Sri Lanka
SALE OF GOODS
(Historical Judgements)

Published by

LANKA LAW

www.lankalaw.net

HISTORICAL JUDGEMENTS

- **Hirdaramani and Others - [1974] LKSC 3; (1974) 77 NLR 409 (28 January 1974)**: This case involved a transaction governed by the Sale of Goods Ordinance, where there was a completed sale of foreign money. The case discusses the concept of a sale and a contract to sell, and it is noted that the Sale of Goods Ordinance does not apply to transactions involving currency as 'moneys' are excluded from the definition of 'goods' within the ordinance.

- **In Le Vincent and Benjamin - [1976] LKSC 3; (1976) 78 NLR 433 (26 June 1976)**: The judgment in this case clarified that the word 'sell' should be given its ordinary meaning and that the Sale of Goods Ordinance did not apply to the transaction in question because it involved the sale of goods that took place in London, not in Ceylon.

- **Givendrasingha v. De Mel, R.F.S. - [1948] LKSC 31; (1948) 49 NLR 422 (21 May 1948)**: This case emphasized that the law to be administered in Ceylon should be the same as would be administered in England at the corresponding period, including the application of statutes related to the sale of goods.

- **Jayasena Perera v. Ratnadasa - [1981] LKSC 35; (1981) 1 Sri LR 398 (8 April 1981)**: This Supreme Court case clarified the distinction between a "sale" and an "agreement to sell" under the Sale of Goods Ordinance. It emphasized that property in goods passes from the seller to the buyer at the time intended by the parties, as per sections 18 and 19 of the Sale of Goods Ordinance. The case also discussed the importance of the terms of the contract, the conduct of the parties, and the circumstances of the case in determining when ownership is transferred.

- **People‟s Bank Vs Yashodha Holdings (Pvt.) Ltd.** S.C. CHC (Appeal) No. 21/2006 S.C. (H.C.) L.A. No. 27/2006 H.C. Civil No. 75/99 (1)

Other Important Cases

Supreme Court

- Vanathawilluwa Vineyard Ltd v. Commercial Bank Of Ceylon – SLR – 68, Vol 1 of 2008 [2008] LKSC 6; (2008) 1 Sri LR 68 (27 February 2008)

- In Re Hirdaramani and Others – NLR – 409 of 77 [1974] LKSC 3; (1974) 77 NLR 409 (28 January 1974)

- Jayasena Perera v. Ratnadasa – SLR – 398, Vol 1 of 1981 [1981] LKSC 35; (1981) 1 Sri LR 398 (8 April 1981)

- Anglo Persian Oil Co., Ltd. v. Commisioner of Income Tax – NLR – 348 of 38 [1935] LKSC 4; (1935) 38 NLR 348 (30 July 1935)

- Chivers & Sons, Ltd. v. Commissioner of Income Tax – NLR – 342 of 39 [1937] LKSC 7; (1937) 39 NLR 342 (1 November 1937)

- Loxley v. Attorney General – NLR – 109 of 45 [1944] LKSC 13; (1944) 45 NLR 109 (1 February 1944)

Court of Appeal

- Usman v. Rahim – NLR – 259 of 32 [1930] LKCA 37; (1930) 32 NLR 259 (31 July 1930)

- Assen Cutty v. Brooke Bond – NLR – 169 of 36 [1934] LKCA 52; (1934) 36 NLR 169 (24 April 1934)

- Mohamed Ezak v. Marikar – NLR – 289 of 21 [1919] LKCA 33; (1919) 21 NLR 289 (19 December 1919)

- The Attorney General v. Abram Saibo & Co. – NLR – 417 of 18 [1915] LKCA 30; (1915) 18 NLR 417 (30 November 1915)

- Croos v. De Soysa – NLR – 32 of 7 [1903] LKCA 18; (1903) 7 NLR 32 (12 May 1903)
- Alaris v. Wijeysekere – NLR – 245 of 44 [1943] LKCA 10; (1943) 44 NLR 245 (4 March 1943)
- Ariyasena V Provincial Commissioner of Revenue, Western Province – SLR – 325, Vol 2 of 2003 [2003] LKCA 42; (2003) 2 Sri LR 325 (19 September 2003)
- Brown and Company v. Steuart Industries Ltd. – SLR – 440, Vol 2 of 1982 [1966] LKCA 54; (1982) 2 Sri LR 440 (12 November 1966)
- Romanis v. Sherman De Silva & Co., Ltd. – NLR – 52 of 60 [1951] LKCA 36; (1951) 60 NLR 52 (26 June 1951)
- Noorbhai & Co v. Janoo – NLR – 186 of 21 [1919] LKCA 74; (1919) 21 NLR 186 (28 February 1919)
- Muller Et Al. v. Fernando – NLR – 14 of 34 [1931] LKCA 27; (1931) 34 NLR 14 (30 September 1931)
- Jayasena v. Colombo Electric Tramways and Lighting Company Limited – NLR – 409 of 46 [1945] LKCA 36; (1945) 46 NLR 409 (19 September 1945)
- DC Colombo – NLR – 356 of 32 [1931] LKCA 72; (1931) 32 NLR 356 (22 May 1931)
- Jafferjee, AA v. Subbiah Pillai, PR – NLR – 505 of 54 [1953] LKCA 18; (1953) 54 NLR 505 (25 March 1953)
- Rawanna & Co. v. Arunachapillai – NLR – 220 of 47 [1946] LKCA 89; (1946) 47 NLR 220 (29 May 1946)
- Nilabdeen v. Farook – SLR – 14, Vol 1 of 1984 [1976] LKCA 25; (1984) 1 Sri LR 14 (14 September 1976)
- Othman v. Jinadasa – NLR – 149 of 29 [1927] LKCA 52; (1927) 29 NLR 149 (25 July 1927)

- Caruppen Chetty Et Al. v. Habibhoy – NLR – 6 of 15 [1911] LKCA 52; (1911) 15 NLR 6 (21 September 1911)

- Abdul Hamid Et Al. v. Odhavji Anandji & Co., Ltd. – NLR – 505 of 56 [1955] LKCA 40; (1955) 56 NLR 505 (16 May 1955)

- Rae Sands v. Kadibhoy – NLR – 289 of 15 [1912] LKCA 56; (1912) 15 NLR 289 (14 May 1912)

High Court

- The Australia (Cargo Ex) – NLR – 5 of 19 [1916] LKHC 4; [1916] 2; (1916) 19 NLR 5 (20 March 1916)

- Abdul Aziz v. Mohamed Buhary – NLR – 364 of 39 [1937] LKHC 26; [1937] 32; (1937) 39 NLR 364 (8 October 1937)

- Thajudeen v. Gunasekera – NLR – 133 of 76 [1973] LKHC 2; [1973] 1; (1973) 76 NLR 133 (21 February 1973)

- Pakiampillai v. Merry – NLR – 142 of 44 [1942] LKHC 40; [1942] 18; (1942) 44 NLR 142 (10 November 1942)

- The Steamship ‘Australia’ Cause No.7 – NLR – 225 of 18 [1915] LKHC 11; [1915] 14; (1915) 18 NLR 225 (2 July 1915)

- Attorney General v. Miranda Et Al – NLR – 257 of 14 [1911] LKHC 10; [1911] 1; (1911) 14 NLR 257 (15 June 1911)

- Macpherson v. Brown &Co – NLR – 333 of 8 [1906] LKHC 1; [1906] 24; (1906) 8 NLR 333 (15 January 1906)

- Principal Collector of Customs – NLR – 19 of 55 [1953] LKHC 3; [1953] 27; (1953) 55 NLR 19 (19 January 1953)

Hirdaramani and Others - NLR - 409 of 77 [1974] LKSC 3; (1974) 77 NLR 409 (28 January 1974)

[CRIMINAL JUSTICE COMMISSION (FOREIGN EXCHANGE OFFENCES)]

1974 Present: **G. P. A. Silva, retired C.J. (Chairman), Pathirana, J., and D. Q. M. Sirimane, J.**

IN RE

(1) B. HIRDARAMANI (Chairman, Board 01 Directors, Hirdaramani Industries Ltd., Colombo 1)

(2) S. GALETOVIC (Resident Representative, Ingra, Mahaveli Diversion Project) (Yugoslav National)

(3) GLIGO MLADEN (Business Manager. Ingra) Yugoslav National)

(4.) V. MURJIANI (Textile Merchant)

(5) K. K. JAGTIANI (Film Producer)

(6) C. C. SHARMA (Sindhi Priest)

(7) S. A. S. M. ABDUL HAMEED (Absent) (Indian National)

(8) D. S. SABNANI (Co-Partner, Crown Silk Stores, Colombo 11)

Suspects.

Case No. 1/73- C.J.C. (2)

Criminal Justice Commissions Act, No. 14 of 1972., as amended by Criminal Justice Commissions (Amendment) Law, No. 10 of 1972 Sections 2, 3, 6 (1) (d), 11, 15-Offences in relation to currency. foreign exchange Proof - Meaning of terms "currency " , "foreign currency ", "foreign exchange "-Sate of Goods Ordinance, a. 2

Monetary Law Act (Cap. 422), ss. 73, 74, 76-Exchange Control Act (Cap. 423), as amended by Act No. 17 of 1971,ss.4, 5 (1), 5 (2), 6 AB (a) , 6 AR (b), 49, 54-Abetment -Every assistance does not constitute abetment -Sentence- Considerations applicable.

The 1st suspect wanted to buy sterling to set up his son in business in England. He failed to obtain any exchange by legitimate means and therefore resorted to a course of buying sterling at black market rate. There was over whelming evidence as to several visits by the 2nd and 3rd suspects to see the 1st suspect at which the buying and selling of sterling was discussed and the price in Rupees was agreed upon. There was also evidence as to the delivery of the Rupee payments by' the 1st suspect to the 2nd and 3rd suspects and the receipt by his agent in London of payments of sterling and dollars at: or about the time of the transactions in Ceylon between the three suspects. Some of the moneys credited to the bank account of the agent in London was drawn by the agent at the instance of the 1st suspect.

The 2nd and 3rd suspects were Yugoslav nationals who, were temporarily employed in Ceylon. There was sufficient proof that what was bought and sold in Ceylon was foreign currency. In some instances, money in rupees was paid before ascertaining from the 1st suspect's agent whether the foreign money had reached the agent's bank account. In the other instances the money was paid here after such ascertainment.

Held that there was sufficient evidence, direct and circumstantial to establish that the 1st, 2nd and 3rd suspects were guilty of offences under section 5 (1) (a) of the Exchange Control Act. (Cap. 422), as amended by Act No. 17 of 1971. Whenever a charge, under this section has been made out against a particular suspect, such suspect is also guilty of a charge under section 5 (2) as we as section 6 AB (a) and. in those instances in which some of the suspects have been charged with disposing of by sale the asset acquired by them without obtaining the necessary directions from the Bank they too commit an offence under section 6 AB (b).

The Sale of Goods Ordinance does not apply to a sale contemplate in section 5 (1) of the Exchange Control Act. Even assuming the

transaction in the present case was governed by the sale of Goods Ordinance, there was a completed sale, in Ceylon, of foreign money and not merely an agreement to sell.

The subject matter of the sale was foreign currency within meaning of the statutory definition of the expression "1 currency" in the Exchange Control Act, as amended by Act of 1971.

Held further, (i) that, when the Criminal Justice Commission finds a person guilty of an offence under the Criminal Justice Commissions Act, No. 14 of 1972, the Commission is not bound for the probe whether the particular act constituting the offence endangered the national economy or interests.

(ii) that a person who is charged with abetment of offences for buying or selling currency is not liable to be convicted unless it took such an active part in the transactions in question as to induce the person buying or selling currency to engage in the transaction.

Observations on the principles to be taken into consideration for imposing sentence.

REASONS for an Order made by the Criminal Justice Commission (Foreign Exchange Offences).

The Commission was appointed in the following terms.-

"The Criminal Justice Commissions Act, No. 14 of 1972.

By His Excellency William Gopallawa, President of the Republic of Sri Lanka

WHEREAS I am of opinion that, within the period of ten years immediately preceding the date hereof, that is to say, the period commencing on the 14th day of December, 1962, and ending on the date on which this warrant is issued, there have been committed, generally, offences in relation to currency or foreign exchange in contravention of the provisions of law set out to the Schedule hereto, of such a scale and nature as to endanger the national economy or interest.

AND WHEREAS I am of opinion that the practice and procedure of the ordinary courts are inadequate to administrate criminal justice for the purpose of securing the trial and punishment of the persons who committed such offences.

Now, therefore, I, William Gopallawa, President of the Republic of Sri Lanka, do, in pursuance of the provisions of section 2 of the Criminal Justice Commissions Act, No. 14 of 19712, as amended by the Criminal Justice Commissions (Amendment) Law, No. 10 of 1972, by these presents establish a Criminal Justice Commission consisting of three Judges of the Supreme court.-

(a) to inquire into generally the circumstances which led to, and all other matters connected with or incidental to, the commission during the aforesaid period, of all offences in relation to currency or foreign exchange of the description and character set out herein;

(b) to inquire and determine whether any person or persons, and if so, which persons were or were not guilty of such offences ; and

(c) to deal with the persons so found guilty or not guilty in the manner prescribed by the aforesaid Act, as so amended,

SCHEDULE

(a) Offences under-

(1) Section 50, 122 or 123 of the Monetary Law Act (Chapter 422),

(2) the Exchange Control Act (Chapter 423),

(3) the Imports and Exports (Control) Act (Chapter 236),

(4) the Imports and Exports (Control) Act, No. 1 of 1969,

(5) the Customs Ordinance (Chapter 233),

(6) Chapter 5, 5A, 17: 18 or 22 of the Penal Code,

(7) the Post Office Ordinance (Chapter 190),

(8) the Foreign Exchange Entitlement Certificates Act, No. 28 of 1965,

(9) the Telecommunications Ordinance (Chapter 192).

(b) Conspiracy to commit or attempt to commit or abet, any of the aforementioned offences.

Given at Colombo, under the Public Seal of the Republic of Sri Lanka, this 14th day of December, One Thousand Nine Hundred and Seventy-two.

Sgd.

President."

R. S. Wanasundera, Solicitor-General (Now Acting Attorney-General), with E. D. Wikramanayake, Senior State Counsel (Now Deputy Solicitor-General), Sunil de Silva, State Counsel (Now Senior State Attorney) and Douglas Halangoda, State Attorney for the State.

Desmond Fernando with V. E. Selvarajah, for the 1st suspect.

A. C. M. Ameer, Q.C., with H. L. de Silva. S. H. Mohamed and Mark Fernando, for the 2nd and 3rd suspects.

G. E. Chitty. Q.C., with H. L. de Silva, P. Karalasingham and A. R. Mansoor, for the 4th suspect.

A. K. Premadasa, with S. S. Wijeratne, for the 5th suspect.

Chula de Silva. with V. Jegasothy, for the 6th suspect.

M. Tiruchelvam, Q. C., with P. Naguleswaran, for the 8th suspect.

January 28, 1974. **CRIMINAL JUSTICE COMMISSION (Foreign Exchange Offences)**

REASONS FOR THE ORDER MADE ON 4th JANUARY, 1974.-

As His Excellency the President of the Republic was of the opinion that within the period of 10 years immediately preceding the 14th December, 1972, there had been committed, generally offences in relation to currency or foreign exchange in contravention of provisions of law set out in the schedule to the Criminal Justice Commissions Act, No. 14 of 1972, as amended by the Criminal Justice Commissions (Amendment) Law, No. 10 of 1972, of such a scale and nature as to endanger the national economy or interest, he established a Criminal Justice Commission for the following purposes :

(a) to inquire into generally the circumstances which led to and all other matters connected with or incidental for the commission during the aforesaid period, of the offences in relation to currency or foreign exchange in the description and character set out therein ;

(b) to inquire and determine whether any person or persons, and if so, which persons were or were not guilty of such offences ; and

(c) to deal with the persons so found guilty or not guilty in the manner prescribed by the aforesaid Act, as amended.

In terms of section 3 of the said Act, we were appointed as members of the said Commission by the Honourable the Chief Justice and we commenced our sittings in this case, which was the first to be taken up by us, on the 19th February, 1973 and concluded them on 1st November, 1973.

Sixty-five charges were framed against the suspects. A summary of the facts of the case against each of the suspects and copies of some of the statements of each witness were served on each suspect. The first, second, third and sixth suspects pleaded not guilty to the charges and the fifth suspect pleaded guilty on 11th April, 1973 ; the eighth suspect on 28th May, 1973, pleaded not guilty ; the fourth suspect on 11th June, 1973, withdrew his former plea and pleaded guilty in respect of counts 28, 37, 43, 45, 50 and 60 on the ground that he acted as a broker. Notice if the charges was served on the 7th suspect in Madras on 17th September, 1973. He was not present during the proceedings.

The Criminal Justice Commissions Act, No. 14 of 1972, as amended by the Criminal Justice Commissions (Amendment) Law, No. 10 of 1972. under which our powers, functions and jurisdiction to inquire into crimes and offences of the description or character set out in the Warrant establishing this Commission are defined for the purpose of determining whether any person charged before us is guilty or not guilty of any offence, contains the rules and principles of evidence by which have may be guided in order to elicit proof concerning the matters that we are called upon to investigate and come to a determination.

The Act lays down conspicuous departures from well established rules and practices of evidence that normally obtain in the Courts of law in a criminal trial to determine the guilt or otherwise of persons charged and sets out with precision in section 15 (a) the standard of proof which must be satisfied before a finding of guilty against a person is reached.

The other relevant rules and principles of evidence prescribed by the Act may be summarised as follows : -

In terms of section 3 (6) (b) (c), the Commission may commence or continue with the inquiry in the absence of any person, if the Commission is satisfied that such person is evading arrest or absconding or feigning illness or with his consent.

Section 7 provides that an inquiry under the Act is deemed to be a judicial proceeding within the meaning of the Act.

Under section 11 (1), the proceedings are free from formalities and technicalities of the rules of procedure and evidence ordinarily or normally applicable to a Court of law and may be conducted by the Commission in any manner not inconsistent with the principles of natural justice, which to the Commission may seem best adapted to elicit proof concerning the matters that are being investigated.

Section 6 (1) (d) empowers the Commission, notwithstanding any of the provisions of the Evidence Ordinance or any other written law, to admit any evidence which might be inadmissible in civil or criminal proceedings.

Section 11 (2) (a) states that the Commission may at the inquiry, notwithstanding any of the provisions of the Evidence Ordinance, admit any evidence which might be inadmissible if those provisions were applicable.

Under section 11 (2) (b) a confession or other incriminatory statement to whomsoever and in whatsoever circumstances made by any person who is alleged to have, or is suspected of having, committed an offence may at any inquiry before the Commission be proved against such person, so, however, that if it is sought by or on behalf of such person to reduce or minimise the weight that shall be (j attached to such confession of incriminatory statement, the burden of proving the facts necessary to support such contention shall lie on such person.

Under section 11 (2) (d), a confession or other incriminatory statement made by an accomplice incriminating and other person suspected of having committed an offence shall be relevant and admissible against the latter person only in such an accomplice shall be called as a witness by the Commission or the counsel assisting the Commission and tendered for cross-examination. The Commission shall attach only such weight to evidence against a person suspected of an offence proceeding from the confession or incriminatory statement of an accomplice as, in all the circumstances appears to the Commission to be safe and just. There is also provision that if such an accomplice gives evidence which is in material particulars, different from such confession of statement, the Commission may disregard the evidence given by such accomplice and act on such confession or statement.

Any confession or incriminatory statement referred to in section 11 (2) (b) and section 11 (2) (d) shall not be rendered irrelevant or inadmissible by reason of the provisions of section 122 (3) of the Criminal Procedure Code.

The Commission is also empowered under section 11 (1) (c), if in the course of the inquiry it is of opinion that there are matters which call for an explanation by any person whose conduct is the subject of the inquiry, to call upon such person to give evidence, and whenever he is called upon to do so by the Commission, he is bound to give evidence and to answer any questions that may be put to him by the Commission or by counsel appearing to assist the Commission irrespective of whether he intends to tender other evidence.

The charges against the suspects in this case revolve mainly round certain sections of the Monetary Law Act (Chapter 422) and the Exchange Control Act (Chapter 423). Every charge also specifies section 15 (b) of the Criminal Justice Commissions Act as amended by Law No. 10 of 1972 but this is only for the purpose of stating the Penal Section which involves a party guilty of acts of commission or omission alleged in the said offence.

The section of the Monetary Law Act cited in the charges is section 76 (3) but it is necessary to refer to the entire section in order to appreciate the implication of sub-section (3) thereof. The section provides-

" (1) The Monetary Beard shall determine the minimum rate at which commercial banks may buy spot exchange and the maximum rate at which they may sell spot exchange. Where the Monetary Board has certified the legal parity of a currency in accordance with section 73, the maximum and minimum exchange rates

established for such currency shall not differ from such parity by more than one per centum.

(2) No commercial bank shall buy spot exchange at any rate below the minimum rate determined under subsection (1) or sell spot exchange at any rate exceeding the maximum rate so determined ; and no commercial bank shall in respect of any purchase or sale of such exchange accept any commission or impose any charge of any description except telegraphic or other costs actually incurred in connection with such purchase or sale.

(3) No commercial bank shall carry out any transaction in exchange, not being a spot transaction, at any rate which differs from the rate determined under sub-section (1) for a spot transaction-

(a) by a margin greater than is reasonable having regard to the additional costs, expenses or risks of the transaction ; or

(b) by such margin, if any, as may be prescribed in that behalf by the Monetary Board The irrelevant portion of the section has been omitted.

This section which occurs in the Chapter of Monetary Law Act headed "Instruments of Central Bank Action" with a sub-head relating to operations in gold and foreign exchange has necessarily to be interpreted in relation to section 73 to which it refers and which lays down the maximum and minimum exchange rates for spot transactions as well as any other transaction which would generally mean a future transaction. The section is also inextricably interwoven with section 74(1) which empowers the Monetary Board to determine the rates at which the Central Bank will buy and sell foreign exchange and section 74 (2) which precludes the monetary Board in the case of spot transactions, from differing by more than one half of one per cent, from the legal parities determined under section 73 and, in the case of transactions other than spot transaction sub-section 74(3) imposes what may be termed an upper limit to the variation from the rates determined by the Monetary Board . The limitation imposed cannot, according to this sub- section, exceed the rate laid down in sub-sect on (1) A an amount which will cover anything more than the reimbursement of the Central Bank's expenses by way of additional costs. expenses or risks in the case of each type of transaction. The Act also lays down the agencies through which foreign exchange operations may be transacted by the Central Bank and, apart from Commercial Banks and authorized dealers, it is net permissible for any other person to engage in foreign exchange transactions such as buying, selling, exchanging, lending or borrowing. The above provisions of the Monetary Law Act broadly constitute the background for the charges which have been preferred against the suspects, so far as that Act is concerned.

The other Act which immediately concerns the charges is the Exchange Control Act, which provides for the conferment of powers and the imposition of duties and restrictions in relation to movements of gold and currency and transactions directly or Indirectly involving such movements.

The substantive sections of this Act referred to in the charges as having been contravened by the suspects are section 5(1) (a) and 5 (2) as well as sections 6AB (a) and 6AB (b). As an. introduction to section 5 it is also necessary to refer to section 4 which defines the term " authorized dealer " which looms large in both the sub-sections of section 5. We quote below the relevant portions of these sections :

Section 4 : The Minister may authorize any commercial bank to act for the purposes of this Act as an authorized dealer in relation to gold or any foreign currency.

Section 5 (1) : Except with the permission of the bank-

(a) no person, other than an authorized dealer, shall in Ceylon buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, or exchange any foreign currency with, any person other than an authorized dealer, and

(b) **.....**

(2) Except with the previous general or special permission of the bank, no person whether an authorized dealer or not, shall enter into any transaction which involves the conversion of Ceylon currency into foreign currency or foreign currency into Ceylon currency at rates of exchange other than the rates for the time being authorized by sub-section (3) of section 76 of the Monetary Law Act.

Section 6AB : Every person in, or resident in, Ceylon who, on the date of commencement of this Act, holds, or who, after such date, acquires by way of purchase, gift, testamentary disposition or otherwise, any foreign assets

(a) shall, within one month of the commencement of this Act or the acquisition of the assets, as the case may be, render to the bank a return in such manner and giving such particulars with respect to the assets as may be prescribed ; and

(b) shall not dispose of such assets or part thereof in any manner whatsoever except In accordance with such directions as may be given to him by the bank.

We shall first of all deal with the submissions relating to section 5 which constituted the major attack by counsel for the suspects. Having regard to the evidence in the case, which was hardly contested by the suspects, none of them are authorized dealers for the purpose of dealings in foreign currency. The main point of contest to which the submissions were directed therefore, so far as this section was concerned, was that there was no sale of foreign currency on the part of any suspect charged with that offence, the accent being placed both on the meaning of a ' sale' and the definition of the word " foreign currency ". Mr. H. L. de Silva, who announced his appearance for the 1st suspect at a late stage immediately before the commencement of the addresses, placed before us a submission which was both forceful and attractive, particularly in regard to the definition of ' foreign currency' . Before addressing our mind to that aspect, however, we should like to examine his first argument that the facts in this case did not establish a sale as

distinct from an agreement to sell. It was his submission that 'buying' and ' selling' in section 5 of the Exchange Control Act contemplated the passing of property in Ceylon (as this country wad known at the time of the commission of the alleged offences) and since any property in the goods in this case passed, if at all, in a foreign country, there was no purchase or sale by the 1st suspect-which equally applies to some of the other suspects- of any property in Ceylon which alone is made an offence under section 5(1) (a).

As the argument of counsel involves several concepts and aspects rolled into one we shall endeavour to examine each of them, separately. We shall first consider the contention that there was no ' sale ' in this case but only an agreement to sell. He based this argument on the further contention that the- " Sale of Goods Ordinance " applied to a sale of currency if there was such a sale. In view of the definition of ' goods ' in this ordinance as including " all movables excepting moneys'" we are strongly of the view that the Sale of Goods Ordinance does not apply to these transactions alleged in the charges. For. it seems to us that ' moneys ' in the plural in this context must mean currencies (we are using this word in the layman's sense at this stage) of countries other than the country in which a sale takes place because it is difficult to contemplate the sale of money of a particular country within the same country for a money consideration called the price-which are the words occurring in section 2 of the Sale of Goods Ordinance in defining a ' sale ' and "agreement to sell". If therefore 'moneys' of other countries are not considered as goods in this ordinance, the argument at once ceases to have any validity and we are compelled to fall hack on the ordinary meaning of the word 'sale'. The best test here is to pose the question as to what the intention of the parties was in entering into this transaction. This intention can be gathered very clearly from the statements made by the 1st suspect Bhagawandas Hirdaramani to the Criminal Investigation

Department as well as from the statement made to the Assessor of the Inland Revenue Department Mr. O. F. Perera who gave evidence before us. When these two statements are read, one would do unwarranted violence to his simple language if one were to conclude that the 1st suspect had anything in mind other than the buying of foreign money from one party and later selling it to another or others. We use the words " foreign money " here and hereafter until we resolve the question regarding the interpretation of the word " foreign currency " advisedly and refrain from using the words ' foreign currency ' or ' foreign exchange ' as the meaning of these words too was strenuously contested and we therefore feel obliged to consider the submissions and express our views.

Even assuming that the transaction is governed by the Sale of Goods Ordinance, there was in our view not an agreement to sell but a completed sale of foreign money part of which, according to the 1st suspect's statements, was bought by him to help his son to establish himself in London without suffering any loss of financial prestige from the in-laws by obtaining money from them. Our Sale of Goods Ordinance is almost a reproduction of the English Sale of Goods Act. Very useful observations on the concept of a sale and contract to sell can be gathered therefore from Chalmers' commentary on the English Sale of Goods Act referred to by Counsel. It would appear from this charactistically lucid commentary that a ' a sale '

and ' a contract to sell' can often be synonymous. Where there is a consensual contract for the sale of any article or goods, the transaction may well be considered an outright sale depending on the intention of the parties as to whether the transaction is to be completed at the time of the payment of the consideration called the price. It is generally if conditions are attached to a contract of sale that the transaction becomes a sale on the fulfilment of those conditions subject to which the property in the goods is to be transferred. Therefore, where no such conditions are attached, the sale is complete on payment of the price and the property in the goods passes even though actual possession of the goods by the buyer may take place at some-later date or time. Property or ownership in this context passes in the payment of the price and the goods are held thereafter at the buyer's risk unless there is a condition to the contrary. Quite often, though not always, the acid test for deciding whether a transaction is a completed sale or an agreement to sell is to ask oneself the question whether the full price has been paid. Generally speaking where the full price agreed has been paid there is a completed sale and property in the broad sense passes along with such payment. Implicit in what we have just said is an agreement regarding a price which precedes the sale and in such a transaction there are two distinct stages of an agreement to sell when the price is decided, and a completed sale when that price agreed upon is paid. Both these stages took place in the case under consideration in Ceylon, These two elements cover two of the ingredients which are necessary to constitute an offence under section 5(1) of the Exchange Control Act. in the instant case, the further vital point arises-and This is where counsel's arguments are bulked at every turn by the factual situation-as to whether there has been any dispute between the parties involved, in the transactions which form the subject matter of the charges, as to whether the sale of the foreign money took place or not. Except in regard to the transaction of the 8th suspect, if there is one matter on which there is agreement, it is that one party sold the money of one country to another party and paid a price with money in a different country. Years have elapsed after the transaction and there has been no dispute between the parties concerned about either the price not being paid or the goods not being delivered. In these circumstances it is transparently clear that there was a consensus ad idem on the part of the parties conferred. oe to buy and the other to sell money followed by a fulfilment of the consensus- In these circumstances, abstruse and involved arguments as to where the sale took place and whether the transaction was a contract of sale or a sale seem completely out of place as the negotiations admittedly took place in Ceylon and the price was admittedly paid in Ceylon. Such an argument can succeed only if there is a proposition of law that there cannot be a sale in one country of an article lying in another country. We are certain that Mr. de Silva will never subscribe to such a proposition and will not succeed if he does. We are therefore satisfied that, in all the transaction in which foreign moneys are alleged to have been bought or sold in these charges, there have been sales in Ceylon. This conclusion remains the same whether the Sale of Goods Ordinance applies to these transactions or not as we have referred to earlier. To give a simple illustration, supposing X, a person resident in England and owning a car comes to tins country on a holiday and, during his stay here, sells this car to Y a resident here and receives the consideration in the form of cash, the arrangement regarding the passing of property being that the buyer's son who is a student in England will take delivery on

the completion of the transaction here. In this instance it stands to reason that there is a completed sale of the car by X to Y on payment of the price by Y. The property in the car passes to Y immediately on payment of the price and if his son is not given the delivery of the car in England there-after, X in our view makes himself liable to be sued by Y in Ceylon for such non-delivery notwithstanding the fact that the car was always in England. Equally, if the car has been delivered to Y's son as agreed and X and Y are thereafter charged with having committed an offence against any law of this country, it would be idle for the parties to contend that there was no sale in Ceylon because the article sold was in England. Yet another example of a transaction which occurs quite often nowadays is that when a person earns sterling in England he is allowed to purchase and import a car with that money. He has however to bring the money so earned into Ceylon in the first instance- He thereafter obtains his permit and buys a car from the Ceylon agents of the manufacturers in England by depositing the Rupee value of the sterling with the agents. The price paid includes cost, insurance and freight. What happens thereafter ? The buyer does not appropriate the car in fact until it reaches Ceylon but the property in the car has passed to him on payment of the price and if anything untoward should happen to the car or its parts on the way from England to Ceylon the buyer's remedy is to claim the amount of the loss from the Insurance Company, For the same reason, supposing the agents here have failed to ship the car at all they may be held civilly liable for damages or perhaps criminally liable for cheating on the basis of acceptance of the price and indulging in a purported sale and thus making a false representation to the buyer, It is inconceivable that the agents should be able to avoid liability in either of these proceedings instituted in Ceylon courts by taking up the position that there was no sale in Ceylon but that the sale was in England because the subject matter of the sale was, If not in fact, at least in law, appropriated or to be appropriated in England.

We would add here that we have sought to interpret the law in this respect as a pure question of law and not on the basis that one law would be applicable if there has been a dispute between the parties concerned and that different considerations would apply where the transaction has been fully executed according to plan nor have we proceeded on the basis that any argument which would be available to a party in the event of a dispute between each other will not be available when the State is inquiring into the contravention of a statutory prohibition which the parties are alleged to have infringed. We wish to state this in view of the submission of Mr. de Silva that it is irrelevant that the parties have no dispute as to these legal rights in the thing which was the subject matter of the transaction and that the relevant question is whether the suspects have contravened the law or done the prohibited thing in Ceylon.

Allied with this submission was a further submission by Mr. de Silva that such a transaction would only be a contract of sale and not a sale itself and he drew our attention to certain authorities in support of his submission. In deference to his submissions we would wish to deal with them. If we do not refer to some of them it is only because we do not feel it necessary to do so but it will satisfy counsel and their clients for them to know that we have perused all the cases cited which we consider relevant. One of the cases relied on by Mr. do Silva was the House of

Lords case of Badische Anilin Una Soda Fabrik v. Hickson [1906 A. C. 419.] (1906) A.C. 419. The headnote reads :

" Where a contract is made in the United Kingdom to sell patented goods which are abroad, and is completed by appropriation or delivery abroad, the vendor does not use, exercise or vend the invention in the United Kingdom within the meaning of the patent. "

On a reading of all the judgments of their Lordships in the House of Lords it seems to us that the word " patented " in the headnote makes all the difference to the principle enunciated coupled with the fact that the case dealt with a contract in which, for a particular reason which would have defeated the purpose of the Statute of Monopolies, the appropriation or delivery of the article had to take place abroad and not in the United Kingdom. It was only for that reason that the Judges appear to have held that the vendor did not vend the invention in the United Kingdom. Of the five judgments by each of the Judges what strikes us as being indicative of the reason for the decision is to be found in the last of them by Lord Atkinson where he has stated :

" And it is, moreover, quite obvious that a contract entered into in England for the sale of a specific ascertained chattel situated abroad, of a kind and nature protected here by patent but never imported into this country, can no more deprive the patentee of his profits, " raise the price of the article at home, hurt trade here, or cause general inconvenience " to the community in these kingdoms-the very evils struck at by the Statute of Monopolies-than would the same contract if entered into abroad. The two transactions are indeed equally outside the purview of this statute."

He has also referred in his judgment to an important principle which we have to bear in the forefront of our mind in this case and which he himself had gathered from Maxwell on the Interpretation of Statutes-

" Numerous cases are collected in Maxwell on Statutes, 4th ed., pp. 130-146, in which the general words of statutes were held to be restricted to the specific object aimed at, where it is evident that a literal interpretation of the language used would have carried the operation of the Act beyond the intention of the Legislature in passing it. "

In consonance with this principle we have to constantly remind ourselves, when interpreting the sections of the Acts said to have been contravened by the suspects, what the mischief was that the legislature intended to prevent. We shall have occasion to refer to certain other observations made in Maxwell on this aspect before we conclude our reasons for our findings. We can by no means therefore rely on this case as laying down a general principle of law that the locus or the situs of the act of selling of any goods is the place where the goods are appropriated. Nor can we accept counsel's submission that foreign currency or foreign exchange can be classed as unascertained goods and that the principles applicable to that class of goods should apply to either sterling or dollars. Where the quantum of

exchange of whatever country is specified in a transaction there is no room for argument that the goods are still unascertained, as every pound or dollar is as good as every other one for a buyer or seller.

The next important submission of Mr. de Silva, which from a purely interpretational standpoint, has almost irresistible substance and has given us considerable difficulty, is the one that relates to the meaning of foreign currency in the Exchange Control Act. His contention was that the charge under section 5 (1) (a) cannot be maintained as die subject matter of the alleged sale was not foreign currency within the meaning of the statutory definition in this Act. This contention was based on the absence of evidence regarding the manner in which the money was remitted from the Yugoslavia Bank or the Foreign Trade to London or the receipt by the 1st suspect's agent of any foreign currency within the meaning of the statutory definition. At the highest, in his submission, the 1st suspect acquired a credit or balance at a Bank standing in the name of Dialdas & Sons. His further submission was that while a balance or credit at a Bank constituted foreign exchange, it did not constitute foreign currency within the meaning of the present definition and could not therefore form the subject of an offence under section 5 (1) (a).

The problem of interpretation of the word currency arises in this way. Section 5 (1) of the Exchange Control Act prohibits inter alia the sale in Ceylon of any gold or foreign currency by any person other than an authorised dealer. This Act was enacted in 1S53 and the two words 'currency' and " foreign currency " were defined as follows : -

"currency" means coins and currency notes, and includes bank notes, postal orders, money orders, cheques, drafts, travellers' cheques, letters of credit, bills of exchange and promissory notes ;

" foreign currency " means any currency other than Ceylon currency and includes any drafts, travellers' cheques, letters of credit, bills of exchange and any other document expressed or drawn in terms of Ceylon Currency but payable in any other currency ; and any reference to foreign currency includes a reference to any right to receive foreign currency in respect of any credit or balance at a bank.

In 1971 came an amendment to this Act (Act No. 17 of 1971) which can safely be presumed to have been intended to include within its scope direct or indirect contraventions of exchange control restrictions and the conservation of the fast dwindling foreign assets of the country as was visualised in the preliminary evidence given before this Commission by the Exchange Controller. This amendment however led to the unexpected result, so far as the present case is concerned, in that what would have been a simple issue for decision had the two original definitions referred to continued as they were became a fertile field for the proliferation of ingenious legal arguments, which, as we indicated earlier, were both substantial and cogent. A difficulty has thus been created as a result of a material change in this definition and by the introduction of another definition of the words " foreign exchange " for reasons best known to the Draftsman and to the legislature but will remain in the realms of speculation so far as this Commission is concerned.

The new definitions of "currency", "foreign currency" and "foreign exchange" are as follows:-

1. "currency" includes coins, currency notes, bank notes, postal orders, money orders, cheques, drafts, travellers' cheques, letters of credit, bills of exchange and promissory notes;

2. " foreign currency" means any currency other than Ceylon currency and includes any currency payable by a foreign Government or institution to a person in, or resident in, Ceylon in respect of his pension or other gratuities due to him ;

3. " foreign exchange " means foreign currency and includes all deposits, credits and balances payable in any foreign currency, and any such drafts, travellers' cheques, letters of credit and bills of exchange as are expressed or drawn in Ceylon currency but payable in any foreign currency. "

The first difficulty that has to be resolved is in regard to the word ' currency ' itself which is an essential precondition to the definition of ' foreign currency' as the latter includes the former. Mr. de Silva has submitted that while a definition of a word as meaning something is more restrictive than a definition of a word as including something and the latter definition enables a court to give to the word meanings other than those enumerated in the definition, this rule is by no means conclusive. He has pointed to certain instances where the word " includes" has been used for the purpose of giving an exhaustive definition of a word. We have to agree with this contention as a general proposition. Where, however, a word has been defined in an enactment first with the use of the word ' means ' and later amended using the word ' includes' a court interpreting the word after such amendment has to lean towards the view that the legislature deliberately intended to make the amended definition in exhaustive of what the word can mean. Another reason for such a conclusion is that the legislature could also have used the words " means and includes " if the definition was intended to be exhaustive. If the definition is not intended to be exhaustive then the word currency can have meanings other than those contained in the definition. It would however not be legitimate for this Commission, adopting the same rules of construction as a court, to read into this definition the very "words which would make it possible to find the suspects guilty. On the contrary, when the word has been given so many meanings a court must exercise great caution before giving other meanings. Moreover, in a definition which uses the word includes, What a court can generally do in construing the meaning is to give the natural meaning in addition. Money in a bank account being not a natural meaning of currency, we would not be justified in attributing such a meaning to the word. As we are in agreement with Mr/ de Silva on this rule of construction, it is hardly necessary to look for support from the cases cited by him ; 63 N.L.R, 409, 67 N.L.R. 1 and the South African cases. Suffice it is to say that Weerasuriya J-'s observations in the case of Commissioner of Income Tax v. Baddrawathie Fernando Charitable Trust strongly support Mr. de Silva's contention and we are in respectful agreement with those observations.

In this view of the definition of currency, foreign currency will not include a deposit in a foreign bank. In Mr. de Silva's submission the difficulty is accentuated by the fact that the former definition which may have included a bank account in a foreign country as foreign, currency of that country has been so split up in the amendment as to take away bank deposits from the meaning of foreign currency and to include it in the definition of foreign exchange. We do not think there is an answer to this contention as a pure rule ox construction. A simple test as to the correctness of this contention is to answer the question whether, if the alleged buying and selling transaction between the 1st suspect on the one hand and the 2nd and 3rd on the other hand had taken place before the Amendment of 1971, and it was decided to charge them under the old law would it have constituted an offence under section 5 (1) (a) of the Exchange Control Ordinance, if the only evidence was that the 1st suspect acquired a right to receive foreign exchange by reason of a bank balance in England. We think the answer has to be in the affirmative. The next question is- how then does he become liable for the same offence after Act No. 17 of 1371 when the words "the right to receive foreign currency in respect of any credit or balance in a bank " alone have been taken away from the definition of foreign currency and attached to a new definition of the words " foreign exchange ". In fact the words are placed in such juxtaposition as to make it appear that alter Act No. 17 of 1971 deposits, credits and balances payable in foreign currency are to be identified as foreign exchange and not as foreign currency. Even though the words removed from one definition are not identical with those attached to the other, the substantial portion regarding deposits in a bank have been taken away from the definition of the word foreign currency.

How then does one arrive at a finding whether the transaction in question comes within the ambit of section 5 (1) (a) ? As we said before, if we confine ourselves to theoretical interpretation of words the answer has to be that the offence has not been committed. But what are the facts relied on to establish the charge by way of direct and circumstantial evidence. They are the following:-

1. The 1st suspect's admissions to the C. I. D. and the Assessor of Inland Revenue that he wanted to buy sterling to set up his son in business in England.

2. Overwhelming evidence as to several visits by the 2nd and 3rd suspects to see the 1st suspect at which the buying and selling of sterling was discussed and the price in Rupees was agreed upon.

3. Evidence by confessions of the delivery of the Rupee payments by the 1st suspect.

4. Evidence of the relationship of Dialdas to Kishore Hirdaramani, the son of the 1st suspect.

5. The receipt by Dialdas & Sons of payments of sterling at or about the time of the transactions between the
suspects.

6. The drawing of some of the moneys so received by Dialdas & Sons at the instance of the 1st suspect.

7. The confessional statements of the 1st suspect regarding his several transactions.

8. The admission by the 1st suspect to the Inland Revenue

Assessor that he failed to obtain any exchange by legitimate means and that he therefore- resorted to this course of buying sterling.

A simple and legitimate approach in the face of these admissions and circumstances would be to consider what the substance of the transaction was. If it was a sale of foreign currency and was concluded here, the destination of the money in the bank account of Dialdas & Sons would only show the mode of payment at the other end agreed upon between the parties. What was agreed upon to be paid into Dialdas' account was sterling-the foreign currency-and the fulfilment of the promise in whatever manner it may have been accomplished would complete the offence. The Bank account with Dialdas & Sons only became a convenient agent for the 1st suspect to safeguard the fruits of his completed enterprise of buying sterling. It is reasonable to draw the inference- in fact it is irresistible though there is no direct evidence-that the sterling or the dollars reached the Bank in some form which would have constituted ' currency ' in terms of the definition. If it was in any other form which did not constitute ' currency ' who else but the 1st suspect would have known it and why did he not give an explanation which would have exonerated him, particularly because all the statements made by him to the C. I. D. were admitted in evidence and he had nothing to gain by being silent if he had a reasonable explanation. The principles of Lord Ellenborough's dictum in the case of Rex v. Lord Cochrane and others' Gurney's Reports p. 479 would appear to operate in the face of the totality of evidence against the suspects and the failure of the 1st suspect to offer an explanation tells against him. The dictum reads as follows : -

" No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him ; but, nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest. "

In the result, an otherwise powerful legal argument involving the construction of words loses its effectiveness by reason of the factual background.

Mr. de Silva argued that to say that the suspect wanted to buy pound sterling and in the end that he did get pound sterling to his credit in the bank does not answer the question whether a sale of foreign currency took place although it would certainly, establish that he acquired foreign exchange as defined-He added that a court has

to ascertain in what physical form or shape the foreign currency existed. We think it necessary to go a step further and ask the question as to what came into the bank before the foreign money assumed the physical form or shape of realisable currency in the bank account standing in the name of the Dialdas & Sons, the agent of the 1st suspect. For what was transferred to the 1st suspect was not a Bank account or a credit or balance at a Bank belonging to the 2nd or 3rd suspects but some foreign money which was credited to Dialdas & Sons' bank account. The presence of the money in the bank account of Dialdas & Sons and which was available for use by the 1st suspect is circumstantial evidence establishing the fact that the money had reached the 1st suspect's agent. This was indeed the submission of the Deputy Solicitor-General. In the case of one transaction at least it is known how the foreign money reached the account. In the other we do not know the physical shape in which it came and this is where we consider the inference to be irresistible that it came in a form which c instituted foreign currency unless there was evidence to the contrary from the 1st suspect, within whose peculiar knowledge the circumstances were, or from someone on his behalf like Dialdas or Kripalani. The mode of payment being to deposit the money to the credit of the Bank account of Dialdas & Sons what we have to be satisfied of is as to the shape in which the money travelled from the agent of the 2nd and 3rd suspect to the agent of the 1st. We are justified in drawing the necessary inference in the absence of evidence to the contrary that this journey was made in the shape of one of the ways coming within the definition of foreign currency. The chronology is important. In some instances, money in rupees was paid before ascertaining from Dialdas & Sons whether the foreign money had reached the account. In the others, money was paid here after such ascertainment. We are therefore satisfied that what was bought and sold in Ceylon was foreign currency.

In this connection we also have in mind the submission of the Senior State Counsel that by the term " currency " is meant any form of units of account expressed in terms of instruments capable of transferring the units of account.

We could of course have, in the exercise of our powers under section H (2) (c), called upon the 1st suspect to give evidence and explain to us how certain moneys in the form of sterling found its way into the account of Dialdas & Sons of which he had control and for which he paid in Rupees before or after ascertaining that the sterling reached that account. We did not however wish to adopt this course unless we were compelled to, as such a course would have put the suspect facing these serious charges to further anxiety. We therefore decided to refrain from exercising the special powers conferred by this Act and to proceed on the principle which we have always adopted in the Criminal Courts, in arriving at a finding on the evidence of the prosecution and drawing the necessary inferences from circumstantial evidence. As the available evidence was sufficient to reach a finding beyond reasonable doubt, calling upon the suspect by us mero motu would only have resulted in avoidable embarrassment to him and confirmed the view we have been otherwise able to form.

We are also fortified in coming to this conclusion by the following citation from Maxwell on Interpretation of Statutes (Tenth Edition) at page 114 which sets out

clearly the principles which a court should follow in approaching the problem of interpreting a law intended to prevent any particular mischief : -

" The office of the judge is. to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief" (d). To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoyed (e). Contra legem facit, qui id facit quod lex prohibet. In fraudem vero legis facit, qui salvis verbis legis sententiam ejus circumvenit (f) ; and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud (g).

" Whenever it can be shown that the acts of the parties are adopted for the purpose ox effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly" (h). When the thing done is substantially that which was prohibited, it falls within the Act, simply because, according to the true construction of the statute, it is the thing thereby prohibited (i). Whenever courts see such attempts at concealment, " they brush away the cobweb varnish, " and show the transaction in its true light (k). They see things as ordinary men do (l), and so see through them, whatever might be the form or colour of the transaction, the law looks to the substance (m). For this purpose the courts go behind the documents and formalities, and inquire into the real facts. They may, and therefore must, inquire into the real nature of that which was done. An Act is not to be evaded by putting forward documents which give a false description of the matter (n). In all such cases, it is. in truth, rather the particular transaction than the statute which is the subject of construction, and if the transaction is found in reality to be within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked. "

Mr. de Silva submitted that if there was a gap in the law through which an accused may pass it was not for a court to fill that gap and cited the phrase of Lord Simonds in Major & St. Mellons v. Newport Corporation [(1951) 2 A.E.R. 839 at 841.] (1951) 2 A. E. R. 339 at 841 that it would be " a naked usurpation of the legislative function under the thin disguise of interpretation " to fill such a gap. In making the approach to the problem which we have done, fortified by the well known principles enshrined in the cases referred to in the above quotation from Maxwell, we feel confident that far from filling a gap in the legislature we are accepting the contention that counsel contends for but we have at the same time gone behind the literal meaning of the words and examined the pith and substance of the enactment in order to decide what the mischief was that the legislature intended to prevent. We might observe that although an accused is free to creep through a gap that the legislature has left open, he is not free to circumvent the law by a device of his own creation. While we must therefore pay our tribute to the very able argument of Mr. de Silva, we regret that we must reject it as unacceptable in the circumstances of the present case and hold that the offences under section 5 (1) (a) have been made out in respect of those suspects who are charged therewith.

Whenever this charge has been made out against a particular suspect, we find no difficulty in holding that such suspect is also guilty of a charge under section 5 (2) as well as 6AB (a) and, in those instances in which some of the suspects have been charged with disposing by sale the assets acquired by them without obtaining directions from the Bank, they naturally commit an offence under section 6AB (b) too.

Regarding section 5 (2) we do not find it possible to agree with the contention of Mr. de Silva. His submission was that an unauthorised person dealing in a transaction was not covered by this provision. While it must be conceded that some of the provisions in the Exchange Control Act and the Monetary Law Act, may have stemmed from the Bretton Woods agreement designed to stabilise international monetary exchange rates and may have been introduced in Ceylon when she incurred certain obligations consequent on her membership of the International Monetary Fund, we think that these provisions of section 5 coupled with section 4 can be construed quite independently of such agreement or of the obligations incurred from such membership. Section 5 (1) (o) broadly covers one aspect of foreign currency transactions and provides that-

(1) The Minister may authorise a Commercial Bank as an authorised dealer in relation to gold or any foreign currency.

(2) The transactions under this sub-section are confined to gold and foreign currency.

(3) All transactions such as selling, buying, etc., of gold or foreign currency shall be between authorised dealers.

(4) By implication these transactions appear to refer to spot transactions which are provided for under section 76 (2) of the Monetary Law Act.

(5) No permission of the Bank is necessary for such transactions.

(6) A person other than an authorised dealer can obtain permission from the Bank to engage in such transactions as are referred to in (2) above.

This appears to be a general permission. Section 5 (2) provides for different aspects and covers a much wider field-

(1) For certain transactions the previous general or special permission of the Bank is necessary.

(2) This permission is equally applicable whether the person engaging in the transaction is an authorised dealer or not.

(3) The transactions are not those referred to in (2) under section 5 (1) (a) i.e., buying, selling, etc., of gold or foreign currency but covers any transaction involving

the conversion of Ceylon currency to foreign currency or vice versa.

(4) By implication these transactions are not spot transactions but those referred to in section 76 (3) of the Monetary Law Act and the rates of conversion of currency in such cases must be those laid down in section 76 (3) of the Act.

It will therefore be seen that the two sub-sections-while they may overlap in one or two respects-cover a multitude of different matters. The common features seem to be that at least the general permission of the Bank is necessary in both kinds of transactions for any person other than an authorised dealer and that the rate of conversion cannot be different from what is laid down in section 76 of the Monetary Law Act. The differences are that while section 5 (1) (a) speaks only of a (general) permission, section 5 (2) refers to a general or special permission of the Bank; while the former covers a limited number of transactions, namely, buying, selling, lending, borrowing or exchanging gold or foreign currency, the latter embraces future transactions such as contracts to ship goods immediately or in the future or to buy or sell property in a foreign land or a contract to do so and many others ; while section 5 (i) permits an authorised dealer to engage in a transaction contemplated therein without permission of the Bank, section 5 (2) requires the general or special permission of the Bank for a transaction whether the person concerned is an authorised dealer or not and, lastly, for a person to be liable under section 5 (i) fa) he must be in Ceylon when he commits the act constituting the offence while under section 5 (2) it would appear possible for any Ceylonese to be charged for a contravention of its provisions when he is in Ceylon, wherever the act may have been committed. This of course is not free from doubt as the application of the law is not specific. The argument of counsel on this aspect is therefore based on a wrong premise and is quite untenable. We think that when even an authorised dealer is covered by this sub-section under certain circumstances, a fortiori, an unauthorised dealer is caught up. The 1st suspect became liable under section 5 (1) (a) without more by reason of his not being an authorised dealer alone and became liable under section 5 (2) by reason of entering into a transaction involving the conversion. of Ceylon and foreign currency by reason only of not having obtained the previous permission of the Bank for such transaction, quite apart from non-compliance with section 76 (3) of the Monetary Law Act.

Regarding the submissions relating to section 6AB (a) and 6AB (b), when, in fact, the 1st suspect has admitted the disposal of his assets held abroad though in the name of Dialdas & Sons, it is not thereafter open to him for argument that he had no proprietary rights over such assets. As for the situs of engaging in the transaction of disposal our findings regarding ' sale' are equally applicable, even though the assets were in a foreign bank. We must therefore hold that the 1st suspect as well as other suspects charged with the offence under similar circumstances is guilty of these charges.

Apart from the question of law argued by counsel for the 1st suspect, counsel for the 2nd and 3rd suspects sought to argue that the Governor-General's (now President's) opinion in the warrant establishing the Commission that any particular offence was of such a scale and nature as to endanger the national economy or

interest was not at all conclusive and that this Commission was bound to inquire in each case not only whether an offence against the Exchange Control Act and Monetary Law Act was committed but whether it was of such a scale and nature as to endanger the national economy or interest. A number of illustrations have been placed before us in the written submissions of counsel to show how any of them, even if they constituted offences under these Acts, would not endanger the national economy or interest. We do not find it possible to agree with this submission. The warrant says, if expressed in simple language, that the President is of opinion- obviously on material placed before him by his advisers-that during the period of 10 years preceding the date of the Warrant (14th December, 1972), there had been committed generally offences in relation to currency, in contravention of the Acts set out, of such a scale and nature as to endanger the national economy and interest. In view of these terms it is not the function of this Commission to probe the issue whether his opinion is correct. If counsel's argument is correct the Warrant should have been worded differently in terms such as these- Whereas the President is of the opinion that offences relating to foreign exchange have been committed by various individuals during the last ten years the Commission is appointed to inquire and report as to whether transactions involved in such offences have endangered the national economy or interests. If these were the terms, perhaps this Commission would have had to make a report only at the end of the inquiry into all the cases brought up before it from time to time covering the ten years immediately preceding the issue of the warrant. But that is not the case here. We have been relieved of that responsibility, by the terms of the Warrant and, by the provisions of section 2 (4) of the Criminal Justice Commissions Act itself, the Governor-General's opinion has been made final and conclusive. In terms of section 2 (3) we have been vested with the jurisdiction to inquire into the various cases that merit inquiry and after determining whether any person or persons were guilty of any offences under the Acts enumerated in the Schedule to the Warrant, to deal with the persons so found guilty in the manner prescribed by the Act. Most of the instances cited by counsel may belong to the category where the offences are of such a technical nature as not to be taken notice of in terms of the maxim " de minimis rebus non curat lex" or not to be visited with any penalties in the exercise of one's judicial discretion, but the function of the Commission is clear that it does not, while finding a person or persons guilty of an offence under the Act, also have the responsibility of probing whether the particular act constituting the offence endangered the national economy or interests.

Our inability to accept this submission will at once affect the rest of the submissions of counsel that the 2nd and 3rd suspects, in indulging in these transactions with the 1st suspect and the others not before us in this case, committed no offence. As we had to point out to Mr. Ameer in the course of his submissions, the evidence led on behalf of his clients would at the highest constitute circumstances of mitigation and not exoneration and would tend to show that his clients did not obtain this money to promote the insurgent movement. There was however no escape from the conclusion that the offences against the provisions of the Exchange Control Act and Monetary Law Act which we shall set out in due course had been committed by them. We accept Mr. Ameer's submissions regarding the non-complicity of the 2nd suspect Galatovic with the Ratnagopal transaction.

On behalf of the 6th suspect Mr. Chula de Silva in a brief but effective argument submitted that every assistance does not constitute abetment in the eye of the law. He cited the case of Rex v. Marshall [51 N.L.R. 157 at 161.] 51 N.L.R. 157 at 161 where it was held by the Court of Criminal Appeal that in order to constitute abetment the aid afforded must be such as was essential for the commission of-the crime. Another case in point on which Mr. de Silva relied was Ago Singho v. de Alwis 46 N. L. R. 154 in which it was held that mere knowledge on the part of the abettor was not sufficient to constitute abetment. This was a Divisional Bench case in which the facts were stronger than in the case before us. The alleged abettor, being the driver of a bus, in fact drove on when he knew it was overloaded. He had in fact to stop the bus in order to permit the conductor to overload. Still the Court held that he was not guilty of abetment of the offence of overloading of which the conductor was found guilty.

As this view of the law has generally gained acceptance in our courts, it is hardly necessary to deal in detail with the other cases cited by Mr. Chula de Silva which were also very much in point. The facts before us do not show that the 6th suspect took such an active part in the transactions in respect of which he was charged as to induce the person buying or selling currency to engage in the transaction. Conversely, his conduct was not such as would conclusively lead to the conclusion that the transactions in which he was associated would not have taken place but for his intervention. The negligible reward he received was also more consistent with his having received it for some little assistance he had rendered but not as a fee for someone but for whose intervention the transaction would have failed. V/e must of course say that in the transaction with the 4th suspect he sailed much closer to abetment than in the one with the first when he admitted that he dealt with the 4th suspect sternly and demanded his remuneration for his good offices. We are however mindful of the fact that the question whether he was an abettor in the real legal sense has to be decided on an inference based on circumstantial evidence. We must therefore apply the rule of circumstantial evidence that a person should not be found guilty if his conduct is equally consistent with his guilt or innocence. We have not been able unhesitatingly to hold in his case that the circumstances are only consistent with guilt. His conduct is not inconsistent with his knowledge of what was happening and receiving a gift or " offering" in consideration for his intensely sacerdotal functions during which he must have constantly prayed for the prosperity of those members of his community for whom he performed, certain religious rites as a daily occurrence. The reward he received may well have been for his successful prayers for the prosperity of his devotees and not a commission for a lucrative business deal. We are unable in the circumstances to say that the case against him has been proved beyond reasonable doubt.

In view of our further direction to the Director of Criminal Investigation regarding the 7th suspect we do not propose to deal with the legal position regarding his case.

As regards the charges against the 8th suspect, the observations we have made on the legal position regarding the buying and selling of currency in respect of the 1st suspect will apply equally to his case. The failure of the mode of payment or the

payment itself is immaterial. The fact that he entered into a transaction with the 4th suspect, to which the latter has pleaded guilty, is hardly arguable. It is further admitted in his own statement to the Criminal Investigation Department.

We shall be dealing with his case more fully when we discuss the facts relating to him.

The main transaction which formed the subject matter of the charges under consideration centred round two Yugoslav nationals, Stephen Galetovic and Gligo Mladen, the second and third suspects respectively, who had taken the first step in respect of the disposal in Ceylon, in contravention of her foreign exchange laws, of a sum involving 57,000.

Stephen Galetovic was the Resident Representative of a firm called Ingra which is an Engineering Group or Union of 21 individual companies with the Head Office in Zagreb, Yugoslavia. The third suspect Dr. Gligo in the Business Manager of Ingra Konstructor. Konstructor was one of the several Companies associated with Ingra.

If the project undertaken is one requiring the attention of two or more of these Companies, Ingra acts as contractor for the project. The execution of the particular project undertaken is left to the Companies concerned and Ingra has nothing to do with the technical, commercial or financial matters of such Company. Ingra only keeps the contractual relation with the other contracting party. Ingra undertook this contract on behalf of Konstructor, Split, Yugoslavia, and two other Yugoslavian Companies. Ingra had interests in Ceylon and had undertaken the Maskeli-Oya Project, Stage I, on contract during the period 1965 to 1969. In 1970 Ingra was awarded the Mahaweli Ganga Development, Polgolla Diversion Project contract.

The project was estimated at Rs. 84,000,000 of which the foreign component was Rs. 45,000,000 and the local component was Rs. 39,000,000. According to the contract the Ceylon Government had to advance Rs. 3,000,000 in foreign currency and Rs, 3,000,000 in Ceylon Rupees. The foreign exchange component was to be paid direct from, the World' Bank to the account of Konstructor with the National and Grindlays Bank, London. This amount was to be paid over a period of 1,200 days according to the progress of the work.

The material placed before Commission and the charges preferred against the suspects and in particular the first, second and third suspects show that during the period May to August, 1971, Dr. Gligo and Dr. Galetovic had disposed of foreign currency amounting to 57,000 in Ceylon and realised a sum of Rs. 2,129,000. According to the case presented by the Solicitor-General, Galetovic and Gligo had sold in Ceylon to Bhagwandas Hirdaramani, a merchant in Colombo, the first suspect, 37,000 for Rs. 1,369,000 at what is called the black market rate of Rs. 37 per pound. Galetovic and Gligo had also sold to one R. J. Ratnagopal 20,000 for Rs. 760,000. Ratnagopal was the Chairman of a Company called the Equipment Construction Company registered in the United Kingdom, and his wife was Chairman of a local company bearing the same name registered in Ceylon. These companies had extensive dealings with the Ingra being the suppliers of heavy

machinery and equipment for the construction work undertaken by the Yugoslav Company.

Ratnagopal had in turn sold to Hirdaramani 10,000 for a sum of Rs. 370,000. Hirdaramani had subsequently other subsidiary transactions whereby he re-sold 34,000 out of this to Murjiani, the fourth suspect, and 10,000 to Thaha and realised a sum of Rs. 1,324,800 and at the end of these transactions Hirdaramani had acquired 13,000 in London valued at Rs. 500,000, even at his own rate of purchase which was only about Rs. 400,000, and thereby made a Rupee profit of Rs. 100,000. The above is a brief resume of the transactions which bring in the first, second and the third suspects.

It will be useful to note at this stage that Galetovic was well known to Mr. and Mrs. Ratnagopal for over five years and he had met Mr. Ratnagopal in Yugoslavia in 1967 or 1968. Gligo was known to Ratnagopal for several years and he had gone to his house several times. He knew his wife and was a good friend of both Ratnagopal and his wife.

Hirdaramani too was known to Ratnagopal from 1953. Hirdaramani was also well-known to Galetovic with whom he had had dealings and from whose firm Galetovic had bought certain goods for his project.

The firm of Dialdas & Sons in London also figures in this transaction. Dialdas & Sons is owned by one Dialds who is the brother-in-law of Hirdaramani, the first suspect and is also the father-in-law of Hirdaramani's son Kishore. The Manager of Dialdas is one Kripalani.

The name of Peter Muzina had transpired in these transactions. He had been in Ceylon at the time Ingra handled the Maskeli-Oya Project and was the Chief Accountant and Technical Manager of Konstructor, Split, Yugoslavia, the leading civil engineering company which handled this project for Ingra.

During the time relevant to the transactions which formed the charges before the Commission, Muzina was Manager of the foreign Department of Konstructor and was in Yugoslavia. It was through Muzina that the two Yugoslavs in Ceylon arranged for the foreign currency to be sent to London from Yugoslavia to Dialdas & Co., London, or to J. W. K. Jackson, London, or to the E. C. C. Ltd., account of Ratnagopal in the Midland Bank Ltd., London.

J. W. K. Jackson of Ealing, London, W5, was the agent of Mubarak Thaha of Ceylon. He collected foreign exchange in the U.K., and informed Thaha in Ceylon by Telex and the latter in turn paid out to his customers in Ceylon in local Rupees. Similarly when Thaha accepted Ceylon Rupees from persons in Ceylon for the sale of sterling, he instructed Jackson in London who paid in sterling to the persons whose names were sent up by Thaha.

The Attorney-General in his opening has for convenience split up the transaction in respect of which the charges have been formulated into six transactions. For the

purpose of dealing with the charges we propose to deal with them in the same manner.

We shall, firstly, deal with the charges in respect of Bhagavandas Hirdaramani, the first suspect, Stephen Galetovic, the second suspect and Gligo Mladen, the third suspect.

The first transaction in respect of these suspects relates to counts 1, 2, 3 and 4 of the charges. In May, 1971, Galetovic called on Hirdaramani at his residence at Barnes Place with his colleague Gligo. On the evidence, this is the first occasion when Hirdaramani and Gligo met although Galetovic and Hirdaramani had known each other for a considerable time. Galetovic and Gligo intimated to Hirdaramani that they were in a position to sell 10,000 at the black market rata. Hirdaramani who was at this time on the look out to buy foreign exchange accepted the offer. Immediately he gave Galetovic and Gligo an advance payment of Rs. 37,000. This was an advance payment for - 2,000 at the agreed rate of Rs. 37 per pound sterling. The arrangement was that the pound sterling was to be deposited with the firm of Dialdas & Sons in London. Hirdaramani was informed over the telephone by Kripalani the Manager of Dialdas & Sons in London that a sum of 4,000 had been received in London to the credit of Hirdaramani. On receipt of this information Hirdaramani contacted Galetovic and Gligo who came and met him and Hirdaramani gave them a further sum of Rs. 74,000 which would, therefore, cover 4,000 deposited to the credit of Hirdaramani with Dialdas & Sons, London. In June 1971, Hirdaramani found after contacting Kripalani that another 4,000 had been received in London to his credit. After receipt of this information Hirdaramani gave Galetovic and Gligo another sum of Rs. 148,000. In early July, 1971, Hirdaramani telephoned Kripaiani and found that a further 2,000 had been received in London to his account. Thereafter Hirdaramani gave Galetovic and Gligo the balance sum of Rs. 74,000. Hirdaramani had, therefore, received to his credit in London with Dialdas & Sons, London, out of these transactions 10,000 for which he paid the Yugoslavs Rs. 370,000 in Ceylon. From the material disclosed in his statement to the Police, it appears that this amount of foreign exchange is still lying to the credit of Hirdaramani at Dialdas & Sons, London.

The second transaction deals with counts 5 to 14 and counts 43 to 48 of the charge. The facts relating to this transaction are briefly as follows: it covers a period from about the end-of May, 1971, to about the first week of August, 1971. This transaction brings in Ratnagopal who is not a suspect before us in this case. At the end of May, 1971, Gligo had approached Ratnagopal on the question of obtaining Ceylon currency by sale in the black market of 24,000 U. S. Dollars which is said to be the equivalent of 10,000. Keeping this over in mind Ratnagopal had met Hirdaramani and asked him whether Hirdaramani was prepared to purchase foreign currency from him and worked out the procedure that he should adopt in the event of such a sale. Hirdaramani indicated to Ratnagopal that the foreign currency had to be credited to his account at Dialdas & Sons, in London, and that he would pay Ratnagopal in Ceylon at the black market rate. In June, 1971, however, further steps in this transaction took place when Gligo arranged for one Peter Muzina of Yugoslavia residing in Yugoslavia to go across to London and discuss this matter

with Ratnagopal. Peter Muzina was the Chief Accountant and Financial Manager of Ingra in Ceylon during the Maskeli-oaya Project which ended in 1969.

Ratnagopal had met Peter Muzina after Gligo offered the foreign exchange to him in some place in Europe. Gligo had given his name and address. Gligo had also told Peter Muzina that Ratnagopal will contact him and discuss this matter. Peter Muzina had written to Gligo and told him that he had met Ratnagopal and that he would make arrangements to deposit the money in the way suggested. The subsequent arrangement was, therefore, that the Yugoslav undertook to transmit foreign exchange from Yugoslavia to Ratnagopal's account in England and Ratnagopal undertook to make payments to Galetovie and Gligo in Ceylon currency.

In pursuance of this agreement in July, 1971, Ratnagopal gave to Kripalani of Dialdas & Sons, London, two cheques drawn on an English Bank each for 5,000. This was done about the second week of July before Ratnagopal left for Ceylon on 12th July, 1971. In consideration of this payment Hirdaramani gave Ratnagopal in Ceylon a total sum of Rs. 370,000 during the period from the middle of July, 1971 to end of July, 1971. To make these payments Hirdaramani had to cash cheques of very large amounts. Ratnagopal thereafter notified Gligo and Galetovie. Gligo came to meet Ratnagopal and removed this money. Ratnagopal received Rs. 370,000 from Hirdaramani and paid Gligo Rs. 360,000 thereby making a profit of Rs. 10,000 for himself. Hirdaramani, therefore, had 10,000 to his credit in London out of this transaction and he sold 7,000 to Murjiani the fourth suspect at the rate of Rs. 39 for a pound. Hirdaramani had 3000 to his credit at Dialdas & Sons after having made a profit of Rs. 13,500.

The third transaction covers counts 15 and 16 and the facts may be summarised as follows : After the 10,000 transaction with Ratnagopal, Gligo informed Ratnagopal again that he needed Ceylon currency urgently and that he could give Ratnagopal $ 24,000 Dollars or its equivalent of 10,000 which could be credited to Ratnagopal's account in London as was done on the previous occasion.

Ratnagopal was in Ceylon at this time. On 3.5.1971 he left for the United Kingdom, but, before he did this he arranged with his wife, Mrs. Malini Chitra Ratnagopal, who is a witness in this case, and one George Abeyratne to see that the required amount of Ceylon currency was delivered to Gligo during Ratnagopal's absence. Ratnagopal sold this foreign exchange to Mubarak Thaha, a businessman in Colombo, the payment being made to one Kingsley Jackson who was Mubarak Thaha's agent in London. After Ratnagopal received the foreign exchange in London he himself paid the amount to Jackson (in London) the agent of Thaha. Thaha who was in touch with his agent Jackson on his Telex Machine then paid Ceylon currency to Abeyratne who appears to have acted as agent to both Thaha and Ratnagopal.

During the second week of August, 1971, Mrs. Ratnagopal received on this transaction two payments of Rs. 197,000 each from George Abeyratne. On receipt of this money Airs. Ratnagopal contacted Gligo who met her at her residence and

collected the monies. To make up this stipulated amount of Rs. 400,000 of which Rs. 5,000 had been taken by George Abeyratne as commission, Mrs. Ratnagopal gave a balance of Rs. 5,000 from monies taken from her firm Equipment Construction Company of Ceylon.

The fourth transaction refers to counts 17 to 24 of the charges and covers the same period as the previous transaction. Ratnagopal once again contacted Hirdaramani and offered him 20,000. Hirdaramani suspected that this foreign exchange was from the Yugoslavs. Hirdaramani thereafter himself directly contacted the two Yugoslavs who indicated that they were desirous of selling about 20,000 in the black market. Hirdaramani agreed to purchase this foreign exchange from the Yugoslavs. He thereafter concluded a deal with Jagtiani the 5th suspect to re-sell an amount of 10,000 out of this amount of 20,000 to Thaha and the understanding was that the foreign exchange was to be deposited with one Jackson, Thaha's agent in London. With this in view Hirdaramani indicated to the two Yugoslavs that the foreign exchange should be transmitted to Jackson in London whose address Hirdaramani ,gave to the Yugoslavs. After this deal was concluded Thaha and Jagtiani immediately drove to Hirdaramani and delivered the sum of Rs. 200,000 as advance. This amount was paid thereafter by Hirdaramani to Galetovic and Gligo. At the end of July, 1971, Thaha after cashing a cheque gave Jagtiani, the fifth suspect, a sum of Rs. 200,000 to be given to Hirdaramani. Jagtiani took this money in a suit case and delivered it to Hirdaramani, and Hirdaramani later paid Galetovic and Gligo a sum of Rs. 170,000 after verifying that the entirety of 10,000 had been received in London.

The fifth transaction is in respect of counts 25 to 33 and 49 to 59. This relates to the purchasing of the balance amount of 10,000 out of the 20,000 offered to Hirdaramani by Galetovic and Gligo referred to in the previous transaction. This took place about the third week of August, 1971.

Thaha who had earlier agreed to purchase this amount was arrested and therefore it was not possible to go through the deal with him. Hirdaramani thereupon decided that this amount of 10,000 be credited to his own account at Dialdas & Sons is London. This amount was sold to Murjiyani, the 4th suspect, making use of the services of the sixth suspect, Sharma, as broker.

Hirdaramani paid the Yugoslavs for this Sterling Rs. 370,000. By sale to Murjiyani he obtained a sum of Rs. 390,000 less an. amount of Rs. 500 paid to Sharma. On this transaction Hirdaramani made a profit of Rs. 19,500.

The sixth transaction is in respect of counts 34 to 42 and 60 to 65. Hirdaramani once again bought a further sum of 7,000 from Galetovic and Gligo at the rate of Rs. 37 per pound. This amount was credited to his account at Dialdas & Sons, London. Hirdaramani sold this amount to Murjiyani through the medium of Sharma. Hirdaramani therefore bought this sterling for Rs. 259,000 and sold it for Rs. 273,000. After paying Rs. 350 to Sharma, Hirdaramani made a profit of Rs. 13,650.

We shall firstly deal with the case against Hirdaramani the 1st suspect.

The witnesses Tyrell Gunatilleke, S. P., C.I.D., who was in charge of this inquiry in respect of foreign exchange offences, and F. S. P. Wettasinghe, A.S.P., C.I.D., who assisted Tyrell Gunatilleke, have both, in their evidence, produced the statements made by Hirdaramani in respect of foreign currency transactions, which are the subject matter of the charges before us. These statements were made by Hirdaramani whilst he was under detention under the Emergency Regulations. P14 was a statement made to the Police by Hirdaramani on 1.9.71 and P14A was made on the same date. P14B and P14C were made on 13.9.71, P14D on 13.9.71 and P14E on 11.10.71. These statements are of a confessional nature, and in all of them Hirdaramani has admitted the foreign currency transactions which are the subject matter of the charges before us.

In these statements, particularly in P14C of 13.9.1971, Hirdaramani the 1st suspect has admitted-

(1) the purchase of 37,000 sterling for Rs. 1,360,000 from Galetovic, the 2nd suspect and Gligo, the 3rd suspect, between May, 1971 and August 1971, at different times;

(2) the purchase in July, 1971, of 10,000 Sterling from Ratnagopal and payment to him of Rs. 370,000 in consideration thereof. This Sterling was deposited to his credit with Dialdas & Sons;

(3) the arrangement by which the pounds Sterling which he purchased from the Yugoslavs was to be deposited with Dialdas & Sons, London, to his credit;

(4) the instructions he gave to Galetovic and Gligo to deposit 10,000 Sterling with J. W. K. Jackson in London who was Thaha's agent in London ;

(5) the sale of 10,000 Sterling to Thaha through Jagtiani, the 5th suspect, at Rs. 40 a pound Sterling ;

(6) the sale of 24,000 Sterling to Murjiani, the 4th suspect in 3 transactions of 7,000 Sterling, 7,000 Sterling and 10,000 Sterling. The sum of 13,000 Sterling is still lying to his credit with Dialdas & Sons in
London.

These statements which Hirdaramani has made to the Police are admissible under section II of the Criminal Justice Commissions Act, against him.

In our view no satisfactory evidence has been led to reduce or minimise the weight that should be attached to these confessional statements. The burden of proving the matters which reduce or minimise the weight that should be attached to such confessional statements is on Hirdaramani. Hirdaramani has not given evidence challenging or controverting these incriminatory statements against him contained in the statements he has made to the police.

There is also the evidence of the 3rd suspect Gligo given on oath before us which corroborates the confessional statements made by Hirdaramani to the police. According to Gligo, in May, 1971, when he thought he was getting into financial difficulties in connection with the contract which Konstructor had in respect of the work on the Mahaveli Diversion Scheme (Polgolla Project), he explained to Galetovic the 2nd suspect-the need for immediate money. Then having failed to raise a loan from the Bank, Galetovic took Gligo to Hirdaramani, and Gligo then narrated in detail how Hirdaramani bought 37,000 Sterling for Rs. 1,369,000. He gave details as to how the money was to be deposited to the credit of Hirdaramani with Dialdas & Sons, London, to which firm 27,000 Sterling was sent to the credit of Hirdaramani, and two crossed cheques for 10,000 Sterling were sent to Thaha's agent Jackson in London. According to the document P29, it was on Dr. Gligo's instructions that Peter Muzina despatched the sterling to Dialdas & Sons through Jackson. Gligo has informed Muzina that he received Ceylon currency for the foreign currency.

The other witness who gave evidence before us in respect of the charges against Hirdaramani was one O. F. Perera, Senior Assessor of the Department of Inland Revenue. He stated that he had read in the newspapers about the Supreme Court proceedings in respect of the habeas corpus application made on behalf of Hirdaramani through which he came to know that Hirdaramani was involved in foreign currency transactions. He interviewed Hirdaramani on two occasions in the presence of Hirdaramani's Accountant, one Ratnam of Pope & Company. Witness Perera explained the procedure of the interview he had with Hirdaramani. He said that he questioned Hirdaramani and that simultaneously notes were made and the notes were typed by the Typist, and on a date convenient to both parties they went through the notes of the interview and the accuracy of the notes was confirmed by signing them. He said that Hirdaramani signed them after they were read over to him. The 1st interview took place on 21.11.1972 and Hirdaramani signed the interview notes on 14.12.1972. These notes are a production, marked P44. Under the heading, " Foreign Exchange Transactions ", Hirdaramani has admitted to witness Perera of the Inland Revenue Department that from May, 1971 to August, 1971, he has bought 47,000 pounds sterling in the black market as follows: -

(a) 10,000 from Ratnagopal,

(b) 37,000 from officials resident in Ceylon, who are representatives of Ingra and Konstructor.

Shortly after these purchases he has sold 34,000 in the following manner: -

(a) an aggregate of 24,000 to one Murjiani by three transactions of 7,000, 7,000 and 10,000 ;

(b) 10,000 again to A. M. Thaha.

A further sum of 13,000 was lying to his credit in London with the father-in-law of his son, Dialdas.

Gligo's evidence is that he has instructed Peter Muzina who was the Manager of the foreign Department of Konstructor in Yugoslavia, to remit these sums in pounds sterling to Dialdas & Sons, London, and to Jackson of London. P29A is an affidavit sworn by the authorised representative of Konstructor, one Kriste Piskulic, before the Municipal Court in Split, Yugoslavia, on 22.5.1972. This affidavit reveals that Konstructor on the orders of Gligo had made the following payments : -

(1) On 18.6-71, 2,000 pounds sterling, in favour of Dialdas & Sons, London ;

(2) On 7.7.71, 2,000 pounds sterling, in favour of Dialdas & Sons, London ;

(3) On 22.7.71, 2.000 pounds sterling, in favour of Dialdas & Sons, London;

(4) On 30.7.71, 4,000 pounds sterling, in favour of Dialdas & Sons, London ;

(5) On 30.7.71, 7,000 pounds sterling, in favour of Dialdas & Sons, London ;

(6) On 16.8.71, 10,000 pounds sterling, in favour of Dialdas & Sons, London, and

(7) On 30-7.71, 10,000 pounds sterling, in favour of Jackson, London.

Peter Griggs, the Chief Detective Inspector of Scotland Yard, London, who assisted A.S.P., Wettasinghe in the U.K. in investigating into foreign currency transactions gave evidence before us. He said he recorded the statement of J. W. K. Jackson of Ealing, London, on 27.5.72, and on 30.5.72, in the presence of A. S. P., Wettasinghe, he again recorded his statement on 2.6.72. A further statement was recorded en 26.7.72, but this was not in the presence of Wettasinghe. Jackson was Thaha's agent in London- In his statement (P37) dated 27.5.72, Jackson of Ealing, London, on 27.5.77, and on 30-5.72, in the August, 1971, he received to his account two sums of sterling pounds- 10,000 and 15,000, on behalf of Mubarak Thaha, from a firm known as the ' Konstructor Split, Yugoslavia'. The witness Griggs also recorded the statement of N. S. Kripalani, The Manager of Dialdas & Sons, in London. In his statement (P33) of 2nd June, 1972, made to witness Griggs, Kripalani has admitted that between May and August, 1971, a sum of 47,000 was received by him and entered in the books of Dialdas & Sons, London, on behalf of Hirdaramani of Ceylon. Kripalani gives details of the pounds sterling received by Dialdas & Sons, to he credit of Hirdaramani. The evidence reveals that Hirdaramani's brother-in-law is the owner of Dialdas & Sons, and that Hirdaramani's son, Kishore, was also married to the daughter of Dialdas.

In respect of the charge of failure on the part of the suspects concerned to render to the Central Bank a return of the assets held by them in terms of Section 6AB (a) of the Exchange Control (Amendment Act) Mr, K. A. Rupasinghe, Staff Assistant, Central Bank of Sri Lanka, produced the Gazette P47 giving a list of authorised dealers in foreign currency. The suspects' names are not in this list. Quite apart from that there is no evidence that the suspects have tendered any return in terms of this section in respect of the assets held by them.

We are satisfied beyond reasonable doubt that Bagawandas Hirdaramani, the 1st suspect, is guilty on counts 1, 2, 4, 7, 8, 9, 10, 13, 14, 17, 19, 20, 21, 23, 24, 25, 27, 28, 29, 31, 32, 34, 36, 37, 38, 40 and 41.

We shall next consider the evidence against Galetovic, the 2nd suspect. The main evidence against this suspect consisted of the statements he has made to the police while he was under detention. These statements have been referred to and produced by witnesses Tyrell Gunatilleke and Wettasinghe.

In the statement (P19) made by him on 6.9.71, he denies that he was aware of any arrangement whereby Gligo had come to terms with Ratnagopal to get down the proceeds of foreign exchange to Ceylon for any purpose whatsoever. In his statement P 19B of 13.9.1971, made at 11 p.m. he says that the only transaction between Gligo and Hirdaramani was in respect of linen. He flatly denied that there was any foreign currency transaction with Hirdaramani. Thereafter he was confronted with Hirdaramani and Gligo. In his statement P 19E, made at 12.32 a.m. on 14.9.72 he went to the length of only saying that in April. 1971, during one of his visits to Hirdaramani, Hirdaramani told him that his son and father-in-law are in London and that ii he needed any help in London, Hirdaramani could assist him through his son's father-in-law. He has said that he sent 450 in three instalments, to be kept at Dialdas & Sons' in the event of any member of his family needing this sum in London to buy anything there. He admitted however that he had an account in Lloyds Bank, London, and that he has instructed this Bank to remit this amount to Dialdas & Sons, London. On this occasion too he denied any foreign currency transactions involving Gligo and Hirdaramani. In his statement P19F of 14.9.71, again, he does not admit the transactions in respect of the charges before us. However, on 4.12.71 he addressed a letter to the S. P. (C.I.D.), which is marked P 5 X, in which he apologised and expressed his deepest sorrow for the inconvenience caused as a result of his " incomplete and partially incorrect statement" he gave earlier. In this letter he admits taking Gligo to Hirdaramani, the purpose being to get a private loan, and to get the offer for linen. He has introduced Gligo to Hirdaramani as a gentleman who is a main representative of Konstructor, and the Business and Financial Manager thereof. He wanted a loan from Hirdaramani. Hirdaramani replied that no loan was possible but that if Gligo could remit 10,000 to an English Company in London he could pay 50 per cent, immediately and the balance later. Gligo accepted this proposal and the deal was fixed. He has stated further in this letter that he had tried to divert Gligo from this business but failed. He next refers to the other transactions whereby foreign currency was purchased by Hirdaramani.

Galetovic further admits in this statement that after this on 28.2.72 in which he refers to the letter P5X addressed to the S. P. (C. I. D.). In this statement Galetovic says that he was an eye-witness to a transaction in foreign exchange and local currency between Gligo and Hirdaramani. He admits having introduced Gligo to Hirdaramani in order to solve the problem of shortage of local money for work in the Mahaveli Project. Gligo and Hirdaramani met in a sitting room of the ground floor of the residence of Hirdaramani. To a proposal for a private loan Hirdaramani replied that it was not possible to give a loan. He says that Gligo accepted a deal whereby,

if foreign currency was deposited in an English Company in London, Hirdaramani would give local currency. He stated he was present throughout the discussion. He stated further that Hirdaramani indicated that sterling should be remitted to Dialdas & Sons, London.

Galetovic further admits in this statement that after this initial visit to the house of Hirdaramani in connection with this transaction he visited Hirdaramani's house on three or four occassions in the company of Gligo to collect the instalments of money in Ceylon currency in connection with this transaction. He further admits that during the 3rd or 4th visit to the residence of Hirdaramani to finalise the instalments Hirdaramani asked Gligo whether he could make two more remittances to London to two different addresses, namely, Dialdas & Sons and one Jackson. He however stated that while they were returning home after this transaction he warned Gligo to give up this deal as otherwise he would be forced to inform the Head Office.

Galetovic in all his statements denies that he was aware of any transaction between Ratnagopal and Gligo.

Gligo in his evidence before us confirmed that Galetovic took him to Hirdaramani and that he did not know Hirdaramani before that. He referred to the transaction in the presence of Galetovic whereby ultimately 37,000 was forwarded to Hirdaramani for a sum of Rs. 1,369,000. Gligo also stated that Galetovic was not aware and had no hand in the transactions in respect of foreign currency which Gligo had with Ratnagopal.

On the admissible evidence against Galetovic, although there is only a suspicion that Galetovic may have had a connection in the Ratnagopal transaction, yet, we are not satisfied beyond reasonable doubt that Galetovic was involved in the foreign currency transaction between Ratnagopal and Gligo.

In respect of the foreign currency transaction between Galetovic and Gligo on the one hand and Hirdaramani on the other hand, Mr. Ameer, learned Senior Counsel for Galetovic, submitted that Galetovic did nothing more but accompany Gligo and that Galetovic was a mere messenger, in our view Galetovic was the architect and the brains behind these illegal foreign exchange transactions whereby Yugoslavs were able to dispose of large amounts of foreign currency in this country. In our view, further, the admission by Gligo in P19E, the statement he made to the Police on 14.9.71 that he remitted 450 to Dialdas & Sons for which he said he received no rupees in Ceylon was no innocent transaction. One cannot understand why, when he had an account with Lloyds Bank, London, he needed his own money to be deposited with Dialdas & Sons, in London, to enable him or his family to buy anything in London if they happened to go there. Galetovie had a better command of the English Language and spoke English fluently while Gligo's English was poor. He would have therefore been the chief negotiator with Hirdaramani.

In his statement P19N, made to the Police on 15.4.72, he states that the English currency received as a part of his emoluments is banked at Lloyds Bank, London, to his account. He had enough pounds sterling available to him in his account at

Lloyds Bank if he or his family needed money in the U. K. In our view this 450 initial deposit with Dialdas & Sons, was a trial transaction and this was to be the modus operandi for future illegal foreign currency transactions. His statement to the Police, P19J, made on 16.12.71 shows that he was not a raw novice in respect of foreign currency dealings in this country. In his statement he admits that he passed information to Hirdaramani that one Dr. Simon of Konstructor, Split, Yugoslavia, was interested in selling foreign exchange in Ceylon. He admits also that he knew Jagtiani although he has not met him as his name was mentioned to him by Hirdaramani. Jagtiani is the 5th suspect in this case. A false denial made by Galetovic in his original statement to the Police that he had nothing to do with the foreign exchange transactions of Gligo and Hirdaramani or any knowledge thereof, and the belated admission in P5X, his letter to the SP., C.I.D., and P 191 of 28.2.72. where he admits his presence on the occasion of currency dealings between Hirdaramani and Gligo, which were put through, lead us to the irresistible conclusion that he and Gligo were not only fully aware of the full implications of the illegal foreign exchange sales to Hirdaramani but that Galetovic was a party with Gligo for the sale of 37,000 to Hirdaramani, in return for Rs. 1,369,000.

We are satisfied, therefore, beyond reasonable doubt that the charges in regard to Galetovic in respect of the sale of foreign currency to the value of 37,000 to Hirdaramani have been proved beyond reasonable doubt.

We accordingly find Stephen Galetovic, the 2nd suspect, guilty of counts 1, 3, 17, 18, 28, 26, 34 and 35.

Having considered all the available evidence, we do not think that there is justification to convict the 2nd suspect Galetovic with what may be called the Ratnagopal transactions referred to in counts 5, 6, 15 and 16. We accordingly find him not guilty of counts 5, 6, 15 and 16 and we acquit him on these counts.

We shall next consider the case against Gligo, the 3rd suspect. Gligo is the Business & Finance Manager of Konstructor in Ceylon. He was the only suspect who gave evidence on oath before us voluntarily. He spoke of the financial affairs of INGRA in Ceylon up to May, 1971, and as they were getting into more difficulties due to shortage of funds he decided to raise a loan in Ceylon in Ceylon rupees. He approached Ratnagopal, whom he had known and met in Yugoslavia, for a loan of Rs. 400,000.00 to be repaid in a year. He met him in May, 1971. Ratnagopal offered him three proposals. He said he wanted a bank guarantee in foreign currency. Secondly, he said that he could give this money and that he could ask an agent of his to pay provided a commission was paid to him, but this also must be guaranteed in foreign currency. Thirdly, he said that if foreign currency is deposited to Ratnagopal's account in London, Gligo will receive rupees in Ceylon. Gligo told him that he was only concerned with the loan. No final arrangements were made.

Gligo next informed Peter Muzina, the Manager of the Foreign Department of the Firm in Yugoslavia, about his difficulties. He informed Muzina also the discussions he had with Ratnagopal about the loan. Muzina told him that he would discuss this matter with Ratnagopal. Obviously these discussions with Peter Muzina were by

letters. Ratnagopal told Gligo that he would go abroad and discuss the matter with Peter Muzina personally. Gligo also told Ratnagopal to discuss the matter with Muzina. Ratnagopal left Ceylon on 31.5.1971.

In the meantime, Gligo said that the financial position worsened. Having had no definite word from Ratnagopal he broached the subject to Galetovic the second suspect about the financial position of Konstructor.

In June, 1971, he and Galetovie went to Grindlays Bank, but they were not able to get & loan. He then described how Galetovie took him to Hirdaramani and how he was able to sell 37,000 to Hirdaramani in a series of transactions, whereby they were able to realise Es, 1,369,000 in local currency. Galetovie was present during these transactions with Hirdaramani. We have discussed fully this aspect of the transaction when we dealt with the evidence against Hirdaramani and Galetovie. There is, however, one matter of significance which we have to repeat, and it is what Gligo stated regarding the remittance of foreign exchange to Dialdas & Company and Jackson. Gligo did this by giving instructions to Peter Muzina, the Manager of the Foreign Department of Konstructor in Yugoslavia. Whenever he received money in Ceylon currency he informed Peter Muzina. Gligo, therefore admits that he sold the foreign currency to the value of 37,000 to Hirdaramani in Ceylon rupees.

Gligo then refers to the return of Ratnagopal from abroad and to the fact that Muzina informed him that he had met Ratnagopal abroad. Muzina informed him the transaction was alright and that Ratnagopal will explain to him in detail and that Ratnagopal will give him the money. He met Ratnagopal in mid July, but Ratnagopal did not tell him the arrangements he had made with Muzina. He said that Ratnagopal gave him in three instalments Rs. 360,000. Ratnagopal told him that he will be leaving for England again and that he had instructed his wife to give him more money. The evidence is that Ratnagopal left Ceylon on 3.8,1971 and only returned to Ceylon on 28.8.1971. Gligo is emphatic that he was unaware of the transactions Ratnagopal had with Muzina abroad or in London. He again stated that if Muzina and Ratnagopal did anything in London he did not know anything about it.

In brief it may be stated that Gligo admitted his foreign currency transactions with Hirdaramani, but in regard to his dealings with Ratnagopal that as far as he was concerned he was getting a loan from Ratnagopal in Ceylon rupees and he was unaware of the dealings Ratnagopal had with Muzina.

He further admitted that in accordance with what Ratnagopal staged to him before he left the Island, after his depature Ratnagopal's wife Malini Chitra Ratnagopal gave him Rs. 400,000.00 in three instalments, two of Rs. 197,500 and one of Rs. 5,000. Gligo therefore received from Ratnagopal a total sum of Rs. 760,000 in Ceylon rupees. If you add this amount of Rs. 1,369,000 he received from Hirdaramani, Gligo had received in all Rs. 2,129,000.

The statements made by Gligo to the Police in connection with these foreign currency transactions have been produced. These statements were also made

when Gligo was under detention under the Emergency Regulations. In his first statement P15 of 2.1.1971 he denied he went to Mrs. Ratnagopal's house and obtained money between 3.8.1971 and 23.8.1971, that is the period when Ratnagopal was away in England. He also denied that before Ratnagopal left Ceylon he gave him any more for any purpose. He denied that he had any monetary transactions in Ceylon or abroad with Ratnagopal. On the same day he was confronted with Mrs. Ratnagopal. He made a statement in her presence. In P15B he still denied the transaction. In P15C Gligo said that Mrs. Ratnagopal was lying. We shall discuss the evidence of Mrs. Ratnagopal shortly. On 3.9.1971 in P15D he admitted that he did not speak the truth before this and that he wished to speak the truth of his own accord. He said that what Mrs. Ratnagopal said in his presence was the truth, that she gave .him Rs. 395,000 on two occasions, and that before Ratnagopal left Ceylon he gave him Rs. 350,000. He admitted that he asked Ratnagopal for a loan of Rs. 400,000 as he was short of money. He also made this admission in this statement: " I am asked what Ratnagopal told me when I asked him for this loan of Rs. 400.000. He did not give me an answer at first. Ratnagopal later said he will give me Ceylon rupees at the rate of about Rs. 36 per pound sterling or Rs. 15 per U.S. Dollar. He said that the money should be deposited in London at the time he paid the money in Ceylon. We arranged that I should repay the money to him in Ceylon, he will repay the money given to him abroad to my Company in Yugoslavia." Gligo further stated that " after my discussion Ratnagopal left Ceylon and he met my man, Mr. Peter Muzina, the Business Manager of my firm, in some place in Europe. I told Ratnagopal to meet him and gave his name and address. I told Peter Muzina that Ratnagopal will contact him and discuss this matter. I also informed Peter Muzina about the shortage of money and explained the plan to him. "

Gligo further stated : " I believe that Peter Muzina had sent to Ratnagopal the amount of foreign currency required to meet the value of Rs. 745,000 at the rate of Rs. 36 per pound. I have not preserved my correspondence with Peter Muzina." This conduct militates against the innocence of Dr. Gligo regarding the nature of the transaction.

In P15E dated 3.9.1971, Gligo again admits that he received from Mrs. Ratnagopal two instalments of Rs. 395,000 each. He said that he took this money from Mrs. Ratnagopal on instructions from Mr. Ratnagopal. His position in P15F of 4. 9. 1971 is that Ratnagopal gave him in Ceylon rupees a loan. In P15H he again admits the receipt of Rs. 360,000 from Ratnagopal and Rs. 400,000 from Mrs. Ratnagopal. He further stated in P15H that after Ratnagopal returned, on the morning of 1.9.1971 when he was going in his car to Ratnagopal's house he saw some people outside Ratnagopal's house, and there were some Police officers. He went back to his house and burnt all documents. It is in evidence that he burnt even the correspondence he had with Peter Muzina in connection with this transaction. In his statement. P15J of 7.9.1971, he narrated how Wettasinghe, A.S.P.. took him to Polgolla and how a sum of Rs. 1,000.000 was recovered in a pillow case in the room occupied by Luka, the cashier of Konstructor. After the recovery of this money, Gligo said in his statement that he apprised Wettasinghe for the first time of his dealings in June, July and August, 1971, with Hirdaramani. whereby he sold

37,000 to Hirdaramani at Rs. 37 per pound and realised a sum of Rs. 1,369,000. In P15J he admits how he had realised a total of Rs. 2,129,000, i.e., from Ratnagopal Rs. 760,000 and from Hirdaramani Rs. 1,369,000. He gave details of how foreign currency was sent to Dialdas & Sons. The first payment was 10,000 and was sent to Dialdas & Sons to the credit of Hirdaramani. The second payment was 7,000 (Sterling) and was sent to Dialdas & Sons to the credit of Hirdaramani. The third payment consisted of two cheques which were drawn in favour of Jackson of London whose address was given by Hirdaramani. The fourth payment was 10,000 (Sterling) and was to be deposited with Dialdas & Sons to the credit of Hirdaramani. P15L dated 14.9.1971 is a detailed statement made by Gligo to the Police, in which he gives a full and complete statement of the deposit of 27,000 with Dialdas & Sons and 10,000 with Jackson. He states that Galetovic was only a messenger in the transactions with Hirdaramani, as in fact all transactions were done by him (Gligo).

Mrs. Malini Chitra Ratnagopal, the wife of Ratnagopal, in her evidence told us how she gave Dr. Gligo large sums of money on two occasions. On the first occasion one Mr. Abeyratne came and gave her a parcel which was handed over to Gligo. Abeyratne told her that the parcel contained Rs. 197,500. Abeyratne gave her a second parcel, also containing Rs. 197,500. Gligo came and collected these monies. Subsequently, she also gave Gligo Rs. 5,000, She said that Ratnagopal, before he left Ceylon, gave her instructions regarding these payments.

The important question we have to ask ourselves is whether Gligo was concealing from us the knowledge that he received these monies from Ratnagopal, that Ratnagopal will receive foreign currency in London for the Ceylon rupees given to him. As we pointed out, Gligo emphatically denies that he knew of any transactions between Peter Muzina and Ratnagopal.

The circumstantial evidence in the case and the inference that one can draw from the evidence given by Gligo, and also the other evidence in the case, lead us to the irresistible conclusion that Gligo was suppressing from the Commission his knowledge and complicity in the transaction, whereby Peter Muzina remitted out of Konstructor funds in Yugoslavia to Ratnagopal in the form of foreign currency in London for Ceylon rupees which Gligo received in this country. The evidence proves conclusively that, even conceding that the transaction began as a request for a loan by Gligo from Ratnagopal, it ultimately matured into a foreign exchange deal whereby Ratnagopal purchased foreign currency and gave Gligo Ceylon rupees in payment.

We wish at this stage to refer again to the document P29A, the affidavit sworn to by the authorised Representative of Konstructor, before the Municipal Magistrate in Split. The relevant portion of the affidavit reads as follows : -

" On the orders of Dr. Mladen Gligo, Branch Office Director for Administration and Finances, the following payments have been effected through the Bank in London." Items 1 to 6 refer to 27,000 that have been sent between 18.6.1971 and 16.8.1971 from Konstructor in favour of M. Dialdas & Sons, London. Item 7 states that on

8.7.1971 the amount of U. S. Dollars 24,000 in favour of E. C. C. Account No. 90322350, Midland Bank Ltd., Gresham Street, London, E. C. 2 ; item 8, on 26.7.1971 the amount of U. S. Dollars 48,000 in favour of E. C. C. Account No. 90322350 Midland Bank Ltd., 2 Gresham Street, London, E. C. 2, " having been sent by Konstructor. "

E. C. C. is an English Company of which Mr. Ratnagopal is the Chairman, and had dealings with INGRA in Ceylon. They supplied INGRA with machinery and other articles.

This affidavit, therefore, unequivocally connects Muzina with Gligo and shows that it was on Gligo's instructions that Muzina had remitted foreign currency to the account of Ratnagopal's Company, E. C. C. at the Midland Bank Ltd., London. No reasons have been given why the Authorised Representative of Konstructor should deliberately lie and state that it was on the instructions of Gligo that the foreign currency was sent to Ratnagopal's Company Account in London.

Apart from this, it must be recalled that Gligo admitted that when he sold foreign currency to Hirdaramani, he instructed Muzina to remit the foreign currency to either Dialdas & Sons or Jackson. One cannot believe, therefore, that when Gligo was transacting foreign currency deals with Ratnagopal, he did not use the same modus operandi-that is, instructing Peter Muzina to remit the money to London, which means he adopted in the Hirdaramani transactions.

It is also difficult to believe that Gligo's transactions with Ratnagopal and his receipt of Ceylon currency, were on the basis of a loan. Why was no receipt given to Ratnagopal for this sum of Rs. 760,000 ? No entries have been made in any books of Konstructor in Ceylon in respect of this. No such account books were produced before us. Gligo says that he did not even give an undertaking and say when he will repay this loan. No security was given to Ratnagopal for the loan of this large sum of money. If this was a bona fide transaction of a loan from Ratnagopal, why did not Gligo tell Luka the Cashier the true character of this transaction ? Why did he tell Luka that it was money obtained from the Bank ? Lastly, why did Gligo on 1,9.1971 when he was going to visit Ratnagopal having seen police officers outside Ratnagopal's house reverse his car and go back to his home and burn all correspondence, including the letters written by Peter Muzina ? It is no doubt true that Ratnagopal had cautioned Gligo after his return from England that there was a talk that the money that was realised by the sale of foreign exchange had been diverted for the insurgency movement. There was no necessity to burn the correspondence with Peter Muzina for this reason, because these letters would have shown the true and bona fide nature of the transaction, if it was really so.

The statement in the affidavit (P29) that it was at the instance of Gligo that foreign currency was remitted by Konstructor from Yugoslavia to Ratnagopal's E. C. C Account in the Midland Bank, London, throws considerable light on the real object that Gligo had in mind in destroying the correspondence he had with Peter Muzina.

If this Was not the correct position we feel certain that it was within Gligos power to call some evidence to refute it and to support his own evidence of his innocence. The failure on his part to place any such evidence is a circumstance that operates against his innocence.

We are satisfied, beyond reasonable doubt, therefore, that Gligo had full knowledge of the transaction between Muzina and Ratnagopal whereby Ratnagopal received foreign currency to his ECC Account in the Midland Bank, London. In return for the foreign currency Ratnagopal received in London, Gligo received Rs. 760,000 in Ceylon from Ratnagopal.

Gligo has stated in his evidence that 10,000 was sent to Jackson, Thahas Agent, by crossed cheques at Hirdaramanis request. He has instructed Muzina to remit these cheques to the address given by Hirdaramani. The crossed cheques were received by Jackson to his account at Barclays Bank Limited, London. The statement made by Jackson to Detective Inspector Griggs (P37) dated 27th May, 1972, and the letter (P23) dated 6th August, 1971, from Barclays Bank Limited, to Jackson stating that the Bank has received 10,000 from Konstructor Split and asking for instructions from Jackson, and Jacksons letter to the Bank (P24) dated 11th August, 1971, to transfer this 10,000 to his account at Westminster Bank Limited, London, are all proof of this transaction. This item of 10,000 has been also entered in the Accounts Book (P25) which contains the foreign currency transactions entered by Jackson on behalf of Thaha. The documents P23, P24, and P25 were recovered by Griggs after interrogating Jackson in London.

We are therefore satisfied, beyond reasonable doubt, that Gligo Mladen, the 3rd suspect, is guilty of the following counts - 1, 3, 5, 6, 15, 16, 17, 18, 25, 26, 34, and 35.

We are satisfied that the rates of exchange at which the buying and selling of foreign currency in respect of the charges before the Commission and in respect of the transactions involving the conversion of foreign currency into Ceylon currency and the conversion of Ceylon currency into foreign currency, were at rates higher than the rates for the time being authorised by section 76(3) of the Monetary Law Act, Chapter 422.

In respect of the charges under section 5(1) of the Exchange Control Act, Chapter 423, we are satisfied that these transactions were done without the permission of the Central Bank. The foreign currency transactions which are the subject-matter of charges under section 5(2) of the Exchange Control Act in our view had been entered into without the previous general or special permission of the Central Bank.

Under section 49 of the Exchange Control Act in any Prosecution of a person for an offence against this Act, the burden proving that he had obtained the permission or the consent the Bank for doing the act or making the omission was constitutes the offence shall be on him. The suspects have to discharge this burden.

We are also satisfied that the following suspects, in respect whom charges have

been preferred before us, are not dealers within the meaning of the Exchange Control Act -

1. Bhagawandas Hirdaramani, the 1st suspect,

2. Stephen Galetovic, the 2nd suspect,

3. Gligo Mladen, the 3rd suspect,

4. Vashdev Murjiani. the 4th suspect,

5. K. K. Jagtiani, the 5th suspect,

6. D. S. Sabnani, the 8th suspect,

7. S. A. S. Mohamed Abdul Hameed, the 7th suspect.

So are the following persons, viz. Rajamandri Jayagandhi Ratnagopal and Mubarak Thaha, whose names have transaction in the course of the evidence.

In regard to the charges under section 6AB (a) of t Exchange Control Act, namely counts 4, 13, 23, 31, 40, we satisfied that the suspects concerned have, within one month the commencement of the acquisition of the foreign -referred to in the charges, failed to render to the Central Bank in such manner and giving such particulars with respect to assets as are prescribed.

We are satisfied in regard to the charges under section 6AB (' namely counts 14, 24, 32, and 41, that the disposition of foreign assets were done without obtaining the directions of Central Bank.

The 4th, 5th, 6th, 7th and 8th suspects are alleged to have taken part, at various stages and in various degrees, in disposal of foreign currency, acquired by the 1st suspect in transactions with the 2nd and 3rd suspects. The only evidence on which a conclusion can be reached in respect of these suspects (except the 7th) consists of their statements made to the Police.

As far as the 7th suspect is concerned, there was no evidence available on which we could reach a positive finding. The he played, however, emerges from the statements of the other suspects, available on which we could reach a positive finding particularly the 4th suspect, but since none of these other suspects were called to give evidence, those statements cannot De used against the 7th suspect. We shall advert to his case in greater detail in due course.

We now proceed to consider the case against each of the 4th ; 8th suspects, but briefly in respect of the 4th, 5th and 7th suspects as the two former tendered pleas of guilty and, as already stated, there is no evidence against the last mentioned.

There were as many as 21 charges (namely counts 9, 11, 28 30, 37, 39, 43, 44, 46,

47, 49, 50, 51, 52, 55, 55, 53, 60, 61, 63 and 64) framed against the 4th suspect. The involvement of the 4th suspect is in connection with the disposal of foreign currency purchased by the 1st suspect from the 2nd and 3rd suspects in three of the transactions he had with the latter. On one occasion, the 1st suspect is alleged to have purchased 10,000 from the 2nd and 3rd suspects and disposed of a sum of 7,000 out of his amount through the 4th suspect to the 7th suspect's agent in Hong Kong (counts 9, 11, 43, 44, 48 and 47).

On another occasion, the 1st suspect is alleged to have purchased another 10,000 and disposed of 8,000 out of this sum through the 4th suspect to the 7th suspect (counts 28, 30, 49, 51, 55 and 56), and the balance 2,000 also through the 4th suspect to the 8th suspect (counts 50, 52 and 58) though the delivery of this latter sum failed due to various circumstances. In a third occasion, the 1st suspect is alleged to have purchased . 7,000 and disposed of this sum through the 4th suspect to the 7th suspect (counts 37, 39, 60, 61, 63, & 64).

At an early stage in the proceedings, the 4th suspect who had originally pleaded Not guilty , withdrew that plea and pleaded Guilty to the following counts against him, namely, 28, 37, 49, 50 and 60-all offences involving the conversion of foreign Currency into Ceylon currency in contravention of section 5 (2) of the Exchange Control Act. He pleaded guilty on the basis that he was, merely an agent who put through these transactions for a commission. The learned Solicitor-General stated that the 4th suspect was really a go-between and consented to his plea being accepted on the basis on which it was tendered and under- took to reconsider the question regarding the remaining charges referred against him. He did not after consideration think it necessary to proceed on such remaining charges in view of the plea of guilty tendered by him, but only suggested the appropriateness of an order being made in regard to count 9 too. We have considered all the circumstances and the statement made for the 4th suspect on 24.3.1973 (P 40) in which he admitted the part he played in these transactions and we are satisfied that the plea of " guilty " tendered by him can be accepted in respect of these counts, and on the basis on which it was tendered.

The 4th suspect did not plead guilty to count 9, and learned counsel assisting the Commission submitted that a finding would have to be reached in respect of that count as that count to was exactly similar to the counts to which the 4th suspect has pleaded guilty. This count is in respect of the 7,000 for which the 4th suspect negotiated with the 1st suspect. A separate count (43) has been framed for his negotiations in respect of this sum of 7,000 with the 7th suspect. In each instance I had entered into a transaction (first with the 1st suspect and then with the 7th suspect) involving the conversion of Ceylon currency into foreign currency. He has pleaded guilty in respect of his transaction with the 7th suspect (count 43) and in his statement he had admitted the entire transaction. We are, therefore, satisfied, beyond reasonable doubt, that the 4th suspect is guilty under count 9 also. In view of the above and of his plea of guilty, we find the 4th suspect guilty under counts 28, 37, 43, 49, 50 and 60.

The 5th suspect is charged only on one count, namely count 22, for abetting the 1st

suspect and one Mubarak Thaha to enter into a transaction involving the conversion of foreign currency into Ceylon currency in contravention of section 5(2) of the Exchange Control Act. This charge is based on a transaction in which the 1st suspect is alleged to have purchased 10,000 from the 2nd and 3rd suspects at Rs. 37 per sterling, I told the 5th suspect that he had sterling for sale at Rs. 40 in sterling. The 5th suspect contacted Mubarak Thaha we was willing to buy sterling at that rate. The 5th suspect was thereafter instrumental in obtaining the purchase price of Rs. 4 lakhs from Mubarak Thaha in two instalments of Rs. 2 lakhs each and he delivered the cash to the 1st suspect who, according to Thaha's instructions, credited the 10,000 to Thaha's age Jackson, in London.

The 5th suspect has admitted this transaction and the part played therein in his statement to the Police (P28) and also the fact that he received Rs. 10,000 as his commission on the deal from the 1st suspect. He pleaded guilty to this charge of the beginning of this inquiry and we accepted his plea.

The 6th suspect is charged on three counts, namely, 12, 33 and 42. These are based on three alleged transactions that the 4th suspect had with the 1st suspect for three sums of 7,000, 7,000 and 10,000 referred to earlier in considering the case against the 4th suspect. The allegation against the 6th suspect is that he abetted the 1st and 4th suspects to enter into these transactions and thereby committed offences under section 5 (2) of the Exchange Control Act, read with section 102 of the Penal code. As stated earlier, the only evidence on which a conclusion can be reached against him is his statement (P30A) made to the Police on 15.12.1971. The 6th suspect has there stated that the 1st suspect wanted him to give a message to the 4th suspect to meet the 1st suspect in his office, He conveyed this message to the 4th suspect who smiled to himself on hearing it. The 6th suspect knew that the 4th suspect was " well known in the Pettah for illicit traffic in foreign exchange". About 5 or 6 days after he conveyed this message to the 4th suspect, the 1st suspect gave him Rs. 350. He inquired from the 1st suspect the reason for this and the 1st suspect told him that he had sold 7,000 to the 4th suspect and asked the 6th suspect to keep the Rs. 350 and not to ask questions.

The 6th suspect then went to the 4th suspect and told him that the 1st suspect said and the fact that he had been given Rs. 350. The 4th suspect stated that he had still not received the 7,000 and asked the 6th suspect to come in a few days, thereafter the 1st suspect gave the 6th suspect two further sums of Rs. 350 and Rs. 500 on two occasions, stating that he had sold further sums of 7,000 and 10,000 to the 4th suspect. The 6th suspect went and met the 4th suspect on many occasions and told him about these two further transactions between the 1st and 4th suspects. The 4th suspect then gave the 6th suspect sum of Rs. 500. Shortly afterwards, the 1st suspect was taken to custody and sometime thereafter, the 4th suspect left the land.

It would be seen from the above that the 6th suspect, apart from conveying the message of the 1st suspect to the 4th suspect (not being even aware at that time in what connection the 1st suspect wanted to see the 4th suspect) has not taken any active part in the transactions themselves. He no doubt became aware of the

transactions when the 1st suspect told him about them and paid him certain sums of money on three occasions on calculations of cents for every sterling made solely by the 1st suspect and 4th which the 6th suspect had nothing whatever to do. In fact the 6th suspect told the 1st suspect on one occasion that he does not feel that he has earned the money that was being paid to him. The statement of the 6th suspect does not show that he had anything to do with the transactions themselves as they were conducted by the 1st suspect all on his own, and directly with the 4th suspect.

It is true no doubt that the 6th suspect, having received these sums of money from the 1st suspect, went on numerous occasions to see the 4th suspect and told him the fact that he knew about the 4th suspect's transactions with the 1st suspect and the fact that he received three sums of money from the 1st suspect and asked the 4th suspect " What is he going to do about it for me ". It was then that the 4th suspect told him that there was plenty of time and he would see to the 6th suspect's interests and not run way. It was sometime thereafter that the 4th suspect paid Rs. 500 to the 6th suspect.

It was suggested by learned State Counsel that the role of the 6th suspect was that of a go-between so that the transaction: would not be capable of being traced to either the 1st or 4th suspect and the 6th suspect thereby intentionally facilitated tin commission of offences under section 5 (2) of the Exchange Control Act. We are unable to state with any degree of confidence that the statement of the 6th suspect necessarily warrants such an inference. That statement undoubtedly shows that the 6th suspect, at a certain stage, was aware of the transaction between the 1st and 4th suspects since he had ; somewhat unexpectedly received monies from the 1st suspect in respect of each of these transactions and he used this fact to see if he could also get some money from the 4th suspect. In other words, since the original innocent message he conveyed from the 1st suspect to the 4th suspect resulted in fruitful foreign currency transactions and h unexpectedly and luckily received " santhosams " from the 1st suspect on that account, he was persuading the 4th suspect also to give him a similar " santhosam'". It must also be remembered that the 6th suspect is a priest of the Sindhi community ministering to the needs of that community and both the 1st and 4th suspects are members of that community.

We think that the most that can be said on the statement of the 6th suspect is that having knowledge of the transaction between the 1st and 4th suspects, he received, unasked, three sums of money from the 1st suspect and he persuaded the 4t suspect also to make similar payment. Mere knowledge that an offence was committed or of an unlawful transaction is insufficient to establish abetment. In order to make a person an abettor, the facility or aid afforded by him to the doer of the act must be such as was essential for the commission of the crime abetted. (Vide 51 N.L.R. at 157, 46 N.L.R. at 154 and 45 N.L.R. at 551).

In view of these matters, we are unable, on the sole statement of the 6th suspect, to reach beyond reasonable doubt, the conclusion that he abetted the 1st and 4th suspects in the -commission of offences under section 5(2) of the Exchange Control Act. We accordingly hold that the 6th suspect is not guilty of counts 12, 33 and 42

and acquit him.

There are 9 !charges framed against the 7th suspect, namely counts 43, 45, 48, 49, 53, 57, 60, 62 and 65. These charges are in respect of the disposal by the 4th suspect of the three sums he purchased from the 1st suspect. As stated earlier, in considering the case against the 4th suspect, he purchased three sums of foreign currency, namely 7,000, 7,000 and 10,000 from the 1st suspect. The 4th suspect disposed of the two former sums and 8,000 out of the last-mentioned sum to the 7th suspect and transferred these sums to an address in Hong Kong as-instructed by the 7th suspect. Notice of these proceedings and the charges against him were served on the 7th suspect -in Madras in India on 17th September, 1973 by Mr. F. S. P. Wettasinghe, A.S.P., but the 7th suspect did not attend the inquiry before us. The inquiry against the 7th suspect was therefore conducted in his absence in terms of section 5 (6) (c) of the Criminal Justice Commission Act as we were satisfied on the evidence placed before us that he was absconding. Apart from the statements made by the 1st and 4th suspects (who were not called as witnesses and whose statements cannot therefore be used against the 7th suspect), there was no other evidence on which we would reach a finding either way in respect of the 7th suspect As the 4th suspects statements to the Criminal Investigation Department, however, involved the 7th suspect in several illegal transactions in foreign exchange, we were not satisfied that the 7th suspect had not committed any offence and considered it appropriate to direct further investigations and to bring up his case before the Commission in due course.

There are three charges-counts 50, 54 and 59-against the 8th Suspect. These are based on the purchase by the 4th suspect of a sum of 10,000 from the 1st suspect and the disposal of 2,000 out of this sum to the 8th suspect for Rs.. 80,000. Count 50 is for entering into a transaction involving the conversion of Ceylon currency into foreign currency in contravention of section 5 (2) count 54 is for buying foreign currency in contravention of Section 5 (1)) (a) ; and count 59 is for failing to make a return of his foreign assets in contravention of section 6AB (a) of the Exchange Control Act.

The case against the 8th suspect also rests entirely on the statements made by hint to the Police and produced marked P41 and P41 (a) to (c). These statements show-that the suspect at first denied that he had any transaction with the 4th suspect involving foreign currency. Later, however, he admitted that he had a transaction with the 4th suspect. Since the nature of the transaction and whether it amounted to a sale or purchase or an attempt to sell or purchase foreign currency under section 5(1) (a)-an allegation in count 54-was the subject of much argument before us, it is best that the relevant portions of the statement of the 8th suspect be reproduced:

" I have been interrogated by A.S.P. Mr. Wettasinghe on the statement made by me and I have, in that statement, admitted certain aspects of my transactions with Murjiani. In that, it is correct that Murjiani offered me somewhere in July-August 1971, 2.000 at the rate of Rs. 40 per sterling. However, I withheld the fact that I did purchase the 2,000 sterling (in) question. I did so because I only paid for this purchase and the person on whose behalf I did so was a very close friend of mine

who is since dead and I did not want to bring his name into disrepute now that he is dead. To continue, sometime in 1970 G. Boolchand of Jaipur, who was a resident in Ceylon on a Temporary Residence Permit and a very close friend of mine who knew me from childhood, gave me, just before he died in 1970, two blue sapphire stones weighing about 21 carats in all worth about Rs. 50,000 or Rs. 60,000 at that time. He was then living at Thimbirigasyaya. I cannot remember the address but I can provide it later. He was employed in a firm as an Accountant. Before his death, he requested me to sell these two stones at a good price and send the proceeds to his former employer, Mr. G. Hasaram of Style, Connaught Place, New Delhi. After Mr. Boolchand's death somewhere in 1971, one Mr. Samsudeen, a gem broker resident in Galle, bought these two blue sapphires from me and gave me Rs. 83,000. I kept this money at home and informed Mr. Hasaram when I was in India that I had received instructions from Boolchand to send him the proceeds of the sale of these two stones. Hasaram then gave me the following address in London to remit these proceeds to G. Hasaram, Park West, 216 Marble Arch, London. I believe this address as I can recollect is correct but I am not sure of the number. Sometime in July-August 1971 when my brother Ashok was in Spain, Vashi Murjiani of Dickmans Road came to my office with my Manager, Kishinchand Telaram, and asked me whether I was interested in buying 2,000 sterling to 3,000 sterling at the rate of Rs. 40 per . At first I told Murjiani that I was not interested. Murjiani then said that it was e bargain for that rate. I told him that I would consider this and asked him to come again in a few days. A few days later he came again and by that time I had sold Boolchand's two blue sapphires. On this occasion, he offered me the 2,000 and I accepted the offer. I then gave him the address of Hasaram referred to above for this sterling to be credited and paid Murjiani Rs. 80,000 on the following afternoon or so, I paid the Rs. 80,000 to Murjiani in cash for the 2,000 at the rate of Rs. 40 per . On this day, when I went home for lunch, I brought the Rs. 80,000 and handed it over to Murjiani when he called for it that afternoon. I am asked whether it is correct that the Rs. 80..000 was given by me to my Manager K. Tolaram, to be handed over to Murjiani when he called for it that day. My answer is that as far as I can recall, I paid the money to Murjiani. Tolaram may have been present at that time, i think this was paid in my office. About three days later, Murjiani returned and told me that the money could not be sent to Hasaram's address. He said that it was not workable but did not explain further. I then told him that the money should be sent to this person. He then asked me for another address and returned the earlier slip to me. I then told him that I was not interested and to return the money. Murjiatii then told me that he was already committed for the transfer and wanted another address. I then told him to come again in a few days. In the meantime, I contacted Hasaram by letter and explained the position to him. He then sent me another address which reads-as far as I can remember-as follows. Narendra. Oxford Street, London. I cannot remember the initials or the number of the premises. Thereafter Murjiani did not come to see me again. I got the second address from Hasaram by about the end of August. 1971. To date I have not seen Murjiani. I do not know yet what has1 happened to, the Rs. 80,000 I gave Murjiani aa the 2,000 could not be credited as agreed upon. Since Murjiani did not come to collect this second address. I did not ask Murjiani who was providing the sterling for sale nor did he tell me. "

The 8th suspect did not give evidence or contradict or attempt to minimise the effect of the above confessional statement. We must, therefore, consider whether this statement establishes any one or more or all of the three charges against him. This statement undoubtedly shows quite clearly that the 8th suspect had entered into a transaction involving the conversion of Ceylon currency into foreign currency (viz. pounds sterling) in contravention of section 5 (2) of the Exchange Control Act. We are, therefore, satisfied, beyond reasonable doubt, that the 8th suspect is guilty under Count 50.

On the question as to whether the 8th suspect purchased foreign currency in contravention of section 5 (1) (a) of-the Exchange Control Act, it was urged that 2,000 sterling was not available to the 4th suspect in view of the statement of the 1st suspect and that, therefore, neither a purchase nor an attempt to purchase has been established against the 8th suspect. This was based solely on the fact that the 1st suspect, in his statement, had admitted that he disposed of three sums of sterling, vis. 7,000, 7.000 and 10,000 to the 4th suspect and had also stated that, to the best of his recollection, these sums were transferred to " Murjiani's (4th suspect's) contact in Hong Kong (P14C and P14J), "

Now the statement of the 4th suspect shows that out of the last 10.000, only 8.000 was disposed of to the 7th suspect and sent to an address in Hong Kong, and it was the balance 2,000 that was sold to the 8th suspect. There is also the fact that according to the 1st suspect's statement, even after all the disposals of sterling, he still had left with him 13:000 sterling in London. The submission of learned counsel for the 8th suspect that there was no sale as the goods, viz, 2,000 sterling, was not available for sale cannot be maintained as this amount of sterling was available not only out of the , 10.000 but also out of the 13,000 above referred to. The statements of the 1st and 4th suspects are not evidence against the 8th suspect, but where it was sought to secure some advantage on behalf of the suspect, we freely allowed learned counsel to do so by referring to statements of persons who were not called as witnesses. But, when such an advantage was sought, it was; necessary and only fair to examine the statements made by such persons, not called as witnesses, for the limited purpose of seeing whether such advantage was. in fact, available to a suspect as distinct from using such statement against a suspect. It is only in this context that the statement of the 1st and 4th suspects have been referred to above.

it was also urged that, the 2,000 was, any case, not sent to the first address given by the 8th suspect, and there was nothing to show that the 8th suspect did, in fact, receive 2,000 for the Rs. 80,000, he paid to the 4th suspect. The statement of the. 8th Suspect, however, shows quite clearly that he agreed.

SENTENCE

After a careful consideration of all the submissions made by counsel on both sides on the law applicable to the question of sentence we have reached the conclusion that the provisions of the Exchange Control (Amendment) Law, No. 39 of 1973 are applicable to this case and that the convicted accused are liable to the penalties prescribed thereunder.

Of all the duties of a Judge the one that, gives the greatest anxiety is the decision as to the appropriateness and the quantum of the sentence that would fit an offence of which an accused is found guilty. This is invariably an area where the discretion is left entirely to the Court with two widely different terminal points for the reason that the facts which constitute evidence of an offence can be so different in character meriting a punishment in proportion to its gravity or its extenuating circumstances. While in some cases the offence is established but only in a technical sense, at the other extreme can be an offence teeming with circumstances of aggravation, of the highest degree.

What presents the greatest difficulty causing long and anxious deliberation is to decide the correct measure of punishment to be administered for a particular offence Same of the factors which, contribute to an offence are visibly ponderable while others are imponderable. A Judge would always be naturally apprehensive of the over present factors of human fallibility and would there-Fore prefer to err or, the side of leniency particularly when there is the awareness that his decision has no right of appeal. It is with all these considerations in the forefront of our minds that we approach our task of deciding on the sentence in this case the type of which is. for many reasons, unprecedented in '-'ho annals of this country's legal history.

The following matters stand out prominently in considering the sentence in the case : -

1. This country has been in the throes of a foreign exchange crisis of unprecedented magnitude over the last several years and certainly during the material period concerned in these offences.

2. The. balance of payments position in our international trade, having regard to the essentials" of life which we have necessarily to import for the survival of the people and for which payment has to be made in foreign exchange has reached alarming proportions.

3. Prevention or obstruction by whatever manner of the legitimate avenues of foreign exchange into the country or the misuse by individuals of the meagre foreign exchange available to the country for private profit in these circumstances has to be viewed "s an anti-social activity of the utmost gravity.

4. The seriousness of the offences is aggravated when, such offences are perpetrated by persons with education and stature in the business world, enjoying financial effluence, and to whom this country has granted special privileges and facilities.

5. All the elements of planning and premeditation which ordinarily heighten the seriousness of an offence are present in the cases of the 1st, 2nd, 3rd and even the 4th accused, though we recognise, of course that, so far as the trial is concerned, the 4th accused pleaded guilty the some of the charges against him with some

qualifications at an early stage.

6. The excuse given by the first accused-which itself is not a cogent one-that his object was to advance his son's business in England and to market the goods produced by him in Ceylon. as this country was then known, does not bear examination as he did not stop at the amount required for the purpose of promoting his son's welfare but bought and made a business deal of foreign currency very much in excess of this amount.

7. So far as the 2nd and the 3rd accused are concerned they did not adopt the legitimate course of approaching the Government of this country or the Board acting on its behalf or their own Company in Yugoslavia even if in truth they anticipated financial difficulties in the performance of the r contract but followed the course of surreptitious and illegal dealing in foreign currency.

8 The sum involved in the offences is comparatively large and s few transactions of that magnitude can well cripple the economy of a developing country such as ours.

9. Offences such as these are difficult of detection and these transactions too may have passed un-noticed but for the fortuitous circumstance of its proximity to the armed insurrection of 1971. While we are fully mindful of the stations in life to which you belong and your respective ages and the mental stress which must necessarily result from a severe sentence, it i? also our unpleasant but bounden duty to impose on you a sentence that takes all 'he foregoing factors into account. Performance of painful duties is an essential part of the burdens of our office, and we cannot, however distasteful the task, avoid the performance of those onerous duties with a full appreciation of the importance of the deterrent aspect of punishment in this class of offence. We might also state that the maximum punishment laid down by the law for these offences is imprisonment of five years on each count which can be made to run consecutively up to a maximum of 10 years, together with a fine up to a maximum of three times the amount involved the offences and the forfeiture of the currency concerned in the offences. Bearing these aspects in mind and taking into account all the circumstances urged by counsel on your behalf, the fact that an amount of foreign exchange equal to the amount which formed the subject matter of the charges has been brought into the country and that you have been kept in detention and in remand for varying periods, we impose on you the following sentences which fall far below the maxima prescribed by law: -

[The Commission then imposed sentences on each suspect according to the counts on which he was found guilty.]

It is regretted that, owing to unavoidable circumstances, the current Volume LXXVII cannot be completed.

In Le Vincent and Benjamin - NLR - 433 of 78 [1976] LKSC 3; (1976) 78 NLR 433 (26 June 1976)

[*Criminal Justice Commission (Foreign Exchange Offences)***]**

1976 *Present* **: Samerawickrame, J. (Chairman), Udalagama, J., and Walpita, J.**

IN RE

(1) A. Y. VINCENT, (2) S. BENJAMIN, Suspects

Case No. 8/75

Criminal Justice Commissions-Sale of foreign currency-Contravention of S. 5 (1) (a) of the Exchange Control Act. S. 5(1) (a) of the Exchange Control Act reads-

"Except with the permission of the Bank no person, other than an authorized dealer shall in Ceylon buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, or exchange any foreign currency with, any person other than an authorized dealer".

Where the suspects reached an agreement for the sale at a particular rate of foreign currency and the exchange was delivered to a third party in pursuance of that agreement in London.

Held: That having regard to the ordinary connotation of the word " sell", a person who disposes of something in exchange for money sells that thing. This involves the exchange of merchandise or the subject of the sale for the payment of money. Where sterling is handed over and payment for it is received in London the sale is of course made out of Ceylon. Though the payment of sterling took place in London, yet the payment in rupees took place in Ceylon and this was the second suspect's object in entering into the transaction. What the provision in S. 5 (1) (a) strikes at is "selling" in Ceylon. It does not require the presence of the seller in Ceylon.

Therefore having regard to the facts and circumstances of the case the selling took place on the payment of rupees to the second suspect's representative in Ceylon. Hence the second suspect has contravened S.5 (1) (a).

Shiva Pasupati, Director of Public Prosecutions with E. D. Wikramanayake, Deputy Solicitor-General, Sunil de Silva, Senior State Counsel and Lal Wimalaratne, State Counsel for the State.

Later R. Abeysuriya, Deputy Director of Public Prosecutions with Lai Wimalaratne, State Counsel for the State.

R. Shanmugalingam with V. Dharmalingam for 1st Suspect.

ORDER OF THE COMMISSION

June 26, 1976-

CHARGES in these proceedings relate to five sums aggregating to 1637. 13.0 sent by the 2nd suspect who was in England to his brother-in-law, the 1st suspect, who was in Colombo through Jackson and Thaha. The first charge alleges that the two suspects,

Jackson and Thaha, entered into a transaction for the buying and selling of foreign currency to the value of 1637 which involved conversion of foreign currency into Ceylon currency and the conversion of Ceylon currency into foreign currency at unauthorised rates. The second charge alleges that the 2nd suspect not being an authorized dealer sold foreign currency to the value of 1637 to Thaha and Jackson. The third charge alleges that the first suspect abetted the 2nd suspect to commit the offence set out in the second charge, namely, that of selling foreign currency to Jackson and Thaha.

In a statement made by him to a British police officer, the 2nd suspect has set out five sums of sterling aggregating to 1637, 13.0 which he sent to the 1st suspect. The fact that such sums were sent by the 2nd suspect through Jackson and Thaha and the rupee equivalent paid was paid to the first suspect is borne out by entries in Thaha's diary marked P7, and in the statement made by Thaha,

the relevant part of which has been produced marked P 6. The 1st suspect in his statement to the police has admitted that he received monies from Thaha. The handing over of sterling by the 2nd suspect to Jackson and payment by Thaha in respect of such sterling to the 1st suspect are therefore not in dispute. There is also evidence that the conversion of the said sum of 1637 was done at unauthorised rates. In his statement, Thaha says that he paid Vincent, the first suspect, the Ceylon equivalent of the sterling at the prevailing blackmarket rates. The 2nd subject states that he handed over in May, 1971, the sum of 10 to Jackson and the 1st suspect admitted that in May, 1971, he received Rs. 300 from Thaha. Rs. 30 for a pound sterling is in excess of the authorised rate. In letter dated 9th October, 1971, marked P1F, the 2nd suspect writes to the 1st suspect that he has to pay 600 as freight charges which would amount to Rs. 20,000. This calculation of the rupee equivalent of 600 has been made at the blackmarket rate. He had also arranged for money to be sent from England from Police Sergeant Meerwald's mother in England to Police Sergeant Meerwald through the intervention of the 2nd suspect. Again in his statement to the British police officer, the 2nd suspect referring to some money sent at an earlier period states, "I must have sent about Rs. 20,000. This was about 700 in sterling". This too is a conversion at black market rates.

Learned counsel submitted, however, on behalf of the 1st suspect that he could not be considered to have been a party to a transaction within the meaning of Section 5(2) of the Exchange Control Act, as he. was unaware of the amount of sterling that had been paid by 2nd suspect to Jackson in England in respect of which he received rupees and was therefore not aware that conversion was being made at unauthorised rates. He also submitted that the 1st suspect had no part in fixing of the unauthorised rate and arranging the conversion of the money at that rate and that the only part played by him was the receipt of the money from Thaha and the handing over of the money to the 2nd suspect's mother and other persons to whom he was directed by the 2nd suspect to pay the money. We consider first the submission that the 1st suspect was not aware that conversion was made at an unauthorised rate. As we have earlier said, the evidence shows that the conversion was in fact made at an unauthorised rate. The 1st suspect was

aware that the 2nd suspect was paying pounds in England and that he was receiving in return for them rupees in Ceylon. It is common knowledge that when money is sent, not through the Bank but through other unauthorised sources, a rate higher than the legal or authorised rate is paid. In his statement the 1st suspect says that up to about 1966 the 2nd suspect had sent money through various persons resident in England whose relatives reside in Jaffna. From 1966 he sent money through Thaha. Between 1966 and 1970 he owns to having received about Rs. 10,000. The 2nd suspect estimates the sum at Rs. 20,000. The sums of money in respect of which the charges are made were sent between January, 1970 and 31st May, 1971. The 1st suspect is not an ignorant yokel but an experienced police officer to whom must be imputed a reasonable knowledge of how affairs in the world are conducted. These circumstances point strongly and almost decisively to the conclusion that the 1st suspect was aware that the conversion was made at unauthorised rates. No evidence to the contrary has been placed before us.

In the words of Abbott, J, in Rex v. Burdett (1820) 4 B & Aid 95 at 120: -

" No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

We, therefore, hold that the 1st suspect was aware that conversion of money was being effected at an unauthorised rate. It is true that the negotiation of the conversion and of the rate at which the money was to be converted was probably made between the 2nd suspect and Jackson but the conversion itself was actually effected only when the 1st suspect received the rupees from Thaha. The 1st suspect was the person authorised by the seller to receive the money on his behalf. The role played by him was therefore not insignificant but substantial. A transaction may take place over a period of time and comprise the taking of several steps or acts. All those who participate at the different stages of the transaction

knowing that it is one that involved the conversion of currency at an unauthorised rate contravene, in our opinion, the provision in Section 5 (2). We find accordingly that both suspects have contravened Section 5 (2).

The second charge alleges a contravention by the 2nd suspect of Section 5 (1) (a) of the Exchange Control Act. That provision reads:-

" 5. (1). Except with the permission of the bank-

(a) no person, other than an authorized dealer, shall in Ceylon buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, or exchange any foreign currency with, any person other than an authorised dealer, and "

In his statement the 2nd suspect has set out how he came to send the money through Thaha. He said, " Around about 1965 I met a man called Kingsley Jackson at the Ceylon Students Centre at Marble Arch. During the course of conversation, he told me that he was in a position to forward money to Ceylon. He said that it was legal and that he was an agent for Mr. A. M. Thaha of Colombo who was in the racing business. Jackson said he was also a bookmaker in London and that he had a telex link with Thaha in Ceylon. He used to forward the racing results from England by this method. He told me that if I ever wanted to send money to Ceylon he would do it for me and that Thaha would pay the equivalent amount in rupees to the intended recipients. "

He also said later, " On each occasion that I sent the money I went to my bank, Barclays, South Ealing Road and drew out money. I then went personally to Jackson's house and handed over the money to him with instructions as to whom the money was to be sent. Jackson never gave me a receipt. I always knew that the money had reached Vincent because he wrote from Ceylon to tell me. He also told me in one of the letters that I had better be careful as the way I was sending the money was illegal."

Mr. Shanmugalingam, who appeared for the suspects, submitted that, once agreement was reached for the sale at a particular rate and the exchange was delivered to Jackson in pursuance of the

agreement, the sale was complete. This took place in London. There was no contravention of Section 5(1) (a) unless the sale was made in Ceylon and therefore the charge was not made out. Learned State Counsel Mr. Wimalaratne referred us to section 59 of the Sale of Goods Ordinance which states, inter alia, that "goods" include all movables except moneys, and submitted that that statute had no application; and that as payment was made in Colombo, there was a sale in Colombo. We do not think that the word 'sell' in Section 5(1) (a) imports a sale under the Sale of Goods Ordinance or a sale in terms of any other law. The word must be given its ordinary meaning Having regard to the ordinary connotation of the word ' sell' a person who disposes of something in exchange for money sells that thing. This involves the exchange of merchandise or the subject of the sale for the payment of money. Where sterling is both handed over and payment for it is received in London the sale is of course made out of Ceylon. In this case not merely was the payment made in Ceylon, but payment in rupees in Ceylon was the 2nd suspect's object in entering into the transaction. In his statement he states that it was when ho wanted to send money to Ceylon that he contacted Jackson who had told him that he was in a position to forward money to Ceylon, Whether he received the money in Ceylon personally or through an agent he equally received the money. What the provision strikes at is " selling " in Ceylon. It does not require the presence of the seller in Ceylon.

Having regard to the facts and circumstances we hold that the selling took place on the payment of rupees to the 2nd suspect's representative in Ceylon and that the 2nd suspect has contravened Section 5(1) (a).

We reserve for consideration in an appropriate case in which it arises the question whether there can be a sale made partly in Ceylon and partly in London and whether such a transaction falls under both sub-sections (a) and (b) of Section 5(1), if the other ingredients of those provisions are present.

The 3rd charge alleged abetting by the 1st suspect of the commission of the offence of selling sterling in Ceylon by the 2nd suspect. The only point made was that if the 2nd suspect was not guilty of the charge of selling sterling the 1st suspect would not be

guilty of abetting it.

The only matter that remains for consideration is whether the 2nd respondent was resident in Ceylon at the relevant time within the meaning of Section 51(1) of the Exchange Control Act. During the period in which the contraventions of the Act were committed, that is, January 1970 to May 1971, the 2nd suspect's wife was resident in Ceylon. He had been sending money to her. He was buying a house in Ceylon. On a visit to Ceylon in December 1970 he had seen the house which suited him. Most of the monies which form the subject of the charges were sent to buy the house. He was also on the lookout for a garage which he could purchase. We hold, therefore, that for the purposes of the Exchange Control Act he was resident in. Ceylon.

Accordingly, we find the 1st suspect guilty of the offences set out in charges 1 and 3 and the 2nd suspect guilty of offences set out in charges 1 and 2.

Givendrasingha v. De Mel, R.F.S. - NLR - 422 of 49 [1948] LKSC 31; (1948) 49 NLR 422 (21 May 1948)

1948 *Present :* **Basnayake J.**

GIVENDRASINGHA, Petitioner, and **R. F. S. DE MEL,** Respondent.

In the Matter of an Application for a Writ of Quo WarRanto.

Writ of Quo Warranto-Municipal Council-Election of Mayor-Propose disqualified but Councilor de facto-Validity of election-No. objection taken- Acquiescence-Discretion of Court-Municipal Councils Ordinance, No. 29 of 1947-Section 14 (3).

The respondent was proposed for election as Mayor of Colombo by one G who at the time was disqualified from sitting or voting as a Councilor but did in fact sit and vote as such. On an application for a writ of Quo Warranto-

Held (i) that the provisions of section 14 (3) of the Municipal Councils Ordinance, No. 29 of 1947, were imperative and that the candidate had to be proposed and seconded ;

(ii) that the requirement is satisfied if the proposal is made by a Councilor de facto ;

(iii) that the writ being discretionary will not be granted where the petitioner had acquiesced in the election.

423

APPLICATION for a writ of quo warranto on the Mayor of the Colombo Municipal Council.

E. B. Wikramanayake, with *M. A. M. Hussain,* for the petitioner.- Section 14 (3) of the Municipal Councils Ordinance, No. 29 of 1947, provides that the name of any councillor may be proposed for

election as Mayor by any other councillor present. This section imposes the condition precedent to the election of Mayor that the proposer should be a councillor. The proposer in the present case was not a councillor at the time he proposed the respondent for election as Mayor. At that time he had already been appointed Parliamentary Secretary to the Ministry of Labour. By his becoming a Parliamentary Secretary he became a holder of a public office under the Crown and therefore, by that very fact and without any declaration of any court, he vacated his seat in the Municipal Council and became disqualified to sit, vote and transact business in the Municipal Council under section 11 of the Local Authorities Elections Ordinance, No. 53 of 1946.

By all the tests applicable the proposer, as Parliamentary Secretary, holds a public office under the Crown. He is appointed by the Governor-General, paid out of public funds, and performs public duties. See In re Mirams [1] and The King v. Whitaker [2].

The condition precedent to the election of Mayor that the proposer should be a councillor failed and therefore the respondent has not been duly elected. Failure to obey imperative requirement of law in case of elections would make an election invalid. See Kulatileke v. Raja-karuna et al. [3].

H. V. Perera, K.G., with Nihal Ounasekera and E. A. G. de, Silva, for the respondent.-In the first place it is submitted that the proposer is not disqualified to sit and vote in the Municipal Council by reason of being appointed Parliamentary Secretary. The public office contemplated by section 10 (1) of the Local Authorities Elections Ordinance is an office of a permanent nature and an office which exists independently of the person or persons fining the office. According to the scheme of the Orders in Council, 1946 and 1947, the office of Parliamentary Secretary does not seem to be either a permanent office or an office existing independently of the person who fills it. Under the Orders in Council it is not necessary to have any Parliamentary Secretaries at all nor is it necessary, once a Parliamentary Secretary vacates office, to appoint another as Parliamentary Secretary. If the proposer does not hold a public office the petitioner fails.

But assuming that the proposer was not duly qualified to sit and vote in the Municipal Council at the relevant time, it is submitted that the petition should fail for the following reasons :-

(1) Even though the proposer was not de jure councillor at the relevant time, he was a de facto councillor. He was sitting in the Council and was. taking an active part in the business of the Council. So that the well known rule that in. the case of an election by corporators, i.e., members of a corporation, the title of the electors cannot be called in question when such title could have been called in question before the election and when the corporators had been de facto corporators, would be applicable. See The King v. Hughes [1].

(2) An irregularity which does not affect the result does not avoid an election. The election of the Mayor was an act intra vires of the Muni cipal Council. The Council elects the Mayor by a majority of votes. The respondent has secured 19 votes which represents a clear majority in any contest. Under such circumstances writ would not lie. See Shortt on Mandamus pp. 149-151. See also In re Horbury Bridge, Coal, Iron, and Waggon Company [2] and Queen v. Ward [3].

(3) In this case the petitioner has no right to complain as he has acquiesced in the election from the beginning to the end.

E. B. Wikramanayake, in reply.-If the election is void the writ will lie. See King v. Speyer and Cassels [4]. The King v. Hughes (supra) does not apply as section 11 of Local Authorities Elections Ordinance makes the seat vacant by the very fact that the proposer was appointed Parliamentary Secretary. No declaration of court is necessary. Further, an express provision of law must be obeyed.

Cur. adv. vult.

May 21, 1948. **BasnayakE J.-**

This is an application by one Priyaseela Givendrasingha (hereinafter referred to as the petitioner) for a writ of quo warrnnto on one R. F. S. de Mel (hereinafter referred to as the respondent)

who was on January 12, 1948, elected Mayor of the Colombo Municipal Council. At the meeting summoned under section 15 (1) of the Municipal Councils Ordinance, No. 29 of 1947 (hereinafter referred to as the Municipal Councils Ordinance), the respondent's name was proposed for election as Mayor by one A. E. Goonesinha (hereinafter referred to as the proposer). The petitioner proposed the name of one Dr. Kumaran Ratnam. In the secret ballot which was held the respondent secured 19 votes while his rival, Dr. Ratnam, received 11 votes, and the respondent was declared elected by the presiding officer.

It is alleged that the respondent's election is bad inasmuch as the proposer was at that date not qualified to sit or vote as a member of the Municipal Council as he was the holder of a public office under the Crown in Ceylon. His right to sit or vote in the Municipal Council is the matter of a separate application for a mandate in the nature of a writ of quo ivarranto. That application was heard on the same day as this and I have in a separate judgment given my reasons for holding that the proposer is not qualified to sit or vote as a member of the Municipal Council.

Section 14 (3) of the Municipal Councils Ordinance provides that the name of any Councillor may with his consent be proposed and seconded for election as Mayor by any other Councillor present at such meeting and the Councilors present shall thereupon elect by secret ballot in each case and in accordance with the provisions of sub-section (4) a Mayor from among the Councilors proposed and seconded for election as Mayor.

It is submitted by the petitioner that the respondent has not been duly proposed by a Councillor, as the proposer was disqualified at the time from sitting or voting as a member of the Council. Learned counsel for the petitioner puts his case in this way. The statute requires that a candidate for the office of Mayor should be proposed by a councillor, i.e., a person who is qualified to sit and vote as a member. As the respondent's proposer was not so qualified, he has not been duly proposed, and the requirements of section 14 (3) have not been satisfied. The failure to comply with the requirements of the statute has made the respondent's election void and he is not entitled to exercise the duties of the office of Mayor. The case of

Kulatileke v. Eajakaruna et al.[1] has been cited in support of this proposition. That case deals with the election of a Village Committee. It was a requirement of section 22 2 of the Village Communities Ordinance, No. 9 of 1924, as amended by the Village Communities (Amendment) Ordinances, No. 12 of 1929 and No. 10 of 1933, that the Government Agent should " within three months before the date on which any term of office of a Committee shall expire" appoint a day for the election of a new Committee. The Government Agent failed to comply with this requirement of the statute and it was held that the election was not valid. Garvin J. observes at page 110 : " Where as in this instance the provisions of the Ordinance which regulated the holding of such elections have not been complied with it cannot be said that the election of the respondents to the offices they hold has been validly held ".

This part of learned counsel's argument depends on the question whether section 14 (3) is directory or imperative, apart from the question whether the word " Councillor " therein excludes a Councillor de facto. The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or

Foot Notes:

1(1927) 5 Times 109.

[2] Section 22 of the Village Communities Ordinance, No. 9 of 1924, as amended by the Village Communities (Amendment) Ordinances, No. 12 of 1929 and No. 10 of 1933 :

"22 (1) The Government Agent shall appoint a day, within three months before the date on which any term of office of a committee shall expire, for the holding of a meeting for the election of a committee for the three years next succeeding reckoned from the first day of July next following the day of such election

Provided that if, by reason of the inaccessibility of any subdivision, such meeting cannot conveniently be held, within the said period of three months, the Governor may, by notification in the Government Gazette, enlarge the said period, in the case of any such

subdivision, from three months to six months.

(2) In respect of an election occasioned by a committee going out of office otherwise than by efflux ion of time, the Government Agent shall within three months of the said event hold a meeting for the election of a committee for the unexposed portion of such former committee's term of office.

(3) Such election shall be held at a place within the subdivision and shall proceed in such manner, and be subject, so far as the same are applicable, touch conditions as are in this Ordinance provided in the case of meetings of inhabitants. Except that voting shall be by ballot if so provided for by rules made under section 29 of this Ordinance."fulfilled substantially (Woodward v. Sarsons [1] and De Villiers v. Louw [2]. The latter case lays down the principle that, the breach of the Act governing elections will not always be a ground for avoiding an election. The departure from the prescribed method of election must be so great that the tribunal must be satisfied as a matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws : it is necessary to be able to say that, either willfully or erroneously, the election was not carried out under those laws, but under some other method.

Curiewis J. A. states the proposition thus :

" From this we may infer that the principle which the Legislature intended the Court to act upon in considering the validity or invalidity of individual votes based on a breach of a provision of the Act or of the Regulations, where the Legislature has not erected what the effect of such breach shall be, is that such breach should not invalidate the vote unless the breach be of such a nature as to amount to a violation of a principle either in the Act or the Regulations on which an election shall take place or a vote be recorded. "

In the case of Reg. v. Ward [3] the same principle was thus stated :

" We think, therefore that seeing the mistake committed here has produced no result whatever, that the same persons would have

been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad, as I may say, on special demurrer, we ought in the exercise of our discretion, to refuse leave to disturb the peace of this district by filing this information. "

This principle has been followed by this Court in a number of cases [4]. It was in 1935 made a part of our statute law relating to elections to Municipal Councils [5], and has since 1946 been extended to all elections governed by the Local Authorities Elections Ordinance6.

It is also an accepted principle in election law that, although provisions as to procedure are regarded as important and their observance rigidly enforced, they are not generally regarded as imperative so as to invalidate an election once an election has been concluded and a candidate returned.

It is clear from the principles I have stated above that the disqualification of the proposer is not a ground sufficient in law for invalidating the respondent's election. The case of Kulatileke v. Bajakaruna (supra) has no application to the present question. It seems to proceed on the basis that no election as required by the Ordinance was at all held.

Foot Notes:

[1] (1874-7S) 10 L.R.G.P. 733 at 746.
[2] (1931) S. A. Law Reports A. D. 241.
[3] (1873) 42 L.J. Q.B. 126 at 131.
[4] Karunaratne v. Government Agent, Western Province, (1930) 32 N. L. R. 169 ; Jayascoria v. De Silva (1940) 41 N. L. R. 510 ; Ranesinghe v. Government Agent, Sabaragamuwa (1943) 44 N. L. R. 572.
[5] Section 52, Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935, now repealed.
[6] Section 69 of Ordinance No. 53 of 1946.

Learned counsel for the respondent contends that the public office contemplated in section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946 (hereinafter referred to as the Local

Authorities Elections Ordinance) was an office which existed independently of the person filling it. The office of Parliamentary Secretary, he submits, does not exist apart from the holder and was therefore not the kind of office contemplated in the section. Although section 47 of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, (hereinafter referred to as the Order in Council), provides that the number should not exceed the number of Ministers, the number of Parliamentary Secretaries is not fixed by law. Their number is entirely at the discretion of the Governor-General. The argument now submitted by learned counsel was advanced in regard to the office of director of a company in the case of the Great Western Ry. Co. v. Bater [1], wherein Howlatt J. states :

" It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned' to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain things, and the so-called office or employment was merely the aggregate of the activities of the particular man for the time being. I myself think that that contention is sound, but having regard to the state of the authorities T do not think I ought to give effect to that contention. My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office. If I thought I was at liberty to take that view I should decide this case in favour of the appellants,-but I do not think I ought to give effect to that view, because I think it is contrary to what was proceeded upon in substance in Attorney-General v. Lancashire and Yorkshire Ry. Co., 2 H. & C. 792 ; 10 L. T. 95, in 1864, and one ought not lightly to depart from a course of business proceeded upon in matters of this kind. "

This opinion of Rowlatt J. was considered in the case McMillan v. Guest 2. Lord Wright observes, in regard to this expression of

opinion as to the meaning of the word " office " which Lord Atkinson adopted when the case of Great Western Ry. Co. v. Bater went to the House of Lords (1922) 2 A. C. I: "I do not attempt what their Lordships did not attempt in Bater's case [1922J 2 A. C. 1, that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true" construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office. " In the present instance the express provisions of the Order in Council which I have discussed in my judgment on a similar application * in respect of the proposer leave no room for the view that the office of Parliamentary Secretary is not an office which conforms to the standard laid down by Lord Wright. The offices enumerated in section 10 (7) of the Local Authorities Elections Ordinance I think sufficiently indicate that the public office contemplated here is not the type of office learned counsel for the respondent has in mind. There is no limit to the number of Justices of the Peace and Unofficial Magistrates that may be appointed. Nor is it necessary that on the resignation or death of a particular Justice of the Peace or Unofficial Magistrate another should be appointed to take his place. The position is the same in regard to Commissioners for Oaths and Inquirers. These considerations indicate that the words " public office " in section 10 (1) (d) of the Local Authorities Elections Ordinance have a wide connotation.

Learned counsel further submits on the authority of The King v. Hughes1 that in an application for a quo warranto on the elected the petitioner is not entitled to put in issue the title of the Councilors. That is a case of an information in the nature of a quo warranto for usurping the office of Mayor of Monmouth. The plea was taken that he was duly elected according to the governing charter of the borough. In the replication it was urged that there were two candidates ; that 50 good votes, tendered for the losing' candidate, were improperly rejected ; and that 38 persons, who had been unduly elected, and admitted as burgesses, were received as voters for the defendant, and that a majority of the legal votes tendered was is favour of the other candidate. On demurrer, it was held that the replication was bad, in that it was not a direct denial of

the validity of the defendant's election, and also attempted to put in issue the title of the electors (corporators de facto), which cannot be done in an information against the elected.

The judgment of Holroyd J. at page 1100 states succinctly the principles on which that decision proceeds.

" It is a fundamental principle of pleading, that you must confess and avoid or traverse some one material fact, and the same rule applies to replications as to pleas. The question to be tried in this case is, whether the election of Hughes was good or not. The prosecutor could only put that in issue by a direct and not by an argumentative denial of the validity of the election. These replications state a n amber of facts, from which a conclusion of, ' not duly elected ', is to be drawn. Upon that short ground, it is clear that the replications are bad. As to the other points, it is obvious, that many nice questions may arise as to whether an officer is so de facto or not; sometimes that may be so combined with the question of title de jure that they cannot be served. But when a person is in possession of the office, his title cannot be thus questioned. Where there has been a judgment of ouster, he is no longer in possession of the office; that judgment, if without fraud, is conclusive according to the case of Rex v. Mayor of York (5 T. R. 66). But without further entering into that, I am of opinion, that the first is a decisive objection to the replications."

Learned counsel also submits that no objection was taken at the time of the election to the proposer and that if objection was taken at the time there were other Councilors who were qualified, ready, and willing to propose the respondent's name. An affidavit to this effect signed by sixteen Councillors has been tendered to this Court. He also argues that once the question has been put and voted on, the want of qualification in the proposer or seconded does not vitiate the election.

The case of In re Horbury Bridge Coal, Iron, and Waggon Company[1] is cited in support. Jessel M. P. observes at page 117 : " I think that the objection that the amendment was not seconded cannot prevail, it being admitted that it was put and voted upon." James L.J. observes at page 118 : "In my opinion if the chairman

put the question without its having been either proposed or seconded by anybody, that would be perfectly good." A similar view was expressed by Maartensz A.J. in the case of Jayawardene v. Ratemahatmaya of Katugampola2 where he says :

" Finally it was contended that the resolution should not have been put to the meeting as it was not seconded by anyone. Counsel was unable to refer me to any authority or rule in support of this contention. In the absence of any rule that motions should not be put to the meetings of the inhabitants of a subdivision unless they are seconded, I am not prepared to uphold the objection." These cases cannot be regarded as applying to an election under section 14 of the Municipal Councils Ordinance, sub-section (3) of which expressly provides that the election shall take place upon a name being proposed and seconded. It reads :

" (3) The name of any Councillor may with his consent be proposed and seconded for election as Mayor or Deputy Mayor by any other Councillor present at such meeting and the Councillors present shall thereupon elect, by secret ballot in each case and in accordance with the provisions of sub-section (4), a Mayor and a Deputy Mayor from among the Councillors proposed and seconded for election as Mayor and Deputy Mayor respectively."

The words " shall thereupon elect " and " from among the Councillor proposed and seconded for election as Mayor and Deputy Mayor respectively" leave no scope for the contention that the name of a candidate for either office need not be proposed and seconded as required by the Municipal Councils Ordinance. Sub-section (4), which provides for the situation " where more than two candidates are proposed and seconded for election as Mayor or Deputy Mayor ", puts the matter beyond doubt. The question then is : Are the requirements of sub-section (3) satisfied if the proposal is made by a Councillor de facto ?

No authority has been cited in support of the proposition that acts of a Councillor de facto are a nullity. Neither the Local Authorities

Elections Ordinance nor the Municipal Councils Ordinance declares them to be null and void. In the absence of such a provision it

cannot be assumed that the acts of a de facto Councillor are void. Section 12 of the Local Authorities Elections Ordinance contemplates the case of a Councillor exercising the functions of his office even after his seat has become vacant. If he knowingly acts as a member after his seat has become vacant, he becomes liable to the penalty prescribed in that section. But nothing is said therein of the effect of the disqualification on the acts of the Councillor. Although from very early times similar legislation in England made express provision to the effect that the acts and proceedings of a person in possession of a corporate office, and acting therein, shall, notwithstanding his disqualification, or want of qualification, be as valid and effectual as if he had been qualified, our Ordinances providing for the establishment of Municipal Councils have been silent on the point.

I was informed from the bar that the action contemplated in section 13 (3) of the Municipal Councils Ordinance, has not been taken in respect of the proposer, and that at the relevant date there was no other person claiming the right to exercise the duties of a Councillor in his place. The position seems to be that it was assumed that the proposer was not disqualified in law though the fact which ultimately resulted in his. disqualification may have been known to all his fellow Councillors. It appears from the affidavit of the respondent that the proposer took a very active part in the business of the Municipal Council, and it is asserted therein that no objection was at any time taken by the petitioner or any one else to his right to act as a Councillor.

Apart from principles of election law, the question is one that may properly be examined in the light of our law of corporations. Section 3 of the Civil Law Ordinance enacts that in all questions or issues which may arise or which may have to be decided in this Island with respect to the law of corporations the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance. There been no provision made in respect of acts of disqualified Councillors, the question may properly be decided according to the law of England. The words of section 3 of the Civil Law Ordinance " the law to be administered

shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England" are extensive enough to permit of the application of the provisions of English statute law. I am fortified in my view by the decision of the Privy Council in the case of Seng Djit Hin and Nagurdas Purshotumdas & Company [1 (1923) A. C. 444.] wherein Lord Dunedin in construing the corresponding provision of the Straits Settlements Ordinance says :

" The learned judges of the Court of Appeal based their judgments upon the view that the English statutes above cited were no part of the mercantile law which they thought was the law to be administered in terms of s. 5 of the Ordinance. Their Lordships are quite unable to agree with this view, which they think fails to appreciate that it is not the ' mercantile law ' but ' the 'law ' which is to be the same as the law which would be administered in England in the like case. The first thing to be settled is : Has a question or issue arisen in the Colony with respect to-here follow the enumerated departments of law and then come the general words ' and with respect to mercantile law generally ' ? Now the question here to be decided in the Colony is a question as to the law of sale. No one can doubt that the law of sale is part of the mercantile law. If any proof of the use of such words is required it would be found in the title of the Mercantile Law (Amendment) Act, in two statutes of 1856, both of which especially deal with sale. That being settled the section goes on to say not, as the learned judges seem to assume, that ' the mercantile law ' (though indeed if it were so it would be doubtful if the result would be different) but that ' the law ' to be administered shall be the same as would be administered in England in the like case at the corresponding period. Now if the same question as to sale had to be decided at the sometime in England it is clear beyond all doubt that the above cited statutes of 1915 and 1917 could be pleaded if the facts allowed of their application. That no other provision had been made by Colonial statute all the learned judges agreed, and the contrary has not been urged in this appeal."

The language of section 60 of the Local Government Act of 1933 which speaks of " any person elected to an office under the Local Government Act, 1933 " leaves me in doubt as to whether it is

permissible to resort to that section. I therefore refrain from expressing any definite opinion on this question as it is unnecessary to do so in this case, and prefer to rest my decision on the principles of law I have discussed earlier.

As the view I have formed is that the election of the respondent is not invalid, it is not necessary to discuss at length the submission made by learned counsel for the respondent that the petitioner, having acquiesced in the proceedings, cannot now be heard to say that the respondent's election is bad. It is sufficient to say that I agree with learned counsel. This court has always refused to exercise its discretion in favour of a person who having taken no objection at the proper time to the proceedings afterwards seeks to question them. In the case of Jayasooria v. De Silva 1 Soertsz J. dealing with a case almost similar observes :

" The result is that in effect and in substance, the majority of the members present were in favour of the respondent and although the letter of the law has not been fulfilled, its spirit has been satisfied. When in that state of things a voter such as the petitioner acting clearly on behalf of parties, who had acquiesced in the procedure adopted, comes forward insisting upon the letter of the law, straining at a gnat so to speak, a Court exercising a discretion vested in it, may well refuse to interfere in this extraordinary manner."

The position would be different in a case where the complaint is that a positive requirement of law regarding the qualification of the person elected has not been complied with (Mendias Appu v. Hendrick Singho1). Learned counsel for the respondent made a final submission that if I came to the conclusion that the respondent's election was bad there was no machinery whereby a second election could be held. It is true that the Ordinance does not make provision for such a situation, but the Court has power to direct by mandamus the holding of such an election. The law on this subject is discussed in paragraph 1281 of Volume 9 of Halsbury's Laws of England (Hailsham Edition). This Court has given such directions in the case of De Costa v. Assistant Government Agent, Colombo 2.

For the above reasons the rule against the respondent is discharged with taxed costs. I direct that the costs be taxed in the highest class according to the scale provided for appeals from the District Court in Part IV of the Second Schedule to the Civil Procedure Code.

Rule discharged.

Jayasena Perera v. Ratnadasa - SLR - 398, Vol 1 of 1981 [1981] LKSC 35; (1981) 1 Sri LR 398 (8 April 1981)

JAYASENA PERERA
v.
RATNADASA

SUPREME COURT
SAMARAKOON, C, J., SHARVANANDA, J.,
AND WANASUNDERA, J.
S. C. APPEAL NO. 66/80
C. A. APPEAL N0.209/79(F)
D. C: COLOMBO CASE NO. C/1 192/M
MARCH 9, 1981

Contract-Ownership of lorry - Contract of sale - Agreement to sell- Sale of Goods Ordinance s. 2018, 19, 50 and 57 - Difference between "sale" and "agreement to sell" - Motor Traffic Act s. 12, 13 and 14.

Property (in the lorry) passes on sale at the time when the parties intend it shall. The intention of the parties can be ascertained regard being paid to the terms of the contract, the conduct of the parties and the circumstances of -the case. When there was only a promise to sell, though possession was given to the prospective buyer on payment of a part of the agreed price with the reservation that the seller is absolved of all responsibility for damage caused by the lorry, the intention is that property in the lorry should not pass until the full purchase price was paid. There was here only an agreement to sell rather than a sale. The delivery of possession is not conclusive.

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a "sale", but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell", An "agreement to sell" becomes a sale when the time lapses, or conditions are

fulfilled subject to which the property in the goods is to be transferred. An "agreement to sell" is a contract pure and simple, whereas a "sale" is a contract plus a conveyance.

In a sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition and the goods remain the property of the seller till the contract is executed and he can dispose of them. On a sale, if the seller fails to deliver the goods, the buyer has not only a personal remedy against the seller, but also has the usual proprietary remedies in respect of the goods, such as an action for conversion. Where an agreement to sell is broken by the seller, the buyer has only a personal remedy against the seller. By an agreement to sell a mere jus in personam is created, by a sale a jus in rem is transferred.

If there was a sale of the lorry, the statutory provisions of the Motor Traffic Act s. 12,13 and 14 should have been complied with.

Case referred to

(1) Nilabdeen v. G. W. Silva (1976) 78 NLR 454

399

APPEAL from judgment of the Court of Appeal.

Walter Jayawardena Q.C. with Nimal Senanayake, Kithsiri Gunaratne and Miss S. Senaratne for the defendant-appellant.

R. Manikkavasager for the plaintiff-respondent

Cur. adv. vult.

April 8,1981

SHARVANANDA, J.

Claiming to be the owner. of motor lorry No. 22 Sri 3593, the plaintiff instituted this action against the defendant for a declaration that he is the owner of the motor lorry and for consequential reliefs.

The plaintiff pleaded that the defendant on 1.4.74 sold and delivered to him the motor lorry No. 22 Sri 3593 belonging to the defendant for a sum of Rs. 36,000/- and that he paid a sum of Rs.16,000/-- as part purchase price of the said lorry. He stated that the defendant represented to him that he had misplaced the registration book of the lorry and that he would hand over the registration book to him on or before 21.4.74. He further pleaded that it was agreed between them that on the defendant handing over the registration book and signing the necessary transfer forms, he, the plaintiff, would finance the lorry through a Finance Company and pay the balance sum of Rs. 20,000/- to the defendant. According to the plaintiff, after the purchase he had had the lorry repaired and had his name painted on the body of the lorry and had used the lorry for his business; though the defendant. had promised to hand over the registration book to him on 21.4.74, he had never handed over the book to him. On 18.8.75, he had, at the request of the defendant, brought the lorry to Colombo to get the registration book and to have the lorry valued, but when the lorry was so brought, the defendant had forcibly taken possession of the said lorry from him. The plaintiff's case is that title to the said lorry had passed to him; the contract of sale of the lorry has been completed and that he is presently the owner of the said lorry even though he had still not paid the balance Rs. 20,000/- of the purchase price.

The defendant denied that he had sold the lorry to the plaintiff on 1.4.74. According to him, on that date the parties had only entered into a written agreement to sell the lorry and he had accepted the sum 'of Rs. 16,000/- not as part of the purchase price, but on the terms set out in the said agreement and he handed over possession of the lorry in terms of the agreement to sell. The defendant admitted that he took possession of the lorry on 18.8.75 as the plaintiff had violated the terms of the agreement to sell.

After trial, the District Judge held that the plaintiff was the owner of the motor lorry. and awarded him damages in a sum of Rs. 1,500/-

per month from 18th August 1975 until possession of the said lorry was restored to him and that the balance sum of Rs. 20,000/- of the purchase price of the lorry could be deducted. from the damages payable to the plaintiff. This judgment was affirmed in appeal by the Court of Appeal.

The defendant has, with the leave of the Court of Appeal, preferred this appeal to this Court.

The plaintiff framed this action on the basis that the defendant had sold and delivered the lorry No. 22 Sri 3593 to him on 1.4.74 and that he had become thereby the owner of the said lorry.

The basic question in the case is: was there a sale of the lorry by the defendant to the plaintiff on 1.4.74, or was there merely an agreement by the defendant to sell and transfer the lorry to the plaintiff on his paying the balance purchase price ?

The determination of the above question depends on the proper construction of the written agreement entered into between the parties on 1.4.74. The agreement which is in Sinhala is in two parts, both on the same side of one sheet of paper, each part defining the obligations of the respective party. To ascertain the intention of the parties, both parts have to be read together, and the agreement as a whole must be looked at. The first part P1 signed by the defendant reads as follows:
(English Translation)

"I D. J. Perera of Talahena, Malabe, hereby solemnly state that I have received an advance of Rs. 16,000/- on 1.4.74 from R. A. . Ratnadasa of Malwalawatte, Veyangoda, on the promise of selling him the Lorry (Morris) No. 22 Sri 3593 owned by me, at the price of Rupees Thirty-six Thousand (Rs.36,000/-) and that the lorry is not assigned or mortgaged to an individual or an institution against a loan and I certify that I am agreeable to receive the balance Rupees Twenty Thousand (Rs. 20,000/-) due to me in respect of the lorry before 21.4.74 by financing the lorry."

The second part D2 signed by the plaintiff reads as follows (English Translation)

"I; R. A. Ratnadasa of Malwalawatte, Veyangoda, certify that I have taken delivery today, 1.4.74, of Morris lorry No. 22 Sri 3.593 of D. J. Perera, Talahena, Malabe, on payment of Rupees Sixteen Thousand (Rs.16,000/-) as an advance and have taken over all responsibilities for the lorry and I should state clearly that hereafter Mr. D. J. Perera will not be responsible for any damages caused to the lorry or for any damages caused by the lorry and 1 will take action to raise the balance payment of Rs. 20.000/- due to Mr. D. J. Perera before 21.4.74 from a Finance Company:"

The trial Judge has found that possession of the lorry was given to the plaintiff on 1.4.74 and that he had thereafter had the lorry repaired and had painted his name on the body of the lorry and has used the lorry for his business. He also found that the defendant had misrepresented to the plaintiff that he had misplaced the registration book, when, in fact; the registration book was at that time. in the custody of the Magistrate's Court of Maho in M.C. Maho Case No. 28999 and was released to, the defendant only on 23.10.74 and that the defendant was not in a position to produce the registration book before 21.4.74 as promised by him. He has also accepted the evidence that it was not possible to obtain finance on a motor vehicle without the registration book being handed over to the Finance Company. The record in M.C. Maho 28999 shows that on 16th March 1974 the lorry No.22 Sri 3593 was produced in the Magistrate's Court in connexion with a complaint of transporting timber without a permit and was released to the defendant on 20th March 1974 on his furnishing security in a sum of. Rs. 5,000/- and undertaking to produce the lorry when required. The significance of this undertaking and of the registration book being in the custody of Court till 23.10.74 has been overlooked by the trial Judge. Had the defendant transferred the lorry to the plaintiff on 1.4.74, he would have run the risk of being unable to keep his undertaking to Court.

The decisive question is: what was the effect of the agreement P1 and D2 ? If one looks at the Sale of Goods Ordinance (Cap. 84); the material section is section 18, which states the fundamental rule that the property passes at the time when the parties intended it shall.

Section 18 (1)

Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

In section 19 there are certain specific. rules which are to apply for ascertaining the. intention of parties. But section 19 does not apply to the facts of this case, because section 19 can only apply according to its terms, unless a different intention appears. That refers back to section 18, and, as I construe -the agreement between the parties, a different intention does appear. In my judgment, the terms of the contract, the conduct of the parties and the circumstances of the case, all. manifest an intention that the property in the lorry shall not pass until the purchase is completed by payment of the balance purchase price.

It is to be borne in mind: that at the time of the. transaction, the plaintiff was a stranger to the defendant and the latter had no security for the payment of the balance sum of Rs. 20,000/if he transferred the lorry to the plaintiff.

By P1 the defendant acknowledges receipt of the advance of Rs. 16,000/- and promises to sell to the plaintiff the lorry at the price of Rs. 36,000/-. The defendant has not stated therein that he has sold the lorry for Rs. 36,000/- to the plaintiff and received a part-payment of Rs.16,000/-. By this assurance set out in D2, the plaintiff absolves the defendant of all responsibility for any damage caused by the lorry of which he had taken delivery that day. This assurance on the part of the plaintiff is explicable only-on the basis that title' to the lorry continued to be in the defendant and the defendant was concerned with potential liability that stems from his ownership of the vehicle for any damage caused by the lorry.

In my view the parties have, in terms, expressed the intention that

the property in the lorry should not pass until the full purchase price was paid. The writing consisting of P1 and D2 records an agreement to sell, rather than a sale. It is a matter of significance that the plaintiff, in his list of documents annexed to his plaint under section 383' of the Administration of Justice Law, describes the above document as "agreement to self lorry bearing registered No. 22 Sri 3593" and not as "sale agreement"

Great reliance was placed by Counsel for the plaintiff respondent upon the fact that possession of the lorry was given by the defendant to the plaintiff on 1.4.74. Though delivery of possession is a relevant factor in determining the intention of parties, it is not conclusive. The totality of the circumstances in which delivery of the goods was made has to be considered.

According to the Sale of Goods Ordinance, unless the context or the subject-matter otherwise requires, "contract of sale" includes, agreements to sell as well as "sales" ,-"buyer" means a person who buys or agrees to buy goods; and "seller" means a person-who sells or agrees to, sell goods (section 59(1)): Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a "sale"; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell" (section 2(3)). An "agreement to sell" becomes a sale when the time lapses, or conditions are fulfilled subject to which the property in the goods is to be transferred (section 2(4)). An "agreement to sell" is a contract pure and simple; whereas a "sale" is a contract plus a conveyance. In a sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller; whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition and the goods remain the property of the seller till the contract is executed and he can dispose of them. On a sale, if the seller fails to deliver the goods, the buyer has not only a personal remedy against the seller (sections 50(1) and 51), but also has the usual proprietary remedies in respect of the goods, such as an action for conversion. Where an agreement to sell is broken by

the seller, the buyer has. only a personal remedy against the seller. (section 51). By an agreement to sell, a mere jus in personam is created; by a sale a jus in rem is transferred.

The Motor Traffic Act (Cap. 203) contains certain provisions spelling the obligations of parties when change of possession consequent on a change of ownership takes place. The relevant provisions of the Motor Traffic Act are sections 12(3); 13 and 14.

Section 12(3) provides that on a change of possession of a lorry upon a voluntary, transfer made by a registered owner, the registered owner shall within 14 days after such change of possession forward to the Registrar a statement in the prescribed form together with the revenue licence for the motor lorry and shall deliver to .the new owner the certificate of registration relating to the lorry or a duplicate thereof.

Section 13 provides that "every application for the registration of a new owner upon any change of possession of any motor vehicle shall be made in the prescribed form ..... .and shall be signed by the person claiming to be entitled to be regarded as the owner of the motor vehicle."

Section 14 enacts that "no person shall be registered as a new owner of a motor vehicle unless the application for registration is accompanied by a certificate of registration or a duplicate thereof relating to the motor vehicle".

If, as claimed by the plaintiff, there had been a transfer of the lorry to him on 1.4.74 and he had become the new owner of the . lorry from that date, he should have complied with the statutory provisions of the Motor Traffic Act referred to above. However, the plaintiff never made any application to have himself registered as new owner, and the defendant as registered owner of the lorry did not take any steps required by section 12(3). The defendant's conduct is consistent with the position that he did not transfer the lorry to the plaintiff.

These circumstances militate against the plaintiff's contention that he was the owner of the. motor vehicle.

It would appear that in April 1975 the defendant had gone along with the plaintiff to the Alliance Finance Co. Ltd. to assist the plaintiff to obtain finance on hire-purchase. The proposal form D2 has been signed by the plaintiff as 'proposer', and the defendant has signed as `guarantor'. The defendant has been described therein as "owner of lorry No. 22 Sri 3593". The above entry in the document confirms the contention of the defendant that both parties regarded 'the defendant as the owner of the said lorry, even as late as 22nd April 1975. when the plaintiff was seeking to obtain finance on-hire-purchase. The evidence discloses that, the proposal failed as the plaintiff was` unable to find another guarantor.

It is to be further noted that the plaintiff at no time sought, on the basis of his alleged ownership of the vehicle, to obtain the revenue licence or insurance policy in his name. He had not applied for the revenue licence for the year 1975, nor had he sought to take out insurance on the vehicle. Until it was taken possession of by the defendant on 18.8.75, the plaintiff had, in breach of the law, been running the vehicle without a revenue licence for the year 1975 and without a policy of insurance in relation to the use of the said vehicle. These omissions on the part of the plaintiff cannot be reconciled with his claim of ownership of the lorry in question.

Reliance as placed by the plaintiff on the case of Nilabdeen v. G. W. Silva(1) where on similar facts the claimant succeeded. The main question involved in that case .was, who was "the person entitled to possession" for the purpose of an order under section 102 of the Administration of Justice Law. The Court quite properly held that the person who had come into possession of the vehicle on a document similar to P1 was lawfully in possession of the vehicle. The observations in the judgment on the aspect of passing of property in terms of section 18 of the Sale of Goods Ordinance are obiter dicta, the correctness of which is open to question:

For the reasons set out above, I am of the view that the plaintiff had not established that he had become the owner of the vehicle in question by the transaction of 1.4.74 between him and the defendant. The basis of the plaintiff's claim of ownership of the vehicle fails and his action has to be dismissed.

I allow the appeal and set aside the judgment of the District Court and of the Court of Appeal and dismiss the plaintiff's action with, costs. The defendant-appellant will be entitled to costs in the District Court and to costs of appeal to the Court of Appeal and to this Court.

SAMARAKOON, C. J. - I agree

WANASUNDERA, J. - I agree

Appeal allowed.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. CHC (Appeal) No. 21/2006
S.C. (H.C.) L.A. No. 27/2006
H.C. Civil No. 75/99 (1)

People's Bank
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor,
S. de S. Jayasinghe Mawatha,
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., &
Saleem Marsoof, J.

COUNSEL : S. A. Parathalingam, P. C. with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant

Manohara de Silva, P.C., with Jasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent

ARGUED ON : 25.09.2008

WRITTEN SUBMISSIONS TENDERED ON :

Plaintiff-Petitioner-Appellant	:	10.12.2008
Defendant-Respondent-Respondent	:	31.03.2009

DECIDED ON : 25.06.2009

MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake, J., in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 14,907 metric tons of cement worth US $ 1,007,392.70 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in cement, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires,* which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires,* but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

"(1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction."

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President's Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People's Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted*."(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, "corporations" and "banks and banking" both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People's Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank,* had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." It is noteworthy that G.P.S de Silva, J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.*, [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some

comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653, initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires*, our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the

purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires.* Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are

inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that '' if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.,* ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.,* [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry J, in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent

applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X18) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
>
> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
>
> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of cement which had been imported from China. It is also evident from the said loan application and the receipt dated 9th November 1995 (X19) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had

been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 (1894) -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake, J., in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. CHC (Appeal) No. 22/2006
S.C. (H.C.) L.A. No. 28/2006
H.C. Civil No. 77/99 (1)

People's Bank
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor,
S. de S. Jayasinghe Mawatha,
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., &
Saleem Marsoof, J.

COUNSEL : S. A. Parathalingam, P. C. with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant

Manohara de Silva, P.C., with Jasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent

ARGUED ON : 25.09.2008

WRITTEN SUBMISSIONS TENDERED ON :

Plaintiff-Petitioner-Appellant	:	10.12.2008
Defendant-Respondent-Respondent	:	31.03.2009

DECIDED ON : 25.06.2009

MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake J in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 10,186.10 metric tons of sugar worth US $ 4,104,489 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in sugar, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires,* which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires,* but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

" (1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction."

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President's Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People's Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted*."(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, "corporations" and "banks and banking" both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People's Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank*, had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England." It is noteworthy that G.P.S de Silva J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.*, [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some

comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653, initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires*, our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the

purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires.* Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are

inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that '' if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.,* ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.*, [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry, J., in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent

applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X16) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
>
> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
>
> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of sugar which had been imported from Brazil. It is also evident from the said loan application and the receipt dated 9th November 1995 (X17) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had

been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 [1894] -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake J in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT