශ්‍යතාවයන්ට උග්‍රලෙස අනුකූලතාවය (strictly conform) දැක්විය යුතුය යන්න ද දැඩි ලෙස තහවුරු වී ඇත. ඒ කෙසේ වෙතත් එකී විශේෂ නීතියෙන්ම විනිශ්චය සහාවකට යම්කිසි පැනවීම් සම්ප්‍රදයකට අනුව නඩුවක් පවත්වාගෙන යෑමට අවසරය දී ඇත්නම් ඉහත සඳහන් ප්‍රඥප්තීන් (propositions) එකක්වත් එහි දී අදල වන්නේ නැත. එමෙන්ම එබඳු යම්කිසි සම්ප්‍රදයක් අනුව කටයුතු නොකළහොත් එයින් ඇතිවන ප්‍රතිඵල සඳහන් නොවූ අවස්ථාවක ද එකී ප්‍රඥප්තීන් බලපවත්වන්නේ නැත.''

අපේ රාජාඥා පනතේ පාර්ශ්වකරුවන් එකතු කිරීම සඳහා සිවිල් නඩු විධාන සංග්‍රහයේ පැන වී ඇති රීතීන් අදල වන සේ කරුණු සළස්වා නැත. එමෙන්ම ඉන්දියානු මහජන නියෝජිත පනතේ කලින් තිබූ 85 වැනි ඡේදයෙහි ඇති පරිද්දෙන් පාර්ශ්වකරුවන් එකතු නොකිරීම පෙත්සමක් නිෂ්ප්‍රභ වීමට හේතු භූත වන කරුණක් නොවේ යැයි පැන වී නැත.

දැන් අප අතර ඇති පෙත්සමෙහි ඇති කරුණු ගැන සළකා බලන විට ආසනයට අයිතිවාසිකම් කියන පෙත්සමක පාර්ශ්වකරුවකු හැටියට තරඟ කරන අපේක්ෂකයකු එකතු කිරීමට නොහැකිවීම ගැන පැන නැඟි ඇති කරුණක් නොව යම්කිසි අපේක්ෂකයකුට හෝ වෙනත් අයකුට විරුඬව නගන ලද දූෂණ ක්‍රියා පරිපාටියක් පිළිබඳව ඇති පෙත්සමක ඔවුන් පාර්ශ්වකරුවන් ලෙස එකතු කිරීම අවශ්‍යයැයි සඳහන්ව ඇති අපේ රාජාඥා පනතේ 80A(i)(බී) දරණ ඡේදයෙහි ඇති පැනවීම්වලට අනුකූලව ක්‍රියා කිරීමට නොහැකි වීමෙන් මතු වී ඇති කරුණකි. මැතිවරණ පෙත්සම නඩු විභාගයක දී ඔවුන් වරදකරුවන් ලෙස නිගමනය වූ විටෙක ඔවුන් පිළිබඳ ලංකාණ්ඩුකාර තුමාට වාර්තා කරනු ලැබීමට සහ ඒ නයින් හත් අවුරුදු කාල පරිච්ඡේදයක් තුළ ඔවුන්ගේ මහජන අයිතිවාසිකම් නොලබා සිටීමට ද ඉහත සඳහන් කළ අය බැඳී සිටිති. මෙම පැනවීම මූලික ප්‍රතිපත්තියක් ප්‍රතිෂ්ඨාපනය කොටගෙන පැන වී ඇත. එනම් ඔහුට විරුද්ධව සහ ඔහු යම්කිසි දඬුවමකට භාජන වන අයුරු තීරණයක් කිරීමට පෙර ඔහුට ද සවන් දිය යුතු බව ඒ ප්‍රතිපත්තිය වේ. දූෂණ ක්‍රියාපටිපාටියක් මත ගොඩනැගුණු පෙත්සමක් මැතිවරණ ප්‍රතිඵලය ප්‍රකාශ කිරීමෙන් විසි එක් දිනක් ඇතුළත ඉදිරිපත් කිරීමට සිදු වේ. එම පනතෙහි එකතු කළ යුතු යම්කිසි පුද්ගලයෙක් පාර්ශ්වකරුවකු හැටියට එකතු කිරීමට කිසියම් පැහැදිලි පැනවීමක් හෝ අඩංගු වී ඇති පැනවීමක් හෝ නොපෙනේ. මේ කරුණු සළකා බැලීමේ දී දූෂණ ක්‍රියා පටිපාටියක් පිළිබඳ චෝදනා මුඛයෙන් කරුණු කියා පෑමකට භාජන වූ පුද්ගලයන් වගඋත්තරකරුවන් ලෙස එකතු කළ යුතුයැයි සඳහන්ව ඇති පැනවීම උපදෙස් දීමක් (directory) පමණක් නොව විධානාත්මක (mandatory) පැනවීමක් හැටියට සිතාගත යුතු යැයි මට පෙනීයයි.

දූෂණ ක්‍රියා පරිපාටියක් පිළිබඳව චෝදනා කෙරෙන පෙත්සමක් සමග එම චෝදනා මුඛයෙන් කී කරුණු සනාථ කෙරෙන දිවුරුම් පෙත්සමක් ද තිබිය යුතු බව 80B(ඩී) ඡේදයෙන් පෙනේ. මෙහි පෙත්සම්කරු තමාම සහතික ලෙස ප්‍රකාශ කරන ලද දිවුරුම් පෙත්සමකින් කියා සිටින්නේ මෙම සිද්ධීන් සම්බන්ධයෙන් තමා විස්තර දැන ගත්තේ පොඩිඅප්පුහාමි නමැත්තකුගෙන් බවකි. එහෙත් පොඩිඅප්පුහාමිගෙන් දිවුරුම් පෙත්සමක් ඉදිරිපත් වී නැත. වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා මෙහි පැන වී ඇත්තේ නියම වශයෙන් කරුණු පිළිබඳව ගතු කිරීමට තමාගේ දැනීමෙන්ම හැකි කෙනකු මිස වෙන කෙනකු කී දේ ඇසූ කෙනකු

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විසින් නොවන බව යැයි කියමින් කරුණු සැළ කළේය. මෙම සැළකිරීමෙහි යම්කිසි සාර හාර ගතියක් තිබේ. ඒ කෙසේ වුවත් පැනවීමෙහි සඳහන් කරන්නේ ''නියමිත ආකෘතියට අනුව සැපයුණු'' දිවුරුම් පෙත්සමක් ගැනය. නමුත් නියම වශයෙන් ආකෘතියෙන් එහි පෙන්වා දී නොමැත. නියම බලධාරියා අතින් කරුණු අතර තොරතුරු සැපයෙන එමෙන්ම විශ්වාසය මත නැංවුණු දිවුරුම් පෙත්සමක් මෙහි දී නියම කළා විය හැක. එම නිසා මෙම දිවුරුම් පෙත්සම සම්බන්ධයෙන් ඉදිරිපත් කළ විරෝධය පිළිගැනීමට මට පුලුවන්කමක් නැත.

පෙත්සමේ 3 වැනි ඡේදයෙන් කියැවෙන්නේ මෙසේය:

''තවදුරටත් සාමාන්‍ය වශයෙන් කෙරෙන බියගැන්වීම්වලින් හෝ වෙනත් කරුණුවලින් හෝ ඡන්දදායකයන්ගෙන් වැඩි දෙනෙක් ඔවුනට කැමැති අපේක්ෂකයා තෝරා ගැනීමෙන් වැළකුණු බව හෝ එසේ වැළකීමට ඔවුනට ඉඩ නිබුණු බව ඔබතුමන්ගේ පෙත්සම්කරු වැඩිදුරටත් කියා සිටී.''

මැතිවරණ පෙත්සම්වල වෝදනා සාදන විට ඒවා ඉතා පළල් ලෙස සකස් කිරීම සහ නිදැල්ලේම කරන වෝදනාවකට (bare allegation) වඩා කරුණු ස්වල්පයක් සඳහන් කොට නියම ලෙස කරුණු දැක්වීම විස්තර සැපයීමට යැයි නියෝගයක් ලද විටෙක ඒ කරුණු සැළකිරීම සාමාන්‍ය සිරිත වශයෙන් සිදු වී ඇති දෙයකි.

මේ කරුණට අදාළ 4(i) සහ 5 දරණ නීති රීති මේ අන්දමින් පැන වී තිබේ.

''4(1) මැතිවරණ පෙත්සමක පහත සඳහන් ප්‍රකාශ අඩංගු විය යුතුය.

(අ) ආඥාවේ 79 වැනි ඡේදය යටතේ පෙත්සමක් ඉදිරිපත් කිරීමට පෙත්සම්කරුට ඇති අයිතිවාසිකම එහි සඳහන් විය යුතුය.

(ආ) මැතිවරණය පැවැත්වුනු බව සහ එහි ප්‍රතිඵලය ද සඳහන් විය යුතු අතර පෙත්සමේ ඇති ආයාචනය සනාථ කිරීමට ඇති කරුණු සහ දක්වන හේතු ද එහි සැකෙවින් සඳහන් විය යුතුය.

5. පෙත්සමෙහි සාක්ෂි ඇතුළත් වීම අවශ්‍ය නොවේ. නමුත් වගඋත්තරකරු විසින් ලියා ඉල්ලුම් කළ විටෙක ඔහු විශ්මයට හදිසියේ හාවිත වීම වැළැක්වීමට ද අනවශ්‍ය වියදම් වැළැක්වීමට ද සාධාරණ සහ ක්‍රියාකාරී නඩු විභාගයක් පවත්වාගෙන යාම සඳහා ද අවශ්‍ය වන සාක්ෂි පිළිබඳ විස්තරයක් දීමට ඒ සඳහා වියදම් වන ගාස්තු සහ වෙන කටයුතු ගැන ද සළකා බලා ඒ අනුව අදාළ වන කොන්දේසි යටතේ විනිශ්චයකාර වරයාට නියෝගයක් කළ හැක.''

චක්‍රමසූරිය එ. විලියම් ද සිල්වා, 67 න.නී.වා. 58 යන නඩුවෙහි වෝදනා මුඛයෙන් කියන කරුණ පමණක් සඳහන් කොට ඇති වෝදනාවක් 4(i) දරණ රීතියට ඇතුළත් වන බව එහි දී තීරණය වී ඇත්තේ 5 වැනි රීතියෙන් පෙත්සම්කරු සියලුම කරුණු ගෙනහැර දැක්වීම අනවශ්‍ය බවත්, පෙත්සමේ සඳහන් නොකළ කරුණු සැපයීමට ඔහු බැඳෙන්නේ එවැනි විස්තර සැපයීමට යැයි නියෝගයක් කළ කලක පමණක් බවත් අනාවරණය වන නිසාය.

මේ න්‍යායෙන් පෙත්සම්කරුවකුට නියම ප්‍රතිඥාවක් නොමැතිව වෝදනා මුඛයෙන් කියන කරුණු පමණක් පෙත්සමෙහි රුවා ඉන්පසු ඒ කී කරුණු වලට පිටුවහල ලබා ගැනීමට සාක්ෂි සෙවිය හැකි යයි, එය උග්‍ර විවේචනයට භාජන විය. මෙබඳු විස්තර කරුණු දීමට යැයි නියෝගය කෙරෙන්නේ නඩුවට ටික කලකට පෙර නිසා ද එය සමහර අවස්ථාවල මැතිවරණයෙන් අවුරුද්දක් පමණ ගත වූ පසු කෙරෙන නිසා ද, වගඋත්තරකරුට වෝදනාවල කරුණු පිළිබඳව නිසි විමසීම් සහ පරීක්ෂණයන් පවත්වා එම වෝදනාවන්ට මුහුණ දීමට කල්වේලා ඇතිව නිවේදනයක් නොලැබෙන නිසා ද, මේ ගැන තවත් අතකින් ප්‍රශ්නයක් මතු කෙරිණ.

තුන්වැනි උප ලේඛනයෙහි ගැබ්ව තිබුණ 4(i) සහ 5 යන රීති වර්ෂ 1970 අංක 9 දරණ පනතින් ඉවත් කරණ ලදුව රාජාඥාවට 80බී දරණ අලුත් ඡේදයක් ද ඇතුළත් විය. දූෂණ ක්‍රියාමාර්ගයන් හෝ නීති විරෝධී ක්‍රියා මාර්ගයන් පෙත්සමක ඇතුළත් වූ විට එම පෙත්සමෙහි ම ඒ පිළිබඳ සම්පූර්ණ විස්තර ඇතුළත් විය යුතු බවත්, පෙත්සමේ සඳහන් එබඳු ක්‍රියා මාර්ග පිළිබඳ වෝදනා මුඛයෙන් දක්වා ඇති කරුණු සනාථ කිරීමට පෙත්සම සමග දිවුරුම් පෙත්සමක් ද ඉදිරිපත් කළ යුතුව තිබිණ. අනිත් කරුණු පිළිබඳව 80B(සී) දරණ ඡේදයෙන් පැන වී ඇත්තේ මැතිවරණ පෙත්සමක පෙත්සම්කරු විශ්වාසය තබා ඇති වැදගත් කරුණු සම්බන්ධයෙන් කෙටි ප්‍රකාශයක් තිබිය යුතුය කියාය. මේ පැනවීම මැතිවරණ පෙත්සමේ 3 වැනි ඡේදයෙහි දක්වා ඇති කරුණුවලට අදාළ වන්නකි. සවිස්තරව දැක්වෙන කරුණු සම්බන්ධ රීතිය ඉකුත්කොට ඇති බැවින් පෙත්සමේ ඇති කරුණු පමණක් පිළිසරණ කොට ගෙන සාමාන්‍ය වශයෙන් නඩු විභාගයක් පවත්වාගෙන යා යුතු සේය. එම නිසා වගඋත්තරකරුට තමාට විරුද්ධව වෝදනා මුඛයෙන් කියන ලද කරුණ ගැන සාධාරණ නිවේදනයක් ලැබීමට තරම් එහි ඇතුළත් වන කරුණු ප්‍රමාණවත් විය යුතුය. මෙම පෙත්සමේ තුන්වැනි ඡේදයෙහි ඉතාම පුළුල් අන්දමට සකස්කොට ඇති කරුණු වලින් ඉහත කී සේ කටයුතු සිදුවීම වැළැක්වී ඇති අතර, එම කරුණු නොපැහැදිලි බව ද, රාජාඥාවේ 80B(සී) දරණ ඡේදයේ ඇති පැනවීමට වඩා මෙම පෙත්සමේ ගැබ් වී ඇති කරුණුවල නියමිත අංශක ගණනකින් අඩුව පහතට වැටී තිබෙන බව මෙහි ලා කිවයුතුය. ඉතාම අඩු වශයෙන් වගඋත්තරකරුට වෝදනා මුඛයෙන් කියා ඇති කරුණු පිළිබඳව නියමිත ලෙස දැනගත හැකි නිවේදනයක් පෙත්සමේ කරුණු ප්‍රකාශයෙන් ලැබී, ඒ අනුව අවශ්‍ය ලෙස කරුණු විමසා තමාගේ නිදහසට කීමට ඇති තොරතුරු සපයා ගැනීමට හැකි විය යුතුය. මගේ කල්පනාවේ හැටියට පෙත්සමේ තුන්වැනි ඡේදයෙන් එබඳු දෙයක් නොකෙරේ. 5 වැනි රීතිය ඉවත් කරනු ලැබීම ගැන සළකා නොබලා උසාවියට වගඋත්තරකරුට හානියක් නොවන සේ විස්තර සපයා දීමට නියෝගයක් කිරීමට තවමත් බලය ඇතැයි පෙත්සම්කරු වෙනුවෙන් පෙනී සිට උගත් නීතිවේදියා කරුණු සැළකළේය... එසේ ඉල්ලීමක් කළ විටෙක වගඋත්තරකරුගේ ප්‍රයෝජනය සළකා ඉල්ලීමක් කළ විට එසේ නියෝගයක් කිරීමට උසාවියට බලය තිබිය හැක. නමුත් 80B(සී) දරණ ඡේදයෙහි ප්‍රතිපාදනයන්ට අනුකූලව පෙත්සම්කරු කටයුතු නො කිරීමට එය ඔහුට සමාවක් යැයි ගිණිය නොහේ. තවදුරටත් සළකා බලන කල මැතිවරණ විනිශ්චයකරුවකු විසින් පුළුල් ලෙස වෝදනා මුඛයෙන් සඳහන් කරන කරුණු අඩංගු පෙත්සම් පිළි-

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ගෙන නඩුව විභාග වන අවස්ථාවේ දී සවිස්තරව කරුණු සැපයීමට නියෝග කිරීම වර්ෂ 1970 අංක 9 දරණ සංශෝධන පනතින් ව්‍යවස්ථා සම්පාදක මණ්ඩලය ඉවත් කළ ප්‍රමාද දෝෂය නැවත වාරයක් විනිශ්චයාත්මක කාර්ය සම්ප්‍රදයකින් ඇතුළත් කිරීමක් වනු ඇත. තවද තමාට විරුඬව චෝදනා මුඛයෙන් කියන ලද සිද්ධියක් සම්බන්ධයෙන් කරුණු විමසා බැලීමට සහ තමාගේ නිදහස පිණිස සාක්ෂි රැස්කර ගැනීමට වගඋත්තරකරුවකුට චෝදනා මුඛයෙන් කී සිද්ධිය සිදු වී ස්වල්ප කාලයක් ඇතුළත ලැබෙන නිවේදනයකින් එය ඊට බොහෝ සේ ප්‍රමාදවී ලැබී විස්තර සැපයීමට නියම කිරීමට වඩා මනෝඥ තත්වයක් වගඋත්තරකරුවකුට ඇති වේ. මෙම පැනවීම කෙරෙන ලද්දේ වගඋත්තරකාර පාර්ශ්වකරුවකුගේ ප්‍රයෝජනයට සහ සාධාරණ නඩු විභාගයක් සාධාරණ වශයෙන්ම පැවැත්වීම පරමාර්ථය කොටගෙන වගඋත්තරකරුවාගේ ප්‍රයෝජනය පිණිස වේ. මේ නිසා එය නිර්දේශාත්මක (directory) නියෝගයක් ලෙස මට සිතාගත නොහැකි වන අතර එය විධානාත්මක නියෝගයකැයි මම සළකමි. මැතිවරණ පෙත්සමක් උපචාරාත්මක විරෝධයක් (formal objection) මතු කිරීම නිසා බිඳ නොවැටිය යුතු යැයි කියන පැනවීම ඇතුළත් ඉංග්‍රීසි පාර්ලිමේන්තු මැතිවරණ පෙත්සම් පිළිබඳ රීතිවල අංක 60 දරණ රීතිය මෙහි දී අදල වන ලෙස සළකා ගත යුතු යැයි උගත් නීතිවේදියා කරුණු සැළකර සිටියේය. රාජසභා ආඥා පනතේ අංක 86(2) දරණ ඡේදයට අනුව කල්පනා කරන විට මෙම රීතිය සුදුසු අවස්ථාවල අදල වන්නක් ලෙස ගිණිය යුතු යැයි මම සිතමි. *සරවනමුත්තු එ. ජෝසප් සිල්වා*, 42 න.නී.වා. 561 පිටුව 569. යන නඩුව බලන්න. අප අතර දැනට පැන නැගී තිබෙන මේ නඩුවෙහි ඉදිරිපත් වී ඇති විරෝධය පැන නැග ඇත්තේ රාජාඥාවේ විධානාත්මක ප්‍රතිපාදනයකට අනුකූලව කටයුතු කිරීමට නොහැකි වී ඇති නිසාය. අපේ මැතිවරණ නීතියෙහි ඇති නීති පාඨ තත්වය අනුව මෙම විරෝධය සැළකිය යුතු විරෝධයකි. ඒ නිසා ඉහත සඳහන් 60 වැනි රීතිය එයට අදල නොවේ ය යන්න මගේ මතය වේ. අංක 12 දරණ රීතිය අනුව ඇප මුදලක් තැබීමට නොහැකි වූ අවස්ථාවක හැර එහි පැනවීම්වලට අනුකූලව ක්‍රියා කිරීම මග හැරී ගිය අවස්ථාවක මැතිවරණ පෙත්සමක් නිෂ්ප්‍රභ කළ යුතු යැයි පැනවීමක් අපේ රාජ සභා ආඥා පනතේ නැත. ජයග්‍රාහක අපේක්ෂකයා වගඋත්තරකරුවකු නොකිරීමේ හේතුවෙන් පෙත්සම් නිෂ්ප්‍රභ කොට තිබේ. *ඇල්. රාජපක්ෂ එ. ඇස්. කදිරගාමනාදන්*, 68 න.නී.වා. 14, යන නඩුව බලන්න. එමෙන්ම අංක 15 දරණ රීතියෙන් නියමිත ඇතිව පරිදි පෙත්සමක් ඉදිරිපත් කළ බව යථා කාලයෙහි නිවේදනය නොකිරීමේ හේතුවෙන් ද පෙත්සම් නිෂ්ප්‍රභ කොට තිබේ. *ආරොන් එ. සේනානායක*, 40 න.නී.වා. 257, *ජී. ඒ. කුරේ එ. එච්. ජේ. ජී. ප්‍රනාන්දු*, 54 න.නී.වා. 400 සහ *කේ. රාමලිංගම් එ. වී. කුමාරස්වාමි*, 54 න.නී.වා. 494 යන නඩු බලන්න.

නයර් එ. ටික්, 2 ස.එ.වා. 34 යන නඩුවේ දී රාජාධිකරණය අපේ 15 වැනි රීතියට ප්‍රායෝගික වශයෙන් සමාන කම් (practically same) ඇති මලයාසියාවේ මැතිවරණ පෙත්සම් රීතිවල 15 වැනි රීතිය සලකා බලා නියමිත කාලය තුළ දී නිවේදනය නොදීම පෙත්සම නිෂ්ප්‍රභ කිරීමට හේතුවෙයයි තීරණය කළේය. තවත් කරුණු සඳහන් කළ රාජාධිකරණය එහි මෙසේ කියා තිබේ: ''උදහරණයක් වශයෙන් කිවහොත් මේ රටේ ශ්‍රේෂ්ඨාධිකරණයේ රීතිවලට ඉදුරාම වෙනස්වන ආකාරයෙන් අක්‍රමිකතාවක් සිදු වී තිබීමේ හේතුවෙන් කාලය දිගු කිරීමට බලයක් මැතිවරණ විනිශ්චයකාරවරයකුට මෙම රීතිවලින් නොලැබේ. මේ විධියට අවකාශයක් නොතබනු ලැබීම ඕනෑකමින්ම කළ උපාය මාර්ගයක් යැයි මෙම සාමි මණ්ඩලය කල්පනා කරයි. විනිශ්චයකාරවරයා විසින් කෙරිගෙන යන පරීක්ෂණය කල් දැමීමට හෝ නීති කෘත්‍යය සංශෝධනය කිරීමට හෝ ඔහුට බලය නිබිය යුතු යයි අදහස් කරන ලද අවස්ථාවන්හි ප්‍රකට ලෙසම ඒ බලය ඔහු පිටපවරා තිබේ. නිදසුනක් වශයෙන් 7 වැනි, 8 වැනි සහ 19 වැනි රීති එබඳු කල් දැමීමකට හෝ සංශෝධනය කිරීමකට බලය දී ඇති අපේ 7 වැනි 8 වැනි සහ 19 වැනි රීතිවලට සමහර විට සමතාවයක් නිබීමට පුළුවන. කාලය දිගු කිරීමෙන් සහනයක් සැලසීමට ඇති සාමාන්‍ය බලයට ඉඩ නොතැබීම නිසා එම ප්‍රතිපාදනය විධානාත්මක යයි තීරණය ගැනීමට බෙහෙවින් සහේතුක වූ ලෙස සිතාමතා ගත් බව පෙනීයේ. මෙම ප්‍රතිපාදනය විධානාත්මක බැවින් එය අනුගමනය කිරීමට නොහැකි වීම නිසා සම්පූර්ණ නීති කෘත්‍යය බල ශූන්‍ය වන බවත්, 15 වැනි රීතියට අනුකූලව කටයුතු නොකිරීමේ හේතුවෙන් මැතිවරණ පෙත්සම බිඳ හෙලීමට ප්‍රකට ලෙස බලයක් දී නොතිබීමටත් ඒ තරම් කාර්‍ය්‍ය බලයක් ඇදීමට නුපුළුවන් බවත්, එබඳු මැතිවරණ පෙත්සමක් බිඳ හෙලීමට හෝ නිෂ්ප්‍රභ කිරීමට මැතිවරණ විනිශ්චය කාරවරයකුට නෛසර්ගික (inherent) බලයක් නිබිය යුතු බවත්, එහි දී වැඩිදුරටත් තීන්දු කරන ලදී.

මැතිවරණ පෙත්සමක් පාර්ශ්වකරුවන්ට පමණක් බලපාන දෙයක් නොවීම හා එය මුළු මැතිවරණ ආසනයේම උනන්දුවට හේතුවන දෙයක් වීම ගැන ද ඒ නිසාම එය පිළිබඳව පරීක්ෂණයක් පැවැත්වීම වැළැක්වෙන හැටියට කටයුත්ත සැහැල්ලුවට ගෙන නියෝගයක් නොදිය යුතු බව ගැන මට අමතක වී ගොස් නැත. අනිත් අතින් සලකා බලන විට ප්‍රශ්නයට භාජන වී ඇති මෙම පැනවීම් අනුගම්‍ය නීති විධිවිධානයන් (imperative) වන අතර එවකට පැවැත්වුනු නීතියෙහී වූ අඩුලුහුඩු යයි තමන් විසින් කල්පනා කරන ලද දෙයට ප්‍රතිකර්මයක් සැලසීමේ පරමාර්ථයෙන් ව්‍යවස්ථා සම්පාදක මණ්ඩලය විසින් මේවා සංශෝධන පනතකින් පනවා තිබෙන ප්‍රතිපාදන වෙති. වගඋත්තරකරුවන් ලෙස එකතු කළ යුතු පුද්ගලයන් පාර්ශ්වකරුවන් ලෙස ඇදීමට හෝ මැතිවරණ පෙත්සමක් ඉදිරිපත් කළ යුතු කාලය ඉක්ම ගිය පසු එයට සංශෝධනයක් කිරීමට ඉඩ දීමට හෝ බලයක් සඳහන් වී නැති කලෙක යම්කිසි සහනයක් දීමට ප්‍රවීණ ක්‍රියා බලයක් මා වෙත නොමැතිය. කරුණු මේ ආකාරයෙන් තිබිය දී ව්‍යවස්ථා සම්පාදක මණ්ඩලය විසින් පැනවුණු එබඳු අනුගම්‍ය වූත් ඇත්ත වශයෙන්ම විධානාත්මක වූත් ප්‍රතිපාදනයන් යථා විධියෙන් ක්‍රියාත්මක කිරීම මැතිවරණ විනිශ්චය කරුවකු වශයෙන් මගේ යුතුකම වේ. ප්‍රතිපත්තියට අනුවත් ඉහතින් දී ඇති නඩු තීන්දු වලින් ලැබෙන බලයට අනුවත් එබඳු පැනවීම්වලට අනුව ක්‍රියා කිරීමට නොහැකි වීමේ ප්‍රතිඵලය වන්නේ මැතිවරණ පෙත්සම නිෂ්ප්‍රභ කිරීමය. ඒ අනුසාරයෙන් ගාස්තුව වශයෙන් රු: 1,050/- ක් නියම කොට මෙම පෙත්සම නිෂ්ප්‍රභ කරමි.

පෙත්සම නිෂ්ප්‍රභ කරන ලදී.

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ද ක්‍රෙට්සර් සහ විජයතිලක විනිශ්චයකාරතුමන්ලා ඉදිරිපිටදී

කේ. අන්දිරිස් එ. දෙන් ප්‍රැන්සිස්කු තෝමරත්න*

ශ්‍රේ: අ: අයැදුම්පත් අංකය: 293/69 — ක්වෝ වොරන්ටෝ ආඥාව

විවාද කර තීන්දුව දුන්නේ: 1969 සැප්තැම්බර් 21 වැනිද

ක්වෝ වොරන්ටෝ ආඥාව — ගම්කාර්ය සභාවේ සභිකයකු වශයෙන් තේරී පත්වීම — සභිකයා එම ධුරයේ වැඩ භාර ගැනීමට පෙර තේරී පත්වීම අවලංගු කරවීම පිණිස ආඥාවක් නිකුත් කරන සේ ඉල්ලීම — ගම්කාර්ය සභා ආඥා පනතේ (257 වැනි අධිකාරයේ) 11(1) වැනි ඡේදය යටතේ එම ඉල්ලීමට ඉඩක් නැතැයි යන මූලික විරෝධතාව.

මෙහි වගඋත්තරකරු ගම්කාර්ය සභා ආඥා පනතේ (257 වැනි අධිකාරයේ) 11(1) වැනි ඡේදය අනුව ගම් සභික ධුරය 1.7.1969 වැනි දින සිට දැරීම පිණිස නිසි අයුරින් තේරී පත්වුණු බව 22.3.1969 වැනි දින නාම යෝජනා භාරදීමට නියමිත දිනය ප්‍රකාශ කැරිණ.

මෙම තේරී පත්වීම අවලංගු බව ප්‍රකාශ කරන ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කරන මෙන් එම ගම්කාර්ය සභාවේ අය බදු ගෙවන්නකු වන පෙත්සම්කරු 19.5.1969 වැනි දින දනමින් යුතු පෙත්සමකින් ඉල්ලා ඇත.

වගඋත්තරකරු මෙම ගම්කාර්ය සභාවේ සභාපති වශයෙන් තේරී පත්වුණු මෙම ගම්කාර්ය සභාවේ ප්‍රථම රැස්වීම 17.7.1969 වැනි දින පැවැත්වුණු බව වගඋත්තරකරුගේ දිවුරුම් පෙත්සමේ දක්වෙයි.

වගඋත්තරකරු තේරී පත්වී ඇති බවට ඡන්ද පොල භාර නිලධාරියා ප්‍රකාශ කළ වහාම එහි පැමිණ සිටි අය අමතා, සිය යුතුකම් තම ශක්ති ප්‍රමාණයෙන් හොඳින්ම ඉටු කිරීම ආදියට ප්‍රතිඥා දුන් බව පෙත්සම්කරු උසාවියට පෙන්වා දුන්නේය.

මෙම අයැදුම් පත විභාග කිරීමේ දී ඉදිරිපත් කළ මූලික විරෝධතාවය පිළිබඳව —

තීන්දුව: (1) නයිසයි නියෝගය නිකුත් කැරුණු අවස්ථාවේ වගඋත්තරකරු ගම්කාර්ය සභාවේ කිසිදු රැස්වීමකට සහභාගි වීමක් හෝ එම ධුරය භාරගත් හෝ එහි කටයුතු කළ බවක් හෝ පෙන්වන ක්‍රියාවක් කර නැති බැවින්, එම තත්වය මත ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කිරීමට ඉඩ නැත.

(2) ඔහු තේරී පත්වුණු දිනයේ ඔහු කළ කතාවේ යොදන ලද වචනවලින් දක්වන ලද්දේ තමා ගම්කාර්ය සභාවේ අසුන නිසි විට ගත් කල කිරීමට අදහස් කරන දේ පිළිබඳ ප්‍රකාශයකට නොවැඩි යමක් නොවන අතර, තේරී පත්වීමෙන් හිමිවන අයිතිවාසිකම් පාවිච්චි නොකිරීම වඩා ඥානවන්ත දැයි තීරණය කිරීමට ඔහුට සැහෙන කල් තිබිණ.

(3) නිලයට පත්වුණු බව කීම පමණක් ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කිරීමට ප්‍රමාණවත් නොවේ. නිලය දැරීම හෝ එය පාවිච්චිය ද සිදුවිය යුතුයි.

සලකා බැලූ නඩු: ද සොයිසා එ. කුලතිලක 46 න.නී.වා. 143
ආම්ස්ට්‍රෝං නඩුව (1856) 25 එල්. ජේ. කිව්. බී. 238
ධර්මරත්න එ. මැතිවරණ කොමසාරිස් (1950) 52 න.නි.වා. 429

සලකා බැලූ කෘති: හෝල්ස්බරි 11 වැනි වෙලුම (සිමන්ඩස් මුද්‍රණය) 148 වැනි පිටුව.

නිමල් සේනානායක එම්. ඩබ්ලිව්. අමරසිංහ කැටුව පෙත්සම්කරු වෙනුවෙන්.

රාජනීකිඳ එච්. ඩබ්ලිව්. ජයවර්ධන, ජී. එම්. එස්. සමරවීර කැටුව වගඋත්තරකරු වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

වගඋත්තරකරු, වීරකැටිය ගම්කාර්ය සභාවේ, මුරුතවල, 2 වැනි කොට්ඨාශයේ ගම්කාර්ය සභිකයා වශයෙන් තේරී පත්වීම නිෂ්ප්‍රභ කොට අවලංගු කරන ලෙස අයැදිමින් ඒ සඳහා ක්වෝ වොරන්ටෝ ආඥාවක ස්වරූපයේ අධිකරණ විධානයක් නිකුත් කරන ලෙස ඉල්ලමින් වීරකැටිය ගම්කාර්ය සභාවේ අයබදු ගෙවන්නකු වූ පෙත්සම්කරු 69.5.19 වැනි දින දරන මෙම අයැදුම්පත ඉදිරිපත්කොට ඇත.

නාම යෝජනා භාර ගැනීමේ දිනය වූ 1969 මාර්තු මස 22 වැනි දින වෙනත් නාම යෝජනාවක් ඉදිරිපත් නොවූයෙන් වගඋත්තරකරු මෙම කොට්ඨාශයේ සභිකයා

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 33 වෙනි පිට බලනු.

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වශයෙන් තේරී පත් වූ බවට ප්‍රකාශ කරන ලදී. වගඋත්තරකරු 64.12.23 වැනි දින සිට මිද්දෙනිය ගම්කාර්ය සභාවේ 21 වැනි කොට්ඨාශයේ සභිකයා වශයෙන් තේරී පත්ව සිටින හෙයින් ඔහු තේරී පත්වීමට නුසුදුස්සකුව සිටි බව පෙත්සම්කරු කියා සිටී. එදින සිට මිද්දෙනිය ගම්කාර්ය සභාවට සභිකයන් තෝරා පත් කිරීමක් හෝ එම සභාව විසුරුවා හැරීමක් හෝ සිදු නොවූ බව ඔහු කියා සිටී. වගඋත්තරකරු සෑම විටකම මිද්දෙනිය ගම්කාර්ය සභා මැතිවරණ ප්‍රදේශයේ රටුව මැද මූලානේ පදිංචිව සිටින බව ද, ඔහු ප්‍රකාශකර සිටී. මෙම කරුණු ප්‍රකාශවල නිරවද්‍යතාවය ප්‍රතික්ෂේප කරමින් වගඋත්තරකරු දිවුරුම් පෙත්සමක් ඉදිරිපත් කොට ඇත.

ක්වෝ වොරන්ටෝ ආඥාවක් සඳහා කරන ලද අයැදුම්පත 69.5.19 වැනි දින ඉදිරිපත් කර ඇති හෙයින් එවැනි ආඥාවක් නිකුත් කළ නොහැකි බවට වගඋත්තරකරුගේ අධිනීතිඥවරයා ආරම්භයේ දී ම විරුද්ධත්වය පළ කර ඇති හෙයින් මෙම අවස්ථාවේ දී මෙම සිද්ධියට අදාල කරුණු පිළිබඳව තීරණයක් කිරීම අවශ්‍ය නොවේ. මෙදින වන විට සිදු වී ඇත්තේ, ව්‍යවස්ථාපිත අණපණත්හි 257 වැනි අධිකාරයේ 11(1) වැනි වගන්තියට අනුකූලව වගඋත්තරකරු 69.3.22 වැනි දින නිසි පරිදි නිලයක් දැරීමට තේරී පත් වූ බවට ප්‍රකාශකර තිබීම පමණකි. ඔහු 46 වැනි නව නීති වාර්තාවේ 143 වැනි පිටුවේ වාර්තාකොට ඇති ද සොයිසා එ. කුලතිලක යන නඩුව මේ සඳහා පිටුබල කොට ගෙන ඇත. එම නඩුවේ දී, නයිසයි ආඥාව නිකුත් කරන අවස්ථාවේ, වගඋත්තරකරු ගම්කාර්ය සභාවේ කිසිදු සභා වාරයකට සහභාගි වී නැත්නම් හෝ ඔහු එම නිලයෙහි වැඩ බලා ඇති බව හෝ එම නිලය පිළිගත් බව හෝ විදහා දැක්වෙන ක්‍රියාවක් කොට නැත්නම් හෝ ඔහු තෝරා පත් කිරීම නිෂ්ප්‍රභ කිරීමට ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් නොකරන බව විජේවර්ධන විනිශ්චයකාරතුමා විසින් තීරණය කරන ලදී.

අඵතින් තෝරා ගනු ලැබූ ගම්කාර්ය සභාවේ පළමු සභා රැස්වීම පවත්වන ලද්දේ 1969 ජූලි මස 18 වැනි දින යයි ද, වගඋත්තරකරු අසුන් ගෙන ඡන්දය පාවිච්චි කළේත්, ඔහු සභාපතිවරයා ලෙස තෝරා ගන්නා ලද්දේත් එම රැස්වීමේ දී යයි ද යන වගඋත්තරකරුගේ දිවුරුම් පෙත්සමේ සඳහන් ප්‍රකාශයන් ප්‍රශ්න කොට නොමැත.

වග උත්තරකරු තේරී පත් වී ඇති බවට ඡන්ද පොළ භාර නිලධාරියා ප්‍රකාශ කළ වහාම වගඋත්තරකරු පැමිණ සිටි අය අමතා තමාට හැකි තරම් ඉහළින් ඡන්ද කොට්ඨාශයේ සභිකයා වශයෙන් තමා තම රාජකාරිය ඉටු කරන බව ද, බදු ගෙවන්නන් තමාගේ ආධාරකරුවන් වුවත් නොවුවත්, හැම දෙනාටම එක හා සමානව හොඳින් සේවය කරන බවට ද ඔහු පොරොන්දු වීමත්, ඔවුන්ට ගෞරවයක් ගෙන දීම සඳහා තමා සභාපතිකමට තරඟ කිරීමට අදහස් කරන බව ප්‍රකාශ කළ බවත් ඔහු නිලය භාරගත් බැව් විදහා දැක්වීමට ප්‍රමාණවත් යයි පෙත්සම්කරුගේ අධිනීතිඥවරයා කියා සිටියේය.

තේරී පත්වීමේ ප්‍රීතියෙන් උදම් ව කරන ලද මෙම ප්‍රකාශවලින් තමා යථා කාලයේ දී සභාවේ අසුන් ගත් විට ඉටු කිරීමට අදහස් කරන කාර්‍යයන්ට වඩා වැඩි දෙයක් නොපැවසෙන බව මට පෙනී යන අතර, මේ සියල්ල කී දිනයත් 1969 ජූලි මාසයේ තම අසුන ගෙන තම නිලය භාර ගත හැකි මෑතම දිනයත් අතරතුර තමා තේරී පත්වීමෙන් තමන්ට අයත් වූ අයිතිවාසිකම් භුක්ති නොවිඳීම වඩා නුවණට හුරු යයි තීරණය කිරීමට ඕනෑ තරම් කාලයක් ඔහුට තිබුණි. *ආම්ස්ට්‍රෝං* පිළිබඳ නඩුවේ දී (1856) 25 නී.ස.උ.අ. 238 පෙන්වා දෙන ලද පරිදි වගඋත්තරකරු නියම වශයෙන්ම නිලය දරමින් එය භුක්ති විඳින බවට උසාවිය සෑහීමට පත් වන්නේ නම් මිස, ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් නොකෙරේ.

හුදෙක් නිලයට පත් කරන ලද බවට හිමිකම් කියා පෑම පමණක් ප්‍රමාණවත් නොවේ යයි *හැල්ස්බරී*, 11 වැනි වෙළුමේ (සිමන්ඩ්ස්) මුද්‍රණය 148 වැනි පිටුවේ පෙන්වා දෙයි. නිලය දැරීමක් හෝ භුක්ති විඳීමක් මෙන්ම, හිමිකම් කියා පෑමක් ද තිබිය යුතුයි. ප්‍රශ්නයට භාජනව ඇති මෙම නඩුවේ දී 257 වැනි අධිකාරයේ 11(2) වැනි වගන්තිය අනුව වගඋත්තරකරුගේ පූර්වගාමියා 1969 ජූලි මාසයේ 2 වැනි දින තෙක් තව දුරටත් නිලයේ සිටි හෙයින් එදින තෙක් වගඋත්තරකරුට 2වැනි ඡන්ද කොට්ඨාශයේ සභිකයා විය නොහැකිය. කිසියම් පුද්ගලයකු අනිසි අන්දමින් පළාත් පාලන ආයතනයක සාමාජිකයකු ලෙස තෝරා පත් කරනු ලැබුව ද, ඔහු තවමත් නිලය භාරගෙන නොමැති නම් ඔහු තෝරා පත් කිරීම නිෂ්ප්‍රභ කිරීමට ඇති නිසි පිළියම ක්වෝ වොරන්ටෝ ආඥාවක් මගින් නොවේ.

මූලික විරෝධිතාවය පිළිගෙන අයැදුම්පත නිෂ්ප්‍රභා කරමින් එහි ගාස්තුව ගිනි 25 ක් ලෙස නියම කරමි.

විජයතිලක විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

අයැදුම්පත නිෂ්ප්‍රභ කරන ලදී.

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අලස් විනිශ්චයකාරතුමා සහ තෙන්නකෝන් විනිශ්චයකාරතුමා ඉදිරිපිටදී

ඒ. ඇල්. මල්හාමි සහ තවත් අයෙක් එ. ඊ. ඇස්. අංගම්මන*

ශ්‍රේ. අ. අංක 36/57 (අවසාන) — රත්නපුරයේ දිස්ත්‍රික් උසාවිය අංක 4804

විවාද කළේ: 1970 ජනවාරි 23 වැනිදා
තීන්දු කළේ: 1970 ජනවාරි 26 වැනිදා

සාක්ෂි ආඥා පනත, 114 වැනි ඡේදය, (f) ලකුණ දරණ නිදර්ශනය — කිනම් අවස්ථාවල මෙම ඡේදයේ සඳහන් පූර්වානුමැතිය ක්‍රියාවේ යෙදීම නොකළ යුතු ද?

තීන්දුව: සාක්ෂි ආඥා පනතේ 114 වැනි ඡේදයේ ප්‍රතිපාදනය අනුව උසාවියකට යම්යම් සුදුසු අවස්ථාවල දී යම් යම් සිද්ධීන් විද්‍යමාන බවට පූර්ව නිගමනයක් කිරීමට අවසරය තිබේ. එසේ කිරීම අනිවාර්ය නොවේ. යම් නඩුවක කරුණු අනුව එසේ පූර්ව නිගමනයක් කිරීම නොසැහේ නම් උසාවියට එසේ නොකළ හැක.

නඩුවක සාක්ෂි දීමට පැමිණිල්ලෙන් ගම්මුලාදැනියෙක් සිතාසි යවා කල්ගිය නඩු විභාග දින කිපයකදීම ඔහු පැමිණ සිටි නමුත් අන්තිමට විභාගයට නඩුව ගත් දිනයේ දී ඔහුට නිකුත් කළ සිතාසිය හාර නොදී ආපසු එවීම නිසා ඔහු නොපැමිණියේය. එදින විත්ති පක්ෂයෙන් නඩුව කල් දැමීමට ඉල්ලා පැමිණිලි පක්ෂය ඊට සතුටු වූ නමුත් විනිශ්චයකාරතුමා නඩුව විභාගයට ගත්තේය. පැමිණිලිකරු සාක්ෂි දෙමින් තමා විසින් විත්තිකරුවන්ට විරුද්ධව ප්‍රස්තුත ආරවුල සම්බන්ධ ගම්මුලාදැනියාට කළ තමාගේ අත්සන සහිත පැමිණිල්ල අඩංගු දිනපොතේ සටහනක් ද තමාගේ වාචක සාක්ෂිය තහවුරු කිරීමට ඉදිරිපත් කළේය.

තීන්දුව: මේ කරුණු පිට සාක්ෂි ආඥා පනතේ 114 වැනි ඡේදයේ (f) ලකුණ දරණ නිදර්ශනය අනුව සාක්ෂිකාරයා නොකැඳවූයේ ඔහුගෙන් බලාපොරොත්තු සාක්ෂිය පැමිණිල්ලට පිළිසරණ නොවෙන නිසාය යන පූර්වානුමැතිය විනිශ්චයකාරතුමා විසින් පිළිනොගැනීම යුක්තිසහගතය.

සලකා බැලූ නඩුව: සන්තියා පිල්ලේ එ. සිත්තම්පලම්, 36 ලංකා සනිපතා නීති සංග්‍රහය 49 වැනි පිටුව.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ජී. ඩී. සී. වීරසිංහ මහතා සමග, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්

සැම් ජී. සී. ප්‍රනාන්දු මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

තෙන්නකෝන් විනිශ්චයකාරතුමා:

විත්තිකරුවන් විසින් මැණික් ගැරීම පිණිස භාවිතා කිරීමට කුලියට ගත් රස්ටන් හෝර්න්ස්බි වර්ගයේ ඇංජිමක් සහ වතුර පොම්පයක් සඳහා තමාට ලැබිය යුතු මුදල වන රුපියල් 5,726.88 ක් ලබා ගැනීමේ අදහසින් පැමිණිලිකරු ඔවුන්ට නඩු පැවරිය. විත්තිකාර ඇපැල්කරුවන් විසින් (මින් පසු ඔවුන්ට විත්තිකරුවන් යයි සඳහන් වේ) කරුණු දැක්වූයේ මෙම ගනුදෙනුව කිසිසේත් සිදු නොවිය යන්න කියා පෑමෙනි. වැඩිදුරටත් ඔවුන් විසින් ගන්නා ලද තත්වය වූයේ මෙම නඩුව පැමිණිලිකරු විසින් පවරන ලද්දේ ඔවුන්ට පීඩා කිරීමට සහ නින්ද කිරීමටය යන්නය. පැමිණිලිකරුගේ තත්වය ස්ථාපිත කිරීමට තිබූ ප්‍රධාන සාක්ෂි වශයෙන් ඉදිරිපත් කරන ලද්දේ පැමිණිලිකරුගේ සාක්ෂිය ම ය. විත්තිය වෙනුවෙන් දෙවන විත්තිකරු සාක්ෂි දෙමින් කියේ ඔහු සහ ඔහුගේ සහායක විත්තිකරු කිසිම ඇංජිමක් හෝ වතුර පෝම්පයක් හෝ පැමිණිලිකරුගෙන් කුලියට නොගත් බවය. පැමිණිලිකරුගේ සාක්ෂිය විශ්වාස කළ උගත් විනිශ්චයකාරවරයා පැමිණිලිකරු අයැද සිටි ආකාරයටම පැමිණිලිකරුගේ වාසියට නඩු තීන්දුව ගාස්තුවත් සමගම දුන්නේය.

ඇපැල් නඩු විභාගය පැවැත්වෙන අවස්ථාවේ දී විත්තිකරුවන් වෙනුවෙන් පෙනී සිටි නීතිවේදියා උගත් දිස්ත්‍රික් විනිශ්චයකාර වරයා විසින් සමහර දේ පිළිබඳව තමා විසින් ම යම් යම් දේ වරදවා තේරුම් ගෙන ඇති බව සැළකර සිටියේය. තමාට ගෙවිය යුතු දෙය විත්තිකරුවන් විසින් නොගෙවා සිටින බව වැටහුනු විට තමා ගම්මුලාදැනියා වෙත ගොස් පැමිණිල්ලක් කළ බව තම සාක්ෂියේ දී පැමිණිලිකරු විසින් කියන ලද බව පෙනියේ. පැමිණිලිකරු විසින් විත්තිකරුවන්ට කුලියට

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශය 80 වෙනි කාණ්ඩය 35 වෙනි පිට බලන්න.

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දුන් ඇංජිමේ අංකය ද සඳහන් මෙම පැමිණිල්ල ගම්මුලාදැනියා ඔහුගේ දිනපොතේ ලියාගත් බවත් පැමිණිල්ලට තමා ම අත්සන් කළ බවත් පැමිණිලිකරු කියා ඇත. ඉන්පසු ගම්මුලාදැනියා පැමිණිලිකරු සහ තෙලේනිස් නමැති තවත් තැනැත්තකු සමග (තෙලේනිස් ද සාක්ෂියට කැඳවා තිබේ.) විත්තිකරුවන් මැණික් ගැරීමේ වැඩපලවල යෙදී සිටි ඉඩමට ගිය බවත් තමා විසින් ම එම ඉඩමේ දී ඉහත කී ඇංජිම සහ එහි අංකය පෙන් වූ විට ගම්මුලාදැනියා ඇංජිමේ නොම්මරය හරිදැයි පරීක්ෂා කර බලන ලද බවත් පැමිණිලිකරු විසින් කියා ඇත. පැමිණිලිකරුට තිබුන එකම ස්වාධීන සාක්ෂිය වන ගම්මුලාදැනියා පැමිණිලිකරු විසින් නොකැඳවා ඇති නිසා ඔහු පැමිණියේ නම් පැමිණිලිකරුගේ ප්‍රවෘත්තිය සනාථ නොකරනු ඇතැයි යන පූර්ව නිගමනයට අධිකරණය බැස ගත යුතුයයි ඇපැල්කරුවන්ගේ නීතිවේදියා සැලකර සිටියේය. සාක්ෂි ආඥා පණතේ 114 වන ඡේදය එහි වූ (f) නිදර්ශනයක් සමග කියැවූ විට නීතිවේදියාගේ තර්කයට ඉන් පිළිසරණක් ලැබෙනු ඇත. නමුත් මෙම පැණවීමෙහි දී සමහර කරුණු යම් යම් පරිසරයන්හි පවතින විට උසාවියට රිසි නම් එසේ යයි පූර්ව නිගමනයකට බැසිය හැකි යයි පැණ වී තිබෙනු මිස බැසිය යුතු ම යයි පැණවී නැත. මේ නිසා යම් නඩුවක විශේෂ කරුණු සලකා බලන විට එසේ කිරීම යුක්ති යුක්ත නොවේ යයි සිතේ නම් උසාවියකට එසේ පූර්ව නිගමනයකට බැස ගැනීම ප්‍රතික්ෂේප කිරීමට පුළුවන. වර්ෂ 1966 දෙසැම්බර් මස 16 වැනි දින මෙම නඩුව අවසානයේ දී ඇසීමට පෙර එය ඇසීම පිණිස කලින් නියම කරන ලද බොහෝ දිනවල මෙහි පැමිණිලිකරු විසින් ගම්මුලාදැනියාට සිතාසි යවා තිබුන බවත් එම දිනයන්හි ඔහු උසාවියට පැමිණ සිටි බවත් නඩු පොතින් පැහැදිලි ව පෙනී යයි. අවසාන වශයෙන් මෙම නඩුව 1966.12.16 වැනි දින විභාග කිරීමට නියමිත ව තිබිය දී දිස්ත්‍රික් විනිශ්චයකාරවරයාගෙන් නඩුව කල් දැමීමට යයි විත්තිකරුවන් විසින් ඉල්ලන ලදී. එසේම පැමිණිලිකරු විසින් කැමැත්ත දෙන ලද ඉල්ලීමත් ප්‍රතික්ෂේප කොට තිබේ. ඔහු එය ප්‍රතික්ෂේප කොට ඇත්තේ එම දිනය නඩු විභාගය සඳහා නියම කළ අටවැනි වාරයේ දිනය බව කීමෙනි. මේ දිනයේ දී එනම්, 1966.12.16 වැනි දින, මෙම නඩුව විභාගයට ගෙන එම විභාගය නිමාවට පත් වී තිබේ. ගම්මුලාදැනියා සාක්ෂිකරුවකු වශයෙන් එදින පැමිණ නැත. පැමිණිලිකරු විසින් ගම්මුලාදැනියාට දීම පිණිස ලබාගත් සිතාසිය ගම්මුලාදැනියා ගෙදර නැති බව සහ ඔහු මැණික් ගැරීමට පිටත්ව ගොස් ඇති බවත් වාර්තා කොට ආපසු එවා තිබේ. කරුණු මෙසේ තිබිය දී පැමිණිලිකරු ගම්මුලාදැනියාගේ වාචක සාක්ෂිය නොමැතිව තමන්ගේ නඩුව ඉදිරිපත් කෙරිය. කෙසේ හෝ ගම්මුලාදැනියාගේ දිනපොතේ සඳහන් ව තිබුන පැමිණිලිකරුගේ අත්සනට උඩින් ලියවන ලද පැමිණිලිකරු විසින්ම ගම්මුලාදැනියාට කරන ලද පැමිණිල්ල පැමිණිලිකරු ඉදිරිපත් කළේය. මෙම ලිපියෙන් පැමිණිලිකරු තමාගේ සාක්ෂියේ දී ගම්මුලාදැනියාට පැමිණිල්ලක් ක බවත්, ඒ පැමිණිල්ලේ දී තමා විත්තිකරුවන් සමග කළ ගනුදෙනුව පිළිබඳ විස්තර කියා තිබුන බවත් ප්‍රකාශ කිරීම හා සම්පූර්ණයෙන් සැසඳෙයි. මේ කරුණු සියල්ල ගැන සලකා බලන විට යම් හෙයකින් ගම්මුලාදැනියා සාක්ෂියට කැඳෙව්වේ නම් ඔහු පැමිණිලිකරුගේ නඩුවට පිළිසරණක් නොදේ යයි පූර්ව නිගමනයකට බැස ගැනීම යෝග්‍ය විය හැකියි මම නොසිතමි. මීට සමාන කරුණු උද්ගත වූ අවස්ථාවක එක් සාක්ෂිකරුවකු සාක්ෂි කීමට සිතාසි ලැබී නඩුව කල්ගිය බොහෝ දිනවල උසාවියේ පෙනී සිට නඩුව විභාගයට ගත් දින ඔහු මෙම දිවයිනෙන් පිටත ගොස් සිටීම නිසා නොපැමිණි අවස්ථාවක මෙම උසාවිය සාක්ෂි ආඥා පණතේ 114(f) ඡේදයෙන් පැණවෙන අන්දමට පූර්ව නිගමනයකට බැසීම ප්‍රතික්ෂේප කළේය. සන්තියා පිල්ලේ එ. සිත්තම්පලම්, 36 ලංකා සතිපතා නීති සංග්‍රහයේ 49 වැනි පිටුව බලන්න.

උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා තුමාගේ නඩු තීන්දුවේ දී විත්තිකරුවන්ට පැමිණිලිකරුවන්ගේ සාක්ෂිය උසාවිය මගින් අවිශ්වාස කරනු ලැබීම අවශ්‍ය වුනි නම් ඔවුන් විසින්ම ගම්මුලාදැනියා කැඳවීම කළ හැකි ව තිබුනේ යයි කීමෙන් කරුණු වරදවා වටහාගත් බව ද ඇපැල්කරුවන්ගේ නීතිවේදියා මෙහි දී සැලකර සිටියේය. එතරම් බැරුරුම් කාර්‍ය්‍ය භාරයක් විත්තිකරුවන් පිට පැවරීමෙන් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා අතින් වරදක් සිදු වී ඇති බව මා පිළිගන්නා අතර මෙම වරද පැමිණිලිකරුගේ වාසියට ඔහු විසින් බැසගෙන ඇති ශක්තිමත් නිගමනයත් බිඳ හෙලීමට ප්‍රමාණවත් හේතුවක් යයි මා නොසිතන්නේ එම තීරණයන්ට ඔහු එළඹ ඇත්තේ එක් එක් පක්ෂයක සාක්ෂිකරුවන් කෙරෙහි තැබිය යුතු විශ්වාසය ඉතා විශාල ලෙස පදනම්කොට ගෙන නිසාය.

මේ අනුසාරයෙන් සලකා මෙම නඩුව ගාස්තුවට ද යටත් කොට නිෂ්ප්‍රභ කරමි.

අලස් විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

නිෂ්ප්‍රභ කරන ලදී.

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විජයතිලක විනිශ්චයකාරතුමා ඉදිරිපිටදී

මත්තියපරණම් එ. වෙරළබඩ පොලිසිය, කොළඹ*

ශ්‍රේෂ්‍යාධිකරණයේ අංක 385/69 සමග 34/70 අයැදුම්පත — කොළඹ ඒ. ම. ඵ. අංක 38732

විවාදකර තීන්දුව දුන්නේ: 1970 ජූලි මස 9 වැනි දිනදීය

රේගු ආඥා පනත — 101(1) වැනි වගන්තිය — චිත්තිකරු රේගු ස්ථානය තුළ පිහිටි කොටහේනේ ක්‍රෝට-බෝම් වීදියේ දී කරන ලදැයි කියන චෝදනාවකට වැරදිකරු වීම. — පැමිණිල්ලේ සාක්ෂිවලින් සඳහන් වූයේ අලුත් මාවත පාර ගැනය — ක්‍රෝටබෝම් වීදිය රේගු ස්ථානය තුළ යයි හෝ කොළඹ වරායේ සීමාවන් රේගු ස්ථානයේ සීමාවන්ට සමාන යයි සාක්ෂි නැතිවීම — වැරදිකරු බවට පත්කිරීම අනුමත කළ හැකිද?

රේගු ආඥා පනතේ 101 (1) වැනි වගන්තියෙන් කියැවෙන පරිදි රේගු ස්ථානය තුළ යම් භාණ්ඩ කිපයක් තම අතට ගත්තේ යයි දෙවැනි චිත්තිකරු වැරදිකරු බවට තීරණය කරන ලදී. චෝදනාවෙහි සඳහන් වූයේ මෙම වරද රේගු සීමාව තුළ පිහිටි කොටහේනේ ක්‍රෝටබෝම් වීදියේ දී සිදුකරන ලද එකක් ලෙසය. එසේ වෙතත් පැමිණිල්ලේ සාක්ෂිවල සඳහන් වූයේ එම වරද අලුත් මාවත පාරෙහි සිදුකරන ලද්දක් බවය. කොටහේනේ ක්‍රෝටබෝම් වීදිය රේගු ස්ථානයේ තුළ පිහිටි බවට හෝ කොළඹ වරායේ සීමාවන් රේගු ස්ථානයේ සීමාවන්ට සමාන යයි කිසිම සාක්ෂියක් නොමැත.

තීන්දුව: රේගු ආඥා පනතේ විස්තරකොට ඇති පරිදි රේගු ස්ථානයේ සීමාවන් තුළ චිත්තිකරු මෙම වරද කරන ලදැයි ඔප්පු කිරීමට පැමිණිල්ල අපොහොසත් වී ඇත.

අනුගමනය කරන ලදී: ජිනදස එ. වෙරළබඩ පොලිසිය, 73 න.නී.වා. 75

අනුගමනය නොකරන ලදී: ජෝෂප් එ. වෙරළබඩ පොලිසිය, කොළඹ, 72 න.නී.වා. 357

රාජනීතිඥ ඒ. එච්. සී. ද සිල්වා, මනෝ දේවසාගයම් සමග, ඇපෑලේ දෙවැනි චිත්තිකාර ඇපැල්කරු සහ අයැදුම්පතේ දෙවැනි චිත්තිකාර පෙත්සම්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ නිවංක වික්‍රමසිංහ, ඇපෑලේ සහ අයැදුම්පතේ වගඋත්තරකරුවන් වෙනුවෙන්.

විජයතිලක විනිශ්චයකාරතුමා:

දෙවැනි චිත්තිකරු වෙනුවෙන් පෙනී සිටි උගත් රාජනීතිඥ ඒ. එච්. සී. ද සිල්වා මහතා රේගු ආඥා පනතේ 101(1) වැනි වගන්තියේ අදහස් කොට ඇති පරිදි රේගු ස්ථානය තුළ දී භාණ්ඩයන් වගයක් — ඩී.පී.සී. රසදිය බෝතල් පහක් — දෙවැනි චිත්තිකරු අතට ගත්තේ යයි පැමිණිල්ලට ඔප්පු කිරීමට අපොහොසත් වී යයි කියා සිටියේය. පැමිණිල්ල විසින් මෙහෙයවන ලද සාක්ෂිවලින් පෙනෙන පරිදි පළමුවැනි චිත්තිකරු අලුත් මාවතෙහි සිටිය අතර ඔහු ඔහුගේ අත කොළඹ වරායේ බිත්තියක සිදුරක් තුලින් ඇතුල්කොට මෙම භාණ්ඩ එළියටගත් අතර, මෙම තාප්පයෙහි පිටින් සිටි දෙවැනි චිත්තිකරුත් මේ භාණ්ඩයන් තම අතට ගත්තේ ඉන් පසුවය. සාක්ෂිවලින් කියැවෙන්නේ අලුත් මාවත පාර ගැන වන අතර චෝදනාවෙහි සඳහන් වන විථිය වන කොටහේනේ ක්‍රෝටබෝම් විථිය රේගු ස්ථානයේ පිහිටියක් යයි පෙන්වීමට කිසිම සාක්ෂියක් නොමැති යයි සිල්වා මහතා කියා සිටී.

ඔහු 25.3.70 වැනි දින ජිනදස එ. වෙරළබඩ පොලිසිය 73.න.නී.වා. 45) නඩුවේ තෙන්නකෝන් විනිශ්චයකාරතුමා විසින් අනුගමනය කරන ලද 5.3.69 දින දරන ශ්‍රේ. අංක 934/68 ඒ.ම.ඵ. 37659 නඩුවේ ද ක්‍රෙට්සර් විනිශ්චයකාර තුමාගේ නඩු තීන්දුව කෙරෙහි මාගේ අවධානය යොමු කරයි.

එම නඩු තීන්දුවේ ඔව්හු කොළඹ වරායේ සීමාවන් රේගු ස්ථානයේ සීමාවන් යයි පෙන්වීමට කිසි සාක්ෂියක් නොමැති බැවින් රේගු ආඥා පනතේ විග්‍රහ කර ඇති පරිදි සිද්ධිය රේගු ස්ථාන සීමාව තුළ දී සිදු වී යයි ඔප්පු කිරීම පැමිණිල්ල මත පැවරුණු කාර්‍යයක් යයි තීරණය කළහ.

සිල්වා මහතා, මගේ අවධානය iv වෙළුම අතිරේක ව්‍යවස්ථා සංග්‍රහයේ — රේගු ආඥා පනතේ පෙනෙන පරිදි ''රේගු ස්ථානයේ'' විග්‍රහයට සහ කොළඹ රේගු ස්ථානයේ සීමාවන් පෙන්නුම් කරනු ලබන උප ලේඛනයට යොමු කරයි. ඔහු මගේ අවධානය තව දුරටත්

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශය 80 වෙනි කාණ්ඩය 51 වෙනි පිට බලන්න.

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ජෝශප් එ. පොලිස් පරීක්ෂක (වෙරළබඩ, කොළඹ) (72 න.නී.වා. 357) නඩුවේ පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාර තුමාගේ නඩු තීන්දුවට යොමු කරවයි. ඔහු එහි දී 235 වැනි පරිච්ඡේදයේ රේගු ආඥා පනතේ 148 වැනි වගන්තිය අනුව යමින් වෙනස් මතයක් ගෙන ඇත. එම මතය නම් එම වගන්තිය අනුව ප්‍රතිවිරුද්ධ දෑ ඔප්පු නොකරන තෙක් මෙම ආඥා පනතට පටහැනිව කරන ලද ඕනෑම වරදක් සම්බන්ධව ඕනෑම ආවේදනයක (information) හෝ පටිපාටකරයක (proceeding) එවැනි වරදක් කරන ලද්දේ ඕනෑම වරාය සීමාවක් තුළ හෝ ලංකාවේ දේශික ජල තීරය තුළය යන ප්‍රකාශය ඒ සීමාවන්. ඔප්පු කිරීමක් නොමැතිව ප්‍රමාණවත් වේ. පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා කොළඹ රේගු ස්ථානය කොළඹ වරාය ම යයි සලකා ඇත.

දැනටමත් මා දන්වා ඇති පරිදි තෙන්නකෝන් විනිශ්චයකාරතුමා ඔහුගේ නඩු තීන්දුවේ දී ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා සහ පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා ගන්නා ලද ප්‍රතිවිරුද්ධ මතයන් සාකච්ඡාකොට කලින් සඳහන් කරන ලද විනිශ්චයකාරතුමාගේ මතය අනුගමනය කොට තිබේ.

ඉතා ගෞරවයෙන් යුතුව මා ද ක්‍රෙට්සර් විනිශ්චයකාර තුමාගේ සහ තෙන්නකෝන් විනිශ්චයකාරතුමාගේ නඩු තීන්දුවලට එකඟ වෙමි.

උගත් රජයේ අධිනීතීඥ මහතා පැමිණිල්ල විසින් රේගු ආඥා පනතේ විස්තරකොට ඇති පරිදි චිත්තිකරුවන්ගෙන් එක් කෙනෙක් වත් රේගු සීමාවන් තුළ සිටි බවට සාක්ෂි මෙහෙයවා නොමැති බව පිළිගනී. ඔහු තවදුරටත් චෝදනාවේ ක්‍රෝටබෝම් වීටිය සඳහන් වන අතර සාක්ෂිවලින් සඳහන් වන්නේ අලුත් මාවත ගැන බව ද මගේ අවධානය යොමු කරයි. පැහැදිලි වශයෙන් චිත්තිකරු වැරැදිකරු වීම ස්ථිර කිරීමට නොහැක.

එබැවින් මා දෙවැනි චිත්තිකරුගේ දඬුවම සහ වැරැදිකරු කිරීම ඉවත්කොට ඔහු නිදහස් කරමි.

චිත්තිකරු නිදහස් කරන ලදී.

ගරු ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා ඉදිරිපිටදී

ටී. කේ. මෙන්ඩිස් එ. ගංගා නිම්නභූමි සංවර්ධන මණ්ඩලය*

ශ්‍රේෂ්ඨාධිකරණයේ අංක 59/69 — කම්කරු උසාවි අංක 1/27312 කොළඹ

විවාද කළේ: 1969 ඔක්තෝබර් 11 වැනිදා
තීන්දු කළේ: 1969 දෙසැම්බර් 12 වැනිදා

කම්කරු ආරවුල් පනත — කම්කරුවකුගේ සේවය සමාප්ත කිරීම — සේවා යෝජකයාට විරුද්ධව පිළිසරණ සොයා දිස්ත්‍රික් උසාවියේ නඩුවක් පැවරීම — අනතුරුව කම්කරු උසාවියට ද 31 වැනි ඡේදය යටතේ පිළිසරණ සොයා අයැදුමක් කිරීම — දිස්ත්‍රික් උසාවියේ නඩුව අවසන් වූවායින් පසු කම්කරු උසාවියේ නඩුව විභාගයට ඉල්ලීම — විභාගයට එසේ ගැනීමට නියෝග කිරීම — ඉන්පසු දිස්ත්‍රික් උසාවියේ නඩුව ඉල්ලා අස්කර ගැනීම — කම්කරු උසාවියේ අයැදුම විභාගයට ගත් විට 31(බී)(5) උප-ඡේදය අනුව කම්කරු උසාවියට එය විභාග කිරීමට අධිකරණ බලයක් නොමැති යයි විරුද්ධ වීම — එම විරෝධය පිළිගැනීම සහ අයැදුම ප්‍රතික්ෂේප කිරීම.

ලිපිකරුවකු වූ අයැදුම්කරු විසින් තමා සාවද්‍ය අන්දමින් සේවයෙන් පහ කළේයයි සේවා යෝජකයාට විරුද්ධව සහන ලබා ගැනීමට නඩුවක් 28.2.66 වැනි දින දිස්ත්‍රික් උසාවියේ පවරන ලදී. මේ නඩුව විභාගයට ගැනීමට පෙර ඔහු විසින් එසේම පිළිසරණ සොයා කම්කරු උසාවියට ද අයැදුම් පතක් ඉදිරිපත් කරන ලදී.

29.3.67 වැනි දින කම්කරු උසාවියට දිස්ත්‍රික් උසාවියේ නඩුව පවතින බව දන්වා එම උසාවිය විභාගකර අවසාන තීරණයක් දෙන තුරු කම්කරු උසාවියේ විභාගය කල් දැමීමට නියෝගයක් ලබා ගන්නා ලදී.

13.6.68 වැනි දින දිස්ත්‍රික් උසාවියේ නඩුව පැමිණිලිකරුගේ නීතිවේදියා විසින් කම්කරු උසාවියේ පිළිසරණ සෙවීමට පැමිණිලිකරුගේ ඇති හිමිකමට හානියක් නොමැති ලෙස ඔහුගේ නඩුව අස්කර ගැනීමට ඉල්ලා සිටියෙන් චිත්තිකරුගේ නීතිවේදියා තමාහට නීතියෙන් අයිති හිමිකම්වලට බාධාවක් නොමැතිව කැමැති වූයෙන් එම නඩුව ගාස්තු සමග නිශ්ප්‍රභ කරන ලදී.

මින් පසු 26.9.68 වැනි දින කම්කරු උසාවියේ නඩුව විසඳීමට ගත් විට සේවා යෝජකයාගේ නීතිවේදියා විසින් කම්කරු ආරාවුල් පනතේ 31 වැනි ඡේදයේ (බී)5 උප-ඡේදයේ ප්‍රතිපාදනය අනුව දිස්ත්‍රික් උසාවිය මගින් පිළිසරණ සොයා තිබුන බැවින් කම්කරු උසාවියට පිළිසරණ ඉල්ලීම පිළිගෙන ඊට සහනයක් දීමට කම්කරු උසාවියට අධිකරණ බලයක් නොමැති බව කියා සිටියෙන් එය පිළිගෙන එම අයැදුම් කම්කරුඋසාවියේ විනිශ්චයකාරයා විසින් ප්‍රතික්ෂේප කරන ලදී.

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*ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 49 වෙනි පිට බලනු.

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අයැදුම්කරු මේ තීන්දුවෙන් ඇපැල් ගත්තේය.

තීන්දුව: (1) කම්කරු ආරවුල් පනතේ 31 වැනි ඡේදයේ (බී) (5) උප ඡේදයේ ප්‍රතිපාදනය වී ඇත්තේ එම ඡේදයේ පළමු වැනි උප-ඡේදයේ අනුව කම්කරු උසාවියක් මගින් පිළිගත් අයැදුම් පතක් එම උසාවිය විභාග කර අවසාන තීන්දුවක් දුන් විටෙක පමණක් එම අයැදුම් පත ඉදිරිපත්කළ සේවකයාට එම කරුණ සම්බන්ධව නැවත නීත්‍යානුකූල පිළිසරණක් සෙවිය නොහැකි බවයි.

(2) එම නිසා දිස්ත්‍රික් උසාවියෙහි පිළිසරණ සොයා පැවරූ නඩුවෙහි අවසාන විභාගයක් හෝ තීන්දුවක් ඇති නොවූ හෙයින් කම්කරු උසාවියට ඉදිරිපත් කළ අයැදුම් පත මගින් සෙවූ පිළිසරණ ලබා ගැනීමට ඉහත කී 31 වැනි ඡේදයෙහි (බී) (5) උප-ඡේදයෙන් තහනමක් නොමැති බවය.

සලකා බැලූ නඩුව: එක්සත් ඉන්ජිනේරු කම්කරුවන්ගේ සංගමය එ. දේවනායගම් 69 න.නී.වා. 283, 303. වැනි පිට.

ඩබ්ලිව්. ඊ. එම්. අබේසේකර, ගාමිණී වණිගසේකර සමග, ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන, නෙවිල් ද අල්විස් සහ පෝල් පෙරේරා සමග, සේව්‍ය-වගඋත්තරකරු වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

අයැදුම්කරු ගංගා නිම්න භූමි සංවර්ධන මණ්ඩලීය සේවාවේ ලිපිකරුවෙක් විය. රාජකාරියට නොපැමිණීම නිසා, 1966.3.3 වැනි දින සිට ඔහුගේ සේවය සමාප්ත කර ඇති බව 1966.2.1 වැනි දිනැති ලිපියෙන් ඔහු වෙත දැනුම් දෙන•ලදි. ඉන් අනතුරුව ඔහු විසින් 1966.2.28 වැනි දින කොළඹ දිස්ත්‍රික් උසාවියේ අංක 1546/ඉසෙඩ් දරන නඩුව පවරන ලදී.

සහනය සඳහා කරන ලද අයැදුම පහත සඳහන් පරිදි විය.

''එසේ හෙයින්,

(අ) විත්තිකරු විසින් පැමිණිලිකරුගේ සේවය සමාප්ත කිරීම සාවද්‍ය බවත්, අවලංගු හා හිස් බවත්, ප්‍රකාශ කරමින්ද,

(ආ) පැමිණිලිකරු විත්තිකරුගේ සේවයේ සේවකයකු බවත් සහ තව දුරටත් රැකියාවේ නියුක්තව සිටීමට ඔහුට හිමිකම් ඇති බවත් ඔහුට හිමිකම් ඇති ඔහුගේ වැටුප හා දීමනාවන් ලැබීමට ඔහුට හිමිකම් ඇති බවත් ප්‍රකාශ කරමින් ද,

(ඇ) විත්ති පක්ෂය, එහි නිලධාරීන්, සේවකයන් සහ ප්‍රතිකාරකයන් විසින් පැමිණිලිකරුගේ වැටුප සහ දීමනාවන් අත්හිටවා ගැනීම ප්‍රතිබාධනය කරමින් (restraining) ස්ථිර හා අතුරු නිරෝධාඥාවක් (injunction) සහ මෙම නඩුකරය හෝ ඉල්ලීම අසන තුරු සහ නිශ්චය කරන තුරු ද සිතාසි සමග බාරදීමට එවැනිම නිවැරැදි අණක් (Enjoining Order) සඳහා ද,

(ඈ) ගාස්තු සහ යෝග්‍ය යයි මෙම උසාවියට පෙනී යන පරිදි එවැනි වෙනත් හා තවදුර සහන සඳහා

පැමිණිලිකරු නඩු තීන්දුවක් හා තීන්දු ප්‍රකාශයක් සඳහා අයැද සිටියි.''

සුදුසු යැයි හැඟී ගියහොත් කම්කරු උසාවියට ඉල්ලීමක් කිරීමට ඔහුට ඇති අයිතියට අගතියක් සිදු නොවන සේ නඩුකරය ඉල්ලා අස්කර ගැනීමට ඔහු වෙනුවෙන් පෙනී සිටි රාජනීතිඥ ඊ. බී. වික්‍රමනායක මහතා 1968.6.13 වැනි දින යෝජනාකර සිටියේය. පැමිණිලිකරු විසින් නඩුව ඉල්ලා අස්කර ගැනීම ගැන තමාගේ විරුද්ධත්වයක් නැති අතර පැමිණිලිකරු විසින් කම්කරු උසාවියට ඉල්ලුම් කිරීමේ කිසිම අයිතියක් තබා ගැනීමට තමා කැමැත්ත නොදෙන බව ද විත්තිකරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥ කදිර්ගාමර් මහතා සඳහන් කළේය. නීතිය එයට හිමි මාර්ගයේ ගමන් ගනු ඇතැයි ඔහු සඳහන් කළේය.

පැමිණිලිකරුගේ ඉල්ලීමට ඉඩ දුන් දිස්ත්‍රික් විනිශ්චයකාරතුමා ගාස්තුවට යටත්කොට නඩුකරය නිෂ්ප්‍රභ කළේය.

ඇත්ත වශයෙන්ම සේවාවන් සමාප්ත කිරීම සම්බන්ධයෙන් ටී. කේ. මෙන්ඩිස් විසින් 1966.4.20 වැනි දින කම්කරු උසාවියට ඉල්ලීමක් ඉදිරිපත් කර තිබුණේය. එහි ඔහුගේ අයැදුම පහත සඳහන් පරිදි විය:

''එසේ හෙයින්,

(i) 7 වැනි ශ්‍රේණියේ ලිපිකරු වශයෙන් අයැදුම්කරු ඔහුගේ තනතුරට නැවත පත් කරන ලෙස නියෝග කරන ලෙස ද,

(ii) අයැදුම්කරු නැවත පත්කරන තුරු අස් කළ හෝ සේවය සමාප්ත කළ දින සිට පසුගිය වැටුප සහ දීමනාවන් දීමට නියෝගයක් කරන ලෙස ද,

(iii) ගාස්තු සහ යෝග්‍යයයි උසාවියට හැඟෙන එවැනි වෙනත් සහ තවදුර සහන දෙන ලෙස ද

අයැදුම්කරු උසාවියෙන් අයැද සිටියි.''

මෙහි සඳහන් ප්‍රකාශය සත්‍ය හා නිවැරැදි බව ඉල්ලුම්කරු සඳහන් කරයි.''

දිස්ත්‍රික් උසාවියේ නඩුවක් පවරා ඇති බව 1967.3.29 වැනි දින උසාවියට දන්වන ලදුව දිස්ත්‍රික් උසාවියේ විනිශ්චය කිරීම අවසන් වූ පසු කම්කරු උසාවියට කරන ලද ඉල්ලීම විභාගයට ගත යුතුයැයි පාර්ශ්වකරුවන් ඉල්ලා සිටියෙන් ''දිස්ත්‍රික් උසාවියේ නඩුව අවසන් වූ පසු ''පාර්ශ්වකරුවන් ඉදිරිපත් විය යුතු යයි සභාපතිතුමා නියෝග කළේය.

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මින් පසුව 1968.9.26 වැනි දින මෙම කරුණ කම්කරු උසාවියේ මතු වූ විට, නීතිය එයට හිමි මාර්ගයේ ගමන් ගත යුතුව ඇතැයි දිස්ත්‍රික් උසාවියේ දී සඳහන් කළ අවස්ථාවේ තමා එයින් අදහස් කළේ කුමක් ද යනු කදිර්ගාමර් මහතා අනාවරණය කළේය. පැමිණිලිකරු විසින් දිස්ත්‍රික් උසාවියේ තම ප්‍රතිකර්මය සොයා තුබූ හෙයින්, කාර්මික ආරවුල් පනතේ 31(බී (5) වෙනි වගන්තිය අනුව, ඉල්ලීම අසා නිශ්චය කිරීමට උසාවියට අධිකරණ පාත්‍රතාවක් නොවියයි ඔහු මෙහිදී විරුද්ධත්වය පළ කළේය.

පනතේ 31 (බී) 5 වැනි වගන්තිය පහත සඳහන් පරිදි කියවෙයි:–

> ''(1) වැනි උප වගන්තිය යටතේ කම්කරු උසාවියක් මගින් ඉල්ලීමක් භාරගෙන ඒ සම්බන්ධයෙන් විභාග කර අවසන් කළ විට එම ඉල්ලීම පිළිබඳ කරුණ සම්බන්ධයෙන් වෙන යම්කිසි නීතික ප්‍රතිකර්මයක් ලැබීමට හිමිකමක් නොමැති අතර ඔහු විසින් ප්‍රථමයෙන් වෙන යම්කිසි නීතික ප්‍රතිකර්මයක් සොයන ලද්දේ නම් ඉන් පසුව (1) වැනි උප වගන්තිය යටතේ වූ ප්‍රතිකර්මයට ඔහුට හිමිකම් නොලැබිය යුතුය.''

මෙම විරුද්ධත්වය පිළිගත් සභාපතිතුමා ''පනත යටතේ ඉල්ලුම්කරුට මෙම ඉල්ලීම මෙම උසාවිය ඉදිරියේ පවත්වාගෙන යා නොහැක. මේ අනුව ඉල්ලීම ප්‍රතික්ෂේප කරනු ලැබේ.'' යයි නියම කළේය.

ඉල්ලුම්කරු එම නියෝගයට විරුද්ධව ඇපැල් ගෙන ඇත.

රාජාධිකරණයේ විනිශ්චයට භාජනය වූ දේවනායගම් නඩුවේ (69 න.නී.වා. 303) අපමතික නඩු තීන්දුවේ (dissenting judgment) කම්කරු උසාවියේ කාර්‍යයන් ගැන සාකච්ඡා කරන අතර ගෙස්ට් සාමිවරයාගේ සහ ඩෙව්ලින් සාමිවරයාගේ භාෂාව යොදා ගත් වගඋත්තරකරුගේ අධිනීතිඥවරයා ''සේවකයා විසින් පනතින් දී ඇති ප්‍රතිකර්මය හා ඔහුට ඇති වෙන යම්කිසි නීතික ප්‍රතිකර්මයක් වෙතොත් ඒ දෙකින් එකක් තෝරාගත යුතුය. ඔහුට ප්‍රතිකර්ම දෙකම ඉල්ලා සිටිය නොහැකිය'' යි සඳහන් කර සිටියේය.

''එම ඉල්ලීම හා සම්බන්ධව සේවකයාට එම ඉල්ලීම පිළිබඳ කරුණ සම්බන්ධයෙන් වෙන යම්කිසි නීතික ප්‍රතිකර්මයක් ලැබීමට හිමිකම් නොමැති වන්නේ'' ''කම්කරු උසාවියක් මගින් (1) වැනි උප වගන්තිය යටතේ ඉල්ලීමක් භාරගෙන ඒ සම්බන්ධයෙන් කටයුතුකර අවසන් කළ විට බව 31(බී)(5) වැනි වගන්තියෙහි සඳහන් වන බැවින් ඔහුට ප්‍රතිකර්ම දෙකම ලැබිය නොහැකි යයි කීම වඩා නිවැරදි බව මට පෙනී යයි.

''ඔහු විසින් ප්‍රථමයෙන් වෙන යම්කිසි නීතික ප්‍රතිකර්මයක් සොයන ලද්දේ නම් ඉන් පසුව (1) වැනි උපවගන්තිය යටතේ වූ ප්‍රතිකර්මයට ඔහුට හිමිකම නොලැබිය යුතුය'' යි වගන්තියෙන් කියැවෙන විට, එක ප්‍රතිකර්මයක් සෙවීමේ පටිපාටිකරය අනිකෙහි සහනය ලබාගැනීමට බාධාවක් වශයෙන් ක්‍රියාත්මක විය යුතු අවස්ථාව සම්බන්ධයෙන් වෙනසක් තිබිය යුතු වීමට හේතුවක් නොමැති බැවින් ඔහු විසින් අනෙක් නීතික ප්‍රතිකර්මය සොයා ඒ සම්බන්ධයෙන් කටයුතුකර අවසන් කරන ලද අවස්ථාවක් එයින් අදහස් කරනු ලබන බව මට පෙනී යයි. බාධාව වශයෙන් පවතිනුයේ පැමිණිල්ල හෝ ඉල්ලීම ඉදිරිපත් කිරීම නොව එම අධිකරණ ස්ථානයෙහිම හෝ අන් කිසි අධිකරණ ස්ථානයක හෝ වෙනත් ප්‍රතිකර්මයක් සෙවීම යි. ක්‍රියාත්මක වන ඉල්ලන ලද ප්‍රතිකර්මය සම්බන්ධයෙන් අවසාන නියෝගයක් හෝ විනිශ්චය කිරීමක් නිබීම බව මට පෙනී යයි. තහනම් කොට ඇත්තේ එකම විෂය කරුණ සම්බන්ධයෙන් වෙනස් ක්‍රියා මාර්ගවලින් එකකට වැඩි ප්‍රතිකර්ම ලබා ගැනීම මිස ඒවා සෙවීම නොවේ.

අවස්ථාවේ හැටියට, උසාවියට ඉදිරිපත් කරන ලද පැමිණිල්ලක් පමණක් නොව එම කරුණ සම්බන්ධයෙන් ම කම්කරු උසාවියට ඉදිරිපත් කරන ලද ඉල්ලීමක් ද ඇති බැව් විනිශ්චයකාරතුමාට හෝ සභාපතිතුමාට දැන් වූ විට තමා ඉදිරියේ ඇති පැමිණිල්ල හෝ ඉල්ලීම අන් තැනකින් ඉල්ලා ඇති ප්‍රතිකර්මයේ ප්‍රතිඵලය ලැබෙන තුරු තිබිය යුතු යයි නියෝග කිරීමට හෝ කුමන ප්‍රතිකර්මය සම්බන්ධයෙන් කටයුතු කරගෙන යා යුතු ද යන්න පිළිබඳව තීරණය කරන ලෙස අදල පාර්ශ්වකරුවන් ඉල්ලා සිටිය හැකිවාක් මෙන්ම විනිශ්චය ස්ථාන දෙකක තම ප්‍රතිකර්මය සොයමින් සිටින (එය වැරැදීමකින් විය හැකිය) සේවකයකුට අනෙකෙහි තම ප්‍රතිකර්මය සෙවීම සඳහා එක විනිශ්චය ස්ථානයකට කරන ලද ඉල්ලීම ඉල්ලා අස්කර ගැනීමට අවසර ඉල්ලීමට ඉඩ ඇති බව මට පෙනී යයි.

මෙම නඩුවෙහි, කම්කරු උසාවියේ තම ප්‍රතිකර්මය සෙවීමේ පරමාර්ථය ඇතිව ඉල්ලුම්කරු දිස්ත්‍රික් උසාවියේ තම නඩුව ඉල්ලා අස්කර ගත්තේය. එහෙයින් සභාපතිතුමා විසින් මෙය අසා ඒ පිළිබඳව විනිශ්චය කළ යුතු බව මට පෙනෙයි. සභාපතිතුමා විසින් කරන ලද නියෝගය මම අවලංගු කරන අතර, කරන ලද ඉල්ලීම පිළිගෙන, එය අසා, ඒ පිළිබඳව විනිශ්චය කරන ලෙස මම ඔහුට නියම කරමි. මෙම ඇපැලේ ගාස්තු ඉල්ලුම්කරුට හිමි වන අතර, එම ගාස්තුව රු: 105/ ක් ලෙස මම නියම කරමි.

නියෝගය අවලංගුකර ආපසු යවන ලදී.

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සමරවික්‍රම විනිශ්චයකාරතුමා ඉදිරිපිට දී

කේ. පෙරුමාල් එ. කේ. කරුමේගම්*

ශ්‍රේෂ්ඨාධිකරණ ඉල්ලීම් අංක 211/68 — මාතලේ මහේස්ත්‍රාත් උසාවිය අංක 24721

විවාද කළේ: 1968 අගෝස්තු 20 වැනි ද සහ 1968 සැප්තැම්බර් 12 වැනි ද
තීන්දු කළේ: 1969 අගෝස්තු 18 වැනි ද

නඩත්තුව — ළමයකු පිළිබඳ නියෝගයක් — ස්වාමිපුරුෂයා නොඳුන සිටිය දී විවාහත් වන අවස්ථාවේ භාර්යාව ගර්භිණීව සිටීමේ හේතුවෙන් විවාහය දික්කසාද කිරීම සඳහා පසු අවධියක දිස්ත්‍රික් උසාවියෙන් ලබාගත් තීන්දුවක් — දිස්ත්‍රික් උසාවියේ තීන්දුව අනුව නඩත්තු ගෙවීමට යැයි මහේස්ත්‍රාත්තුමා දුන් තීන්දුව අවලංගු කළ හැකි ද යන්න — ඉන්දියානු නඩු තීන්දු මෙයට අදළ ද යන්න—සාක්ෂ්‍ය ආඥා පනතේ 41(2) වැනි ඡේදය දික්කසාදයක් දීමට හේතුභූතවූ කරුණුවලටත් බලපවත්වන්නේ ද යන්න.

තීන්දුව: (1) බලයලත් සිවිල් උසාවියකින් දෙන ලද තීන්දුවකට අනුව ක්‍රියා කරමින් නඩත්තු නියෝගයක් අවලංගු කිරීමට මහේස්ත්‍රාත්වරයකුට බලය පැවරෙන ප්‍රතිපාදනයක් අපේ නීතියේ සඳහන්ව නැත.

(2) ඉන්දියානු අපරාධ නඩු විධාන සංග්‍රහයේ විශේෂ ප්‍රතිපාදනයක (489(2) දරණ ඡේදය) ගැබ් වී ඇති පරිදි බලය දරණ සිවිල් උසාවියකින් දෙන තීරණයක ප්‍රතිඵලයක් වශයෙන් නියෝගයක් වෙනස් කිරීමට හෝ අවලංගු කිරීමට මහේස්ත්‍රාත්වරයකුට බලය පැවරීමේ ප්‍රතිඵලය මත ගොඩනැගී ඇති ඉන්දියානු නඩු තීන්දු, එබඳු ප්‍රතිපාදනයක් ලංකාවේ නොමැතිකම නිසා මෙම කරුණට අදළ නොවෙයි.

(3) සාක්ෂ්‍ය ආඥා පනතේ 41(2) වැනි ඡේදය දිස්ත්‍රික් උසාවියකින් දෙන ලද තීන්දුවක සඳහන් විවාහයෙහි බල රහිත තත්වය තීරණාත්මක බවට පත් කරන නමුත් එම නියෝගය දීමට හේතුභූත වූ කරුණු එබඳු අවසානාත්මක තත්ත්වයට පත් නොකෙරේ.

(4) නඩත්තු නියෝගයට ලක් වූ දරුවා වුකලි දිස්ත්‍රික් උසාවිය හමුයෙහි විවාහය බලශූන්‍ය බවට පත් කරවා ගැනීම සඳහා පැවති පටිපාටිකරයට සහභාගී වූ පක්ෂයක් නුවූ හෙයින් විවාහය සිදු සැක කරන අවස්ථාවන් පෙත්සම්කරු නොඳැන හර්හණිභාවය පැවති බවට දුන් තීන්දුව ළමයා කෙරෙහි බල නොපාන්නේය.

අවධානය යොමු කළ නඩු: සමස්ත ඉන්දියානු වාර්තා (1940) රැන්ගුන් 298.
සමස්ත ඉන්දියානු වාර්තා (1922) ඉහළ බුරුමය 20.
සමස්ත ඉන්දියානු වාර්තා (1919) පහළ බුරුමය 7(2).
63 නව නීති වාර්තා 544 වැනි සහ 546 වැනි පිටු බලන්න.
7 ලෝක වාර්තා 338.

පී. එදුස්සූරිය මහතා, විත්තිකාර-පෙත්සම්කරු වෙනුවෙන්.

සරත් මුත්තෙට්ටුවේගම මහතා, අයි. ඇස්. ද සිල්වා මහතා සමග, ඉල්ලුම්කාර-වගඋත්තරකාරිය වෙනුවෙන්

සමරවික්‍රම විනිශ්චයකාරතුමා:

තමාගේ දරුවාගේ නඩත්තුව සඳහා විත්තිකාර පෙත්සම්කරු මුදලක් ගෙවිය යුතු යැයි ඉල්ලුම්කාර-වගඋත්තරකාරිය විසින් නියෝගයක් ලබා ගන්නා ලදී. ඉල්ලුම්කාර-වගඋත්තරකාරිය සහ විත්තිකාර-පෙත්සම්කරු අතර සිදු වී ඇති විවාහයෙන් හය මාසයකට වඩා මද කලක් ඉක්ම ගිය පසු වර්ෂ 1964 ජූනි මස 14 වැනි දින එම ළමයා ඉපිද තිබේ. විත්තිකාර-පෙත්සම්කරු ළමයාගේ පියා තමා නොවේය කියෙන් ඒ පිළිබඳව දෙපක්ෂයෙන්ම සාක්ෂි අසන ලද විභාගයකින් පසුව උගත් මහේස්ත්‍රාත්වරයා ළමයා වෙනුවෙන් නඩත්තු ගෙවිය යුතු යැයි නියෝග කළේය. මෙම උසාවියට ඉදිරිපත් කරන ලද ඇපැලක දී එම නියෝගය ස්ථිර විය. ඉන්පසු විත්තිකාර

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 67 වෙනි පිට බලනු.

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පෙත්සම්කරු තමා පමණක් සාක්ෂි දුන් එකපාක්ෂික නඩු විභාගයක දී තමා ඉල්ලුම්කාර-විත්තිකාරිය සමග විවාහ වන අවස්ථාවේ භාර්යාව ගැබ්ගෙන සිටියා යැයි ද, එය තමා නොදන්නේ යැයි ද කියමින් ඒ කරුණ මත තම විවාහය අවලංගු කෙරෙන නියෝගයක් දිස්ත්‍රික් උසාවියෙන් ලබාගත්තේය. විත්තිකාර-පෙත්සම්කරු ළමයා පිළිබඳව ඇති නඩත්තු ගෙවීමේ නියෝගය අවලංගු කොට ඉවත් කරවීමේ අදහසින් දැන් අප ඉදිරිපිට ඇති ඉල්ලීම උසාවියට ඉදිරිපත් කොට තිබේ.

යම් පුද්ගලයකු ළමයකුගේ පියා නොවේ යැයි ද, ඒ හේතුවෙන් එම පුද්ගලයා ළමයාට නඩත්තු ගෙවීමට බැඳී නැතැ යි යන ප්‍රකාශ අඩංගු තීන්දු ප්‍රකාශ සිවිල් නඩුවල දී, දී තිබෙන කල, ඒ නියායෙන් ළමයින්ට නඩත්තු ගෙවීමට දී තිබුණු නියෝග අවලංගු කරන ලද බව දැක්වෙන ඉන්දියාවේ නඩු වාර්තා රාශියක් විත්තිකාර-පෙත්සම්කරුගේ නීතිවේදියා මෙහි දී ගෙනහැර දැක්වීය. යූ අර්සෙයිනා එ. මා කයින් ස්වේෂා සහ තවත් කෙනෙක්, ස.ඉ.වා. (1940) රන්ගූන්, 298, සහ න්ගා පෝ තෙයින් එ. මා මේ සාන් සහ තවත් කෙනෙක්, ස.ඉ.වා. ඉහළ බුරුමය 20. ඉන්දීය අපරාධ නඩු විධාන සංග්‍රහයේ 488 වන ඡේදයෙන් මහේස්ත්‍රාත්වරයකුට නඩත්තු නියෝගයක් දීමට බලය පැවරෙන අතර, එහි 489(2) ඡේදයෙන් එම මහේස්ත්‍රාත්වරයාට එය අවලංගු කිරීමට ද බලය පැවරේ. එකී දෙවැනි ප්‍රතිපාදනය පහත සඳහන් පරිදි වේ.

> ''යම්කිසි බලය ඇති උසාවියකින් දෙන ලද තීරණයක ප්‍රතිඵලයක් වශයෙන් 488 වැනි ඡේදයට අනුකූලව දෙන ලද නියෝගයක් අවලංගු කළ යුතු යැයි මහේස්ත්‍රාත්වරයකුට පෙනී ගිය කලෙක ඔහු විසින් එකී නියෝගය අවලංගු කළ යුතුය. එය එසේ නැතහොත් කාරණාවට අදළ වන පරිදි වෙනස් කළ යුතුය.''

බලය ඇති සිවිල් උසාවියකින් දෙන ලද තීරණයක ප්‍රතිඵලයක් වශයෙන් මහේස්ත්‍රාත්වරයකුට යම්කිසි නියෝගයක් අවලංගු කිරීමට හෝ වෙනස් කිරීමට මහේස්ත්‍රාත්වරයකුට බලය පවරමින් ප්‍රකාශිත විධි විධාන එහි තිබෙනු පමණක් නොව ඉන්දීය විශේෂ සහන පනතට (Indian Specific Relief Act) අනුව යම් කෙනකු ළමයකුගේ පියා නොවේය යන ප්‍රකාශයක් කිරීමට හෝ ඒ අනුව කෙනකු නඩත්තු ගෙවීමට බැඳී නැති බව කියැවෙන ප්‍රකාශයක් කිරීමට හෝ හැකිවන පරිදි ප්‍රතිපාදන පැනවී තිබේ. එබඳු පැවරෙන විධි විධානයක් අපේ නීතියෙහි පැනවී නොමැත්තේය. කෙසේ වෙතත් කලින් ඉන්දියාවේ විසැඳී ඇති සමහර නඩු 1923 වර්ෂයට කලින් විසඳෙන ලද්දෙන් 489(2) දරන ඡේදයෙහි පැනවීම් ඉන්දියාවේ අපරාධ නඩු විධාන සංග්‍රහයට ඇතුළත් කරන ලද්දේ සංශෝධනයක මාර්ගයෙනි. බෝ ගයි එ. මා නයින් ස.ඉ.වා. (1919) පහළ බුරුමය 7(2), අතර කියැවුණු නඩුවේ දී 488 වන ඡේදයෙන් දෙන ලද ආඥා බලය සිවිල් උසාවියක් දරන බලයට උපකාරී ලෙස සැළකිය යුතු බව ද, ඒ නිසා එම නීතිය යටතේ දෙන ලද නඩත්තු නියෝගයන් ක්‍රියාවේ යෙදවීමට කලින් එම නියෝගයට පසුව සිවිල් උසාවියකින් යම්කිසි භාර්යාවක් නඩත්තු ගෙවනු ලැබීමට නුසුදුසු යැයි දෙන ලද නියෝගයක් ඇත්නම් එය ද මහේස්ත්‍රාත්වරයා සළකා ගතයුතු යැයි තීරණය වී තිබේ නම් ඒ නඩුවෙහි ද, මට පරීක්ෂා කිරීමට අවස්ථාව ලැබුණු අනිත් සෑම නඩුවල ද පෙත්සම්කරු ප්‍රශ්නයට භාජනය වූ දරුවා තමාගේ නොවේ යැයි ප්‍රකාශයක් සිවිල් උසාවියකින් ලබාගෙන තිබෙනු මිස, දික්කසාද වීමට හෝ විවාහය නිෂ්ප්‍රභවීමට හෝ පවරන ලද විවාහ නඩුවකින් ලබාගත් ආනුෂංගික තීන්දුවක් ලබා තිබෙනු පෙනේ. තවදුරටත් සලකා බලන කල නඩත්තු ආඥා පනතේ ගැබ්ව ඇති ආඥා බලය ඉන්දියානු අපරාධ නඩු විධාන සංග්‍රහයේ 488 වැනි ඡේදයේ ගැබ්ව තිබෙන සේ සිවිල් උසාවියක ඇති ආඥා බලයට උපකාරී අන්දමින් පැනවී ඇති සේ ගිණිය නොහැකිය. එයට හේතුව නඩත්තු ආඥා පනත පැනවීමට පසු නඩත්තුවක් ලැබීම සඳහා සිවිල් නඩුවක් පැවරීමට ඉඩ පහසුකම් ලැබෙන ක්‍රියා පිළිවෙළක් අප අතර නැතිවීමය. තෙන්නේ එ. ඒකනායක, 63 න.නි.වා. 544 වැනි පිටුව, 546 වැනි පිටුව බලන්න. අතර කියැවුණු නඩුව බලන්න.

විත්තිකාර-පෙත්සම්කරුගේ නීතිවේදියා තවදුරටත් කරුණු සැලකරමින් සාක්ෂි ආඥා පනතේ 41(2) වැනි ඡේදයට අනුව සලකන විට විත්තිකාර පෙත්සම්කරු සහ ඉල්ලුම්කාර-වගඋත්තරකාරිය අතර තිබූ විවාහය, විවාහත් වන අවස්ථාවේ තමා ගැබිණියකව සිටීම ඉල්ලුම්කාරිය විසින් පෙත්සම්කරුට වසඟ්වීමේ හේතුවෙන් බල රහිත ශූන්‍ය විවාහයකැයි කියමින් දිස්ත්‍රික් උසාවිය විසින් දෙන ලද තීරණය සියල්ලක්ම බැඳෙන නඩු තීන්දුවකැයි කියා සිටියේය. නමුත් 41(2) දරණ ඡේදයෙන් අවසානාත්මක

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ප්‍රකාශයක් ලබාගැනීමට ඉදිරිපත් කරන නඩුවක එම ප්‍රකාශයට සම්බන්ධ වන ළමයා ද අවශ්‍යයෙන්ම පාර්ශ්වකරුවකු විය යුතුය. නමුත් ඉන්දීය අපරාධ නඩු විධාන සංග්‍රහයේ 489(2) ඡේදයට සමාන වන ලෙස බලය ඇති සිවිල් උසාවියක තීරණයක් අනුව යමින් නඩත්තු නියෝගයක් අවලංගු කිරීමට බලය මහේස්ත්‍රාත්වරයකුට හා තීරණාත්මක බවට පත්වන්නේ යම්කිසි නිතිමය ස්වරූපයක් එම නියෝගයෙන් ප්‍රදානය කෙරෙන හෝ අපහරණය කෙරෙන කොටස පමණකි. එම නිසා අවසානාත්මක හැටියට එයින් ගැනෙන්නේ විත්තිකාර පෙත්සම්කරු සහ ඉල්ලුම්කාර-වගඋත්තරකාරිය අතර විවාහයක් තිබුණා ද නැද්ද යන ප්‍රශ්නය ගැන ඇතුළත් වන දේ පමණකි. කෙසේ හෝ වේවා එම ප්‍රශ්නය පිළිබඳව දෙන ලද තීන්දුවට හේතුභූත වූ කාරණා පිළිබඳව එම නියෝගය අවසානාත්මක සේ ගිණිය නොහැකි සේ ය. දික්කසාද නඩුවක දෙන ලද තීන්දු ප්‍රකාශය සම්බන්ධයෙන් කන්හයා ලාල් එ. රාධා චර්න්, 7 ලෝ.වා. 338 අතර කියැවී පූර්ණ අධිකරණයකින් දෙන ලද තීන්දුවෙහි පහත සඳහන් පරිදි කියැවී තිබේ. ''මෙම විවාහයට සම්බන්ධ පාර්ශ්වකරුවන් තිදෙනා දික්කසාද වී ඇති බවත් මින් මතු එම පාර්ශ්වකරුවන් අඹු-සැමියන් නොවන බවත් සියලු දෙනාටම බලපාන අන්දමින් පැවසෙන අවසාන නිගමනයකි. නමුත් එම තීන්දුවට එළැඹීමට හේතු භූත වූ කරුණු ඒ අවස්ථාවේ පැවරුණු බවට එකි පාර්ශ්වකරුවන්ගෙන් පිට අය බැඳෙන අන්දමේ මෙහි අවසානාත්මක තීරණයක් ඇති බව පසෙක තිබිය දී එබඳු පිට අය බැඳෙන තත්වයට බැලූ බැල්මට පෙනෙන සාක්ෂියක් වුව ද මෙම නියෝගයෙහි නැත.'' ඒ නිසා විත්තිකාර පෙත්සම්කරු කසාද බඳින අවස්ථාවෙහි නොඳැන තිබූ ඉල්ලුම්කාර වගඋත්තරකාරියගේ ගර්භිණී තත්වය පිළිබඳ තීන්දුව එම නඩුවෙහි පාර්ශ්වකරුවන්ගෙන් පිට අය පවා බැඳෙන තත්වයක නොමැති නිසා එයට ඉල්ලුම්කාර-වගඋත්තරකාරියගේ ළමයා ඒ අනුව බැඳී නැත. නඩත්තු ඉල්ලා සිටි තැනැත්තිය ඉල්ලුම්කාර-වගඋත්තරකාරිය වුවත් එම ඉල්ලීම කරන ලද්දේ ඇයගේ දරුවාගේ ප්‍රයෝජනය පිණිසය.

ඉල්ලුම්කාර-වගඋත්තරකාරියගේ ළමයා සම්බන්ධයෙන් නඩත්තු ගෙවීම සඳහා දෙන ලද නියෝගය අවලංගු කිරීමට විත්තිකාර-පෙත්සම්කරු මෙම උසාවිය ඉදිරියේ සැහෙන හේතු ඉදිරිපත්කොට නැතැයි මට පෙනී යයි. මේ නියායෙන් මෙම ඉල්ලීම ගාස්තුවට යටත්කොට නිෂ්ප්‍රභ කරමි.

ඉල්ලීම නිෂ්ප්‍රභ කරන ලදී.

සිරිමාන්න සහ විජයතිලක විනිශ්චයකාරතුමන්ලා ඉදිරිපිට දී

ඒ. ඇම්. අබේසූරිය එ. ඩබ්ලිව්. ඇම්. ඒ. දියෝනිස් අප්පු සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණ අංක 176/67 — මාතර දිස්ත්‍රික් උසාවිය අංක 3036/පී

විවාද කර තීන්දු කළේ: 1970 අප්‍රියෙල් 24 වැනි දා

බෙදුම් පනත — 22(2) වගන්තිය — අලුත් පක්ෂ විත්තිකරු විසින් හෙළි කිරීම— දන්වීම් නිකුත් කරන ලෙස. විනිශ්චයකාරතුමා නියෝග කළ යුත්තේ කාට ද යන්න.

තීන්දුව: බෙදුම්නඩුවක විත්තිකරුවෙකු විසින් අලුත් පක්ෂයන් හෙළි කරන ලද විට, එසේ අලුත් පක්ෂයන් හෙළි කළ විත්තිකරුට, විනිශ්චය කාරතුමා විසින් නියමයක් වශයෙන්, බෙදුම් පනතේ 22(2) වගන්තියේ අතුරු විධානය යටතේ, ඒ අලුත් පක්ෂයන් වෙත දන්වීම් නිකුත් කරන ලෙස නියෝග කළ යුතුය.

ඇන්. ආර්. ඇම්. දලුවත්ත මහතා, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

විත්තිකාර-වගඋත්තරකරුවන් වෙනුවෙන් කිසිවකු පෙනී සිටියේ නැත.

ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශය 80 වෙනි කාණ්ඩය 70 වෙනි පිට බලන්න.

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සිරිමාන්න විනිශ්චයකාරතුමා:

මේ වූකලී 1961 තරම් වූ ඈත කාලයක පවරන ලද බෙදුම් නඩුවකි. 1965 දී 40 වැනි විත්තිකරුගේ මැදිහත් වීමට උසාවිය විසින් අවසර දෙන ලදී. ඉඩමට අයිතිවාසිකම් ඇතැයි කියාවෙන අලුත් පුද්ගලයන් පස් දෙනකු 40 වැනි විත්තිකරු විසින් ස්වකීය කියමනින් හෙළිකරන ලද අතර, ඔවුහු 41–45 වැනි විත්තිකරුවන් ලෙස එක් කරනු ලැබ සිටිති. හෙළි කරන ලද පක්ෂයනට දැන්වීම් නිකුත් කරන ලෙස උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා නියම කළ ද මේ දැන්වීම නිකුත් කළ යුත්තේ කවුරුන් විසින් ද යන්න ඔහු නියම කොට දක්වා නැත.

විත්තිකරුවන් අලුත් පක්ෂයන් හෙළි කරන අවස්ථාවන්හි දී නඩුව විභාග කරන විනිශ්චයකාරවරුන් විසින්, නියමයක් වශයෙන්, බෙදුම් පනතේ 22(2) වැනි වගන්තිය අතුරු විධානය යටතේ, අලුත් පක්ෂ හෙළි කළ විත්තිකරුට ඔවුන් වෙත දැන්වීම් නිකුත් කරන ලෙස නියෝග කළ යුතුය.

මේ නඩුවෙහි දී හෙළි කරන ලද පක්ෂයනට දැන්වීම් නිකුත් කරන ලෙස උසාවිය විසින් නියෝග කළ යුතුව තිබුණේ පැමිණිකලිරුට නොව, 40 වැනි විත්තිකරුටය. කෙසේ වුව ද නිකුත් කිරීම සඳහා දැන්වීම් පහක් භාර දෙන ලද බව ලේඛනයෙන් පෙනී යන අතර, ඇපැල්කරුගේ අධිනීතිඥවරයාට අනුව එසේ කර ඇත්තේ පැමිණිලිකරු විසිනි. හෙළි කරන ලද පුද්ගලයන් අතුරෙන් හතර දෙනකුට දැන්වීම් යවා ඇත. පස් වැන්නාගේ එනම් 41 වැනි විත්තිකරුගේ ලිපිනය ඔහු හෙළි කළ 40 වැනි විත්තිකරු විසින් දී ඇත්තේ ''බදුල්ල'' යනුවෙන් පමණෙකි. මේ ලිපිනය විත්තිකරුට දැන්වීම යැවීමට තරම් ප්‍රමාණවත් නොවන බව පැහැදිලිය. 41 වැනි විත්තිකරුගේ සවිස්තර ලිපිනය සෙවීම සඳහා අතිශයින් පමා වී ඇති අතර, ඒ ලිපිනය සැපයිය හැකිව සිටි එකම තැනැත්තා 40 වැනි විත්තිකරු වේ.

පැමිණිලිකරු නඩුව සඟේතුක උනන්දුවකින් යුතුව ගෙන නොගියහයි යන හැඟීම මත, බෙදුම් පනතේ 71 වගන්තිය යටතේ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා පැමිණිලිකරුගේ නඩුව ඉවත දැමීය. පැමිණිලිකරුට මේ කාර්යයෙන් ලද දඩුවම් කළ යුතුව තිබුණු බවක් අපි නොසිතමු. පක්ෂයන් හෙළි කළ තැනැත්තා අක්‍රියව උදසිනව සිටින විට, පසු අවධියක දී පවා එක් කරන ලද විත්තිකරුවනට බාරදීම සඳහා දැන්වීම් පැමිණිලිකරුගේ නීතිඥ වරයා ඉදිරිපත් කළ බව නඩු ලේඛනයේ 50 වැනි සටහනින් පෙනේ.

පැමිණිලිකරුගේ නඩුව ඉවත ලන නියමය අපි මින් ඉවත් කරමු. සිදුවී ඇති අධික ප්‍රමාදය නිසා, දැන් සියලුම පක්ෂයනට නඩුව පිළිබඳ දැන්වීම හිතකර වන අතර, 41 වැනි විත්තිකරුගේ ලිපිනය සපයා ඔහුට දැන්වීම බාර දෙන ලෙස 40 වැනි විත්තිකරුට නියෝගයක් නිකුත් කිරීම ද සුදුසුය. ගාස්තු පිළිබඳව නියමයක් නැත.

විජයතිලක, විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩදී ආපසු යවන ලදි.

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එච්. එන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා සහ තාමෝදරම් විනිශ්චයකාරතුමා ඉදිරිපිට දී

නිකොලායිපිල්ලේ අන්තෝනිපිල්ලේ එ. අන්තෝනිපිල්ලේ ජෝර්ජ් රාජසූරියර්

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලුම් පත්‍ර අංක 676/69

යාපනේ මුහුදු වෙරළ පාරේ ඒ. ජී. රාජසූරියර් වෙත ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කරන ලෙස කරන ලද ඉල්ලීම පිළිබඳවයි.

විවාද කර නිම්නු කළේ: 1970 සැප්තැම්බර් 19 වැනි දා
හේතු දක්වන ලද්දේ: 1971 ජූනි මස 12 වැනි දා

වර්ෂ 1963 අංක 9 දරණ පනතින් 4 වැනි වගන්තිය ලෙස සංශෝධිත පළාත් පාලන ආයතන මැතිවරණ ආඥා පනත අනුව ක්වෝ වොරන්ටෝ ආඥාවක් සඳහා ඉල්ලුම් පත්‍රයක් — වෙනත් පළාත් පාලන ආයතනයක සභිකයකු තෝරාපත්කර ගැනීමේ නුසුදුසුකම — ඔහුට ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කළ හැකිද?

මේ ඉල්ලුම් පත්‍රය ඉදිරිපත් කර ඇත්තේ, යාපනේ මහ නගර සභාවේ සභිකයකු ලෙස තේරී පත්වන අවස්ථාව වන විට, පුලොපල්ලෙයි ගම් සභාවේ සභිකයකු ලෙසත් පෙනී සිටිය වගඋත්තරකරු වෙත ක්වෝ වොරන්ටෝ ආඥාවක් ලබා ගනු සඳහාය.

තීන්දුව: වර්ෂ 1963 අංක 9 දරන පනතේ 4 වැනි වගන්තියෙන් සංශෝධිත, පළාත් පාලන ආයතන මැතිවරණ ආඥා පනතේ 9 වැනි වගන්තියේ යෙදීම් අනුව වෙනත් පළාත් පාලන ආයතනයක සභිකයකු ලෙස පත්ව සිටින්නකු තවත් පළාත් පාලන ආයතනයකට තේරී පත්වීමට නුසුදුසුස්සකු බව පැහැදිලිව පෙන්නුම් කරන අතර, යාපනේ මහ නගර සභාවට වගඋත්තරකරු තේරී පත්වීම හිස් එකක් බව කිව යුතුය.

වෙන්කොට දක්වන ලද නඩු: සුන්දර බණ්ඩා එ. පතිරණ, 73 න.නී.වා. 100.
මාර්ටින් පෙරේරා එ. මඩදෙඹේ, 73 න.නී.වා. 25.

කේ. ඇන්. චොක්සි, ඇම්. දේවසගායම් සමග පෙත්සම්කරු වෙනුවෙන්.
රාජනිතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන, සී. වෙල්ලප්පා සමග වගඋත්තරකරු වෙනුවෙන්.

එච්. එන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා:

මේ පෙත්සමෙහි වගඋත්තරකරු වූකලි යාපනේ නගර සභාවට නගර සභිකයන් තේරීමෙහි මැතිවරණයෙහි අපේක්ෂකයෙක් විය. ඒ මැතිවරණය පැවැත්වීමෙන් පසුව නගර සභාවෙහි අංක 1 දරන කොට්ඨාශය සඳහා නගර සභිකයා ලෙස ඔහු තෝරා පත් කර ගනු ලැබූ බව ප්‍රකාශයට පත් කැරිණි.

කිසියම් පුද්ගලයකු කිසියම් පළාත් පාලන සභාවක සභිකයකු නම් ඔහු වෙනත් කිසියම් පළාත් පාලන සභාවක සභිකයකු ලෙස තෝරා පත් කරනු ලැබීමට සුදුසුකම් ඇත්තකු නොවන බව, 1963 අංක 9 දරන පනතේ 4 වැනි වගන්තිය මගින් සංශෝධිත පළාත් පාලන මැතිවරණ ආඥා පනතේ (262 වැනි ශීර්ෂය) 9 වැනි වගන්තිය මගින් විධාන කෙරේ. වගඋත්තරකරු යාපනේ නගර සභාවේ සභිකයකු ලෙස තෝරා පත් කර ගනු ලබන කාලයෙහිදී පුලොපල්ලෙයි ගම් සභාවෙහි සභිකයකු වූ බැව් මේ නඩුවෙහි දී අවිවාදයෙන් පිළිගෙන ඇත. එහෙයින් බැලූ බැල්මට හෙතෙම යාපනේ නගර සභාවට තෝරා පත් කර ගනු ලැබීමට නුසුදුසුව සිටියේය. කෙසේ වුව ද තමන් තෝරා පත් කර ගනු ලබන කාලයෙහි එසේ තෝරා පත් කර ගනු ලැබීමට නුසුදුසු වූ පුද්ගලයකුට විරුද්ධව ක්වෝ වොරන්ටෝ ආඥාවක් නිකුත් කළ නොහැකි බව වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි අධිනීතීඥ තැන තර්ක කළේය. හෙතෙම මේ උසාවියේ මෑත නඩු තීන්දු දෙකක් ඒ සඳහා උපයෝගී කොට ගත්තේය.

ගම් සභාවක සභිකයකු ලෙස තෝරා පත් කර ගනු ලැබූ පුද්ගලයකු ඒ ගම් සභා ප්‍රදේශයේ කිසියම් කොට්ඨාශයක් තුළ සාමාන්‍යයෙන් පදිංචිව නොසිටියහයි යන හේතුව මත නිලයෙන් පහ කර ලීම සඳහා මේ ආඥාව නිකුත් කළ නොහැකි බව සුන්දර බණ්ඩා එ. පතිරණ (73 න.නී.වා. 100) නඩුවෙහි දී තීරණය කරන ලදී. මේ තීරණයට පදනම් වූයේ, 262 වැනි ශීර්ෂයේ 8 වැනි වගන්තියෙහි සාමාන්‍ය පදිංචිය පිළිබඳ අවශ්‍යතාව නියම කර ඇත ද, ඒ අවශ්‍යතාව සපුරා නොලන පුද්ගලයකු පළාත් පාලන මණ්ඩලයක සභිකයකු ලෙස තෝරා පත් කර ගනු ලැබීමට නුසුදුස්සකු වන බව 9 වැනි වගන්තිය මගින් විධාන නොකිරීමේ කරුණයි. මේ කරුණ නිසා, 8 වැනි වගන්තිය යටතේ පවත්නා නුසුදුසු බව වූකලි, තෝරා පත් කර ගනු ලැබීමත් අවලංගු කරලිය හැකි හේතුවක් ලෙස ව්‍යවස්ථාදයකය සැලකූ බවත් නොපෙනෙන බව උසාවියේ මතය විය.

කෙසේ වුව ද ප්‍රස්තුත නඩුව වූකලි ඊට වෙනස් ය; කිසියම් පුද්ගලයකු පළාත් පාලන මණ්ඩලයක සභිකයකු නම් ඔහු තෝරා පත් කර ගනු ලැබීමට නුසුදුසු වන බව (1963 දී සංශෝධිත පරිදි) 9 වැනි වගන්තිය මගින් විධාන කෙරෙන හෙයිනි.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 91 වෙනි පිට බලනු.

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පළාත් පාලන මණ්ඩලයක සභිකයකු තෝරා පත් කර ගනු ලැබීම සාමාන්‍ය අයථා බලපෑම හා හෝ සාමාන්‍ය වංචාව මගින් සිදු වී ඇත්තේය යන හේතුව මත මේ ආඥාව නිකුත් කළ නොහැකි බව මාර්ටින් පෙරේරා එ. මඩදෙණි (73 න.නී.වා. 25) නඩුවෙහි දී මේ උසාවිය තීරණය කළාය. 9 වැනි වගන්තිය අනුව කිසියම් පුද්ගලයකු සභිකයකු වීමට නුසුදුසු වන්නේය යන හේතුව මත මේ ආඥාව ඉල්ලා සිටින ප්‍රතිවාදීන්හි දී මේ ආඥාව නිකුත් කළ හැක්කේ ද නොහැක්කේ ද යන ප්‍රශ්නය මේ අනුව ඒ නඩුවෙහි දී පැන නොනැඟිණි. 9 වැනි වගන්තිය අනුව නුසුදුස්සකු වන පුද්ගලයකුට පළාත් පාලන මණ්ඩලයක සභිකයකු ලෙස අසුනක් හෝ නිලයක් නීත්‍යානුකූලව දැරිය නො හැකි බවත්, නීතිය මගින් වෙකල්පික හෝ ප්‍රසාධක පටිපාටියක් (alternative or effective procedure) සලසා නැති බව උසාවියට ඒත්තු යේ නම් එවැනි පුද්ගලයකු පහ කරලීමට අධිකරණ බලය නිසැකයෙන්ම යෙදිය යුතු බවත් 9 වැනි වගන්තිය හා 10 වැනි වගන්තිය මගින් පැහැදිලි වන බව නඩු තීන්දුවෙන් කියැවේ. එවැනි ප්‍රසාධක වෙකල්පයක් ව්‍යවස්ථාගතවී ඇති බව මේ නඩු විභාගයෙහි දී කැරුණු තර්ක මගින් ඔප්පු නොවිණි.

මේ හේතු නිසා වගඋත්තරකරුගේ තෝරා පත් කර ගනු ලැබීම හිස් වූවක් බව අපි තීරණය කළෙමු.

තාමෝදරම් විනිශ්චයකාරතුමා:
මම එකඟවෙමි.

ඉල්ලීමට ඉඩ දී තේරී පත්වීම අවලංගු කරන ලදී.

එච්. එන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා සහ වීරමන්ත්‍රි විනිශ්චයකාරතුමා ඉදිරිපිට දී

වෙලුන් රණසිංහ එ. දෙන් ලෙයාරිස් ජයතිලක

ශ්‍රේෂ්ඨාධිකරණ අංක 513/66 (අවසාන) — දිස්ත්‍රික් උසාවිය කලුතර 1083/එම්.ආර්.

විවාද කළේ: 1969 ජූනි මස 3 වැනි ද සහ 4 වැනි ද
තීන්දුව දුන්නේ: 1969 ජූනි මස 20 වැනි ද

ගෙවල් හිමියා සහ කුලී ගෙවන්නා — ගෙවල් කුලී පාලන පනතට යටත් නිවසක් — 1962 සිට 1964 දක්වා වැඩිපුර ගෙවල් කුලී ගෙවන ලදැයි ගෙවල් කුලී ගෙවන්නා විසින් එය ආපසු අයකර ගැනීමට ගෙවල් හිමියාට නඩු පැවරීම — ගෙවල් කුලිය නියම කිරීමට යයි වර්ෂ 1964 ගෙවල් කුලී පාලන මණ්ඩලයට කළ ඉල්ලීමක් — ගෙවල් හිමියාට නිවේදනයක් — පරීක්ෂණ දිනයේ ගෙවල් හිමියා පැමිණ නොසිටීම — ගෙවල් කුලිය මසකට රු: 58.82 බව නියම වීම—ගෙවල් හිමියාට නියමවූ කුලිය කියදැයි දන්වා යැවීම—පැමිණිලිකරුගේ ඉල්ලීම රු: 100/- සහ රු: 58.52 අතර ඇති අන්තරය සහ ප්‍රස්තුත කාල සීමාවේ ගෙවන ලද වරිපනම් බදු—මණ්ඩලයේ තීරණය දිස්ත්‍රික් විනිශ්චයකාරතුමා නො පිළිගැනීම — ඔහු පෙන්වා දුන් හේතු නීත්‍යානුකූල ද යන්න.

1.1.1962 වැනි දින සිට 30.9.1964 වැනි දින දක්වා තමා විසින් ගෙවන ලද මුදලක් තම ගෙවල් හිමියා වන චිත්තිකරුගෙන් ලබා ගැනීමට පැමිණිලිකරු නඩු පැවරිය. මේ කාලය තුළ මසකට රු: 100/- බැගින් ගෙවල් කුලිය වශයෙන් ද, රු: 158/73 ක් වරිපනම් වශයෙන් ද ගෙවූ බව පැමිණිලිකරු ඔප්පු කළේය.

1964 වර්ෂයේ දී නිවසේ කුලිය ගෙවල් කුලී පාලන පනතේ 4 වැනි ඡේදයේ විධිවිධාන යටතේ නියම කරන ලෙස ඉල්ලා පැමිණිලිකරු ගෙවල් කුලී පාලක මණ්ඩලය වෙත ඉල්ලීමක් ඉදිරිපත් කළේය. මේ සඳහා 5.11.1964 වැනි දින පැවැත්වුණු පරීක්ෂණයට නිවේදනයක් යැවුනු නමුත් ගෙවල් හිමියා පැමිණ නොසිටියේය.

පෙනී යන හැටියට 1961 අංක 10 දරන පනතින් සංශෝධිත ගෙවල් කුලී පාලන පණතේ 16(ඒ) ඡේදයට අනුව ක්‍රියාකරමින් ප්‍රශ්නයට භාජනව ඇති නිවසේ කුලිය මසකට රු: 58.82 කැයි ගෙවල් කුලී පාලක මණ්ඩලය තීරණය කළේය. පැමිණිලිකරුගේ ඉල්ලීම රු: 100 සහ මණ්ඩලය විසින් නියමිත මාසික කුලිය වශයෙන් තීරණය කළ රු: 58.82 අතර ඇති අන්තරය මත මුදලක් විය.

5.11.1964 වැනි දින මණ්ඩලය කළ නියෝගයට කලින් කාලය පිළිබඳව නියමිත මාසික කුලිය රු: 58.82 බව පිළිගැනීම උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා හේතු දෙකක් මත ප්‍රතික්ෂේප කළේය. එනම්:

(ඒ) මසකට නියම කරන ලද කුලිය රුපියල් 58.82 ක් බව කියමින් දෙන ලද මණ්ඩලයේ නියෝගය දන්වා චිත්තිකරුට යවන ලද ඩී1 දරන ලිපිය මණ්ඩලයේ කාර්යාලීය පිටපත වූයෙන් ගෙවල් කුලී පාලක මණ්ඩලය 20(13) ඡේදයෙහි ප්‍රතිපාදකයන්ට අනුව එය යැවීමෙන් මණ්ඩලය තම යුතුකම ඉටුකළ බව පෙනී නොයෑම,

(බී) රණසිංහ එ. ප්‍රනාන්දු අතර කියැවී 53 න.නී.වා. 163 වැනි පිටුවේ සඳහන් නඩුව මෙම නඩුවට සැසඳීම සහ ඒ අනුව සළකා බලන විට මණ්ඩලයේ නියම කළ කුලිය එසේ නියම කිරීමට පෙරාතුව තිබූ කාල සීමාවකට අදාල නොවීම.

තීන්දුව: (1) ඩී1 දරන නිවේදනය පනතේ 20(13) දරන ඡේදයෙහි පරමාර්ථයට සෑහෙන ප්‍රමාණයකට අනුකූල වේ. මෙම ඡේදයෙන් කියැවෙන්නේ තමන්ට බලපවත්වන මණ්ඩලයේ නියෝගයක ඇතුළත් කරුණු විශ්වාස කළ හැකි පරිදි පාර්ශ්වකරුවන්ට දැන්වීම අවශ්‍ය බවය.

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*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 80 වෙනි කාණ්ඩයෙහි 88 වෙනි පිට බලනු

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(2) රණසිංහ එ. ප්‍රනාන්දු යන නඩුව මෙයට අදාළ කිරීමෙන් නඩුව ඇසූ උගත් විනිශ්චයකාරවරයා අතින් වරදක් සිදුව තිබේ. එම නඩුව සම්බන්ධ වී ඇත්තේ පනතේ අංක 5(2) දරන ඡේදයේ ඇති කරුණුවලටය. එනම් නියමිත කුලිය දෙපක්ෂය විසින් සම්මුතියකට බැසගත් ගණන වී එය මණ්ඩලයේ නියම කරන කුලිය නියමිත කුලිය බවට පත්වන තෙක් නියමිත කුලිය හැටියට ගණන් ගැනේ. නඩුවෙහි කරුණු එසේ වන අතර දැනට ඉදිරිපත්ව ඇති නඩුවේ කුලිය වර්ෂ 1941 තක්සේරුව ගැන අවධානය යොමුකොට ගෙවල් කුලී පාලන පනතේ හැටියට ගණන් බැලූ විට ලැබෙන නියමිත කුලිය වේ.

(3) අංක 16(A) දරන ඡේදයෙහි පරමාර්ථය ගෙවල් කුලී පාලක මණ්ඩලය විසින් නියමිත කුලිය එක් ගණනකින් තව ගණනකට වෙනස් කිරීම නොවේ. පනතේ කරුණට අදාළ ඡේදයන්ට අනුකූලව නියමිත කුලිය කෙතෙක් ද යන්න නිගමනය කිරීම එහි පරමාර්ථයයි.

(4) ගෙවල් කුලී පාලක මණ්ඩලය විසින් නියම කරන ලද කුලියෙහි නිවැරැදි බව ගැන අභියෝගයක් ඉදිරිපත් වී නොමැති නම්, එසේම මණ්ඩලය විසින් නියම කරන ලද කුලිය නියමිත කුලියට වෙනස් යැයි සාක්ෂ්‍ය ඉදිරිපත් කර නොමැති නම් මණ්ඩලයේ තීරණය උසාවියක් විසින් පිළිගෙන ඒ අනුව ක්‍රියා කළ යුතුය.

(5) මේ නිසා පැමිණිලිකරු ඒ කාලය තුළ මසකට නීත්‍යානුකූල ගෙවල් කුලිය රුපියල් 58.82 ක් බව ස්ථාපිත කර ඇති අතර ඔහුගේ පැමිණිල්ලෙන් කියා පාන ලෙස ඔහු වැඩියෙන් කුලී ගෙවීම දැ කර තිබේ.

සඳහන් කළ නඩු: විලියම් එ. සෝමසුන්දරම් 71 න.නී.වා. 459

වෙන්කොට දක්වන ලද නඩු: රණසිංහ එ. ප්‍රනාන්දු, 53 න.නී.වා. 163.

නිමල් සේනානායක, නීල් ඩයස් සමග, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

ජේ. ඩබ්ලිව්. සුබසිංහ විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

එච්. එන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා:

1962 ජනවාරි මස 1 වැනි දා පටන් 1964 සැප්තැම්බර් මස 30 වැනි දින දක්වා වූ කාලය සඳහා තමා විසින් ස්වකීය ගෙවල් හිමිවූ විත්තිකරුට වැඩිපුර ගෙවන ලද බැව් කියන මුදල් ප්‍රමාණයක් ආපසු ලබා ගැනීම පිණිස පැමිණිලිකරු මේ නඩුව පැවැරීය. මේ නිවාසය මතුගම සුළු නගර සභා සීමාව ඇතුළත පිහිටා ඇති අතර, තමා මේ කාලය ඇතුළත දී ගෙවල් කුලිය වශයෙන් මසකට රුපියල් සියයක මුදලක් ද, නිවාසය උදෙසා වරිපනම් ගාස්තු ලෙස රුපියල් 158/73 ක මුදලක් ද ගෙවූ බැව් පැමිණිලිකරු ඔප්පු කළේය.

''ගෙවල් කුලී පාලන පනතේ 4 වැනි වගන්තිය අනුව'' නිවාසයේ කුලිය නියම කරන ලෙස ඉල්ලමින් පැමිණිලිකරු විසින් 1964 ඔක්තෝබරයේ දී මතුගම ගෙවල් කුලී පාලන මණ්ඩලයට ඉල්ලුම්පතක් ඉදිරිපත් කරන ලදී. මේ ඉල්ලුම්පත පිළිබඳව ගෙවල් හිමියාට දැනුම් දෙනු ලැබූ අතර 1964 නොවැම්බර් 5 වැනි දින විභාගයක් ද පවත් වන ලදී. ඒ විභාගයට ගෙවල් හිමියා පැමිණුණු නොසිටියේය. පැමිණිලිකරුගේ ඉල්ලුම්පත වූකලි 1961 අංක 10 දරන පනතින් සංශෝධිත ගෙවල් කුලී පාලන පනතේ 16 (ඒ) වගන්තිය යටතේ දෙන නියෝගයක් සඳහා අභිප්‍රේත එකක් බව මණ්ඩලයට වැටහුණු බවක් පෙනී යන අතර, එම වගන්තියෙන් මෙසේ විධාන කෙරේ.

> 16A— ගෙවල් කුලී ගෙවන්නා විසින් හෝ ගෙවල් කුලී හිමියා විසින් හෝ ඉල්ලුම් කළ විට දී මණ්ඩලය නිවාසයේ නියමිත කුලී ප්‍රමාණය කෙතෙක් ද යන්න සලකා බලා නියෝගයක් නිකුත් කරනු ඇත.

(විලියම් එ. සෝමසුන්දරම්, 71 න.නී.වා 459 නඩුවෙහි දී මා සඳහන් කළ පරිදි) 16 (A) වගන්තියෙන් විධාන කෙරෙනුයේ නියමිත කුලී ප්‍රමාණය තීරණය කිරීම මිස නියමිත කුලිය නියමකරලීම නොවන බව පෙනී යනු ඇත. කුලී ගෙවන්නා විසින් ඉල්ලුම් කළ විට දී ගෙවල් හිමියා විසින් නියමිත කුලිය ද තමා ඉල්ලන අනුඥාන කිසියම් වැඩිවීමක් ද පිළිබඳව කියමනක් සැපයිය යුතු බව ප්‍රධාන පනතේ 16 වැනි වගන්තියෙන් මුල දී විධාන කරන ලදී. ගෙවල් හිමියා විසින් එසේ සපයනු ලබන කියමනක ඇති විය හැකි සාවද්‍යතාවන් නිසා කුලී ගෙවන්නාගේ යහපත තකා මේ විධානය ප්‍රමාණවත් නොවන බව ව්‍යවස්ථාදායක මණ්ඩලය සැලැකූ බව පැහැදිලිය. මේ අඩුපාඩුව 16 (A) වගන්තියෙන් සපිරුණු අතර එය යටතේ කුලී ගෙවන්නකු හට නියමිත කුලී ප්‍රමාණය ගෙවල් කුලී පාලන මණ්ඩලය මගින් වඩා සහතික ලෙස ගණන් බලා තීරණය කරවා ගත හැකිය. මේ අනුව තමා සිය ගෙවල් හිමියාට නිවැරැදි කුලිය ගෙවන බවට කුලී ගෙවන්නාට සහතික කර ගත හැකිය.

මේ කරුණෙහි දී නිවාසයේ කුලිය මසකට රුපියල් 58/82 ක් බව ගෙවල් කුලී පාලන මණ්ඩලය මගින් තීරණය කරන ලදී. මණ්ඩලයේ තීරණය කිරීම නොපිළිගැනීමට උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාට හේතු දෙකක් තුබුණු අතර දැන් මම මේවා සලකා බලමි.

1964 නොවැම්බර් මස 5 වැනි දින පැවැත් වූ විභාගයෙන් පසුව මණ්ඩලය මගින් විත්තිකරුට යවන ලද දැන්වීමෙහි මණ්ඩලයේ කාර්යාලය පිටපත ඩී1 ලෙස විත්තිකරුගේ සාක්ෂ්‍යයෙහි ද සටහන් කැරිණ. මණ්ඩලයේ ලේකම් විසින් අත්සන් කරන ලද මේ පිටපතෙහි නිවාස හිමියාට මසකට ගෙවිය යුතු මාසික කුලිය රු: 58/82 ක් බව මණ්ඩලය කළ නියමය විත්තිකරුට ඉතාම පැහැදිලි ලෙස දන්වන ලදී. ඩී1 දමා සළකුණු කරන ලද ලිපියෙහි ඇතුළත් අනුදේශයන් සළකා බැලූ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා මණ්ඩලය විසින් විත්තිකරුට යවන ලද්දේ ඩී1 සළකුණු කළ ලිපියට අන්‍ය නොවන ලිපියක් බව සළකා ගත් අතර ඩී1 සළකුණු ලැබූ ලිපියේ ස්වරූපයක් ඇති දැන්වීමක් වශයෙන් විත්තිකරුට යැවීම තම නියෝගයේ පිටපතක් ඔහුට යැවීම පිළිබඳව මණ්ඩලය පිට පැවරී තිබෙන යුතුකම ඉටුකිරීමක් නොවන බව වැඩිදුරටත් නිගමනය කළේය. මණ්ඩලය විසින් කරනු ලබන හැම නියෝගයක්ම ලිඛිත එකක් විය යුතුවා මෙන්ම සභාපති විසින් අත්සන් කරන

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ලද්දක් ද විය යුතු බවට 20 වැනි වගන්තියේ (13) වැනි උප වගන්තියෙන් නියම කෙරෙන අතර නියෝගයේ පිටපතක් හැම පක්ෂයකටම යැවිය යුතු බව ද නියම කෙරේ. කිසියම් පක්ෂයකට යැවෙන නියෝගයක පිටපත අනුපිටපතක් විය යුතු බව ද එහි සභාපතිගේ අත්සන තිබිය යුතු බව ද යන අදහස, මේ උප වගන්තිය අකුරටම සළකා බැලීමෙන්, සාධාරණ බැව් පෙනී යන අතර, පනතේ අවශ්‍යතාවන් පිළිපැදිය යුතු ආකාරය පිළිබඳව ගෙවල් කුලි පාලන මණ්ඩලවලට උපදෙස් දීමේ අවශ්‍යතාව මේ නඩුවෙන් හෙළි වන බව මා විසින් පැවසිය යුතුව ඇත. එතකුදු වුවත් තමනට අදළ නියෝගයේ අඩංගු දෑ පිළිබඳව පක්ෂයනට නියමිත ලෙස දැනුම් දිය යුතුය යන 13 වැනි උප වගන්තියේ අරමුණ ඩී1 ආකෘතියෙහි වූ දැන්වීම මගින් ඉටු වන බව මගේ අදහස වේ. එහෙයින් මණ්ඩලයේ නියෝගයේ පිටපතක් ඩී1 විඥාපනය මගින් විත්තිකරුට ලැබුණු බව එහෙයින් මම තීරණය කරමි.

යට කී පරිදි මණ්ඩලයේ නියෝගය 1964 නොවැම්බර් මස 5 වැනි දින කැරුණද මේ නඩුවෙහි දී පැමිණිලිකරු කියා සිටිනුයේ, තමා විසින් 1962 සිට 1964 දක්වා කාලය තුළ එක් එක් මසකට, මණ්ඩලය මගින් නිර්ණිත ගණන වන රු: 58/82 ද, රු: 100/- ද අතර අන්තරය වන ප්‍රමාණයක් වැඩිපුර ගෙවා ඇති බවයි. මණ්ඩලය මගින් නිර්ණිත රු: 58/82 නියෝගයට පෙර අවධියක නියමිත කුලිය ලෙස පිළිගැනීම උගත් විනිශ්චයකාරතුමා ප්‍රතික්ෂේප කර ඇත. එතුමා රණසිංහ එ. ප්‍රනාන්දු (53 න.නී.වා. 163) නඩුවෙහි තීරණය යොදා ගන්නට තැත් කර ඇත. මේ නඩුවට සම්බන්ධ වූයේ පනතේ 5(2) වගන්තියේ(සී) ඡේදය අදළ වන්නා වූ නිවාසයකි. ඒ නඩුවේ තීරණය අනුව, ඒ නිවාසය වූකලි 1941 නොවැම්බර් තක්සේරුව අනුව නියමිත කුලිය නිර්ණය කරන ලද නිවසක් නොවූ අතර,ඒ වූකලි 5 වැනි වගන්තියේ 2 වැනි උප වගන්තියේ 'සී'ඡේදය අදළ වූ නිවසකි. ඒ ඡේදය අනුව නියමිත කුලිය වූකලි කුලිය එකඟ වූ කුලිය සේ ඉල්ලුම් කළ විටෙක මණ්ඩලය විසින් නියම කරන ලද සේ කුලිය බවට ප්‍රකාශිතය. එහෙයින් මේ ප්‍රශ්නයෙහි දී මණ්ඩලය විසින් නියමිත කුලිය නියම කරලන තෙක්, 'සී' ඡේදය අනුව එකඟවූ ප්‍රමාණය අතර, මණ්ඩලය විසින් නියම කරන ලද ප්‍රමාණය නියමිත කුලිය බවට පත් වූයේ මණ්ඩලය විසින් එය ඇත්ත වශයෙන්ම නියම කරන ලද විට පමණෙකි. වෙනත් වචනවලින් කියතොත් ඒ ඡේදය යටතේ මණ්ඩලය වූකලි කලින් නියමිත කුලී ප්‍රමාණය වෙනස් කරයි. මේ හේතු අනුව මණ්ඩලය විසින් නියම කරන ලද කුලිය එසේ නියම කළ දිනයට පෙර කාලය සඳහා අදළ නොවන බව ශ්‍රේෂ්ඨ විනිශ්චයකාරතුමා තීරණය කළේය.

ඒ නඩුව වූකලි පනතේ 16(A) වගන්තිය අදළ වන ප්‍රතිඩියකින් පැහැදිලි ලෙස විසේදනය කළ හැකිය. 16ඒ වගන්තියේ අරමුණ වනුයේ මණ්ඩලය ලවා නියමිත කුලිය එක් ප්‍රමාණයකින් තවත් ප්‍රමාණයකට වෙනස් කරවීම නොව, පනතේ අදළ විධිවිධාන අනුව නියමිත කුලිය වනුයේ කුමක් ද යන්න ඒ මගින් තීරණය කරවීමය. මේ ප්‍රතිඩියෙහි දී අදළ කාලය තුළ නිවාසය සුළු නගර සභාව විසින් වරිපනම් සඳහා තක්සේරු කරනු ලැබූ අතර, ඒ අනුව එසේ තක්සේරු කරන ලද නිවාසයේ වාර්ෂික වටිනාකම අනුව නියමිත කුලිය (වගන්තිය 5(1)(ඒ) ආදිය අනුව) තීරණය කරනු ලදී. නියමිත කුලිය රු: 58/82 බවට තීරණය කිරීමේ දී මණ්ඩලයට වැරදුණු බවක් පැමිණිලි කර නැති අතර, ක්‍රමවත් බව පිළිබඳ පූර්ව නිගමනය මත විශ්වාසය තැබීමට පැමිණිලිකරුට අයිතියක් තිබිණි. එහෙයින් මණ්ඩලයේ තීරණය වූකලී පනතේ 5(1)(අ) වගන්තිය ද නියමිත කුලිය තීරණය කිරීමට අදළ වෙනත් විධිවිධාන සලකා බලා කරන ලද්දක් බව පිළිගැනීමට සිදු වේ.

1964 නොවැම්බරයේ දී මණ්ඩලය කළ තීරණය අතීත කාලයක් සඳහා නියමිත කුලී ප්‍රමාණය පිළිබඳ සාක්ෂ්‍යයක් නොවේය යන විරෝධය වූකලි, එහෙයින්, උපරිම තත්වයෙහි දී වුව ද හුදු විධිමාන වූවක් බව පෙනී යේ. තක්සේරු කරන ලද නිවාසයක නියමිත කුලියට අදළ පනතේ විධිවිධාන ද නියමිත කුලියේ අනුඥාන වැඩිකිරීම්වලට අදළ විධිවිධාන ද අනුව, කවර හෝ විටෙක කවර හෝ නිවාසයක නියමිත කුලිය ඊට කලින් අවධියක නියමිත කුලිය වූ ප්‍රමාණයට වඩා ඉහළ විය නොහැකිය. අනෙක් අතට, විය හැකි එකම දෙය නම් ගෙවල් හිමියකුට අවාසිදයක වූවකි. එනම්, 1962 දී හෝ 1963 දී හෝ නිවාසයක නියමිත කුලිය වූ කලී 1964 දී 16(A) වගන්තිය යටතේ කුලී පාලන මණ්ඩලයකින් තීරණ ප්‍රමාණයට වඩා අඩු විය හැකිවීමය.

16ඒ වගන්තිය යටතේ කුලී පාලන මණ්ඩලයක තීරණයේ අරමුණ ව්‍යක්තව දක්වාලන විධිවිධානයක් 1961 අංක 10 දරන ප්‍රධාන පනතේ සංශෝධනයෙහි අන්තර්ගත නොවේ. එසේ පක්ෂයනට කරුණු ඉදිරිපත් කිරීමේ අවස්ථාවක් ලබා දිය යුතු බවවත් මණ්ඩලයේ නියෝගය පිළිබඳව පක්ෂයනට දන්වාලිය යුතු බවවත් නියෝගය සමීක්ෂණ මණ්ඩලයක අභියාචනයකට යවත් බවටත් විධානය කෙරෙන මණ්ඩලයේ නියෝගයක එවැනි තීරණයක් කෙරෙන බව මට පෙනී යේ [20(3) වගන්තිය]. කරුණු මෙසේ හෙයින්, 16ඒ වගන්තිය යටතේ කෙරෙන තීරණයක් වූකලි නිවාසයේ නියමිත කුලිය පිළිබඳව යටත් පිරිසෙයින් බැලූ බැල්මට ගත හැකි සාක්ෂ්‍ය විය යුතු බවට ව්‍යවස්ථාදයකය අදහස් කළ බව අනුමාන කිරීම සාධාරණය. මණ්ඩලය මගින් නිර්ණිත ප්‍රමාණයේ නිරවද්‍යතාව ප්‍රශ්න නොකෙරේ නම්, එසේම සත්‍ය නියමිත කුලිය මණ්ඩලය මගින් නිර්ණිත කුලියට වඩා වෙනස් බව පෙන්වීමට සාක්ෂ්‍ය ද ඉදිරිපත් නොකෙරේ නම් උසාවියක් ඒ තීරණය පිළිගෙන ඒ අනුව ක්‍රියා කළ යුත්තේය. ව්‍යවස්ථාපිත මණ්ඩලයන් දෙකක් පිහිටුවීම ද ඉන් දෙවන්නෙන් තීරණයන් අවසාන හා තීරණාත්මක බවට ප්‍රකාශවීම ද නිසා, මණ්ඩලයේ තීරණය කිරීමේ නිරවද්‍යතාවට එරෙහිව සාක්ෂ්‍ය ඉදිරිපත් කර නැති නඩුවක දී නිවාසයක නියමිත කුලිය යළිත් උසාවියක් මගින් තීරණය කිරීමේ අවශ්‍යතාව පැන නොනගින්නේය.

මේ කරුණු නිසා, අදළ කාලය සඳහා මසකට නියමිත කුලිය රු: 58/82 බව පැමිණිලිකරු තහවුරු කළ බවත් ඒ අනුව පැමිණිල්ලෙන් පැවසූ අන්දමට වැඩිපුර ගෙවීම් කර ඇති බවත් මම තීරණය කරමි.

අභියාචනයට ඉඩ දෙන අතර උසාවි දෙකෙහිම ගාස්තුව සහ රු: 1,517/67 ක මුදලක් පැමිණිලිකරුට ලැබෙන ලෙස ද තීන්දුව දෙමි.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

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එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා සහ සමරවික්‍රම විනිශ්චයකාරතුමා ඉදිරිපිට දී

ඇම්. ඇම්. සනීක් එ. ඇම්. ඇල්. ඇම්. අහමඩ්

ශ්‍රේෂ්ඨාධිකරණයේ අංක 68/68 (අන්තර්) — කොළඹ දිස්ත්‍රික් උසාවියේ අංක 53124/ඇම්.

විවාද කළේ: 1969 දෙසැම්බර් 18 සහ 19 වැනි දිනවල
නිම්දුව දුන්නේ: 1970 ජනවාරි 16 වැනි ද

විණිසුණු කරුණ — එකම විත්තිකරුට විරුඩව පැමිණිලිකරු විසින් එකම මුදලක් අයකර ගැනීමට දෙවැනි වරට ඉදිරිපත් කළ නඩුවක් — පළමු නඩුවේ දී දෙපක්ෂය අතර විසඳීමට නිබුණු ප්‍රධාන ආරවුල් කරුණු පැමිණිලිකරුගේ වාසියට තීරණය වී නිබීම — නමුත් පැමිණිලිකරුගේ නඩුව යෝග්‍ය කාලයට ප්‍රථම පැමිණිලි කිරීම නිසා නඩුව ඉවත දැමීම—පළමු නඩුවේ දී පැමිණිල්ලට වාසිව තීරණය වූ කරුණු දෙවැනි නඩුවේ දී විභාග කර තීරණය කිරීම නීතියට පටහැනිවේ ද? — මෙවැනි නඩුවල දී අනුගමනය කළ යුතු පිළිවෙත.

පැමිණිලිකරු විසින් රුපියල් 8,000 ක් ආපසු ලබා ගැනීමට ඉදිරිපත් කළ පැමිණිල්ලේ මෙසේ සඳහන් විය.

(අ) පැමිණිලිකරු විසින් විත්තිකරුගේ ගෙයක් කුලියට ගත් අවස්ථාවේ දී විත්තිකරු ළඟ රුපියල් 8,000!- ක් තැන්පත් කළ බව ,

(ආ) ගෙය කුලියට ගැනීමේදී ඇති වූ කොන්දේසියක් අනුව ගෙයි බුත්තිය ආපසු බාර දෙන විට එම මුදල ආපසු දීමට පොරොන්දු වීම,

(ඉ) එම ගෙයි බුත්තිය ආපසු බාර දුන් බව,

නඩු විභාගයේ දී විත්තිකරු වෙනුවෙන් අංක 12 වශයෙන් නගන ලද හබ ප්‍රශ්නය නම් ගෙවල් කුලි පාලන ආඥා පනතේ 18 වැනි ඡේදයට පටහැනිව ඉහත කී රුපියල් 8,000/- ගෙවන ලද්දේ ද? යන්නයි.

එවිට පැමිණිලිකරු විසින් ඉන් පැන නගින කරුණක් සේ පහත සඳහන් හබ ප්‍රශ්නය මතු කළේය:—

''මෙම උසාවියේ අංක 44364/එම්. දරණ නඩුවේ දී අංක 12 දරණ ඉහත කී හබ ප්‍රශ්නය විසඳී තිබුන නිසා එය නැවත දෙවැනි නඩුවේ දී විනිශ්චයට භාජනය කිරීමට නීතියේ විණිසුනු ප්‍රතිපත්තිය අවහිර වන සේ ක්‍රියාත්මක වේ ද?''

යට කී අංක 44364/එම්. දරණ නඩුවේ දී මෙම පැමිණිලිකරුම තමා විත්තිකරු ළඟ රුපියල් 8,000/- ක් ඉල්ලූ විටක ආපසු දීමේ පොරොන්දුව පිට තැන්පත් කළ නිසා ඒ මුදල් ආපසු ඉල්ලා සිටියේය. පළමු නඩුවේ දී විත්තියේ නිදහසට ප්‍රධාන වශයෙන් කියා සිටියේ රුපියල් 8,000/- ක මුදලක් විත්තිකරු ළඟ තැන්පත් නොකළ බවයි.

උගත් විනිශ්චයකාරතුමා විත්තියේ නිදහසට ඉදිරිපත් කළ එකී කරුණු ඉවත දමා මෙසේ ද පැමිණිල්ලේ වාසියට නින්දු කළේය:

(අ) විත්තිකරු විසින් පැමිණිලිකරුගෙන් එම මුදල වූ රුපියල් 8,000/- ඉල්ලා ලබා ගත් බව.

(ආ) විත්තිකරුට ගෙයි බුත්තිය පැමිණිලිකරුට ආපසු බාර දීමෙන් පසු පමණක් එම මුදල ආපසු ලබාගන්ට හැකි බව.

(ඇ) එම රුපියල් 8,000/- පැමිණිලිකරු විසින් ගෙවීම නීති විරෝධී නොවන බව.

(ඈ) පැමිණිලිකරු ගෙයි බුත්තිය ආපසු නොදී සුදුසු කාලයට ප්‍රථම මෙම නඩුව ඉදිරිපත් කළ නිසා එය ඉවත දැමිය යුතු බව.

තීන්දුව: (1) පළමු නඩුවේ දී පැමිණිලිකරුගේ වාසියට නඩුවේ හබ ප්‍රශ්න විසඳුනු ලැබූ නමුත් අන් කරුණක් මත නඩුව ඉවත දැමූ බැවින් එම විසඳීම් නැවත විසඳීමට නීතියේ විණිසුණු පිළිවෙත අවහිර නොකරයි.

(2) මේ මතය පදනම් වී ඇති මූල ධර්මය නම් පැමිණිලිකරුගේ ප්‍රථම නඩුව නිසි කලට පෙර ගෙනෙන ලද බැවින් ඉවත දැමූ නිසා විත්තිකරුට ඇපැලක් ගෙන ඔහුට විරුද්ධව නිබුණු කරුණු වෙනස්කරවා ගන්ට අවශ්‍යතාවයක් පැන නොනැගුණු හෙයිනි.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා: ''ඇත්ත වශයෙන්ම ඒ තීරණයට විරුද්ධව අභියාචනය කිරීමේ අයිතියක් විත්තිකරුට නොනිබුණු බව වර්තමාන ඇපැලෙහි පැමිණිලිකරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥවරයාට පිළිගැනීමට සිදුවිය. කරුණු මෙසේ වන හෙයින් තමනට අභියාචනය කළ නොහැකි දිස්ත්‍රික් උසාවියක තීරණයකින් විත්තිකරු බැඳී ඇති සේ සැලකීම ප්‍රස්තුත නඩුවෙහි දී පැහැදිලි වශයෙන්ම අසාධාරණ වන්නක්ය. තීරණයේ අවසාන නියෝගයක් නො වූ හෙයින් එය විනිශ්චිත කරුණක් වියනොහේ.''

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 80 වෙනි කාණ්ඩයෙහි 109 වෙනි පිට බලනු.

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අවධානය යොමු කළා: පාවහන් යාන්ත්‍රික සමාගම එ. කටලන් (1896) 1 වා. අ. 667 පිටුව
රොවීනා උම්මා එ. රහුමා උම්මා, 41 න.නී.වා. 522.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන, ඇ/ප්. සී. පෙරේරා සහ ජී. ඇම්. ඇස්. සමරවීර සමග, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්

රාජනීතිඥ සී. රෙංගනාදන්, ඇස්. සී. ක්‍රොසට් තම්බයියා සමග, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්

එච්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍රවිනිශ්චයකාරතුමා:

මේ නඩුවෙහි පැමිණිලිකරු තමා චිත්තිකරු වෙත රුපියල් 8,000/- ක් තැන්පත් කළ බව කියමින් එය ආපසු ලබා ගැනීම සඳහා චිත්තිකරුට විරුඬව නඩු පැවැරීය. පැමිණිලිකරු එකල චිත්තිකරුගෙන් එක්තරා නිවාසයක් කුලියට ගත් බවත්, කුලීකර ශිවිසුමේ අනුදේශයන් අනුව නිවාසය ආපසු බාර දුන් කල්හි පැමිණිලිකරුට ආපසු දීමේ කොන්දේසිය පිට රුපියල් 8,000/- ක මුදලක් චිත්තිකරු වෙත තැන්පත් කළ බවත් පැමිණිල්ලෙන් වැඩි දුරටත් කියැවිණි. මේ මුදල ආපසු ලබා ගැනීම පිළිබඳ අයිතිය වූකලි, නිවාසය 1961 ජුනි මාසයෙහි චිත්තිකරු වෙත ආපසු බාර දීම මත පදනම් වී ඇත.

පූර්වෝක්ත ප්‍රකාශයන්හි යාචිත කරුණු නහාලමින් නඩු විභාගයෙහි දී විසඳිය යුතු ප්‍රශ්න ඉදිරිපත් කරන ලදී. චිත්තිකරු වෙනුවෙන් ඉදිරිපත් කැරුණු විසඳිය යුතු ප්‍රශ්නයන්ගෙන් එකක් නම් (අංක 12) රුපියල් 8,000/- ක මුදලක් ගෙවීම කුලී පාලන පනතේ 18 වැනි වගන්තියට පටහැනි ද යන්න බව මෙහි ලා සඳහන් කිරීම අපේ වර්තමාන කාර්යය සඳහා සෑහේ.

පැමිණිලිකරු අනතුරුව පහත දැක්වෙන්න ද විසඳිය යුතු ප්‍රශ්නයක් ලෙස ඉදිරිපත් කළේය.

44364/ ඇම් නඩුවෙහි දී මේ උසාවිය කළ තීරණය අංක 12 දරණ විසඳිය යුතු ප්‍රශ්නය අරභයා දෙපක්ෂය විනිශ්චිත කරුණක් ද?

44364/ඇම් නඩුවෙහි දී මේ පැමිණිලිකරු ම රුපියල් 8,000/- ක මුදලක් ආපසු ලබා ගැනීම සඳහා චිත්තිකරුට විරුඬව නඩු පවරා තුබුණු අතර, එහි පදනම වූයේ තැන්පතුව (deposit) ඉල්ලූ විටෙක ආපසු දිය යුතුය යන්නයි; ඒ නඩුව පිළිබඳ විභාගයෙහි දී නැඟුණු විසඳිය යුතු ප්‍රශ්න ද එය විභාග කළ උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා ඊට දුන් පිළිතුරු ද පහත දක්වමි:

(1) (අ) කුලීකරය වෙනුවෙන්, චිත්තිකරු පැමිණිලිකරුගෙන් රුපියල් 8,000/- ක මුදලක් ඉල්ලා ලබා ගත්තේ ද?
එසේය.

(ආ) ඒ මුදල චිත්තිකරු විසින් ලබා ගත්තේ තැන්පතුවක් ලෙස තබා ගැනීමට ද?
එසේය.

(ඇ) ඒ මුදල පැමිණිලිකරු ඉල්ලූ විට ඔහුට ආපසු දිය යුතුව තිබුණේ ද?
රුපියල් 8,000/- ගේ මුදල පැමිණිලිකරුට ආපසු දිය යුතු වූයේ ඔහු විසින් චිත්තිකරුට නිවාසය ආපසු බාර දුන් විටය.

(2) පැමිණිලිකරුට එකී රුපියල් 8,000/- ආපසු ලබා ගැනීමට අයිතියක් තිබේ ද?
එසේය; එහෙත් චිත්තිකරුට නිවාසය ආපසු බාර දුන් විට පමණෙකි.

(3) රුපියල් 8,000/- ගේ මුදල පැමිණිලිකරු විසින් චිත්තිකරුට ගෙවන ලද්දේ වුව ද, පැමිණිලිකරු විසින් එසේ ගෙවීම නීති විරෝධී ද ?
නැත.

(4) එසේ නම්, පැමිණිලිකරුට ඒ මුදල ආපසු ඉල්ලා සිටිය හැකි ද?
මෙය පැන නොනඟී.

අංක (1) (අ) දරන විසඳිය යුතු ප්‍රශ්නය සලකා නඩුව ඉවතලීම අවශ්‍ය වූ අතර ඊට හේතු වූයේ චිත්තිකරු විසින් එවකට නිවාසය පැමිණිලිකරුට බාර දී නොතිබීමය. ප්‍රස්තුත නඩුවෙහි දී වූකලී කලින් නඩුවෙහි ඉදිරිපත් කර තුබුණු විසඳිය යුතු ප්‍රශ්නවල තීරණයන් විනිශ්චිත කරුණු ලෙස විනිශ්චයකාරතුමා තීරණය කර තිබිණ. වෙනත් වචනවලින් කියනොත්, විවාදිත ප්‍රධාන කරුණු විනිශ්චිත කරුණු ලෙස පහත දක්වෙන පරිදි චිත්තිකරුට විරුඬව තීරණය කර තුබුණු හෙයින් ප්‍රස්තුත නඩුවෙහි දී ඒවා පිළිබඳව විවාද කිරීමට චිත්තිකරුට අවසර නොමැති විය.

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(අ) රුපියල් 8,000/- ඇත්ත වශයෙන්ම ගෙවූ බව.

(ආ) තැන්පතුවෙහි කොන්දේසිය වූයේ පැමිණිලිකරු විසින් නිවාසය ආපසු බාර දුන් විට මුදල ආපසු දිය යුතු බව.

(ඇ) තැන්පතුව බාර ගැනීම කුලී පාලන පනතේ අදළ විධිවිධානය උල්ලංඝණය කිරීමක් නොවන බව.

කලින් නඩුවෙහි තීරණය මේ කරුණු කිසිවක් අරභයා විනිශ්චිත කරුණු නොවන බවට ඇපෑලෙහි දී විත්තිකරුගේ උගත් අධිනීතිඥවරයා තර්ක කළේය.

කලින් නඩුවෙහි ඉදිරිපත් කැරුණු මූලික නිදහසට කරුණු වූයේ තමා වෙත රුපියල් 8,000/- ක මුදලක් තැන්පත් කළ බැව් අපලාප කිරීම (denial) වූ අතර, ඒ නඩුවෙහි දී ඒ මුදල ඇත්ත වශයෙන්ම තැන්පත් කැරුණු බව හෙළි වූ හෙයින් ඒ නිදහසට කරුණු නියත ලෙසින්ම නඩු තීන්දුවෙහිදී ප්‍රතික්ෂේප කරන ලදී. එහෙයින් ප්‍රශ්නය වනුයේ ඒ තීරණය ද අනෙක් විසඳිය යුතු ප්‍රශ්න පිළිබඳ තීරණය ද පැමිණිලිකරුගේ නඩුව ඉවත ලා තිබුණ ද විනිශ්චිත කරුණු වන්නේ ද යන්නයි. *රොචීනා උම්මා එ. රහුමා උම්මා* (41 න.නී.වා. 522) නඩුවෙහි දී ද මේ ප්‍රශ්නයම තීරණය කැරුණු බව මට පෙනී යේ. කලින් බෙදුම් නඩුවක විෂය වූ ඉඩමක් සම්බන්ධ බෙදුම් නඩුවකි, එය. කලින් නඩුවෙහි දී කරුණු දෙකක් විවාදයට භාජන විය. පළමුවැන්න නම්, 1922 අගෝස්තු දිනය දරන ඔප්පුවකට, පූර්ව ලියාපදිංචිය නිසා 1911 සැප්තැම්බර් දිනය දරන ඔප්පුවක් අභිබවා පූර්වතාවක් ලැබේ ද යන්නයි. දෙවැන්න නම්, ඉඩම පොදුවේ භුක්ති විඳින ලද ද යන්නයි. කලින් නඩුවෙහි දී උසාවිය පළමුකොට 1922 ඔප්පුවට පූර්වතාවක් නොමැති බව ද දෙවැනුව ඉඩම පොදුවේ භුක්ති විඳින ලද බව ද තීරණය කළාය. දෙවැනි තීරණය සලකා, නඩුව ඉවතලීමට සිදු විය.

පසුව ඉඩමෙහි අයිතිය පිළිබඳ ප්‍රකාශයක් සඳහා එම දෙපක්ෂයම අතර පූර්වතාවක් නොතිබුණේය යන කලින් නඩුවෙහි තීරණය විනිශ්චිත කරුණු (res judicata) බව එක් පක්ෂයක් කියා සිටියේය. මේ යාචනය දිස්ත්‍රික් උසාවිය මෙන්ම ශ්‍රේෂ්ඨාධිකරණය ද ප්‍රතික්ෂේප කළාය. එහි දී ඉන්දියාවේ උසාවි විසින් පිළිගන්නා ලද පහත දක්වෙන සිද්ධාන්තය කෙනමන් විනිශ්චයකාරතුමා උපයෝගි කොට ගත්තේය:

''වෙනත් කරුණක් මත අවසාන ලෙස ඉවත ලන ලද නඩුවක පැමිණිලිකරුවකුට වාසි වන ලෙස තීරණය කැරුණු කවර හෝ විසඳිය යුතු ප්‍රශ්නයක්, පසු නඩුවක විත්තිකරුට එරෙහිව විනිශ්චිත කරුණු ලෙස සැලකිය නොහේ. නඩු තීන්දුවට පදනම් නොවූ තීරණයක් කිසියම් පක්ෂයකට එරෙහිව අවසාන තීරණයක් ලෙස සැලකිය නොහැකිය.''

ඉහත දැක් වූ මූලධර්මය ප්‍රස්තුත නඩුවට පැහැදිලි වශයෙන්ම යෙදිය හැකි වන අතර, මූලධර්මයෙහි පදනම විස්තර කරලීම මේ අවස්ථාවෙහි දී උචිතය. වර්තමාන පැමිණිලිකරු ද වර්තමාන විත්තිකරු ද අතර කලින් පැවැති නඩුවෙහි දී රුපියල් 8,000/- හේ මුදල කිසි විටෙක නොගෙවන හෝ බාර නොගන්නා ලද්දේය යන්න නිදහසට කරුණු ලෙස විත්තිකරු විසින් ඉදිරිපත් කරන ලද බවත්, උසාවිය කලින් නඩුවෙහි දී ඒ මුදල ඇත්ත වශයෙන් ගෙවන ලද බවට විත්තිකරුට විරුඬව තීරණය කළ බවත් ඇත්තකි. එනකුදු වුවත්, අකාල බව නිසා පැමිණිලිකරුගේ කලින් නඩුව ඉවත ලනු ලැබූ විට, ඇපෑලක් ලෙස තමාට විරුඬ තීරණයෙන් පුනරාවර්තනයක් ලබා ගැනීමට විත්තිකරුට අවශ්‍යතාවක් නොවිය. ඇත්ත වශයෙන්ම ඒ තීරණයට විරුඬව අභියාචනය කිරීමේ අයිතියක් විත්තිකරුට නොතිබුණු බව වර්තමාන ඇපෑලෙහි පැමිණිලිකරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥවරයාට පිළිගැනීමට සිදුවිය. කරුණු මෙසේ වන හෙයින් නවතම අභියාචනය කළ නොහැකි දිස්ත්‍රික් උසාවියක තීරණයකින් විත්තිකරු බැඳී ඇති සේ සැලකීම ප්‍රස්තුත නඩුවෙහි දී පැහැදිලි වශයෙන්ම අසාධාරණ වන්නේය. තීරණයේ අවසාන නියෝගයක් නුවූ හෙයින් එය විනිශ්චිත කරුණක් විය නොහේ.

පාවහන් යාන්ත්‍රික සමාගම එ. කට්ලන් (1896) 1 වා.අ. 667 පිටුවෙහි සඳහන් නඩුවෙහි ඉංග්‍රීසි උසාවියක් කළ තීරණයක් පැමිණිල්ලේ අධිනීතිඥවරයා විසින් උපයෝගි කොට ගෙන ඇත. ඒ නඩුවෙහි දී ආරක්ෂක බලපත්‍ර ලාභියෙක් ආරක්ෂක බලපත්‍ර උල්ලංඝණයක් සඳහා වන්දි ඉල්ලා සිටියේය. එම දෙපක්ෂයම අතර කලින් පැවැති නඩුවක දී ආරක්ෂක බලපත්‍රය වලංගු බවට කරන ලද තීරණයක් විනිශ්චිත කරුණු ලෙස බලපවත්වන බවට රෝමර් විනිශ්චයකාරතුමා තීරණය කළේය. ආරක්ෂක බලපත්‍රයේ වලංගු භාවය පිළිබඳ ඒ තීරණය පැවැතිය ද කලින් නඩුව ඉවත ලන ලද්දේ විත්තිකරු විසින් ආරක්ෂක බලපත්‍රය උල්ලංඝණය නොකරන ලද්දේය යන හේතුව මතය. කෙසේ වුව ද ඒ එසේ ඉවත

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ලනු ලැබුවද ආරක්ෂක බලපත්‍රයේ වලංගු භාවය පිළිබඳ තීරණය විනිශ්චිත කරුණු ලෙස බලපවත්වන බව රෝමර් විනිශ්චයකාරතුමා විසින් තීරණය කරන ලදී. යාචනය එසේ පිළිගන්නා ලද හේතු හොඳින් වටහා ගනුයේ කරුණු දෙකක් පෙන්වාලීම වැදගත් වේ. පළමුව කලින් තීන්දුවෙන් පහත දැක්වෙන පරිදි ප්‍රකාශයක් තිබිණ:—

> ''එම පනතේ 31 වැනි වගන්තිය අනුව, එකී ආරක්ෂක බලපත්‍රයේ වලංගු බව විවාදයට භාජන වූ බව සහතික කෙරේ.''

දෙවැනුව, රෝමර් විනිශ්චයකාරතුමා උපයෝගී කොට ගත් හේතූන් දෙවැනි නඩුව පිළිබඳ ඔහුගේ විනිශ්චයෙහි දක්වා ඇත:—

> ''මේ ආරක්ෂක බලපත්‍රය පිළිබඳව නම් මා විසින් නඩුව ඉවත නොදමන ලද බව මේ විනිසුමෙන් සෑහෙන තරමට පෙනී යන බව මගේ හැඟීමයි. වලංගු බව පිළිබඳ ප්‍රශ්නය පැමිණිලිකරුට වාසිවන ලෙස තීරණය කළ මම ගාස්තු ගෙවන ලෙස විත්තිකරුට නියම කළෙමි. විනිසුමෙහි ඒ කොටස අරභයා අභියාචනයක් ඉදිරිපත් කිරීමට විත්තිකරුවන් අදහස් කළේ නම්, ඒ අභියාචනය ඇපැල් උසාවිය විසින් අසනු ලැබීමේ අයිතියක් ඔවුනට තුබුණු බවට මට සැක නැත.''

ආරක්ෂක බලපත්‍රය වලංගු බව විත්තිකරුට විරුඬව තීරණය කරන ලද හෙයින් කලින් නඩුවෙහි දී විත්තිකරුට විරුඬව ගාස්තුවලට ඉඩ දෙනු ලැබූ විට අවධාරණය කිරීමෙහි දී රෝමර් විනිශ්චයකාරතුමා තරයේ කියා සිටි කරුණ නම්, විත්තිකරුට විරුඬව ගාස්තු නියෝගය පැනවුණු කල්හි, ඊට විරුඬව අභියාචනය කිරීමෙන් ආරක්ෂක බලපත්‍රයේ වලංගු බව පිළිබඳ තීරණය සමීක්ෂණය කරවා ගත හැකිව තුබුණු බවයි. මේ අභියාචනය වූ කලි විත්තිකරුට විරුඬව කිසියම් ප්‍රශ්නයක තීරණයක් මත පදනම් වූ විත්තිකාර-ඇපැල් කරුට විරුඬව ගාස්තු නියෝගයක් තිබුණේය යන්න මත හෝ 1883 ආරක්ෂක බලපත්‍ර, මෝස්තර හා වෙළඳ ලකුණු පනතේ 31 වැනි වගන්තියෙහි විධිවිධාන අනුව, ආරක්ෂක බලපත්‍රයේ වලංගු බව පිළිබඳ තීරණයට විරුඬව විත්තිකරුට අභියාචනය කළ හැකිව තිබුණේය යන්න මත රඳා පැවැතිය හැකිව තිබිණි. මගේ මතය අනුව නම් මා සඳහන් කළ දෙවැනි හේතුව මත එය අභියාචනය කළ හැකිව තිබුණු බවයි. කිසියම් නඩුවක පක්ෂයක් නොවූ කෙනකුට පවා විරුඬව ආරක්ෂක බලපත්‍රයක වලංගු බව පිළිබඳ තීරණයක් බලපාන බව 31 වැනි වගන්තියෙහි විධිවිධාන මඟින් දැක්වෙන අතර, ඒ තීරණය වූකලි දෙපක්ෂය අතර විවාදිත ප්‍රශ්නයක් අරභයා වූවක් නම්, ඒ තීරණය ඒ පක්ෂයට විරුඬව පූර්ණ ලෙස බලපාන බව ද ඉන් නිගමනය වන බවත් පෙනී යේ. ඉංග්‍රීසි පරිවය (practice) අනුව ආරක්ෂක බලපත්‍ර පිළිබඳ නඩුවක එවැනි තීරණයක් අභියාචනයට යටත් බව ද පෙනී යේ.

පාවහන් යාන්ත්‍රික සමාගමේ නඩුව ද ප්‍රස්තුත නඩුව ද අතර සම-රූප බවක් දැක්වීමට පැමිණිලිකරුගේ අධිනීතීඥ වරයා තැත් කළේය. ඔහු එසේ කළේ මෙහි දී ද කලින් නඩුවෙහි දී දිස්ත්‍රික් විනිශ්චයකාරතුමා විසින් විත්තිකරුට පක්ෂව ගාස්තු නියම කිරීම ප්‍රතික්ෂේප කළේය යනහේතුව අනුවය. ඒ ප්‍රතික්ෂේප කිරීමට විරුඬව අභියාචන අයිතියක් විත්තිකරුට තුබුණු බවට ද ඒ අනුව තමාට විරුඬව තීරණයක් පුනරාවර්තනයක් විත්තිකරුට ලබා ගත හැකිව තුබුණ බවට ද අධිනීතීඥවරයා සාධක දැක්වීය. රෝමර් විනිශ්චයකාරතුමා හුදෙක් ඉංග්‍රීසි නඩුවෙහි විත්තිකරුට ගාස්තු නියෝගයට විරුඬව අභියාචනය කළ හැකිව තිබුණේය යන්න මත සිය තීරණය පදනම් නොකළ බව පෙන්වීමට මම වෑයම් කළෙමි. ඔහු ඒ නියෝගය පදනම් කර ගත්තේ ආරක්ෂක බලපත්‍රයේ වලංගු බව පිළිබඳ ප්‍රශ්නය විවාදයට භාජනව උසාවිය මඟින් නියත වශයෙන්ම තීරණය කළ බව හා ඊට විරුඬව අභියාචනය කිරීමට විත්තිකරුට ඉඩ තුබුණු බව අවධාරණය කර දැක්වීමටය. කෙසේ වුව ද ප්‍රස්තුත නඩුවෙහි දී ගාස්තු ප්‍රතික්ෂේපයට විරුඬව විත්තිකරු අභියාචනය කළ ද, දැනට විනිශ්චිත කරුණු ලෙස පැමිණිලිකරු ඉදිරිපත් කිරීමට අපේක්ෂාකරන තීරණය පුනරාවර්තනයක් ලබා ගැනීමට අපේ විධිවිධාන අනුව විත්තිකරුට අයිතියක් නොතිබිණ. ඒ හේතු නිසා, අපේ ශ්‍රේෂ්ඨාධිකරණයේ *රොවීනා උම්මා එ. රහුමා උම්මා* නඩුවෙහි දී, පාවහන් යාන්ත්‍රික සමාගම් නඩුව විශේෂ පරීක්ෂණයන් පැවැති නඩුවක් ලෙස විසේදනය කර දැක්වීම නිවැරැදි බවට මම එකඟ වෙමි.

ඒ අනුව, අංක 44364/ඇම්. කොළඹ දිස්ත්‍රික් උසාවියේ නඩුවෙහි තීරණය ප්‍රස්තුත නඩුවෙන් විනිශ්චිත කරුණු ලෙස බල නොපාන බව මම තීරණය කරමි. අභියාචනයට ගාස්තු සමග ඉඩ දෙන අතර, විනිශ්චිත කරුණු පිළිබඳ යාචනයට තුඩු දුන් ඒවා හැර අනෙක් ප්‍රශ්න අරභයා නඩුව විභාගයට යා යුතුය.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩ දී ආපසු යවන ලදී.

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සමරවික්‍රම විනිශ්චයකාරතුමා ඉදිරිපිට දී

ටී. පී. විලියම් එ. පොලිස් පරීක්ෂක, ගම්පහ

ශ්‍රේෂ්ඨාධිකරණ අංක 1263/1968 — මහේස්ත්‍රාත් උසාවි අංක ගම්පහ 18069/ඒ

විවාද කළේ: 1969 මාර්තු 21 වැනි දා
තීන්දු කළේ: 1970 අප්‍රෙල් 18 වැනි දා

මිළ පාළන පනත — පාලන මිලට වැඩියෙන් හරක් මස් විකිණීමේ චෝදනාව — මිළ නියෝගය වරද කළ ප්‍රදේශයට අදාළ ද යන බව— අධිකරණ සැලකිල්ල — හරක් මස් මෙරට ඒවා ද පිටරටින් ආනීත ඒවා ද යන්න ගිළිබඳ ඔප්පු කිරීම — බර පිළිබඳව ඔප්පු කිරීම.

විත්තිකාර-ඇපැල්කරු තෙමේ (කොළඹ නගර සභා සීමාවෙන් බැහැර වූ) කොළඹ දිස්ත්‍රික්කය තුළ පිහිටි බැලුම්මහර දී පාලන මිළට වැඩියෙන් හරක් මස් විකිණීම පිළිබඳව වරදකරු කරන ලදී. ඇපැලෙහි දී පහත දක්වෙන හේතූන් මත, වරදකරු කිරීම ගැන විරෝධය දක්වන ලදී.

(අ) අදාළ මිළ නියෝගය බලපාන්නා වූ කොළඹ පරිපාලන දිස්ත්‍රික්කයට බැලුම්මහර ප්‍රදේශය අයත් වන බව ඔප්පු නොකැරිණි.

(ආ) හරක් මස් පිටරටින් ආනීත ඒවා නොවන බව ඔප්පු නොවිණ.

(ඇ) මස් කිරීම පිළිබඳ සහතිකය ඔප්පු නොකැරිණි.

උසාවිය විසින් පහත දැක්වෙන පරිදි තීරණය කරන ලදී.

තීන්දුව: (1) සාක්ෂ්‍ය පනතේ පණස් හත් වැනි වගන්තිය අනුව, ''බස්නාහිර පළාතේ අකාරාදි හා සංඛ්‍යාගත ග්‍රාම නාම ලේඛනය ආශ්‍රය කිරීමෙන් බැලුම්මහර ප්‍රදේශයේ පිහිටීම පිළිබඳව අධිකරණයට සැළකිල්ලට ගත හැකි බව. ඒ ග්‍රාම නාම ලේඛනය වූකලි ජන ලේඛන හා සංඛ්‍යා ලේඛන දෙපාර්තමේන්තුව විසින් ප්‍රකරණය කරන ලද්දක් හෙයින් රජයේ අනුමැතිය පිට පළකැරුණක් වන අතර, බැලුම්මහර කොළඹ පරිපාලන දිස්ත්‍රික්කයට අයත් වන බව එහි සඳහන් කර තිබේ.

(2) මස් කඩයේ ද එහි දක්නට තිබූ මියගිය ගව සිරුරුවල ද තත්ත්වය පිළිබඳව නඩුවේ දී ඉදිරිපත් කළ වාචික සාක්ෂ්‍ය මගින් ඒ හරක් මස් පිටරටින් ගෙන්වන ලද හරක් මස් නොවන බව.

(3) ඔප්පු නොකරන ලද හෙයින් ආදයම් පරීක්ෂක විසින් ඉදිරිපත් කරන ලද සහතිකය පිළිගත නොහැකි වූව ද විකුණන ලද හරක් මස් ප්‍රමාණයේ බර අවුන්ස දහතරයි තුන්කාලක් වූ බවටත්, එහෙයින් මිළ පාලන රෙගුලාසි ඒ මගින් උල්ලංඝණය වූ බවටත් වාචික සාක්ෂ්‍ය තිබිණ.

ආශ්‍රිත නඩු: හසන් එ. පානදුරේ පොලිස් පරීක්ෂක, 72 න.නී.වා. 449.

ඇ/ප්. ඩබ්ලිව්. ඔබේසේකර, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

පී. පෙරේරා, රජයේ නීතිඥ, නීතිපතිතුමා වෙනුවෙන්.

සමරවික්‍රම විනිශ්චයකාරතුමා:

(කොළඹ නගර සීමාව හැර) කොළඹ දිස්ත්‍රික්කය තුළ පිහිටියේ යයි කියන බැලුම්මහර දී පාලන මිළට අධික වූ මිළකට හරක් මස් විකුණුවේ යයි කියන චෝදනාවකට වැරදිකරු කරමින් දුන් තීන්දුවකට විරුඬව අභියාචක-විත්තිකරු මෙම ඇපැල ගෙන ඇත.

ඇපැල්කරු වෙනුවෙන් පෙනී සිටි නීතීඥවරයාගේ තර්කය වූයේ මෙහි සඳහන් වන චෝදනාවට බලපාන මිල පිළිබඳ නීතියට යටත්වන (කොළඹ නගර සීමාවෙන් පිටත) කොළඹ පරිපාලන දිස්ත්‍රික්කය තුළ බැලුම්මහර පිහිටි බවට කිසිම සාක්ෂියක් නැති බවය. මේ තර්කය ගැන, උගත් මහේස්ත්‍රාත්තුමා මෙසේ කියා ඇත: ''තුන් වැනි තර්කය වූයේ මෙම මස්කඩය පිහිටා ඇති බැලුම්මහර

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 80 වෙනි කාණ්ඩයෙහි 104 වෙනි පිට බලනු.

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කොළඹ නගර සභා සීමාව තුළ නොව, කොළඹ දිස්ත්‍රික්කය තුළ පිහිටා ඇති බවට කිසිම සාක්ෂ්‍යයක් නැති බවය. මේ තර්කය ගැන කල්පනා කරන විට සාමාන්‍යයෙන් නිල කටයුතු හා පරිපාලන කටයුතුවල දී කොළඹ නගර සීමාව තුළ නොව, ගම්පහ නගරයෙන් සැතැපුම් කීපයක් මෑත බැලුම්මහර පිහිටා ඇති බව පිළිගැනීමට මට බලය ඇතැයි සිතමි. ඒ ආකාරයෙන් ම ගම්පහ නගරය වුවත් කොළඹ පරිපාලන දිස්ත්‍රික්කය තුළ පිහිටා ඇති නිසා, කොළඹට වඩාත් කිට්ටුව පිහිටි බැලුම්මහර කොළඹ දිස්ත්‍රික්කය තුළ පිහිටියේ යයි අධිකරණමය වශයෙන් පිළිගැනීමට මට පුළුවන.'' මගේ අදහස නම් බැලුම්මහර පිහිටි තැන පිළිබඳ උගත් මහේස්ත්‍රාත්තුමා අධිකරණමය වශයෙන් පිළිගැනීමක් කිරීම නිවැරැදිය. එහෙත් මෑත නඩු තීන්දුවකින් මෙය කළ යුතු ආකාරය පැහැදිලි කර ඇත. *හසන් එ. පානදුර පොලිස් පරීක්ෂක* **(72 නව නීති වාර්තා, පිටු 449)** නම් නඩුවේ දී විරමන්ත්‍රී විනිශ්චයකාරතුමා මෙසේ නිගමනය කොට ඇත. සංගණන හා සංඛ්‍යා දෙපාර්තමේන්තුව විසින් සකසන ලද ''අකුරු හා අංක අනුව බස්නාහිර ප්‍රදේශයේ ගම් '' (An Alphabetical and Numerical list of Villages in the Western Province) යනුවෙන් හඳුන්වන ගම් ලැයිස්තුව, බලය ලත් ආයතනයක් මගින් නිකුත් කළ ලේඛනයක් ලෙස පිළිගත හැකිය. සාක්ෂ්‍ය පනතේ 57 වැනි ඡේදය යටතෙහි මෙවැනි ලේඛනයක් අවශ්‍ය වූ විටෙක අධිකරණයට උපයෝගි කර ගත හැක. මෙම ලේඛනය අනුව බැලුම්මහර නමැති ගම සියනෑ බටහිර කෝරළේ මැදපත්තුව තුළ පිහිටා ඇත. සියනෑ කෝරළේ බටහිර කොටස (මැදපත්තුව) කොළඹ පරි-පාලන දිස්ත්‍රික්කය තුළ පිහිටා ඇති බව 1955 (පරිච්ඡේද 392) නො. 22 දරණ පරිපාලන දිස්ත්‍රික්ක පනතේ i වැනි උපලේඛනයේ i වැනි තීරයේ i වැනි අංකයෙන් පෙනේ.

ඇපැල්කරු වෙනුවෙන් පෙනී සිටි උගත් නීතීඥවරයා ගේ ඊළඟ තර්කය නම් හරක් මස් පිටතින් නොගෙනා බවට සාක්ෂ්‍ය නැති බවයි. ඔත්තුකරු ස්වකීය සාක්ෂ්‍යයේ දී කියා ඇත්තේ චිත්තිකරු මස් කඩේ එල්ලා තිබුණ මස් කුට්ටියකින් කැල්ලක් කපා තමාට දුන් බවය. උප පොලිස් පරීක්ෂක විමලසේන කියා ඇත්තේ මස් කඩේ තුළ ගවයන්ගේ බොකු ද, හම් ද, කුර ද, ලේ පෙරෙමින් තිබූ මස් කුට්ටි කීපයක් ද, මස් කඩේ බිම ලේ වැනි අලුත් පැල්ලම් ද තමා දුටු බවය. බැලූ බැල්මට පෙනෙන සාක්ෂ්‍ය අනුව (Prima Facie) මා කල්පනා කරන්නේ මෙම මස් අලුත් ඒවා බවත් පිටින් ගෙනෙන ඒවා නොවන බවත්ය.

උගත් නීතීඥවරයා තව දුරටත් තර්ක කර ඇත්තේ, උගත් මහේස්ත්‍රාත්වරයා, ගම්පහ සුළු නගර සභා ආදයම් පරීක්ෂක විසින් නිකුත් කරන ලද කිරුම් පිළිබඳ සහතිකයක් විශ්වාසකර ඇති බවය. ආදයම් පරීක්ෂක සාක්ෂ්‍ය කරුවකු වශයෙන් කැඳවා නැති බැවින් ඔහු විසින් දෙන ලද සහතිකය පිළිගත නොහැකි බවය.

උප පොලිස් පරීක්ෂක විමලසේන කියා ඇත්තේ, තමා චිත්තිකරුත්, මස් පාර්සලයත්, කිරුම් සහ මිනුම් පිළිබඳ පරීක්ෂක ඉදිරියට පැමිණ වූ බවත්, චිත්තිකරු ද, පරීක්ෂක ද ඉදිරියේ එම මස් කිරා බැලූ බවත්, මස්වල බර අවුන්ස $14\frac{3}{4}$ ක් වූ බවත්ය. මේ නිසා අභියාවක-චිත්තිකරු විසින් විකුණන ලද මස්වල බර ගැන සාක්ෂ්‍ය ඉදිරිපත් වී ඇති බව පිළිගත හැකිය.

ඇපැල මේ අනුව නිෂ්ප්‍රභ කෙරෙයි.

ඇපැල නිෂ්ප්‍රභ කරන ලදී.

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(80 ஆம் ஆங்கிலத்தொகுதியின் பாகமாக வெளியிடப்பட்டது)

ஆங்கில மொழியில் வெளியிடப்பட்ட சில வழக்கு முடிவுகளின்
தமிழ் மொழிபெயர்ப்பு

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1972

தொகுதி ஒன்றுக்கான கட்டுப்பணம் ரூபா 17/50, முற்பணமாகச் செலுத்தப்படல்வேண்டும்.
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கட்சிக்காரர் பெயர் அட்டவணை

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அற்றேனித் தத்துவம்

அற்றேனித்தத்துவம் — இந்தியாவில் அத்தாட்சிப்படுத்தப்பட்டது. இந்தியாவில் நீதவான் முன்னிலையில் ஒப்பமிடப்பட்டது; கையொப்பத்தின்கீழ் பதவிப்பெயர் தரப்படவில்லை; அற்றேனித்தத்துவம் செல்லுபடியாகுமா என்பது.

அற்றேனித்தத்துவம் வழக்காளியின் கையொப்பத்தைக் கொண்டுள்ளது என ஒத்துக்கொள்ளப்பட்டிருப்பதோடு —

(அ) நீதவான் நீதிமன்றத்தின் இலச்சினை என வெளிப்படையாகத் தோன்றும் தமிழிலான இலச்சினை ஒன்றையும்,

(ஆ) அது தூத்துக்குடி உபபிரிவு நீதவானால் கையொப்பமிடப்பட்டுள்ளது என இலங்கையிலுள்ள இந்திய உயர் ஆணையாளரின் அலுவலகத்தைச்சேர்ந்த ஒருவர் அளித்த அத்தாட்சியையும் உடையதாயிருக்குமிடத்து...

தீர்ப்பு: நீதிவானின் கையொப்பத்தின் கீழ் அவரின் பதவிப்பெயர் தரப்படாவிடினும், குறித்த வழக்கை வழக்காளியின் அற்றேனி நடாத்துவதற்கு அதுபோதிய அதிகாரமளிப்பதாகும்.

வி. ஆறுமுகம் எதிர் எஸ். வள்ளியம்மா ... 7

அறுதியுறுதி - நிபந்தனைகள் கொண்ட

எதிராளிக்கு மாவினால்எழுதப்பட்ட நிபந்தனையோடுகூடிய அறுதியுறுதி மீள்வதற்கான காலத்துள் கடனிணக்கச்சபை மூலமான இணக்கம்—கடன் திருப்பிக்கொடுப்பதற்கும் மீள அறுதி எழுதுவதற்குமான காலம் நீடித்தல் — அறுதி மீளப்பெறுவதற்கென மாவின் உரிமைகள் வழக்காளிகளுக்குச் சாட்டுதல் செய்யப்படுதலும் இணக்கக் கட்டளையும்— வழக்காளிகள் முறைப்படி பணம் கொடுத்து அறுதிமீள்வதற்குக் கோருதல். எதிராளிமறுத்தல்—நிலைநாட்டுவதற்கான வழக்கு—கடனிணக்கச்சபைச் சட்டம் மாவுக்கு நிவாரணமளிக்கவில்லை என்ற காரணத்தின்மீது நீதிமன்றம் வழக்கினைத் தள்ளுபடி செய்தது — கடன் இணக்கச்சபைக் கட்டளைச்சட்டம் — பிரிவு 30 இன் பயன்.

ஓர் உறுதிமூலம் (பி1) மா என்பவர் 2500 ரூபாவுக்காக காணி ஒன்றை அறுதி எழுதியிருந்தார். ஆறு ஆண்டுகளுள் அத்தொகை திருப்பிக் கொடுக்கப்படுவதன் பேரில் அக் காணியைத் திருப்பி அறுதி எழுதுதல் வேண்டும் என்பது நிபந்தனை.

மீள்வதற்கான காலத்தினுள் நிவாரணம் கோரிக் கடன் இணக்கச்சபைக்குச் செய்யப்பட்ட விண்ணப்பத்தின்மீது இணக்கமான உடன்படிக்கை ஒன்று ஏற்பாடு செய்யப்பட்டது. இதன்படி, மற்றும் விடயங்களுக்கிடையில் கடன்பட்டவரான மா 31-12-65 இன் முன்னர் உடன்படிக்கையின் நியதிகளுக்கிணங்கப் பணத்தைக் கொடுத்தால் கடன் கொடுத்தவர் திரும்பவும் காணியை மாவுக்கு அறுதி எழுதுதல் வேண்டும்.

அதன்பின்னர் பி1 இன் நியதிகளுக்கும் இணக்க உடன்படிக்கைக்கும் இணங்க மீளவும் அறுதிபெறுவதற்குத் தனக்குரிய உரிமையை மா வழக்காளிகளுக்கு அளித்தார். வழக்காளிகளும் முறைப்படி ரூபா 2500 பணத்தைக்கொடுத்து காணியை மீள அறுதி எழுதும்படி கோரினர். எதிராளி மறுத்தார். அதனால் உண்டான வழக்கை அறிவுசான்ற மாவட்ட நீதிபதி தள்ளுபடி செய்தார். அவர் அதற்குக் கூறிய காரணம் என்னவெனில், ஏற்படுத்திப் பதிந்து கொண்டவாறுள்ள உடன்படிக்கைப்படி முதலிலுள்ள கடன்காரனை, மாவுக்குமட்டும் நிவாரணம் அளித்ததே ஒழிய அந்த நிவாரணம் அவரின் சாட்டுதல் காரருக்குச் செல்லாது என்பதாகும்.

தீர்ப்பு: (1) இணக்கஉடன்படிக்கையின் ஒரேபயன் மீள அறுதிஎழுதுவதற்கான நிபந்தனையை நிறைவேற்றுவதற்குள்ள காலத்தை நீடித்ததே அல்லாமல், அந்த மீள அறுதி எழுதுதல் மாவுக்கும் அவரின் வழியுரிமையாளர் —சாட்டுதல்காரர் என்போருக்கும் செய்யப்படவேண்டும்என்று பி1 இருந்த நிலைமையை மாற்றவில்லை என்பதனால் அவ்வழக்கை அறிவுசான்ற மாவட்ட நீதிபதி தள்ளுபடி செய்தது பிழையாகும்.

(2) கடனிணக்கச்சபைக் கட்டளைச்சட்டத்தின் 30 (2) என்னும்பிரிவு, இணக்க உடன்படிக்கையில் மீளஅறுதிஎழுதுதற்கான

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காலத்தில் செய்யப்பட்ட மாற்றத்துக்கு சட்டமுறையான அங்கீகாரமளிப்பதாகும்.

(3) அளிக்கப்பட்ட நிவாரணம் மாவுக்கு மட்டுமே ஏற்புடையதாதல் வேண்டும் என உடன்படிக்கையில் நிபந்தனை எதுவும் இல்லாமையால் மாவிடமிருந்துவிலக்குக் கொள்பவர், அதன்கண் குறிப்பிடப்பட்ட காலம் தொடர்பில்மட்டும் இணக்க உடன்படிக்கையினுல் மாற்றஞ்செய்யப்பட்டவாறுள்ள பி 1 இன் நியதிகளை நம்பி நடத்தற்கு உரிமையுடையர்.

ஏ. டபிள்யூ. அசன்சிஞவும் வேறொருவரும் எதிர் ஆர். எல். எச். பபுன் அப்பு 14

இடம் மாற்றுதல்

கொலை வழக்கை இடம் மாற்றுதல்—சிங்களவரான குற்றஞ்சாட்டப்பட்டவர்கள் சம்பந்தப்பட்ட வழக்கை ஒரு சுற்றுலாப் பிரிவிலிருந்து இன்னெரு சுற்றுலாப்பிரிவிற்கு மாற்றுதல் — இந்தத் தவறு தமிழர் பெரும்பான்மையினராய் உள்ள இடத்தில் நிகழ்ந்தது—கொலை செய்யப்பட்டவர்களும் தமிழர் — குற்றஞ்சாட்டப்பட்டவர்களால் தேர்ந்தெடுக்கப்பட்ட சிங்களம்பேசும் யூரிமாரும் தமிழ்ப்பிரதேசத்தில் வாழ்பவர்களே — அதனல் அவர்களின் உள்ளங்கள் பாதிக்கப்படுதல் சாத்தியம் — இனப்பிரச்சனையோ சமுதாய மோதலோ இருப்பதாக முறைப்பாடு இல்லை.

(அ) கொலையுண்டவர்கள் எல்லோரும் தமிழர்கள்;

(ஆ) தமிழர் பெரும்பான்மையினராய் வாழும் இடத்தில் இந்தத் தவருனது இழைக்கப்பட்டது;

(இ) யூரிமார் சிங்களவர்களாய் இருந்தபோதிலும் தமிழர் பெரும்பான்மையினராய் வாழும் இடத்தில் யூரிமார் வாழ்கின்றனரென்பதால் அடிஉள்ளத்தளவிலாதல் அவர்கள் பாதிக்கப்படுதல் மிகச்சாத்தியமாதலால் நியாயமானதும் பாரபட்சமற்றதுமான விளக்கம் நடைபெறச் சந்தர்ப்பம் ஏற்படாதென்று குற்றஞ்சாட்டப்பட்டோர் அஞ்சுகின்றனர்;

என்ற காரணங்களினுல், அந்த வழக்கை வடக்குச் சுற்றுலாப் பிரிவிலிருந்து மத்திய சுற்றுலாப் பிரிவுக்கு அல்லது மேற்குச் சுற்றுலாப் பிரிவுக்கு மாற்றும்படி குற்றஞ்சாட்டப்பட்டோரின்சார்பில் விண்ணப்பம் செய்யப்பட்டிருக்கின்றவிடத்து...

தீர்ப்பு: இந்த வழக்கில் இனப்பிரச்சனையோ சமுதாயமோதலோ இருப்பதாக முறைப்பாடு காணப்படாவிடத்து குற்றஞ்சாட்டப்பட்டவர்களாலேயே தேர்ந்தெடுக்கப்பட்ட சிங்களம் பேசும் யூரிமாரின் கண்ணியத்தை மேற்சொல்லப்பட்ட நிகழ்வுகளைக் கொண்டு, கேள்விக்குட்படுத்துவது மிகவும் நேர்மையற்றதும் நியாயமற்றதுமாகும்.

யே. வில்லியமும் வேறு ஒருவரும் எதிர் இராணியார் 3

எழுத்தாணை

யாதுரிமை எழுத்தாணை

நிக்கலாப்பிள்ளை அந்தோனிப்பிள்ளை எதிர் அந்தோனிப்பிள்ளை ஜோர்ஜ் இராசகுரியர் ... 13

கடன் இணக்கச்சபை — 30 ஆம் பிரிவு

அசன்சிஞவும் வேறொருவரும் எதிர். பபுன் அப்பு 14

குற்றவியல் நடவடிக்கைமுறைச் சட்டக்கோவை

கொலைவழக்கை இடம்மாற்றுதல்

வில்லியமும் வேறொருவரும் எதிர் இராணியார் 3

சுங்கக் கட்டளைச்சட்டம்

சுங்கக் கட்டளைச்சட்டம் பிரிவு 101 (1) சுங்கப் பிரதேசத்தினுள் கொட்டாஞ்சேனை கொட்டபோம் (செட்டித்தோட்டம்) தெருவில் புரியப்பட்ட குற்றம் ஒன்றுக்கு எதிரி குற்றத்தீர்ப்பளிக்கப்பட்டார். வழக்காளி தரப்பின் சான்று அளுத்மாவத்தை வீதியைக் குறிப்பிட்டது—கொட்டபோம்தெரு சுங்கப் பிரதேசத்திலுள்ளது என்பதற்கு சான்று எதுவுமில்லை. அல்லாமலும் கொழும்புத் துறைமுக எல்லைகளும் சுங்கப்பிரதேச எல்லைகளும் ஒன்று என்பதற்கும் சான்றில்லை—குற்றத்தீர்ப்பு நிலைக்கக் கூடியதா? என்பது.

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சுங்கக் கட்டளைச்சட்டத்தின் பிரிவு 101 (1) இன் கீழ் கருதப்பட்டவாறுள்ள சுங்கப் பிரதேசத்தினுள் சில பொருட்களைக் கையாண்டார்என இரண்டாவது எதிரி குற்றத்தீர்ப்பளிக்கப்பட்டார். சுங்கப்பிரதேசத்தினுள், கொட்டாஞ்சேனையிலுள்ளகொட்டபோம் தெருவில் அக்குற்றம் புரியப்பட்டது எனக் குற்றச்சாட்டுக் கூறியது. ஆனால் வழக்காளிதரப்புச் சான்று அளுத்மாவத்தை வீதியில் அது நிகழ்ந்தது எனக் காட்டியது. கொட்டாஞ்சேனையிலுள்ள கொட்டபோம் தெரு சுங்கப் பிரதேசத்திலுள்ளது என்பதற்கோ கொழும்புத்துறைமுக எல்லைகளும், சுங்கப்பிரதேச எல்லைகளும், ஒன்றுனவை என்பதற்கோ எவ்வித சான்றும் இருக்கவில்லை.

தீர்ப்பு: சுங்கக் கட்டளைச்சட்டத்தில் வரையறை செய்யப்பட்டவாறுன சுங்கப்பிரதேசத்தினுள் எதிரி குற்றம் புரிந்தார் என்ற குற்றச்சாட்டை வழக்காளி தரப்பு நிரூபிக்கத் தவறிவிட்டது என்பதாகும்

பின்பற்றப்பட்டது: ஜினதாசா எதிர் முன்கரைப் பொலிசு 73 என். எல். ஆர். 48

பின்பற்றப்பட்டிலது: ஜோசப் எதிர் பொலிசுப்பரிசோதகர்(முன்கரைகொழும்பு) 72 என். எல். ஆர். 357

மதியாபரணம் எதிர் முன்கரைப் பொலிசு கொழும்பு 5

தாபரிப்பு (பராமரிப்பு)

தாபரிப்பு — பிள்ளை ஒன்று தொடர்பிலான கட்டளை — பின்னர், கணவனுக்குத் தெரியாது திருமணத்தின் நேரத்தில் மனைவி கருப்பவதியாகவிருந்தாள் என்ற காரணத்தின்மீது மாவட்ட நீதிமன்றம் மணநீக்கத் தீர்வையளித்தது — குடியியல் நீதிமன்றத்தின் முடிவின்மீது தாபரிப்புக்கான நீதவானின்கட்டளை நீக்கப்படமுடியுமா?—இந்திய வழக்கு முடிவுகள் ஏற்புடையனவா—சான்றுக் கட்டளைச்சட்டத்தின் 41 (2) ஆம் பிரிவு மணநீக்கம் அளிக்கப்படும் காரணத்துக்கும் செல்லக்கூடியதாகுமா?

எதிராளி மனுதாரைத் திருமணஞ் செய்தபின்னர் ஆறுமாதத்தில் விண்ணப்பகாரி எதிர்வாதிக்குப்பிள்ளை ஒன்று பிறந்தது. கணவன் தான் தந்தையல்ல என வாதாடினர். விண்ணப்பகாரி — எதிர்வாதி தாபரிப்புக்கோரி விண்ணப்பம் செய்திருந்தார். நீதவான் நீதிமன்றத்தில் அவருக்குச்சாதகமாகக் கட்டளை கிடைத்தது. இக்கட்டளை மேல் முறையீட்டிலும் உறுதியாயிற்று. அதன் பிறகு எதிராளி மனுதார் மாவட்ட நீதிமன்றத்தில் மணநீக்கத்தீர்வை ஒன்றைப் பெற்றார். அதற்குக் காரணம் திருமணநேரத்தில் கணவனுக்குத் தெரியாது விண்ணப்பகாரி — எதிர்வாதி கருப்பவதியாயிருந்தார் என்பதேயாகும். இப்போதைய விண்ணப்பத்தின் மூலம், மாவட்ட நீதிமன்றத்தில் திருமணஞ் செல்லுபடியற்றது என்ற நடவடிக்கைகளில் அளிக்கப்பட்ட தீர்ப்பின் காரணமாகத் தாபரிப்புக் கட்டளையை நீக்கும்படி எதிர்வாதி மனுதார் கோருகிறார்.

தீர்ப்பு: (1) தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவைப் பின்பற்றித் தாபரிப்புக்கானகட்டளை ஒன்றை நீக்குவதற்கு நீதவானுக்கு அதிகாரமளிக்கும் ஏற்பாடு எமது சட்டத்தில் இல்லை.

(2) தகுதிவாய்ந்த குடியியல்நீதிமன்றம் ஒன்றின் முடிவின் விளைவாகத் தாபரிப்புக் கட்டளை ஒன்றை வேறுபடுத்துவதற்கு அல்லது நீக்குவதற்கு நீதவானுக்கு அதிகாரமளிக்கும் இந்தியக்குற்றவியல் நடவடிக்கைமுறைச் சட்டக்கோவையின் பிரிவு 489 (1) குறிப்பான ஏற்பாடு ஒன்றின் அடிப்படையில் எழுந்த வழக்கு முடிவுகள் இலங்கையில் அத்தகைய ஏற்பாடு இல்லாதபொழுது ஏற்புடையனவல்ல.

(3) திருமணம் வெற்றுனது என்பது பற்றிமாவட்டநீதிமன்றம் ஒன்றின் கட்டளையைச் சான்றுக்கட்டளைச்சட்டத்தின் 41 (2)ஆம் பிரிவு முடிவானதாக்கும் நேரத்தில், அக்கட்டளை ஆக்கப்பட்ட காரணத்துக்கு அதன் பிரயோகத்தை விசாலமானதாக்கவில்லை.

கே. பெருமாள் எதிர் கே. கருமேகம் ... 9

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மேற்கோள் காட்டப்பட்ட தீர்ப்புகள் :

உஅர்சேளு எதிர் மாகின்சுவெயும்வேறெ ருவரும் ஏ.ஐ.ஆர். (1940) ரங்கூன் 298

ஙாபோதெயின் எதிர் மாமேசன்னும் வேறெருவரும் ஏ. ஐ. ஆர். (1922) மேல் பர்மா 20

போகி எதிர் மாநியோன் ஏ. ஐ. ஆர். (1919) கீழ் பர்மா 7 (2)

தென்னே எதிர் எகநாயக, 63 என்.எல். ஆர். 544, 546 இல்

கனகிலால் எதிர் ராதாசேன் 7 டபிள்யு. ஆர். 388.

மோட்டார் வாகனச் சட்டம்

மோட்டார் வாகனச் சட்டம் — சொத் தாண்மை மாற்றத்தின் மீது மோட்டார் வாகனத்தின் சொந்தக்காரன் பதியப்படுவ தனைத் தடைசெய்ய அரசாங்க அதிபருக்குத் தத்துவம் உண்டா?

தீர்ப்பு: (1) மோட்டார் வாகனச் சட் டத்தின்கீழ், மோட்டார்வாகனம் ஒன்றின் சொத்தாண்மையில் மாற்றம் ஏற்படு மிடத்து, அதன் புதியசொந்தக்காரனைப் பதி தல் சம்பந்தமான அச்சட்ட ஏற்பாடுகளின் நிபந்தனைகளும் தேவைப்பாடுகளும் இணங்கி யொழுகப்பட்டிருப்பின் அப் புதிய சொந்தக் காரனை மோட்டார் வாகனப் பதிவாளர் பதிவு செய்யக்கட்டுப்பட்டவராவர்.

(2) மோட்டார் வாகனம் ஒன்றின் புதிய செந்தக்காரனைப் பதியாது தடைசெய் வதற்கு பாரஎண்ணெய் மோட்டார் வாக னங்கள்மீது வரிவிதித்தற் கட்டளைச்சட்டத் தின் கீழேனும் மோட்டார் வாகனச் சட்டத் தின் கீழேனும் அரசாங்க அதிபர் ஒருவருக் குத் தத்துவம் கிடையாது.

யூ. ஆர். அபயசேளு எதிர் மோட்டார் வாகனப் பதிவாளர் 11

யாதுரிமை எழுத்தாணை

யாதுரிமை எழுத்தாணைக்கான விண்ணப் பம் — 1963இன் 9 ஆம் இலக்கச்சட்டத்தின் 4 ஆம் பிரிவினுல் திருத்தப்பட்டவாறுன உள்ளூரதிகாரசடைகள் தேர்தல்கள் சட் டவிளைச்சட்டத்தின் 9 ஆம் பிரிவு—ஏற்கனவே வேறேர் உள்ளூர் அதிகாரசபையின் உறுப் பினராயிருப்பின் தெரியப்படுவதற்குத் தகுதி யின்மை — யாதுரிமை எழுத்தாணை இத் தகைய விடயத்துக்குண்டா?

இது எதிர்வாதிக்கெதிராக யாதுரிமை எழுத்தாணை பெறுவதற்கான விண்ணப்ப மாகும், எதிர்வாதி யாழ்ப்பாணம் மாநகர சபையின் உறுப்பினராகத் தெரிவுசெய்யப் பட்ட அந்நேரத்தில், ஏலவே அவர் புலோப் பழைக் கிராமசபையின் உறுப்பினராகத் தெரிவு செய்யப்பட்டிருந்தார் என்பது ஏற்றுக்கொள்ளப்பட்டிருக்கிறது.

தீர்ப்பு: 1963 இன் 9 ஆம் இலக்கச் சட் டத்தின் 4 ஆம் பிரிவினுல் திருத்தப்பட்டவா றுன உள்ளூரதிகார சபைகள் தேர்தல்கள், கட்டளைச்சட்டத்தின் 9 ஆம் பிரிவின் ஏற் பாடுகளை, அதாவது ஆள் ஒருவர் உள்ளூர் அதிகாரசபையின் உறுப்பினராக ஏலவே இருப்பின் அவர் தெரிவுசெய்யப்படுவதற்குத் தகுதியற்றவராவர் என வெளிப்படையாகக் கூறும் ஏற்பாடுகளைக் கவனிக்கும்பொழுது, யாழ்ப்பாணம் மாநகரசபைக்கு உறுப்பினர் ஒருவராக எதிர்வாதி தெரிவுசெய்யப்பட் டமை வெற்றும் வறிதுமாகும்.

ஒத்தனவாகக்காணப்படாத முன்னைய வழக் குகள் :

சுந்தரபண்டா எதிர் பத்திரனை 73 பு. ச. அ. 100

மாட்டின் பெரேரா எதிர் மடதொம்பை 73 பு. ச. அ. 25

நிக்கலாப்பிள்ளை அந்தோனிப்பிள்ளை எதிர் அந்தோனிப்பிள்ளை ஜோர்ஜ் ராஜகுரியர் ... 13

விலைக்கட்டுப்பாட்டுச் சட்டம்

விலைக்கட்டுப்பாடு—ஹிப்பொலான்எனப் படும் செயற்கைப்பட்டின் ஒருவகையைக் கட்டுப்பாட்டுவிலைக்குக் கூடுதலான விலையில் விற்றதற்காகக் குற்றவாளிகளாகக் காணப் படல் — ஹிப்பொலான், என்பது, குற்றச் சாட்டில் குறிப்பிடப்பட்டசெயற்கைப்பட்டு

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வகைகளில் ஒன்றுகக் குறிப்பிடப்படவில்லை —குற்றத்தீர்ப்பை நிலைநிறுத்த வேண்டுமா?

கிறேப், சற்றின், ரபேற்று, அரிக்கோட், மஸ்லின், (பேனிசிங் பாபிரிக்ஸ், 48 அங்குல அகலம் கொண்ட சாயமூட்டிய நைலோன் ரபெற்று, 44/45 அங்குல அகலம் கொண்ட சாயமூட்டிய நைலோன் சியோர்ஸ் என்பன தவிர்ந்த) சியோர்ஸ் கிரேப் என்பனவற்றை உள்ளடக்குவனவாகக் குற்றப் பத்திரத்தில் விபரிக்கப்பட்டிருக்கும் இரண்டு யார் ஹிப் பொலாஸ் (கூ.மொ.வி.—யப்பானில் செய்யப்பட்டது) கட்டுப்பாட்டுச் சில்லறை விலைக்குக் கூடுதலான விலையில் விற்றன ரென்று குற்றஞ்சாட்டப்பட்ட இருவரும் குற்றவாளிகளாகக் காணப்பட்டனர்.

தீர்ப்பு: குற்றஞ் சாட்டப்பட்டவர்களால் விற்கப்பட்ட துணிப்பொருள், விலைக் கட்டுப்பாட்டுக்குள் கொண்டு வரப்பட்ட செயற்கைப்பட்டுகளிலெவையேனும் வகைக்குள் அடங்குவனவாகக் குற்றப்பத்திரிகைகளில் காட்டப்பட்ட செயற்கைப் பட்டு வகையுள் அடங்குகின்ற தென்பதற்கான சான்று இல்லாத பட்சத்தில் குற்றவாளிகளாகக் காணப்பட்ட முடிவினை நிலைநிறுத்த முடியாது.

மொகமெட் அமீனும் வேறொருவரும் எதிரிகள்–மேல் முறையீட்டாளர் எதிர் உணவு, விலைக்கட்டுப்பாட்டுப் பரிசோதகர், கொழும்பு 1

விலைக்கட்டுப்பாட்டுச் சட்டம்

விலைக்கட்டுப்பாட்டுச் சட்டம் — கட்டுப்பாட்டு விலைக்குமேலாக மாட்டிறைச்சி விற்ற குற்றச்சாட்டு — குற்றம்புரியப்பட்ட இடத்துக்கு விலைக்கட்டளையின் ஏற்புடைமை — நீதிமுறை அறிவு — இறைச்சி இறக்குமதி செய்யப்பட்டதா அல்லது உள்ளூரிறைச்சியா என்பதற்கானசான்று—நிறை பற்றிய சான்று.

கொழும்பு மாவட்டத்தில் (கொழும்பு மாநகர எல்லைக்குப்புறத்தே) அமைந்துள்ளது எனச்சொல்லப்பட்ட பெலும்மஹர என்ற இடத்தில், கட்டுப்பாட்டு விலைக்கு மேலாக மாட்டிறைச்சி விற்றார் என எதிரி — மேன்முறையீட்டாளர் குற்றத்தீர்ப்பளிக்கப்பட்டார். மேல்முறையீட்டில், பின்வரும் காரணங்கள்மீது குற்றத்தீர்ப்புக் கெதிராக ஆட்சேபம் தெரிவிக்கப்பட்டது.

(அ) சம்பந்தப்பட்ட விலைக் கட்டளை குறிப்பிடும் பெலுமஹர, கொழும்பு நிருவாக மாவட்டத்தினுள் அமைந்துள்ளது என்பதற்குச் சான்றில்லை.

(ஆ) சம்பந்தப்பட்ட மாட்டிறைச்சி இறக்குமதி செய்யப்பட்டதல்ல என்பதற்குச் சான்றில்லை; அத்துடன்

(இ) நம்பிக்கொள்ளப்பட்ட நிறை பற்றிய அத்தாட்சி நிரூபிக்கப்படவில்லை, என்பன அவை.

தீர்ப்பு: (1) பெலும்மஹர எங்குள்ளது என்பது பற்றி சான்றுக்கட்டளைச்சட்டத்தின் 75 ஆம் பிரிவின்படி நீதிமுறை அறிவு கொள்ளப்படலாம்; அதற்கு தொகைக் கணிப்புப் புள்ளிவிபரத் திணைக்களத்தினுல் தொகுக்கப்பட்ட மேல்மாகாணக் கிராமங்களின்எழுத்து வரிசை எண் வரிசைப் பட்டியல் அதிகாரபூர்வமாக வெளியிடப்பட்ட நூலானமையின் நீதிமன்றத்தால் பார்க்கப் படலாம்; அதன்படி பெலும்மஹர கொழும்பு நிர்வாக மாவட்டத்தினுள் அமைந்துள்ளது எனக் குறிப்பிடப்பட்டுள்ளது.

(2) இறைச்சிக்கடையின் நிலைமைபற்றியும் விலங்கு உடல்கள் பற்றியும் அளிக்கப்பட்ட வாய்மொழிச்சான்று அந்த இறைச்சி இறக்குமதி செய்யப்பட்டதல்ல என்பதற்கு முதற்றோற்றச்சான்றளிக்கிறது.

(3) வருவாய்ப் பரிசோதகரால் வழங்கப்பட்ட அத்தாட்சிப்பத்திரம் நிரூபிக்கப்படாமையின் ஏற்றுக்கொள்ளக்கூடியது; விற்கப்பட்ட மாட்டிறைச்சியின் அளவு 14¾அவுன்சு மட்டுமே என்பதாகும். இதற்குப் போதிய வாய்மொழிச்சான்று உண்டு, அதன் காரணமாக அது விலைக்கட்டுப்பாட்டு ஒழுங்குவிதிகளை மீறியதாயிற்று.

குறிப்பிடப்பட்ட வழக்குகள்:

அசன் எதிர் பொலிசுப் பரிசோதகர், பாணந்துறை 72 பு. ச. அ. 449

ரி.பி. வில்லியம் எதிர் பொலிசுப் பரிசோதகர், கம்பஹா 17

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நீதியரசர் சமரவிக்கிரம அவர்கள்

மொகமெட் அமீமும் வேறொருவரும் எதிரிகள்-மேல்முறையீட்டாளர் எதிர் உணவு, விலைக்கட்டுப்பாட்டுப் பரிசோதகர், கொழும்பு.

உயர்நீதிமன்றம் 629*630/1968
கொழும்பு, தெற்கு நீதவான் நீதிமன்றம் 82564/

விவாதிக்கப்பட்டது மார்ச் 7, 1969
தீர்மானிக்கப்பட்டது 17 ஆகஸ்ட். 1970

விலைக்கட்டுப்பாடு— இப்பொலான் எனப்படும் செயற்கைப்பட்டின் ஒருவகையைக் கட்டுப்பாட்டு விலைக்குக் கூடுதலான விலையில் விற்றதற்காகக் குற்றவாளிகளாகக் காணப்படல்—ஹிப் பொலான், என்பது, குற்றச்சாட்டில் குறிப்பிடப்பட்ட செயற்கைப்பட்டு வகைகளில் ஒன்றுக் குறிப் பிடப்படவில்லை=குற்றத்தீர்ப்பை நிலைநிறுத்த வேண்டுமா?

கிறேப், சற்றின், ரபேற்று, அரிக்கோட், மஸ்லின், (பேனிசிங் பாபிரிக்ஸ், 48 அங்குல அக லம் கொண்ட சாயமூட்டிய நைலோன் ரபெற்று, 44/45 அங்குல அகலம் கொண்ட சாயமூட்டிய நைலோன் சியோர்ஸ் என்பன தவிர்ந்த) சியோர்ஸ் கிரேப் என்பனவற்றை உள்ளடக்குவனவாகக் குற்றப்பத்திரத்தில் விபரிக்கப்பட்டிருக்கும் இரண்டு யார் ஹிப்பொலாஸ (கூ.மொ.வி.=யப்பானில் செய்யபபட்டது) கட்டுப்பாட்டுச் சில்லறை விலைக்குக் கூடுதலான விலையில் விற்றனரென்று இந்த இரண்டு குற்றஞ்சாட்டப்பட்டவரும் குற்றவாளிகளாகக் காணபபட்டனர்.

தீர்ப்பு:—குற்றஞ்சாட்டப்பட்டவர்களால் விற்கப்பட்ட துணிப்பொருள், விலைக்கட்டுப்பாட்டுக்குள் கொண்டுவரப்பட்ட செயற்கைப்பட்டுக்களில் எவைபேனும் வகைக்குள் அடங்குவனவாகக் குற்றப்பத்திரிகைகளில் காட்டப்பட்ட செயற்கைப்பட்டு வகையுள் அடங்குகின்றதென் பதற்கானசான்று இல்லாத பட்சத்தில் குற்றவாளிகளாகக் காணப்பட்ட முடிவினை நிலை நிறுத்தமுடியாது.

வழக்குரைத்தவர்: எதிரிகள்—மேன்முறையீட்டாளர்க்காக கொல்வின் ஆர். டி. சில்வா, அரிச்சந்திரா மென்டிஸ், பி. தென்னகூன் சி. சந்திரசேகரம் ஆகியோர்;

சட்டத்துறைத் தலைமையதிபதிக்காக, ரைறன் பெர்ஞந்து, முடிக்குரிய வழக்குரைஞர்.

நீதியரசர் சமரவிக்கிரம

1966-ம் ஆண்டின் 5-ஆம் இலக்க இறக்குமதி செய்யப்பட்ட நூற்றுணிகளும் இறக்குமதிசெய் யப்பட்ட நூற்றுணிப்பொருள்களும் விலைகள் கட்டுப்பாட்டுக் கட்டளையை மீறுவதாகிய தவறு களுக்காக 1ம், 2ம் எதிரிகள் மேன்முறையீட் டாளர்கள் குற்றத்தீர்ப்பளிக்கப்பட்டுள்ளார்கள்.

ரேயோன், செலுலோஸ், செயற்கைத் தும்பு———ஏனைய தயாரிக்கப்பட்ட தும்புகள் உட்பட, கிரேப், சற்றின், டபட்டா, கெயர் கோட், மஸ்லின், வீட்டு அலங்கார துணிவகை கள் 48'' அகலமுள்ள சாயமூட்டப்பட்ட நைலோன் டபட்டா, 44''/45'' அகலமுள்ள சாயமூட்டப்பட்ட நைலோன் ஷியர் தவிர்ந்த ஷியர் கிரேப் ஆகியனவான செயற்கைப் பட்டுத் துணிவகைகள், அதற்குமேல் விற்கப்படக்கூடாத ஆகக்கூடிய கட்டுப்பாட்டுச்சில்லறை விலையை நிர்ணயிக்கும் கட்டளையானது செயற்பாட்டில் இருந்தது எனவும், மேன்முறையீட்டாளர்கள் இருவரும் மேற்சொல்லப்பட்ட செயற்கைப் பட்டுத் துணிவகையில் ஒன்றன (யப்பானிற் செய்யப்பட்டது கூ. மொ. வி.) ஹிப்பலோனில் 2 யாரை, கட்டுப்பாட்டுக் சில்லறை விலைக்கு மேலாக விற்றார்கள் எனவும் குற்றப்பத்திரம் குற்றஞ்சாட்டியுள்ளது.

குற்றப்பத்திரத்தில் கூறப்பட்டுள்ள தவறு இருக்கவில்லை எனவும், மேலும், எது எப்படி யாயினும், குற்றச்சாட்டு நிரூபிக்கப்படவில்லை எனவும் மேல் முறையீட்டாளர்களுக்கான அறிவு

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சான்ற வழக்குரைஞர் சமர்ப்பித்துள்ளார். குற்றச்சாட்டு, முறையானது என்பது எனது அபிப்பிராயம். அத்துடன் விலக்கட்டளைக்கு விடயப் பொருளானது எனக் குறிப்பீடு செய்யப்படும் செயற்கைப்பட்டுப் பொருள் வகைகளுள் ஏதேனும் ஒரு வகையுள், மேல் முறையீட்டாளர்கள் விற்ற பொருள் அமையும் என சான்று கிடைக்குமாயின் குற்றச்சாட்டு நிரூபிக்கப்பட்டதாக அமையும். எனினும் ஹிப்பலோன், கிரேப், சற்றின், டபட்டா, கெயர் கோட், மஸ்லின் அல்லது ஷியர் கிரேப் போலாகுமெனக் கூறுவதற்கு எவ்வித சான்றுமில்லை. இவ்வழக்கில் உள்ள சான்று, மேல்முறையீட்டாளர்களால் விற்கப்பட்ட பொருளான ஹிப்பலோன் செயற்கைப்பட்டு ஆகும் என்பதே தவிர, விலக்கட்டுப்பாடு செய்யப்பட்டுள்ள செயற்கைப்பட்டுத்துணி வகை எனக் குற்றச்சாட்டில் தரப்பட்டுள்ள செயற்கைப்பட்டுவகைகளுள் எதிலேனும் அடங்குமென்பதற்குச் சான்றில்லை. அறிவுசான்ற முடிக்குரிய வழக்குரைஞர் அவ்விலக்கட்டளை செயற்கைப்பட்டு துணிவகைகளுக்கு ஏற்புடையது எனவும், விற்கப்பட்ட பொருள் செயற்கைப்பட்டுஎன்பதற்கான எண்பிப்புப்போதியதுஎனவும் சமர்ப்பித்தார். 1966இன் 5ஆம்இலக்கவிலக்கட்டளையின் ''ஆ'' என்னும் அட்டவணையின் 2ஆம் பந்தி நியதிகள்கள் இக்கருத்துக்கு ஆதரவு தருவனவல்ல. மேலும் கிரேப், சற்றின், டபட்டா கெயர் கோட், மஸ்லின், ஷியர் கிரேப் என்பவற்றைக்கொண்ட செயற்கைப்பட்டுத் துணி வகைகளுக்குக் கட்டளை தொடர்பு உடையது எனக் குற்றச்சாட்டு தருகின்றது. எனவே, மேல்முறையீட்டாளர்க்கான வழக்குரைஞரின் 2வது வாதம், அதாவது குற்றச்சாட்டு நிரூபிக்கப்படவில்லை என்பது ஏற்றுக்கொள்ளப்பட வேண்டும் என நான் கருதுகிறேன் எனவே 1ம். 2ம், எதிரிகள்மேன்முறையீட்டாளர்களுக்குவிதிக்கப்பட்ட குற்றத்தீர்ப்புகளையும், தண்டனைகளையும் அகற்றி அவர்களை விடுதலை செய்கிறேன்.

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நீதியரசர் விஜயதிலகா

உயர்நீதிமன்றம் 495/70

யே. வில்லியமும் வேறு ஒருவரும் எதிர் இராணியார்

வவுனியா நீதவான் நீதிமன்றத்தின் 45266ஆம் இலக்க வழக்கை வட சுற்றுலாப்பிரிவிலிருந்து மத்திய சுற்றுலாப்பிரிவுக்கு அல்லது மேற்குச் சுற்றிலாப்பிரிவுக்கு மாற்றுவதற்கான விண்ணப்பம்

விவாதிக்கப்பட்டுத் தீர்மானிக்கப்பட்டது 1970 ஜூலை, 8

கொலை வழக்கை இடம் மாற்றுதல்—சிங்களவரான குற்றஞ் சாட்டப்பட்டவர்கள் சம்பந்தப்பட்ட வழக்கை ஒரு சுற்றுலாப்பிரிவிலிருந்து இன்னேரு சுற்றுலாப்பிரிவுக்கு மாற்றுதல்-இந்தத் தவறு தமிழர் பெரும்பான்மையினராய் உள்ள இடத்தில் நிகழ்ந்தது-கொலை செய்யப்பட்டவர்களும் தமிழர்—குற்றஞ்சாட்டப்பட்டவர்களால் தேர்ந்தெடுக்கப்பட்ட சிங்களம் பேசும் யூரிமாரும் தமிழ்ப்பிரதேசத்தில் வாழ்பவர்களே-அதனால் அவர்களின் உள்ளங்கள் பாதிக்கப் படுதல் சாத்தியம்—இனப்பிரச்சனையோ சமுதாய மோதலோ இருப்பதாக முறைப்பாடு இல்லை.

(அ) கொலையுண்டவர்கள் எல்லோரும் தமிழர்கள்

(ஆ) தமிழர் பெரும்பான்மையினராய் வாழும் இடத்தில் இந்தத் தவறுனது இழைக்கப்பட்டது;

(இ) யூரிமார் சிங்களவர்களாய் இருந்தபோதிலும் தமிழர் பெரும்பான்மையினராய் வாழும் இடத்தில் யூரி மார் வாழ்கின்றனரென்பதால் அடி உள்ளத்தளவிலாதல் அவர்கள் பாதிக்கப்படுதல் மிகச் சாத்தியமாதலால் நியாயமானதும் பாரபட்சமற்றதுமான விளக்கம் நடைபெறச் சந்தர்ப்பம் ஏற் படாதென்று குற்றஞ்சாட்டப்பட்டோர் அஞ்சுகின்றனர்,

என்ற காரணங்களினால், அந்த வழக்கை வடக்குச் சுற்றுலாப்பிரிவிலிருந்து மத்திய சுற்றுலாப்பிரிவுக்கு அல்லது மேற்குச் சுற்றுலாப்பிரிவுக்கு மாற்றும்படி குற்றஞ்சாட்டப்பட்டோரின சார்பில் விண்ணப்பம் செய்யப்பட்டி ருக்கின்றவிடத்து...

தீர்ப்பு:: இந்த வழக்கில் இனப்பிரச்சனையோ சமுதாய மோதலோ இருப்பதாக முறைப்பாடு காணப்படாவிடத்து குறறஞ்சாட்டப்பட்டவர்களாலேயே தேர்ந்தெடுக்கப்பட்ட சிங்களம்பேசும் யூரிமாரின் கண்ணியத்தை மேற்சொல்லப்பட்ட நிகழ்வுகளைக்கொண்டு, கேள்விக்குட்படுத்துவது மிகவும் நேர்மையற்றதும் நியாயமற் றதுமாகும்.

எச். எல். டி. சில்வா, ஜயதிச்ச ஹெறற்றுடன், விண்ணப்பதாரர்க்காக;

முடிக்குரிய வழக்குரைஞர் எல். டபிள்யூ. பி, வடுகொடபிற்றிய. சட்டத்துறைத் தலைமையதிபதிக்காக

நீதியரசர் விஜயதிலகா

வட சுற்றுலாப்பிரிவில் நேர்மையானதும் பாரபட்சமற்றதுமான விளக்கம் நிகழமுடியாது என்று நியாயமானதோர் அச்சம் இருப்பதன் காரணமாக, இவ்வழக்கு மத்திய சுற்றுலாப் பிரி வுக்கு அல்லது மேற்குச் சுற்றுலாப்பிரிவுக்கு மாற் றப்படுவதற்கு ஏற்றவொன்றுகும் என விண்ணப் பகாரர்களின் வழக்குரைஞரான திரு. டி.சில்வா அவர்கள் சமர்ப்பித்துள்ளார்கள். விண்ணப் பகாரரான, இவ்வழக்கில் குற்றஞ்சாட்டப்பட் டுள்ளவர்கள் சிங்கள மக்கள் என்றும், தீங் கிழைக்கப்பட்டவராய், இறந்துபோன மூன்று ஆட்களும் தமிழர் என்றும் தெரியவருகிறது. திரு. டி. சில்வா முற்றீர்ப்பு வழக்குகள் பலவற்

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றிற்கு எனது கவனத்தை ஈர்த்துள்ளார். 1925 அகில இந்திய வழக்கறிக்கைகள் லாகூர், 101, 1928 அகில இந்திய வழக்கறிக்கைகள் லாகூர் 460, இந்திய சட்ட அறிக்கைகள் 25ஆம்தொகுதி (கல்கத்தா) 727, இந்திய குற்றவியல் நடவடிக்கை முறைக்கோவையின் 586ஆம் பிரிவு, சித்தாலியின் குற்றவியல் நடவடிக்கை முறைக்கோவை (1946) 2770 என்பன அவை.

குறிப்பிட்ட சம்பவம் தமிழர் பெரும்பான்மையினராயுள்ள மாங்குளத்தில் நிகழ்ந்தது என்றும், குற்றஞ்சாட்டப்பட்டவர்கள் சிங்களம் பேசும் யூரிமார்கள் வேண்டும் எனத் தெரிவு செய்திருப்பினும்கூட கொலையுண்டவர்கள் எல்லோரும் தமிழராவர் என்பதால் யூரிமாரின் உள்ளங்கள் பாதிக்கப்படலாம் என்பது மிகவும் சாத்தியமாதலின், நியாயமானதும் பாரபட்சமற்றதுமான விளக்கம் பெறும் வாய்ப்பு இருக்காது எனக் குற்றஞ்சாட்டப்பட்டவர்கள் அஞ்சுவதாகவும் விண்ணப்பகாரரின் வழக்குரைஞர் மேலும் சமர்ப்பித்துள்ளார். இவ்வழக்கிலுள்ள நிகழ்வுகள் சாதி சம்பந்தமான அல்லது இனஞ் சம்பந்தமான பிரச்சினையைக் கிளப்பவில்லை என்பதை திரு. டி. சில்வா ஒப்புக்கொள்கிறார். அப்படியிருப்பினும்கூட, இறந்தவர்கள் எல்லோரும் தமிழர்கள் என்பதால் யூரிமார்கள் பாதிக்கப்படக் கூடும் என்ற அச்சம் அக்குற்றஞ்சாட்டப்பட்டவர்கள் மனதில் நியாயமாகவே உள்ளது எனக் கூறுகின்றார். நான் இவ்விண்ணப்பத்தைக் கூர்ந்துபார்த்தேன். இவ்வழக்கில் சாதி சம்பந்தமான அல்லது இனஞ் சம்பந்தமான பிரச்சினை இருப்பதாக ஒரு கூற்றேனும் இல்லை என்பது குறிப்பிடப்படவேண்டியது.

இவ்வித சூழ்நிலையில், இவ்வழக்குக்கெனத் தெரிவுசெய்யப்படக்கூடிய யூரிமார்களது மனங்களைக் குழப்பக்கூடிய அத்தகையதொரு பிரச்சினை இருக்கலாம் என்று எதிர்பார்ப்பது இந்நீதிமன்றத்துக்குச் சரியல்ல என்று நான் கருதுகின்றேன்.

41 புதுச் சட்ட அறிக்கை 369இல் உள்ள நீதியரசர் சூட்சின் தீர்ப்பையும், 38 புதுச் சட்ட அறிக்கை 332இல் உள்ள நீதியரசர் த கிரெட்சர் (மூத்தவர்) அவர்களின் தீர்ப்பையும் சான்று காட்டி முடிக்குரிய வழக்குரைஞர் திரு. வடு கொடப்பிற்றிய எனது கவனத்தை ஈர்த்துள்ளார். குறிப்பாக சிங்களம் பேசும் யூரிமாரிலை விளங்கப்படவேண்டும் என விண்ணப்பக்காரர்கள் தெரிவு செய்திருக்கும்பொழுது வட சுற்றுலாப்பிரிவில் நியாயமானதும் பாரபட்சமற்றதுமான விளக்கம் பெறமுடியாது என எனக்குத் தோன்றவில்லை.

சிங்களம் பேசும் யூரிமாரால் விளங்கப்பட வேண்டுமென விண்ணப்பக்காரர்கள் தெரிவுசெய்திருப்பினும், தமிழரைப் பெரும்பான்மையினராய்க்கொண்ட ஓர் இடத்திலிருந்துதான் இந்த யூரிமார்கள் வரலாம் ஆதலின், தாம் தமிழ் பேசப்படும் ஒரு பகுதியில் வாழ்கிறார்கள் என்பதலை அவர் அடி உணர்வின் காரணமாக அவர்களையறியாமலே உள அடிப்படையான அல்லது வேறு வகையான தாக்கத்துக்கு உட்பட்டவராவர் என திரு. டி. சில்வா சமர்ப்பிக்கிறார்.

சிங்களம் பேசும் யூரிமாரது கண்ணியத்தை இத்தகைய சூழ்நிலைகளில் கேள்விக்குட்படுத்துவது மிகவும் நேர்மையற்றதும் நியாயமற்றதுமாகும் என்பது என் எண்ணம். சிங்கள மக்களைப் பெரும்பான்மையினராய்க்கொண்ட பிறிதொரு சுற்றுலாப்பிரிவுக்கு இவ்வழக்கு மாற்றப்படின், குற்றஞ் சாட்டப்பட்டவர்கள் நேர்மையற்ற அநுகூலம் பெறுவதற்கென அத்தகைய சுற்றுலாப்பிரிவைத் தெரிந்துள்ளனர் என நேர் ஒத்த குற்றச்சாட்டுச் செய்யப்படலாம். இவ்வழக்கிலுள்ள நிகழ்வுகளின்படி திரு. டி. சில்வா குறிப்பிடும் விதமான அச்சத்திற்குக் காரணம் எதுவும் இருப்பதாக நான் எண்ணவில்லை.

எனவே இதற்கிணங்க இவ்விண்ணப்பத்தை நான் மறுக்கவேண்டியவனாயுள்ளேன்

விண்ணப்பம் மறுக்கப்பட்டது.

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நீதியரசர் விஜயதிலக

மதியாபரணம் எதிர் போசோர் பொலிசு கொழும்பு

எஸ். சி 385/69 விண் 34/70 கொழும்பு ஜேஎம்சி 38732

விவாதித்து முடிவு செய்த தேதி; யூலை 9, 1970

சுங்கக் கட்டளைச்சட்டம் பிரிவு 101(1) சுங்கப் பிரதேசத்தினுள் கொட்டாஞ்சேனை கொட்டபோம் (செட்டித்தோட்டம்) தெருவில் புரியப்பட்ட குற்றம் ஒன்றுக்கு எதிரி குற்றத்தீர்ப்பளிக்கப் பட்டார் வழக்காளி தரப்பின் சான்று அளுத்மாவத்தை வீதியைக்குறிப்பிட்டது—கொட்டபோம்தெரு சுங்கப்பிரதேசத்திலுள்ளது என்பதற்கு சான்று எதுவுமில்லை. அல்லாமலும் கொழும்புத்துறைமுக எல்லைகளும் சுங்கப்பிரதேச எல்லைகளும் ஒன்று என்பதற்கும் சான்றில்லை— குற்றத்தீர்ப்பு நிலைக்க கூடியதா? என்பது.

சுங்கக் கட்டளைச்சட்டத்தின் பிரிவு 101 (1)இன் கீழ் கருதப்பட்டவாறுள்ள சுங்கப்பிரதேசத் தினுள் சில பொருள்களைக் கையாண்டார் என இரண்டாவது எதிரி குற்றத் தீர்ப்பளிக்கப்பட்டார். சுங்கப்பிரதேசத்தினுள், கொட்டாஞ்சேனையிலுள்ள கொட்டபோம் தெருவில் அக்குற்றம்புரியப்பட்டது எனக்குற்றச்சாட்டு கூறியது. ஆனல் வழக்காளிதரப்புச் சான்று அளுத்மாவத்தை வீதியில் அது நிகழ்ந்ததெனக் காட்டியது. கொட்டாஞ்சேனையிலுள்ள கொட்டபோம் தெரு சுங்கப்பிரதேசத்தி லுள்ளது என்பதற்கோ கொழும்புத்துறைமுக எல்லைகளும், சுங்கப்பிரதேச எல்லைகளும், ஒன் றனவை என்பதற்கோ எவ்வித சான்றும் இருக்கவில்லை.

தீர்ப்பு:- சுங்கக் கட்டளைச் சட்டத்தில் வரையறை செய்யப்பட்டவாறன சுங்கப்பிரதேசத்தினுள் எதிரி குற்றம் புரிந்தார் என்ற குற்றச்சாட்டை வழக்காளி தரப்பு நிரூபிக்கத்தவறிவிட்டது என்பதற்கும்,

பின்பற்றப்பட்டது: ஜினதாசா எதிர் முன்கரை பொலிசு 73 என். எல். ஆர், 48

பின்பற்றப்பட்டிலது: ஜோசப் எதிர் போலிசுப்பரிசோதகர் (முன்கரை மொழும்பு 72 என்,, எல். ஆர், 357

வழக்குரைஞர்:- இராணி வழக்குரைஞர் ஏ. எச். சி. த சில்வா, மனே தேவசகாயத்தின் அனுசரணையுடன் மேன்முறை யீட்டில் 2ஆம் எதிரி...மேன்முறையீட்டாளருக்காக 2 ஆம் எதிரி–மனுதார்க்காக–விண்ணப்பத்தில்

திவங்க விக்கிரமசிங்கா:முடிக்குரிய வழக்குரைஞர் எதிர்வாதிக்கு மேல்முறையீட்டிலும் விண்ணப்பத்திலும்

நீதியரசர் விஜயதிலக

சுங்கக் கட்டளைச்சட்டத்தின் 101ஆம் பிரிவின் (I)ஆம் உட்பிரிவிற் கருதப்பட்டவாறன சுங்கப் பிரதேசத்தினுள்தான் வழக்கிற் சம்பந்தப்பட்ட பொருள்களை (அதாவது ஐந்து மோர்க்குரி பி பி சி போத்தல்களை. இரண்டாம் எதிரி கையாண்டார் என வழக்காளி தரப்பு நிலைநாட்டத் தவறிவிட்டது என இரண்டாவது எதிரியின் சார் பிற்றேன்றிய அறிவுசான்ற இராணி வழக்குரைஞர் திரு. ஏ. எச். ரி. த சில்வா சமர்ப்பிக்கிறார். வழக்காளிதரப்பிலளிக்கப்பட்ட சான்றின்படி முதலாம் எதிரி அழுத்மாவத்தை வீதியில் நின்று கொண்டு கொழும்புத்துறை முகச்சுவரின் துவாரத்தினூடாகக் கையைவிட்டு இப்பொருள்களை எடுத்துள்ளார். அதன்பின்னர் தான், இச்சுவருக்கு வெளியே நின்றுகொண் டிருந்த இரண்டாம் எதிரி அவற்றைக் கையாளா லானர் எனத் தோற்றுகிறது. மேலும் சான்றா னது அழுத்மாவத்தைவீதியைக் குறிப்பிட்ட போதும், குற்றச்சாட்டில் குறிப்பிடப்பட்ட தெரு அதாவது கொட்டாஞ்சேனையிலுள்ள கொட்டபோம் தெரு சுங்கப்பிரதேசத்தினுள் உள் ளது என்பதற்கு எவ்வித சான்றுமில்லை. எனவும் திரு. த சில்வா சமர்ப்பிக்கின்றார், நீதியரசர் டி கிரேட்சர் அளித்த தீர்ப்பொன்றையும் அவர் குறிப்பிட்டுள்ளார். (எஸ் சி 934/68, ஜே. எம். சி. 37659 தேதி 5—3—69) இது நீதியரசர் தென் னக்கூனலும் பின்பற்றப்பட்டுள்ளது (ஜினசேன எதிர் முன்கரைப்பொலிசு 73என்எல்ஆர் 48, தேதி 25—3—70) இவற்றில் நீதியரசர்கள்செய்தமுடிவு யாதெனில் கொழும்புத்துறைமுக எல்லைகள் சுங்கப்பிரதேச எல்லைகளுடன் ஒத்தவை என்பதற் குச் சான்றெதுவுமில்லாதபொழுது, குறிப்பிட்ட சம்பவம் சுங்கக் கட்டளைச்சட்டத்தில் வரையறை

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செய்யப்பட்டவாறுன சுங்கப்பிரதேசத்தினுள் தான் நடந்தது என்பதனை வழக்காளி தரப்பு நிரூபிக்கவேண்டியது அவசியமாகும் என்பது.

சுங்கக் கட்டளைச்சட்டத்தில் (துணைச்சட்ட வாக்கம் IIஆம் தொகுதி) ''சுங்கப் பிரதேசம்'' என்பதற்கானவரைவிலக்கணத்தையும், கொழும் புச்சுங்கப்பிரதேசத்தின் எல்லைகளைக்காட்டும் அட்டவணையையும் திரு. த சில்வா குறித்துக் காட்டியுள்ளார்கள். அத்துடன் ஜோசப் எதிர் பொ ப. (முன்கரை கொழும்பு) 72NLR 357 இல் நீதியரசர் பண்டித குணவர்த்தனு அளித்த தீர்ப் பையும் சுட்டிக்காட்டினர். அதில் சுங்கக்கட்டளைச் சட்டத்தின் (அத். 136) 149ஆம் பிரிவின் காரணமாக நீதியரசர் வேறுவிதமாகக் கருத்துக் கொண்டுள்ளார்கள். அப்பிரிவு கூறுவது, இக் கட்டளைச் சட்டத்தின்கீழான ஏதேனும் நட வடிக்கையில் அல்லது அதுபற்றிய தகவலில் அக்குற்றம் ஏதேனும் துறைமுகத்தின் எல்லை களுள் அல்லது இலங்கையின் ஆள்புல நீர்ப்பரப் பின் எல்லைகளுள் புரியப்பட்டது எனச் செய் யப்படும் கூற்று அத்தகைய எல்லைகள்பற்றி நிரூ பிக்காமலே. அதற்குப்போதிய சான்றுகும். அவ சியமானால் அது அவ்விதமானது எனநிரூபிக்கப் படல்வேண்டும். கொழும்புச்சுங்கப்பிரதேசத்தினை யும் கொழும்புத்துறைமுகத்தினையும் ஒன்றே என நீதியரசர் பண்டித குணவர்த்தனு கருதினார்கள் போலத்தெரிகிறது. நான் மேலே குறிப்பிட்டது போல நீதியரசர் தென்னக்கூன் அவர்கள் மற்ற நீதியரசர்கள் இருவரும், அதாவது, நீதியரசர் டி கிரெட்சரும், நீதியரசர் பண்டித குணவர்த் தனவும் வெளியிட்ட ஒன்றுக்கொன்று முரண் பாடான கருத்துக்களை ஆராய்ந்துவிட்டு, நீதி யரசர் டி கிரெட்சரது தீர்ப்பையே பின்பற்றினர். இவர்களின் தீர்ப்பே எனக்கும் உடன்பாடாகும் என மிகுந்த பணிவுடன் கூறுகிறேன்.

சுங்கக்கட்டளைச்சட்டத்தில் வரைவிலக்கணஞ் செய்யப்பட்டவாறுள்ள சுங்கப்பிரதேசத்தினுள் இவ் எதிரிகள் இருவரில் எவரேனும் இருந்தார் என்பதனை நிரூபிக்க வழக்காளி தரப்பு சான் றளிக்கவில்லை என அறிவுசான்ற முடிக்குரிய வழக் குரைஞர் ஏற்றுக்கொள்கிறார். குற்றச்சாட்டு கொட்டபோம் தெருவைக் குறிப்பிட சான்று அளுத்மாவத்தை வீதியைக் குறிப்பிடுகின்றது எனவும் காண்பிக்கின்றார். எனவே இக்குற்றத் தீர்ப்பை நிலைநாட்டமுடியாது என்பது தெளிவு.

அதற்கிணங்க 1ஆம் எதிரிக்கெதிரான குற் றத்தீர்ப்பையும் தண்டனையையும் தள்ளி வைத்து அவரை விடுதலை செய்கிறேன்

மேன் முறையீடு அனுமதிக்கப்பட்டது.

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நீதியரசர் சமரவிக்கிரம

வி. ஆறுமுகம் எதிர் எஸ். வள்ளியம்மா

உயர்நீதிமன்றம் 63/1967 கொழும்பு விண்ணப்ப நீதி மன்றம் 77635

விவாதிக்கப்பட்டது: 1968—செத்தம்பர் 9.
தீர்மானிக்கப்பட்டது: 1969—டிசம்பர் 21.

அற்றேனித்தத்துவம்—இந்தியாவில் அத்தாட்சிப்படுத்தப்பட்டது இந்தியாவில் நீதவான் முன்னிலையில் ஒப்பமிடப்பட்டது,: கையொப்பத்தின்கீழ் பதவிப் பெயர் தரப்படவில்லை; அற்றேனித்தத்துவம் செல்லுபடியாகுமா என்பது,

அற்றேனித்தத்துவம் வழக்காளியின் கையொப்பத்தைக் கொண்டுள்ளது என ஒத்துக்கொள்ளப்பட்டிருப்பதோடு

(அ) நீதவான் நீதிமன்றத்தின் இலச்சினை என வெளிப்படையாகத் தோன்றும் தமிழிலான இலச்சினை ஒன்றையும்

(ஆ) அது தூத்துக்குடி உபபிரிவு நீதிவானால் கையொப்பமிடப்பட்டுள்ளது என இலங்கையிலுள்ள இந்திய உயர் ஆணையாளரின் அலுவலகத்தைச்சேர்ந்தவர் ஒருவர் அளித்த அத்தாட்சியையும் உடையதாயிருக்குமிடத்து:...

தீர்ப்பு:—நீதிவானின் கையொப்பத்தின்கீழ் அவரின் பதவிப்பெயர் தரப்படாவிடினும், குறித்த வழக்கை வழக்காளியின் அற்றேனி நடாத்துவதற்கும் அது போதிய அதிகாரமளிப்பதாகும்,

வழக்குரைஞர்: டபிள்யூ. டி. குணசேகர விண்ணப்பதாரர்— மேன்முறைமீட்டாளருக்கு
டி. ஆர். பி. குணதிலக, சி. தகநாயகாவுடன் எதிராளி—எதிர்வாதிக்கு

நீதியரசர் சமரவிக்கிரம

இவ்வழக்கின் கணக்கில் வைப்பாகக் கிடந்த சுமார் 700 ரூபாவைப், பெற்றுக்கொள்வதற்கான விண்ணப்பம் ஒன்றின்மீதான விசாரணையிற் செய்யப்பட்ட கட்டளைக்கெதிரான ஒரு மேன்முறையீடாகும். அவ்விண்ணப்பம் வழக்காளியின் அற்றேனி ஒருவராற் செய்யப்பட்டிருந்தது. அற்றேனித் தத்துவம் செல்லுபடியற்றது என எதிர்வாதியான எதிராளி ஆட்சேபித்தார். அவ் ஆவணம் உண்மையானது அல்ல என்பதும் அது முறைப்படி ஆக்கப்படவில்லை என்பதும் அவரின் காரணங்களாகும். அவ் ஆவணத்தை கை எழுத்து நிபுணர் ஒருவரைக் கொண்டு ஆராயும் வாய்ப்பை அவர் பெற்றுக் கொண்டார். ஆனாலும் விசாரணையினபொழுது வழக்காளியினுடைய உண்மையான கையொப்பத்தினை அவ்வாவணம் கொண்டிருக்கவில்லை என்ற குற்றச்சாட்டைக் கைவிட்டு, எதிர்வாதியான எதிராளியின் வழக்குரைஞர் அவ் அற்றேனித் தத்துவம் முறைப்படி ஆக்கப்படவில்லை என்ற தனிக் காரணத்தின் மீதே அவ் ஆவணத்தை ஆட்சேபித்தார். அற்றேனித் தத்துவம் வழக்காளியினுடைய கையொப்பத்தைக் கொண்டிருந்தது என்பது ஒத்துக்கொள்ளப்பட்டதாகி விடின், அற்றேனித்தத்துவத்தினை ஆராய்வதில் நீதிமன்றம் அளவு கடந்த நுணுக்கத்தினைக் கடைப்பிடித்திருத்தல் அவசியம் என நான் எண்ணவில்லை. தூத்துக்குடி உபபிரிவு நீதவானின் கையொப்பம் அவரின் உத்தியோகத்தின் பதவிப் பெயரைக்கொண்டிருக்கவில்லை என அறிவு சான்ற விண்ணப்ப ஆணையாளர் குறிப்பிடுகிறார். எவ்வாறுயினும், அந்த அற்றேனித் தத்துவம், தமிழில் ஓரிலச்சினையைக் கொண்டுள்ளது. அது வெளிப்படையாக நீதவான் நீதிமன்றத்தின் இலச்சினையாகலாம். இலங்கையிலுள்ள இந்திய உயர் ஆணையாளரின் ஆணையகத்தைச் சேர்ந்த

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உத்தியோகத்தர் ஒருவர், தூத்துக்குடி உபபிரிவு நீதவானுல் அது கையொப்பமிடப்பட்டுள்ளது என உறுதியளித்துள்ளார்.

வழக்காளியின் சார்பில் அற்ரோனியால் செய்யப்பட்ட விண்ணப்பத்துக்கு அற்ரோனித்தத்துவம் போதிய அதிகாரமளிக்கின்றது என நான் கருதுகிறேன். அறிவு சான்ற ஆணையாளரின் கட்டளையை அப்புறப்படுத்தி பணத்தைப் பெற்றுக்கொள்வதற்கு விண்ணப்பத்தை அநுமதித்துக் கட்டளையிடுகிறேன்.

விண்ணப்பம் ஒன்று முன்னரும் செய்யப்பட்டுள்ளது; ஆனுல் பயனளிக்கவில்லை; அந்நேரத்திற் காண்பிக்கப்பட்ட அற்ரோனித்தத்துவம்பற்றி எண்பிப்பு இல்லாமையினுலேயே அது பயனற்றதாயிற்று. வேறு நடவடிக்கைகளும் நிகழ்ந்துள்ளன என்றும், இந்தப்பணத்தைப் பெறுவதற்கெனப் பல சந்தர்ப்பங்களில் நீதிமன்றத்தின் நேரம் செலவிடப்பட்டுள்ளது என்றும் தோன்றுகிறது. வழக்காளி, இவ்வழக்கின் தேவைகளுக்காகத் தமது தமையனரை அற்ரோனியாகச் செயலாற்ற நியமித்துக்கொள்ள முடிவு செய்த பொழுது அற்ரோனித் தத்துவம் தொடர்பில் ஏற்புடைய அத்தனைச்சிக்கலற்ற சட்ட ஏற்பாடுகளுக்கிணங்க முறைப்படி நிறைவேற்றப்பட்ட அற்ரோனித் தத்துவத்தை அவர்க்கு வழங்கியிருந்தால் நீதிமன்ற நேரமும், கட்சிக்காரரின் செலவுகளும் தவிர்க்கப்பட்டிருக்கும். அத்தகைய சூழ்நிலையில், மேல்முறையீடு சம்பந்தமான அல்லது கீழ் நீதிமன்ற விசாரணை சம்பந்தமான செலவுகள் பற்றிய எவ்வித கட்டளையும் நான் இடவில்லை.

மேன் முறையீடு அனுமதிக்கப்பட்டது.

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நீதியரசர் சமரவிக்கிரமா அவர்கள்

கே. பெருமாள் எதிர் கே. கருமேகம்

உ. நீ. வின். இல. 211/68—நீ. நீ, மாத்தளை 24721

வாதத்தேதி: 1968 ஒகத்து 30, 1968 செத்தம்பர் 12
தீர்ப்புத்தேதி: 18 ஒகத்து 1969

தாபரிப்பு — பிள்ளை ஒன்று தொடர்பிலான சட்டளை — பின்னர், கணவனுக்குத் தெரியாது திருமணத்தின் நேரத்தில் மனைவி கருப்பவதியாகவிருந்தாள் என்ற காரணத்தின்மீது மாவட்ட நீதி மன்றம் மணநீக்கத்தீர்வையளித்தது — குடியியல் நீதிமன்றத்தின் முடிவின்மீது தாபரிப்புக்கான நீதவானின் கட்டளை நீக்கப்படமுடியுமா? — இந்திய வழக்கு முடிவுகள் ஏற்புடையனவா — சான்றுக் கட்டளைச்சட்டத்தின் 41(2) ஆம் பிரிவு மணநீக்கம் அளிக்கப்படும் காரணத்துக்கும் செல்லக்கூடியதாகுமா?

எதிராளி மனுதாரைத்திருமணஞ்செய்தபின்னர் ஆறு மாதத்தில் விண்ணப்பகாரி எதிர்வாதிக்குப்பிள்ளை ஒன்று பிறந்தது. கணவன் தான் தந்தையல்ல என வாதாடினர், விண்ணப்பகாரி—எதிர்வாதி தாபரிப்புக்கோரி விண்ணப்பம் செய்திருந்தார். நீதவான் நீதிமன்றத்தில் அவருக்குச்சாதகமாகக்கட்டளை கிடைத்தது. இக்கட்டளை மேல்முறையீட்டிலும் உறுதியாயிற்று, அதன்பிறகு எதிராளி மனுதார் மாவட்டநீதிமன்றத்தில் மணநீக்கத்தீர்வை ஒன்றைப் பெற்றார். அதற்குக்காரணம் திருமணநேரத்தில் கணவனுக்குத்தெரியாது விண்ணப்பகாரி—எதிர்வாதி கருப்பவதியாயிருந்தார் என்பதேயாகும். இப்போதைய விண்ணப்பத்தின்மூலம், மாவட்டநீதிமன்றத்தில் திருமணஞ்செல்லுபடிவற்றது என்ற நடவடிக்கைகளில் அளிக்கப்பட்ட தீர்ப்பின் காரணமாகத் தாபரிப்புக்கட்டளையை நீக்கும்படி எதிர்வாதி மனுதார் கோருகிறார்.

தீர்ப்பு: (1) தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவைப்பின்பற்றித் தாபரிப்புக்கான கட்டளை ஒன்றை நீக்குவதற்கு நீதவானுக்கு அதிகாரமளிக்கும் ஏற்பாடு எமது சட்டத்தில் இல்லை:

(2) தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவின்விளைவாகத் தாபரிப்புக்கட்டளை ஒன்றை வேறுபடுத்துவதற்கு அல்லது நீக்குவதற்கு நீதவானுக்கு அதிகாரம் அளிக்கும் இந்தியக்குற்றவியல் நடவடிக்கை முறைச்சட்டக்கோவையின் பிரிவு 489 (1) குறிப்பான ஏற்பாடு ஒன்றின் அடிப்படையில்எழுந்த இந்திய வழக்கு முடிவுகள் இலங்கையில் அத்தகைய ஏற்பாடு இல்லாத பொழுது ஏற்புடையனவல்ல.

(3) திருமணம் வெற்றுனது என்பதுபற்றி மாவட்ட நீதிமன்றம் ஒன்றின் கட்டளையைச்சான்றுக்கட்டளைச்சட்டத்தின் 41 (2) ஆம் பிரிவு முடிவானதாக்கும் நேரத்தில், அக்கட்டளை ஆக்கப்பட்ட காரணத்துக்கு அதன் பிரயோகத்தை விசாலமானதாக்கவில்லை.

மேற்கோள் காட்டப்பட்ட தீர்ப்புகள்:

உ, அர்சேகு எதிர் மாகின்சுவெயும் வேறொருவரும் ஏ. ஐ. ஆர்.(1940) ரங்கூன் 298
ஙாபோதெயின் எதிர் மாமேசன்னும் வேறொருவரும் ஏ. ஐ. ஆர் (1922) மேல் பர்மா 20
போகி எதிர் மாநியேன் ஏ, ஐ. ஆர். (1919) கீழ் பர்மா 7 (2)
தென்னே எதிர் எகநாயக, 63 என். எல். ஆர். 544, 546இல்
கனகிலால் எதிர் ராதாசேன் 7 டபிள்யூ. ஆர். 338,

பி. எதுஸ்ஸுரிய, எதிர்வாதி மனுதாருக்கு

சரத் முத்தேத்துவேகம, ஐ. எஸ். த சில்வாவுடன் விண்ணப்பகாரி எதிர்வாதிக்கு

நீதியரசர் சமரவிக்கிரமா:

எதிராளியான மனுதார் (கே. பெருமாள்) தனது பிள்ளைக்கு தாபரிப்புப்பணம் கட்டவேண்டுமென்று விண்ணப்பகாரியான எதிர்வாதி (கே. கருமேகம்) கட்டளையொன்று பெற்றிருந்தார். இப்பிள்ளை 1964 யூன் 14ஆந் தேதியன்று பிறந்தது. இத்தேதி இவர்கள் இருவரும் திருமணஞ்செய்த பின்னர் ஆறுமாதங்களுக்குச் சிறிது மேலானதாகும். எதிராளி மனுதார் தான் அப்பிள்ளைக்குத்தந்தையல்ல எனக்கூறவே அதன்

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தொடர்பில் நிகழ்ந்த விசாரணையில், இரண்டு பக்கத்தாரும் அளித்த சான்றுகளைக்கேட்ட நீதவான் அப்பிள்ளைக்குத் தாபரிப்புப்பணம் கட்டும் படி கட்டளையிட்டார். இந்நீதிமன்றத்துக்குச் செய்யப்பட்ட மேன்முறையீட்டில் அக்கட்டளை உறுதிப்படுத்தப்பட்டது. அதன்பின்னர் எதிராளி மனுதார் தனக்கும் விண்ணப்பகாரி—எதிர்வாதிக்கும் இடையிலான திருமணத்தை நீக்கஞ்செய்யும் தீர்வை ஒன்றை மாவட்ட நீதிமன்றத்தின்மூலம் பெற்றார். அதற்கான விளக்கத்தில் அவரின் கட்சி மட்டுமே சமுகமளித்தது, அவர்மட்டுமே சான்றளித்தார். மணநீக்கத்துக்கான காரணம், மனைவி திருமண நேரத்திலேயே கருப்பவதியாகவிருந்தார் என்றும், அவர் கருப்பவதியாகவிருந்ததைத் தான் அறியார் என்பதாகும். அப்பிள்ளைக்கான தாபரிப்புத் தொடர்பிலான கட்டளையை நீக்கஞ் செய்து தள்ளிவிடும்படி கோரி எதிராளி மனுதார் இப்பொழுது இந்நீதிமன்றத்துக்கு விண்ணப்பம் செய்துள்ளார்.

தந்தையல்லர் என்ற வாதத்தை ஏற்று, தாபரிப்புச்செலுத்துவதற்கான கடப்பாட்டிலிருந்து விடுவித்துக்குடியியல் வழக்குகளில் அளிக்கப்பட்ட தீர்வைகள் காரணமாகத் தாபரிப்புக் கட்டளைகள் நீக்கஞ்செய்யப்பட்ட சில இந்திய வழக்குகளை எதிராளி—மனுதாரின் சட்டவுரைஞர் எடுத்துக்காட்டினர்கள். அவை—உ அர்சேஞ எதிர் மாகின்சுவேயும் வேறொருவரும் அ. இ. அ. (1940) ரங்கூன் 298 ஙாபோ கெயின் எதிர் மாமே சன்னும், வேறொருவரும் அ. இ. அ. (1922) மேல் பர்மா 20; இந்திய குற்றவியல் நடவடிக்கை முறைச்சட்டக்கோவையின் 488 ஆம்பிரிவு தாபரிப்புக்கட்டளை ஒன்றையிடுவதற்கு நீதவானுக்கு தத்துவம் அளிக்கிறது. அத்துடன் 488(2) ஆம் பிரிவு அக்கட்டளையை நீக்க அல்லது வேறுபடுத்தவும் நீதவானுக்குத்தத்துவம் அளிக்கிறது. அந்த ஏற்பாடு பின்வருமாறு::-

> "தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவின்பயனுய்488ஆம் பிரிவின்கீழ் செய்யப்பட்ட ஏதேனும் கட்டளை நீக்கப்படவேண்டும் அல்லது வேறுபடுத்தப்படவேண்டும் என நீதவானுக்குத் தோன்றுமிடத்து, அதற்கிணங்க அக்கட்டளையை நீக்குதல் வேண்டும் அல்லது விடயத்துக்கேற்ப அதனை வேறுபடுத்தல் வேண்டும்."

தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவின்பயனுகக்கட்டளையொன்றை நீக்குவதற்கு அல்லது வேறுபடுத்துவதற்கு நீதவானுருவருக்குத் தத்துவமளிக்கும் வெளிப்படையான ஏற்பாடு இந்தியக்குறிப்பான நிவாரணச்சட்டத்தில் இருக்கிறது என்பது ஒருபுறமிருக்க, தந்தையல்லர் என்றும் அதன்விளைவாகத்தாபரிப்புச் செலுத்தும்கடப்பாட்டிலிருந்து விடுபடுகிறார் என்றும் வெளிப்படுத்துவதற்கும் ஏற்பாடு உண்டு. அத்தகைய தீர்ப்புகளைப்பெறுவதற்கான வழக்குகளில் சம்பந்தப்பட்ட பிள்ளையும் அவசியமான கட்சியாகும். தகுதிவாய்ந்த குடியியல் நீதிமன்றம் ஒன்றின் முடிவைப்பின்பற்றித் தாபரிப்புக்கான கட்டளையை நீக்க நீதவானுக்கு அதிகாரமளிக்கும் இந்தியக்குற்றவியல் நடவடிக்கை முறைச்சட்டக் கோவையின் 488(4) ஆம்பிரிவின்ஏற்பாடுபோன்ற சட்ட ஏற்பாடு எதுவும் எமது சட்டத்தில் இல்லை. பிரிவு 489(2) இலுள்ள ஏற்பாடு திருத்தம் ஒன்றின்மூலமாக இந்தியக்குற்றவியல் நடவடிக்கை முறைச்சட்டக்கோவையில் 1923ஆம் ஆண்டிற் புகுத்தப்பட்டது. சில இந்திய வழக்குகள் இவ்வாண்டின் முன்னர் தீர்மானிக்கப்பட்டவை. போகி எதிர் மா நியென் அ. இ. அ. (1 19) கீழ்பர்மா 2(3) என்பதில், 488ஆம் பிரிவினுல் வழங்கப்பட்ட நியாயாதிக்கம், குடியியல் நீதிமன்றத்துக்குள்ளதற்குத்துணையானது. அத்துடன் அப்பிரிவின் கீழாக்கப்பட்ட தாபரிப்புக் கட்டளையை வலியுறுத்தும்முன்னர், மனைவியைத் தாபரிப்பு பெறுவதற்குத் தகுதியற்றவராகும் குடியியல் நீதிமன்றம் ஒன்றின் பின்னைய கட்டளை எதனையும் தவனித்தல் வேண்டும் எனவும் தீர்மானிக்கப்பட்டது. அவ்வழக்கிலும், நான் பார்க்கச்சந்தர்ப்பம் கிடைத்த ஏனைய வழக்குகளிலும், மனுதார் பிள்ளை தன்னுடையதல்ல என்ற தீர்ப்பு பெற்றது அதற்கான குடியியல் வழக்கிலேயல்லாமல், அப்பிள்ளை கட்சிக்காரராகவிராத, மணநீக்கத்துக்கான அல்லது மணம் செல்லுபடியற்றது என்ற வழக்கில் இடைநேர் விளைவான முடிவின் மூலமாகவன்று எனத்தோன்றுகிறது. அல்லாமலும் தாபரிப்புக் கட்டளைச்சட்டத்தின்கீழான நியாயாதிக்கம், இந்தியக்குற்றவியல் நடவடிக்கை முறைச்சட்டக் கோவையின் 488ஆம் பிரிவிலுள்ளதுபோன்று குடியியல் நீதிமன்றம் ஒன்றின் நியாயாதிக்கத்துக்குத் துணையாக அமைந்ததன்று. ஏனெனில், தாபரிப்புக்கட்டளைச்சட்டம் ஆக்கப்பட்டதுமுதல், தாபரிப்புக்கோருவதற்கான குடியியல் வழக்குத்தொடருதல் இயலாததாகும்—தென்னே எதிர் ஏகநாயகா 63 பு. ச. அ. 544, 546இல்.

சான்றுக்கட்டளைச்சட்டத்தின் 41 (2)ஆம் பிரிவினைப்பார்க்கும்பொழுது. திருமணத்தின் போது, தான் கருப்பவதி என்பதனை விண்ணப்ப

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காரி மனுதாரிடமிருந்து மறைத்தார் என்ற காரணத்தின்மீது, எதிராளி மனுதாருக்கும் விண்ணப்பகாரி எதிர்வாதிக்குமிடையிலான திருமணத்தை வெற்றும் வெற்றிமானதாக வெளிப்படுத்தும் மாவட்டநீதிமன்றத்தின் கட்டளை ஆள் ஒருவருக்கெதிராகச்செய்யப்பட்ட கட்டளையன்று எவர்க்கும் ஏற்புடையது ஆகும் என எதிராளி மனுதாரின் அறிவுசான்ற சட்டவறிஞர் சமர்ப்பித்தார்கள், எவ்வாறுயினும், ஏதேனும் சட்ட முறைப்பண்பை வழங்குகின்ற அல்லது அகற்றுகின்ற கட்டளையின் அப்பாகத்தைமட்டுமே 41(2) ஆம் பிரிவு இறுதியானதும் முடிவானதுமாக்குகின்றது. எனவே, இவர்கள் இருவருக்குமிடையில் திருமணம் இருந்ததா இல்லையா என்ற பிரச்சினை பற்றி முடிவானதாகும். அக்கேள்வி என்ன காரணத்தின் அடிப்படையில் தீர்மானிக்கப்படுகின்றது என்று அக்காரணம் தொடர்பில் முடிவானதாகாது. மணநீக்கத்தீர்வைபற்றி, கன்கிலால் எதிர் ராதாசேன் 7 டபிள்யூ. ஆர், 338, என்ற வழக்கிலளிக்கப்பட்ட முழுக்குழாத் தீர்ப்பில் காணப்பட்டதாவது, அதன்கட்சிக்காரர்கள் மணநீக்கம் பெற்றனர் என்பதற்கும், அவர்கள் அதன்மேலும் கணவன் மனைவியல்லர் என்பதற்கும் எல்லா ஆட்களுக்கும் அது முடிவானது, ஆனால் அத்தீர்வை எக்காரணமாகக் கூறப்பட்டதோ அது இருந்தது என்பதற்கு அதில் சம்பந்தப்படாதவர்கள்விடயத்தில் முடிவானதல்ல, அன்றியும் அவர்க்கெதிரான முதற்றோற்றமளவிலான சான்றுமல்ல; எதிராளி மனுதார்க்குத் தெரியாது திருமணத்தின்போது விண்ணப்பக்காரி எதிர்வாதி கருப்பவதியாயிருந்தார் என்ற முடிவு, அவ்வழக்குக்குக்கட்சிக்காரராக அல்லாதவர்களைக் கட்டுப்படுத்தாது. அதற்கிணங்க விண்ணப்பகாரி எதிர்வாதியின் பிள்ளையைக்கட்டுப்படுத்தாது. விண்ணப்பகாரி எதிர்வாதியே தாபரிப்புக்கு விண்ணப்பஞ்செய்பவராயினும், அவ்விண்ணப்பம் அவரின் பிள்ளையின் நன்மைக்காகவே செய்யப்பட்டது.

விண்ணப்பகாரி—எதிர்வாதியின்பிள்ளைக்காக செய்யப்பட்ட தாபரிப்புக்கட்டளையை நீக்குவதற்குப்போதிய காரணங்களை இந்நீதிமன்றத்தின் முன்னுல் சமர்ப்பிக்க எதிராளி மனுதார் தவறிவிட்டார் என்றே எனக்குத் தோன்றுகின்றது. அதற்கிணங்க இவ்விண்ணப்பம் செலவு தொகையுடன் தள்ளுபடி செய்யப்படுகின்றது,

விண்ணப்பம் தள்ளப்பட்டது.

பிரதம நீதியரசர் எச். என். ஜீ. பர்ணந்துவும் முதற்கனிட்ட நீதியரசர் ஜீ. பி. ஏ. சில்வாவும்

யூ. ஆர். அபயசேன எதிர் மோட்டார் வாகனப்பதிவாளர்

உ. நீ, விண்ணப்பம் இல. 171/70

விவாதித்துத் தீர்மானித்தது 1971 பெப்ருவரி 22

மோட்டார்வாகனச்சட்டம்—சொத்தாண்மை மாற்றத்தின்மீது மோட்டார் .வாகனத்தின் சொந்தக்காரன் பதியப்படுவதனைத் தடைசெய்ய அரசாங்க அதிபர்க்குத்தத்துவம் உண்டா?

தீர்ப்பு: (1) மோட்டார் வாகனச்சட்டத்தின்கீழ், மோட்டார் வாகனம் ஒன்றின் சொத்தாண்மையில் மாற்றம் ஏற்படுமிடத்து, அதன் புதிய சொந்தக்காரனைப்பதிதல் சம்பந்தமான அச்சட்ட ஏற்பாடுகளின் நிபந்தனைகளும் தேவைப்பாடுகளும் இணங்கியொழுகப்பட்டிருப்பின் அப்புதிய சொந்தக்காரனை மோட்டார் வாகனப்பதிவாளர் பதிவு செய்யக்கட்டுப்பட்டவராவர்.

(2) மோட்டார்வாகனம் ஒன்றின் புதிய சொந்தக்காரனைப்பதியாது தடை செய்வதற்கு பாரஎண்ணெய் மோட்டார் வாகனங்கள்மீது வரிவிதித்தற் கட்டளைச்சட்டத்தின் கீழேனும், மோட்டார் வாகனச்சட்டத்தின் கீழேனும் அரசாங்க அதிபர் ஒருவருக்குத்தத்துவம் இடையாது.

சோமபால முனசிங்க மனுதாருக்கு

எஸ். சிவராசா (முடிவழக்குரைஞர்) எதிர்வாதிக்கு

பிரதம நீதியரசர் எச். என். ஜீ. பர்ணந்து

இவ்வழக்கிலுள்ள மனுதார். 3 ஸ்ரீ 3211என்னும் பதிவு இலக்கமுடைய சொந்தப்பாவனைக்கான மோட்டார் கார் ஒன்றை, அதன் பதியப்பட்ட சொந்தக்காரரிடமிருந்து 1969 ஒக்டோபர் 5ம்தேதி விலைக்கு வாங்கினர்; அதன்மேல், அக்காரின் பதியப்பட்ட சொந்தக்காரனுகத்தன்னையும், பூரண சொந்தக்காரனுக நிதியுதவிக்கம்

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பனி ஒன்றையும் பதிவு செய்யும்படி உரியமாதி ரிப்படிவத்தில் மோட்டார் வாகனப்பதிவாள ருக்கு அவர் விண்ணப்பம் செய்தார். ''இவ்வா கனம் தொடர்பில் எவ்விதமாற்றங்களும் பதியப் படலாகாது என''ப்பதிவாளரைக் கேகாலை அர சாங்கஅதிபர் பணித்திருந்ததனையே தனிக்காரண மாகக்கொண்டு அவ்விண்ணப்பத்தைப்பதிவுசெய் யப்பதிவாளர் மறுத்தார்.

அரசாங்கஅதிபர் இப்பணிப்பை விடுத்திருந்த தற்கான காரணம் யாதெனில், அக்காரின் முன் னைய சொந்தக்காரன், அவருக்குச்சொந்தமா யிருந்த 22 ஸ்ரீ 4889 இலக்கமுடைய வேறொரு வாகனம் சம்பந்தமாக பாரஎண்ணைய் வரியாக அவராற் செலுத்தப்பட்டிருக்கவேண்டிய பணங் களைச்செலுத்தத்தவறியமைக்காக 1969 மார்ச் 23ஆந்தேதிக்கு சிறிதுமுன்னர் கேகாலை நீ. நீ. இல. 60063இல் இரண்டு வாகனங்களையுமே கைப் பற்றி விற்பதற்காக உள்ளதாகத் தோன்றும் நடுக்கட்டல் எழுத்தாணை ஒன்று விடுக்கப்பட்டி ருந்தது என்பதாலாகும்.

(249ஆம் அத்தியாயமான) பாரஎண்ணைய் மோட்டார் வாகனங்கள்மீது வரிவிதித்தற் கட் டளைச்சட்டம் மோட்டார் வாகனம் ஒன்றின் புதிய சொந்தக்காரன் பதியப்படுவதனைத் தடை செய்ய அரசாங்க அதிபர் ஒருவர்க்குத்தத்துவம் எதுவும் வழங்கவில்லை எனவும், ஓர் அரசாங்க அதிபரின் பணிப்புகளைப்பின்பற்றி அவ்விதம் பதிவை மறுப்பதற்கு மோட்டார் வாகனச்சட்டம் எத்தத்துவமும் வழங்கவில்லை எனவும் பதி வாளருக்காகத்தோன்றிய அறிவுசான்ற முடிக் குரிய வழக்குரைஞர் ஏற்றுக்கொண்டார்கள். உண்மையில் அதுவே சரியானதாகும். மோட் டார் வாகனச்சட்டத்தின்கீழ், சொத்தாண்மை யில் மாற்றம் ஏற்படும்பொழுது, அத்தகைய பதிவு சம்பந்தமான அச்சட்டத்தின் நிபந்தனை களும் தேவைப்பாடுகளும் இணங்கி ஒழுகப்பட் டிருப்பின், அந்த மோட்டார் வாகனத்தின் புதிய சொந்தக்காரனைப்பதிவுசெய்யப் பதிவாளர் கட் டுப்பட்டவராவர். எனவே இச்சந்தர்ப்பத்தில் பதிய மறுத்தது சட்டத்துக்கு மாறுனதாகும்.

இவ்விண்ணப்பத்துக்கான மனுதார், அவர் கோருவதுபோலப்பதியப்பட உரித்துடையர் என் றாலும்கூட இவ்வாகனத்தைக்கைப்பற்றி விற்கக் கேகாலை நீதவான் விடுத்த நடுக்கட்டல் எழுத் தாணை வலியுறுத்தப்படக்கூடியதா என்ற கேள்வி பற்றி எதுவும் குறிப்பிட நான் விரும்பவில்லை.

இக்காரணங்களைக்கொண்டுதான், விண்ணப் பத்தில் மனுதார் பரிந்துவேண்டிய விதிப்பா ணையை வழங்குமாறு பணித்து 1971 பெப்ரவரி 22ஆந் தேதி நாம் கட்டளையிட்டிருந்தோம், செலவு தொகை பெற மனுதார் உரித்துடையர் அது 105 ரூபாவாக நிச்சயிக்கப்பட்டுள்ளது.

முதற் கனிட்ட நீதியரசர் ஜீ. பி. ஏ. சில்வா
எனக்கும் ஒருப்பாடாகும்
விண்ணப்பம் அனுமதிக்கப்பட்டது.

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பிரதம நீதியரசர் எச். என். ஜீ. பர்ணந்துவும், நீதியரசர் தாமோதரமும்

நிக்கலாப்பிள்ளை அந்தோனிப்பிள்ளை எதிர் அந்தோனிப்பிள்ளை ஜோர்ஜ் ராஜசூரியர்

உ. நீ. விண்ணப்பம் இல. 676/69

யாழ்ப்பாணம் கடற்கரைத்தெருவைச்சேர்ந்த எ. ஜி. ராஜசூரியருக் கெதிராக யாதுரிமை எழுத்தாணையின் இயல்பினைக்கொண்டதொரு விதிப்பாணை பெறுவதற்கான விண்ணப்பத்தின் விடயத்தில்:—

விவாதித்துத் தீர்மானிக்கப்பட்டது: 1970 செத்தம்பர் 19
காரணங்கள் கூறப்பட்டது: 1971 மார்ச்சு 12

யாதுரிமை எழுத்தாணைக்கான விண்ணப்பம்—1963 இன் 9 ஆம் இலக்கச்சட்டத்தின் 4 ஆம் பிரிவினால் திருத்தப்பட்டவாறான உள்ளூராதிகார சபைகள் தேர்தல்கள் கட்டளைச்சட்டத்தின் 9ஆம் பிரிவு—எற்கனவே வேறோர் உள்ளூர் அதிகார சபையின் உறுப்பினராயிருப்பின் தெரியப்படுவதற்குத் தகுதியின்மை—யாதுரிமை எழுத்தாணை இத்தகைய விடயத்துக்குண்டா?

இது எதிர்வாதிக்கெதிராக யாதுரிமை எழுத்தாணை பெறுவதற்கான விண்ணப்பமாகும். எதிர்வாதி யாழ்ப்பாணம் மாநகரசபையின் உறுப்பினராகத் தெரிவுசெய்யப்பட்ட அந்நேரத்தில், ஏலவே அவர் புலோப்பழைக்கிராமச்சபையின் உறுப்பினராகத் தெரிவு செய்யப்பட்டிருந்தார் என்பது ஏற்றுக்கொள்ளப்பட்டிருக்கிறது.

தீர்ப்பு: 1963 இன் 9 ஆம் இலக்கச்சட்டத்தின் 4 ஆம் பிரிவினால் திருத்தப்பட்டவாறான உள்ளூராதிகார சபைகள் தேர்தல்கள் கட்டளைச்சட்டத்தின் 9 ஆம் பிரிவின் ஏற்பாடுகளை, அதாவது ஆள் ஒருவர் வேறோர் உள்ளூராதிகார சபையின் உறுப்பினராக ஏலவே இருப்பின் அவர் தெரிவு செய்யப்படுவதற்குத் தகுதியற்றவராவர் என வெளிப்படையாகக்கூறும் ஏற்பாடுகளைக் கவனிக்கும்பொழுது யாழ்ப்பாணம் மாநகரசபைக்கு உறுப்பினர் ஒருவராக எதிர்வாத தெரிவுசெய்யப்பட்டமை வெற்றும் வெறிதுமாகும்,

ஒத்தனவாகக் காணப்படாத முன்னைய வழக்குகள்:

சுந்தரபண்டா எதிர் பத்திரனை 73 பு. ச. அ. 100
மாட்டின் பெரேரா எதிர் மடதொம்பை 73 பு. ச. அ. 25

கே. என். சொக்ஸி, எம். தேவசகாயத்துடன் மனுதார்க்கு.
எச். டபிள்யூ. ஜெயவர்த்தனை, கியூ. சி, சி. செல்லப்பாவுடன் எதிர்வாதிக்கு

பிரதம நீதியரசர் எச். என். ஜீ. பர்ணந்து:

இவ்விண்ணப்பத்துக்கான எதிர்வாதி யாழ்ப்பாண மாநகர சபைக்கான உறுப்பினர்கள் தேர்தலில் வேட்பாளராகவிருந்தார். தேர்தலின் பின்னர் அம்மாநகரசபையின் 1 ஆம் இலக்க வட்டாரத்துக்கு உறுப்பினராக அவர் தெரியப்பட்டுள்ளார் என அறிவிக்கப்பட்டது.

1963 ஆம் ஆண்டின் 9 ஆம் இலக்கச் சட்டத்தின் 6 ஆம் பிரிவினால் திருத்தப்பட்டவாறுள்ள (262 ஆம் அத்தியாயமான) உள்ளூராதிகார சபைகள் தேர்தல்கள் கட்டளைச்சட்டத்தின் 3 ஆம் பிரிவு "ஆள் எவரும் அவர் அக்காலத்து வேறு ஏதேனும் உள்ளூராதிகார சபையின் உறுப்பினர் ஒருவராயிருப்பின் அவ் ஆள் உள்ளூராதிகாரசபை ஒன்றின் உறுப்பினராகத் தெரியப்படுதற்கு எந்நேரத்திலாயினும் தகுதியுடையவராகமாட்டார்" என்று ஏற்பாடு செய்கிறது. யாழ்ப்பாண மாநகரசபையின் உறுப்பினராகத் தெரிவுசெய்யப்படும் அந்நேரத்தில் எதிர்வாதி புலோப்பளைக் கிராமச்சபையின் உறுப்பினராக ஏற்கனவே இருந்துவந்தார் என்பது இவ்வழக்கில் எதிர்க்கப்படவில்லை.

எதிர்வாதியின் சட்டவுரைஞர் தெரிவுசெய்யப்படும் நேரத்தில் தகுதியற்றவராயிருந்த ஆள் ஒருவருக்கெதிராக "யாதுரிமை" எழுத்தாணை கிடையாது என வாதாடினர். இந்நீதிமன்றத்தினால் அளிக்கப்பட்ட இரண்டு வழக்குத்தீர்ப்புகளையே அவர் ஆதாரமாக நம்பியிருந்தார்.

சுந்தர பண்டா எதிர் பத்திரனை (73 பு.ச. அ.100) என்பதில், கிராமச்சபை ஒன்றில் உறுப்பினராகத் தெரியப்பட்டவர் ஒருவரை அவ்வுறுப்பினர் அக்கிராமப்பிரதேசத்தின் ஏதாவது வட்டாரத்

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தினுள் சாதாரணமாக வதிவுடையவராக இருக்க வில்லை என்ற காரணத்தின்மீது பதவியிலிருந்து அகற்றுவதற்கு இவ் எழுத்தாணை பயன்படுத்தப் படலாகாது எனத் தீர்ப்பளிக்கப்பட்டது. "சாதாரண வதிவு" என்னும் தேவைப்பாடு 268 ஆம் அத்தியாயத்தின் 8 ஆம் பிரிவில் விதிக்கப்பட்டிருப்பினும், அத்தேவைப்பாட்டைத் திருப்திப் படுத்தாத ஆள் ஒருவர் உள்ளூரதிகாரசபை ஒன்றுக்கு உறுப்பினராகத் தெரியப்படுவதற்குத் தகுதியற்றவராவார் என 9 ஆம் பிரிவு எற்பாடு செய்யவில்லை என்பதனை அத்தீர்ப்பு அடிப்படையாகக் கொண்டிருந்தது. "இதன்காரணமாக 8 ஆம் பிரிவின்கீழான தகுதிபெற்றிராமையைத் தெரிவு வெற்றுனது என வெளிப்படுத்துவதற்கான காரணம் ஒன்றுகச் சட்டசபை கருதியதாகத் தெரியவில்லை" என நீதிமன்றம் அபிப்பிராயப்பட்டது.

இங்குள்ள வழக்கு வித்தியாசமானது. ஏனெனில் (1963 இல் திருத்தப்பட்டவாறுன) 9 ஆம் பிரிவு வேறு ஓர் உள்ளூரதிகாரசபையின் உறுப்பினராயிருப்பின் ஆள் ஒருவர் தெரிவு செய்யப் படுவதற்குத் தகுதியற்றவர் ஆவார் என வெளிப்படையாகவே ஏற்பாடு செய்துள்ளது.

மாட்டின் பெரேரா எதிர் மடதொம்பை (73 பு. ச. அ. 25) என்பதில், உள்ளூரதிகாரசபையின் உறுப்பினர் ஒருவரின் தெரிவு தகாத செல்வாக்கினுல் அல்லது பொதுவான உண்டாட்டினுல் அல்லது இவையிரன்டினுலும் கைவரப்பட்டது என்ற காரணத்தின்மீது இவ்எழுத்தாணை பயன்படாது. என இந்நீதிமன்றம் முடிவு செய்தது. 9 ஆம் பிரிவினுல் உறுப்பாண்மைபெற ஆள் ஒருவர் தகுதியிழந்தவராகச் செய்யப்பட்டுள்ளார் என்ற காரணத்தின்மீது நாடப்படும்பொழுது அவ்எழுத்தாணை பயன்படுமா பயன்படாதா என்ற கேள்வி அவ்வழக்கில் எழவில்லை. 9 ஆம் பிரிவினுல் தகுதியற்றவராகக் காணப்படும் ஒருவர் சட்டமுறையில் உள்ளூரதிகாரசபை ஒன்றின் உறுப்பினராகப் பதவிவகிக்க முடியாது எனவும், அத்தகைய ஆளை அகற்றுவதற்கென நியதிச்சட்டத்தினுல் அதற்கென மாற்றுன அல்லது பயனுன நடவடிக்கை நெறி ஏற்பாடு செய்யப்பட்டிருக்கவில்லை என நீதிமன்றம் திருப்திப்பட்டால் அதற்கான நியாயாதிக்கம் பிரயோகிக்கப்படவேண்டும் எனவும் 9 ஆம், 10 ஆம் பிரிவுகள் தெளிவாக்கியுள்ளன எனவும் அத்தீர்ப்பு எடுத்துக்கூறியுள்ளது. இந்த வழக்கை நாம் கேட்டபொழுது, சமர்ப்பிக்கப்பட்ட வாதங்கள் அத்தகைய பயனை மாற்று உண்டு என்பதனை நிலைநாட்டவில்லை.

இக்காரணங்களுக்காகவே எதிர்வாதியின் தெரிவு வெற்றும் வெறிதுமாகும் என நாம் கட்டளையிட்டோம்.

நீதியரசர் தாமோதரம்:
எனக்கும் ஒருப்பாடே.

தேர்தல் செல்லாது எனக்கூறப்பட்டது.

பிரதம நீதியரசர் எச. என். ஜீ. பர்ணந்துவும், நீதியரசர் தாமோதரமும்

ஏ. டபிள்யூ. அசன்சினுவும் வேறிருவரும் எதிர் ஆர். எல். எச். பபுன் அப்பு

உ. நீ. 557/67 (எப்) மா. நீ. தங்காலை 1178/எல்

விவாதித்துத் தீர்மானிக்கப்பட்டது: 1971 பெப்ருவரி 28

எதிராளிக்கு மாவினுல் எழுதப்பட்ட நிபந்தனையோடு கூடிய அறுதியுறுதி மீள்வதற்கான காலத்துள் கடனிணக்கச்சபைமூலமான இணக்கம்—கடன் திருப்பிக்கொடுப்பதற்கும் மீள அறுதி எழுதுவதற்குமான காலம் நீடித்தல்—அறுதி மீளப்பெறுவதற்கென மாவின் உரிமைகள் வழக்காளிகளுக்குச் சாட்டுதல் செய்யப்படுதலும் இணக்கக்கட்டளையும்—வழக்காளிகள் முறைப்படி பணம் கொடுத்து அறுதி மீள்வதற்குக் கோருதல் எதிராளி மறுத்தல்—நிலைநாட்டுவதற்கான வழக்கு—கடனிணக்கச்சபைச்சட்டம் மாவுக்கு நிவாரணமளிக்கவில்லை என்ற காரணத்தின்மீது நீதிமன்றம் வழக்கினைத்தள்ளும்படி செய்தது—கடன் இணக்கச்சபைக்கட்டளைச்சட்டம்—பிரிவு 30 இன் பயன்.

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ஓர் உறுதிமூலம் (பி 1) மா என்பவர் 2500 ரூபாவுக்காக காணி ஒன்றை அறுதி எழுதியிருந்தார். ஆறு ஆண்டுகளுள் அத்தொகை திருப்பிக்கொடுக்கப்படுவதன்பேரில் அக்காணியைத் திருப்பி அறுதி எழுதுதல் வேண்டும் என்பது நிபந்தனை.

மீள்வதற்கான காலத்தினுள் நிவாரணம் கோரிக் கடன் இணக்கச்சபைக்குச் செய்யப்பட்ட விண்ணப்பத்தின்மீது இணக்கமான உடன்படிக்கை ஒன்று ஏற்பாடு செய்யப்பட்டது. இதன்படி, மற்றவிடயங்களுக்கிடையில் கடன்பட்டவரான மா 31-12-65 இன் முன்னர் உடனபடிக்கையின் நியதிகளுக்கிணங்க பணத்தைக்கொடுத்தால் கடன் கொடுத்தவர் திரும்பவும் காணியை மாவுக்கு அறுதி எழுதுதல்வேண்டும்.

அதன்பின்னர் பி 1 இன் நியதிகளுக்கும் இணக்க உடன்படிக்கைக்கும் இணங்க மீளவும் அறுதி பெறுவதற்குத் தனக்குரிய உரிமையை மா வழக்காளிகளுக்கு அளித்தார். வழக்காளிகளும் முறைப்படி ரூபா 2500 பணத்தைக்கொடுத்து காணியை மீள அறுதி எழுதும்படி கோரினர். எதிராளி மறுத்தார். அதனால் உண்டான வழக்கை அறிவுசான்ற மாவட்ட நீதிபதி தள்ளுபடி செய்தார். அவர் அதற்குக்கூறிய காரணம் என்னவெனில், ஏற்படுத்திப் பதிந்துகொண்டவாறுள்ள உடன்படிக்கை முதலிலுள்ள கடன்காரனை, மாவுக்குமட்டும் நிவாரணம் அளித்ததே ஒழிய அந்த நிவாரணம் அவரின் சாட்டுதல்காரருக்குச் செல்லாது என்பதாகும்.

தீர்ப்பு: (1) இணக்க உடன்படிக்கையின் ஒரே பயன் மீள அறுதி எழுதுவதற்கான நிபந்தனையை நிறைவேற்றுவதற்குள்ள காலத்தை நீட்டித்ததே அல்லாமல், அந்த மீள அறுதி எழுதுதல் மாவுக்கும் அவரின் வழியுரிமையாளர் — சாட்டுதல்காரர் என்போருக்கும் செய்யப்படவேண்டும் என்று பி 1 இலிருந்த நிலைமையை மாற்றவில்லை என்பதனால் அவ்வழக்கை அறிவுசான்ற மாவட்ட நீதிபதி தள்ளுபடி செய்தது பிழையாகும்:

(2) கடனிணக்கச்சபைக்கட்டளைச்சட்டத்தின் 30 (2) என்னும் பிரிவு, இணக்க உடன்படிக்கையில் மீள அறுதி எழுதுதற்கான காலத்தில் செய்யப்பட்ட மாற்றத்துக்கு சட்டமுறையான அங்கீகாரம் அளிப்பதாகும்,

(3) அளிக்கப்பட்ட நிவாரணம் மாவுக்குமட்டுமே ஏற்புடையதாதல்வேண்டும் என உடன்படிக்கையில் நிபந்தனை எதுவும் இல்லாமையின் மாவிடமிருந்து விலக்குக்கொள்பவர், அதன் கண் குறிப்பிடப்பட்ட காலம் தொடர்பில்மட்டும் இணக்க உடன்படிக்கையினால் மாற்றஞ்செய்யப்பட்டவாறுள்ள பி 1 இன் நியதிகளை நம்பி நடத்தற்கு உரிமையுடையர்.

டபிள்யூ. டி. குணசேகர, வழக்காளி—மேல்முறையீட்டாளர்க்கு.
ஆனந்த கருணதிலக, எதிராளி—எதிர்வாதிக்கு

பிரதம நீதியரசர் எச். என். ஜி. பர்ணந்து

இவ்வழக்கில் மாதிரிசு என்பவர், பி 1 எனக் குறிப்பிடப்பட்டுள்ள 2500 ரூபா தொகைக்குக் காணி ஒன்றை எதிராளிக்குநிபந்தனையோடுகூடிய அறுதியாக எழுதியிருந்தார். அந்நிபந்தனை யாதெனில், ஆறுண்டுக்காலத்துள் சொல்லப்பட்ட தொகையான 2500 ரூபா திருப்பிக்கொடுக்கப்படும் பட்சத்தில் எதிராளி அக்காணியை விற்பனைக்காரருக்கு அல்லது அவரின் வழியுரிமையாளர், மரணசாதனத் தத்துவகாரர், உரிமைத் தத்துவக்காரர், சாட்டுதல்காரர் என்போர்க்கு மீளவும் அறுதி அளிக்கவேண்டும் என்பதாகும். இவ்விதமாக மீளவும் அறுதிபெறுவதற்கான உரிமை 1964 யூன் 29 இன் முன்னர் எப்போதாயினும் பிரயோகிக்கப்பட்டிருக்கலாம்.

மீட்பதற்கான காலம் முடிவதற்கு மிகவெள்ளனவாகவே மாதிரிசு கடன் இணக்கச்சபைக்கு விண்ணப்பம் செய்தார் எனத் தெரிகிறது. அவ்விண்ணப்பத்தின்மீதான நடவடிக்கைகளில் மாதிரிசும் எதிராளியும் இணக்கமானதோர் உடன்படிக்கையேற்படுத்திக்கொண்டனர். இது சபையினாலும் அங்கீகரிக்கப்பட்டது. அவ் உடன்படிக்கையின் பிரதான ஏற்பாடு பின்வருமாறு:

> "உடன்படிக்கையின் நியதிகளுக்கிணங்க அதாவது 1965 டிசம்பர் 31 இன் முன்னர் கொடுப்பதற்குள்ள தொகையைக் கடன்பட்டவர் கொடுத்தால், கடன் கொடுத்தவர் அக்காணியைக் கடன்பட்டவருக்கு அறுதியளிப்பர்."

இந்த உடன்படிக்கையின்பின்னர், பி 1 இன் நியதிகளுக்கும், கடன் இணக்கச்சபையின் கட்டளைக்கும்இணங்க மீளப்பெறுவதற்குத்தனக்குரிய உரிமையை மாதிரிசு இவ்வழக்கின் வழக்காளிகளுக்கு பி 3 ஆவணத்தின்படி கையளித்தார் அதன்மேல்,வழக்காளிகள் 25 0ரூபாதொகையை எதிராளிக்கு முறைப்படி கொடுத்து, மீள அறுதி எழுதும்படி கோரினர். அவ்விதம் அறுதி எழுதுவதற்கு மறுத்தமைக்கு எதிரானதே இவ்வழக்கு.

கடன் இணக்கச்சபையினால் பதிவுசெய்யப்பட்ட உடன்படிக்கை முதலில் கடன்பட்டவரான மாதிரிசுக்கு மட்டுமே நிவாரணம் தந்ததேயொழிய

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மாதிரிசுவின் சாட்டுதல்காரருக்கு அந்நிவாரணம் ஏற்புடையதாகாது என்னும் காரணத்தின்மீது அறிவுசான்ற மாவட்ட நீதிபதி அவ்வழக்கைத் தள்ளுபடி செய்தார்.

அவ்வுடன்படிக்கையின் பயன். மீள அறுதி எழுதுவதற்கான நிபந்தனையை நிறைவேற்ற வேண்டிய காலத்தைப் பின்போடுவதேயொழிய மாதிரிசுக்கு அல்லது "அவரின் வழியுரிமையாளர்.....அல்லது சாட்டுதல்காரருக்கு" மீள அறுதி எழுதுவதற்கென பி 1 இல் ஏற்பாடு செய்யப்பட்டுள்ள நிலைமையை மாற்றும் பயனுடையதல்லவென்பது அறியப்படும். மோசடித் தடுப்புக் கட்டளைச்சட்டத்தின்கண் அதற்கு முரணானது எதுவேனுமிருப்பினுங்கூட, ஏற்படுத்தப்படும் உடன்படிக்கையொன்று எல்லா நோக்கங்களுக்கும் பயனுடையதும் செல்லுபடியாந் தன்மையுடையதாயுமிருத்தல்வேண்டுமெனக் கடன் இணக்கச்சபைக் கட்டளைச்சட்டத்தின் 30ஆம் பிரிவின் (2)ஆம் உட்பிரிவு ஏற்பாடு செய்கிறது மீள அறுதி எழுதுதல் பற்றிய மாற்றத்தின் செல்லுபடியாந்தன்மை சட்டநியதியாக ஏற்கப் பட்டுள்ளது.

மாதிரிசுக்கு பி 1 இன் கீழிருந்த உரிமையானது காணியிலுள்ள அக்கறையொன்றுகக் கணிக்கப் பட்டுச் செயல்படுத்தப்படக்கூடியதான்று மென்பதைக் கருத்திற்கொண்டால், கடனுக்காக அவரிடமிருந்து அது விற்கப்பட்டிருக்கக்கூடும், அப்படி விற்கப்படின் கொள்வனைக்காரர் எதிராளிக்கெதிராக அவ்வுரிமையைப் பிரயோகித்திருக்கலாம். இவ்வாறு, தானுகக் கொள்வனை செய்பவனெருவனும் அவ்வித உரிமையுடைய வனுகலாமென்பது எங்கள் அபிப்பிராயம். உடன் படிக்கையால் தரப்படும் நிவாரணம் கடன்பட்டவருக்குமட்டுமே சேரவேண்டுமென்று ஒரு நிபந்தனை அந்த உடன்படிக்கையில் சேர்த்திருக்கப் படலாம். அத்தகைய எவ்வித நிபந்தனையுமில்லாத நிலையில் மாதிரிசுவிடமிருந்து கொள்வனை செய்தவர் அதன் கண் காலவரையறை தொடர்பில் உடன்படிக்கையால் செய்யப்பட்ட மாற்றத்தைமட்டும்கொண்ட பி 1 இனை நம்பி நடப்பதற்கு உரிமையுடையார்.

இக்காரணங்களைக்கொண்டு வழக்காளியின் வழக்கைத் தள்ளுபடி செய்யும் கட்டளையை ஒதுக்கி வைக்கிறேம். வழக்காளிகளுக்குச் சாதகமாக அவர்கள் கோரியபடி வழக்குச் செலவுகளுடன் தீர்வை எழுதப்படும். ஆனல் மேன்முறையீட்டுச் செலவுகள்பற்றி நாம் எதுவித கட்டளையுமிடவில்லை.

நீதியரசர் தாமோதரம்:

எனக்கும் ஒருப்பாடே.

மேல்முறையீடு அனுமதிக்கப்பட்டது.

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நீதியரசர் சமரவிக்கிரமா அவர்கள்

ரி. பி. விலியம் எதிர் பொலிசுப் பரிசோதகர் கம்பஹா

உ. நீ. 1263/68 நீ. நீ. கம்பஹா 18069/A

வாதத்தேதி; மார்ச்சு 21, 1969
முடிவு செய்த தேதி ஏப்ரல் 18, 1970

விலக்கட்டுப்பாட்டுச்சட்டம்—கட்டுப்பாட்டு விலைக்கு மேலாக மாட்டிறைச்சி விற்ற குற்றச் சாட்டு—குற்றம்புரியப்பட்ட இடத்துக்கு விலைக்கட்டளையின் ஏற்புடைமை — நீதிமுறை அறிவு— இறைச்சி இறக்குமதி செய்யப்பட்டதா அல்லது உள்ளூரிறைச்சியா என்பதற்கான சான்று—நிறை பற்றிய சான்று,

கொழும்பு மாவட்டத்தில் (கொழும்பு மாநகர எல்லைகளுக்குப்புறத்தே) அமைந்துள்ளது எனச்சொல்லப் பட்ட பெலும்மஹர என்ற இடத்தில், கட்டுப்பாட்டு விலைக்கு மேலாக மாட்டிறைச்சி விற்றார் என எதிரி — மேன்முறை யீட்டாளர் குற்றத்தீர்ப்பளிக்கப்பட்டார். மேல் முறையீட்டில், பின்வரும் காரணங்கள்மீது குற்றத்தீர்ப்புக்கெதிராக ஆட்சேபம் தெரிவிக்கப்பட்டது.

(அ) சம்பந்தப்பட்ட விலைக்கட்டளை குறிப்பிடும் பெலும்மஹர, கொழும்பு நிருவாக மாவட்டத்தினுள் அமைந்துள்ளது என்பதற்குச் சான்றில்லை.

(ஆ) சம்பந்தப்பட்ட மாட்டிறைச்சி இறக்குமதி செயயப்பட்டதல்ல என்பதற்குச் சான்றில்லை; அத்துடன்

(இ) நம்பிக்கொள்ளபட்ட நிறை பற்றிய அத்தாட்சி நிரூபிக்கப்படவில்லை, என்பன அவை.

தீர்ப்பு: (1) பெலும்மஹர எங்குள்ளது என்பதுபற்றி சான்றுக்கட்டளைச் சட்டத்தின் 57 ஆம் பிரிவின்படி நீதிமுறை அறிவு கொள்ளப்படலாம்; அதற்கு தொகைக்கணிப்புப் புள்ளிவிபரத் திணைக்களத்தினால் தொகுக்கப் பட்ட மேல் மாகாணக் கிராமங்களின் எழுத்து வரிசை எண் வரிசைப்பட்டியல் அதிகாரபூர்வமாக வெளியிடப்பட்ட நூலானமையின் நீதிமன்றத்தால் பார்க்கப்படலாம்; அதன்படி பெலும்மஹர கொழும்பு நிர்வாக மாவட்டத்தினுள் அமைந்துள்ளது எனக் குறிப்பிடப்பட்டுள்ளது.

(2) இறைச்சிக்கடையின் நிலைமைபற்றியும் விலங்கு உடல்கள்பற்றியும் அளிக்கப்பட்ட வாய்மொழிச்சான்று அந்த இறைச்சி இறக்குமதி செய்யப்பட்டதல்ல என்பதற்கு முதற்றோற்றச்சான்றளிக்கின்றது.

(3) வருவாய்ப்பரிசோதகரால் வழங்கப்பட்ட அத்தாட்சிப்பத்திரம் நிரூபிக்கப்படாமையின் ஏற்றுக்கொள் ளக்கூடியது; விற்கப்பட்ட மாட்டிறைச்சியின் அளவு $14\frac{3}{4}$அவுன்சுமட்டுமே என்பதாகும் இதற்குப் போதிய வாய் மொழிச்சான்று உண்டு, அதன் காரணமாக அது விலைக்கட்டுப்பாட்டு ஒழுங்கு விதிகளை மீறினதாயிற்று.

குறிப்பிடப்பட்ட வழக்குகள்; அசன் எதிர் பொலிசுப்பரிசோதகர், பாணந்துறை 72 பு, ச. அ. 449

எப். டபிள்யூ. ஒபயசேகரா, எதிரி மேல்முறையீட்டாளர்க்கு.

பி. பெரேரா முடிக்குரிய சட்டவுரைஞர் சட்டத்துறைத் தலைமையதிபதிக்காக.

நீதியரசர் சமரவிக்கிரமா

கொழும்பு மாவட்டத்திலுள்ள கொழும்பு மாநகர எல்லைகளுக்கப்பாற்பட்ட ஓர் இடம் எனச் சொல்லப்படும் பெலும்மஹர என்னும் இடத்தில் கட்டுப்பாட்டு விலைக்குக் கூடுதலான விலைக்கு மாட்டிறைச்சி விற்றார் என்பதற்காக அவருக்கு விதிக்கப்பட்ட குற்றத் தீர்ப்புக்கெதிராக எதிரி மேல்முறையீட்டாளர் மேல் முறையீடு செய் திருக்கின்றார்.

பெலும்மஹர என்ற இடம், குற்றச்சாட்டில் குறிப்பிடப்பட்ட விலைக்கட்டளை ஏற்புடைய தான கொழும்பு நிருவாக மாவட்டத்தினுள் (கொழும்பு மாநகரசபை எல்லைகளுக்கு அப்பால்) அடங்கும் என்பதற்கு சான்றில்லை என மேல் முறையீட்டாளர்க்கான அறிவு சான்ற சட்ட வுரைஞர் சமர்ப்பித்தார்கள். இதுபற்றி, நீதிவான் பின்வருமாறு கூறியுள்ளார்.

"மாட்டிறைச்சிக்கடை அமைந்துள்ள இடமான பெலும்மஹர கொழும்பு மாவட்டத்தினுள்

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அமைந்துள்ளது, கொழும்பு மாநகரசபை எல்லைகளுள் அல்ல என்பதற்கான சான்று எதுவுமில்லை என்பதான வாதம் தொடர்பில் பார்க்கும்பொழுது, இவ்விடம் கம்பஹாப்பட்டினத்திலிருந்து ஆக இரு மைல் தூரத்திலேயே யுள்ளது, கொழும்பு மாநகரசபை எல்லைகளுள் அல்ல என உத்தியோகமுறை நெறியிலும் நிருவாகத்திலுமான சாதாரண போக்கின் அடிப்படையில் நீதிமுறை அறிவு கொள்ள எனக்கு உரித்துண்டு என நான் எண்ணுகிறேன். அதே போல, கொழும்பு மாவட்டத்திலேயே கம்பஹா பட்டினமும் அமைந்திருக்கின்றதாதலினாலும் கொழும்பு செல்லும் திசைப்புறமாக பெலும்மஹர இருப்பதனாலும் அது கொழும்பு மாவட்டத்தினுள் உள்ளது என நான் நீதிமுறை அறிவு கொள்ளலாம்''. இதுவே நீதிவான் கூறியது. பெலும்மஹர எங்கேயுள்ளது என்பதுபற்றி அறிவு சான்ற நீதிவான் நீதிமுறை அறிவு கொண்டது சரி என்றே நான் கருதுகிறேன். ஆனால் எவ்விதம் நீதிமுறை அறிவு கொள்ளல் வேண்டும் என்பது அண்மைத் தீர்ப்பொன்றில் குறிப்பிடப்பட்டுள்ளது. அசன் எதிர் பொலிசுப்பரிசோதகர் பாணந்துறை (72 புதுச்சட்ட அறிக்கை 449) என பதில் நீதியரசர் வீரமந்திரி அவர்கள், கூறியதாவது, மேல் மாகாணத்திலுள்ள கிராமங்களின் எழுத்துவரிசை எண்வரிசைப்பட்டியல் எனவழைக்கப்படும் வெளியீடு தொகைக்கணிப்புப்புள்ளி விவரத்திணைக்களத்தால்கொடுக்கப்பட்டது. அது உரிய அதிகாரப்படி வெளியிடப்பட்டுள்ளதால் நீதிமன்றம் பார்வையிடக்கூடிய தகுந்த புத்தகம் என்று சான்றுக்கட்டளைச்சட்டத்தின் 57 ஆம் பிரிவிற்கிணங்க அதனை நீதிமன்றம் பார்த்து, தேவையாயின் அதன்படி செயலாற்றவும் கூடும் என்பதாகும். அத்தொகுப்பு நூலை நான் பார்வையிட்டேன். அதன்படி பெலும்மஹரக் கிராமம் சியானமேற்கு கோரளை, மெதபத்துவைச் சேர்ந்தது என அறியக்கிடக்கின்றது. (392 ஆம்அத்தியாயமான)நிருவாக மாவட்டங்கள் சட்டத்திற்கான முதலாம் அட்டவணையின் 1 ஆம் நிரையிலுள்ள 1 ஆம் விடயத்திலிருந்து, சியான மேற்குக் கோரளை (மெதபத்து) கொழும்பு நிருவாக மாவட்டத்திலுள்ளது என்பது தெரிகின்றது.

சம்பந்தப்பட்ட மாட்டிறைச்சி இறக்குமதி செய்யப்பட்டது அல்ல என்பதற்கான சான்றில்லை. எனமேன்முறையீட்டாளரின் அறிவுசான்ற சட்டவுரைஞர் அடுத்துச்சமர்ப்பித்தார்கள். இறைச்சியை வாங்கச்சென்ற உடந்தையாளர் தமது சான்றில் சொன்னதாவது, அந்த இறைச்சிக்கடையில் தொங்கிக்கொண்டிருந்த உடற்கட்டையொன்றிலிருந்து. அறுத்துத்தான் எதிரி இறைச்சியைக் கொடுத்தார் என்பதாகும் பொலிசு உபபரிசோதகர் விமலசேனவும், தாம், அங்கு கால்நடையின் குடல், குளம்பு, முதலியவற்றையும் இரத்தஞ் சொட்டிக்கொண்டிருந்த உடற்கட்டைகள் சிலவற்றையும் அக்கடையில் கண்டதாகவும், மேலும் நிலத்தில். புதிய இரத்தக்கறை போன்ற அடையாளம் இருந்ததாகவும் குறிப்பிட்டார். இவற்றைக்கொண்டு சம்பந்தப்பட்ட இறைச்சி இறக்குமதி செய்யப்பட்ட இறைச்சியல்ல என்பதற்கான முதற்றோற்றச் சான்று உண்டு என நான் எண்ணுகிறேன்.

கம்பஹா நகரசபை வருவாய்ப்பரிசோதகரால் வழங்கப்பட்ட நிறுவை அத்தாட்சிப்பத்திரத்தை நம்பியே தீர்ப்பளித்தார் நீதிவான் என அடுத்து அறிவு சான்ற சட்டவுரைஞர் சமர்ப்பித்தார்கள். அப்பரிசோதகர் சாட்சியாகக்கூப்பிடப்படவில்லை. அவராற்றரப்பட்ட அத்தாட்சிப்பத்திரம் சான்றில்ஏற்கப்படக்கூடியது என்று எனக்குத் தோற்றவில்லை எனினும், எதிரியையும் இறைச்சிப்பொட்டணத்தையும், நிறுவைகள் அளவைகள் பரிசோதகர் முன்னர் தாம் கொண்டு சென்றதாகவும், எதிரியின் முன்னிலையில் இந்த இறைச்சி அவரால் நிறுக்கப்பட்டு அது 14¾ அவுன்ஸ் இருக்கக் காணப்பட்டது எனவும் உபபரிசோதகர் விமலசேன கூறியிருந்தார். எனவே எதிரி விற்ற இறைச்சியின் நிறைபற்றிப் போதிய சான்று உண்டு.

இவற்றுக்கிணங்க மேன்முறையீட்டை தள்ளுபடி செய்கிறேன்.

மேன்முறையீடு தள்ளப்பட்டது

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