NICHOLAS

v.

MACAN MARKAR LIMITED

COURT OF APPEAL.
SENEVIRATNE, J. (PRESIDENT) AND SIVA SELLIAH, J.
C. A. APPLICATION No. 97/80.
SEPTEMBER 6, 10, 11, 12 AND 13, 1984.

Writ of Certiorari – Dispute re identity of tenant – Certificate of tenancy, s.35 (2) of the Rent Act – Entry of tenant's name in Rent Register of Rent Board, s.37 of Rent Act – appeal to Rent Board of Review – Appeal on question of law – What is a question of law ?

One Nicholas, the Mills Manager of George Steuart & Co. Ltd., occupied the Flat in suit and claimed to be its tenant. He told his landlord that George Steuarts will pay the rent. The landlord (O.L.M. Macan Markar Ltd.) insisted the tenant was George Steuart & Co., Ltd., but that firm denied this and stated that the rent was being paid by it on behalf of the tenant.

The tenant then applied to the Rent Board for a certificate of tenancy. The Rent Board held that George Steuart & Co., Ltd. had obtained the flat for Nicholas and that he was the tenant and issued a certificate of tenancy under s. 35 (2) of the Rent Act to

Nicholas. His name was also directed to be entered in the Rent Register of the Rent Board under s. 37 of the Rent Act as tenant. But on appeal to the Board of Review this decision of the Rent Board was set aside. The petitioner then applied to the Court of Appeal to have the decision of the Board of Review quashed by certiorari.

Held –

The duty of the Board of Review is to consider the appeal to it "upon matters of law". The finding of the Rent Board that Nicholas was the tenant is an inference of fact. It cannot be said the Rent Board had acted without any evidence or that its finding was inconsistent with the evidence and contradictory of it. The Rent Board of Review is not entitled to substitute its own view of the facts for the view of the facts of the Rent Board.

Cases referred to :

(1) *Sangaralingam v. Colombo Municipal Commissioner (1976) 78 NLR 501, 502.*
(2) *A. T. S. Paul v. Wijerama and Others (1972) 75 NLR 361.*
(3) *R. v. Medical Appeal Tribunal ex parte Gilmore – Gilmore's Application [1957] 1 All ER 796.*
(4) *Anisminic Ltd. v. Foreign Compensation Commission and Another [1969] all ER 208*
(5) *Edwards v. Bairstow [1956] AC 14, [1955] 3 All ER 48.*
(6) *Mahawithana v. Commissioner of Inland Revenue [1962] 64 NLR 217.*
(7) *Global Plant Ltd. v. Secretary of State for Health and Social Security [1971] 3 All ER 385*
(8) *Caledonian (Ceylon) Tea & Rubber Estates Ltd. v. Hillman (1977) 79 NLR (Vol. 1) 421, 425.*
(9) *Bank of Ceylon v. Collettes Ltd. [1984] 2 SLR 253.*
(10) *Kalawana Election Petition – Rajapakse v. Gunasekera [1984] 2 SLR 1.*
(11) *Ceylon Transport Board v. W. A. D. Gunasinghe [1968] 72 NLR 76.*
(12) *Inland Revenue v. Fraser [1942] 24 Tax Cases 498.*

APPLICATION for Writ of Certiorari.

H. L. de Silva, P.C. with *Bimal Rajapakse* for petitioner.
S. J. Kadiragamar, Q.C. with *D. S. Wijesinghe* and *K. Thevarajah* for respondent.

Cur. adv. vult.

December 13, 1984.

SENEVIRATNE, J. (President)

The petitioner has filed this application on 5.2.80 for a Mandate in the nature of a Writ of Certiorari to quash an order of the Rent Board of Review made on 20.11.79. The petitioner C. Nicholas was the occupier (for the present I will describe him as such) of Flat No. 47, Galle Face Court 2, of which the 1st respondent was the owner and admittedly the landlord as defined in section 48 of the Rent Act No. 7 of 1972. C. Nicholas, who was an employee (Mills Manager) of

George Steuart & Co., Ltd., occupied this flat on 15.1.74. The 1st respondent refused to accept Nicholas as the tenant of Flat No. 47, and insisted that it recognised George Steuart & Co., Ltd. as its tenant. George Steuart & Co., Ltd. denied that it was the 1st respondent's tenant of this Flat. As a result of this dispute Nicholas made an application to the Rent Board on 29.6.76 for a certificate of tenancy. This Application marked "A" was considered both by the Rent Board and the Board of Review.

Inquiry was held by the Rent Board on 4.6.77. At the inquiry held by the Rent Board, Nicholas the petitioner gave evidence, and another witness Mrs. Mutucumaraswamy gave evidence and corroborated Nicholas on one matter pertaining to his evidence. That is, that she knew Nicholas, and as he was searching for a flat, she took Nicholas to the office of the 1st respondent company and introduced Nicholas to the company. According to Nicholas Mrs. Mutucumaraswamy introduced him to Mackie Marcan Markar, a member of his company. Nicholas produced several documents A1 – A24 to support this case.

Nicholas's case was that the flat was obtained by him for his residence, and that he informed the 1st respondent that his employer George Steuart & Co., Ltd., will pay the rent. This was said to guarantee the payment of rent which was a substantial amount. The advance payment of three months rent for this flat, a sum of Rs. 2,058.75 cents has been paid by Nicholas by his cheque dated 28.12.73 (A4 (a)/B4(a)). But the 1st respondent has issued the receipt for this cheque in the name of his employer George Steuart & Co., Ltd. and refused to issue a receipt in the name of Nicholas even though George Steuart & Co. Ltd. requested the 1st respondent to issue a receipt in his name. It was proved that the rent for this flat was deducted from the pay of Nicholas by his employer firm, and was paid to the 1st respondent company by a cheque issued by George Steuart & Co., Ltd. (A6/B6). Even though George Steuart & Co., Ltd. requested the 1st respondent to recognise Nicholas as the tenant of the flat on whose behalf this firm was paying the rent, the 1st respondent refused to do so, stating that in books of the 1st respondent George Steuart & Co., Ltd. has been entered as the tenant of Flat No. 47 (A10) at the inquiry before the Rent Board no evidence was led on behalf of the 1st respondent company. The 1st respondent company did not even produce the alleged books in which George Steuart & Co., Ltd. was said to be entered as the tenant of

Flat No. 47. The Rent Board having considered the evidence of Nicholas, Mrs. Mutucumaraswamy and the documents A1 – A24 by its order dated 15.7.77 came to the finding–

(1) that the correspondence showed that George Steuart & Co., Ltd. had, obtained the Flat for Nicholas ; as such Nicholas was the tenant of this Flat ;

(2) that the main defence of the respondent-company was that George Steuart & Co., Ltd. was entered in their books as the tenant, but that the books were not produced ;

The Rent Board placed great stress on the fact that the said books were not produced and even observed that it can be, that the alleged books have been made to suit their purpose, and also that as these alleged Rent Registers were not produced the Rent Board cannot come to a decision whether there were such books. As such the Rent Board made two orders on 15.7.77 –

(1) to issue a certificate of tenancy in respect of premises No. 47 to Nicholas – Section 35 (2) of the Rent Act ;

(2) to enter the name of Nicholas as tenant in the Rent Register ;

This second order seems to be an order made under section 37 (6) of the Rent Act, under which section the Rent Board "can enter a person's name in the Rent Register as tenant". That is the Rent Register maintained by the Board under Section 37 (1) of the Rent Act.

The respondent to the application made by Nicholas, that is O. L. M. Macan Markar Limited, which is also the 1st respondent to this application, appealed to the Rent Board of Review on 28.10.77 against the order of the Rent Board ; Section 40 (4) of the Rent Act sets down that–

"Any person who is aggrieved by any order made by any Rent Board. . . . . ; may appeal against the order to the Board of Review.

Provided, however, no appeal shall lie except upon a matter of law."

Section 40 (11) of the Rent Act sets down that –

"the decision of the Board of Review shall be final and conclusive."

This Section 40 (11) resulted in lengthy submissions made to this court, to which reference will be made later. The Rent Board of Review held that "the question that arises is whether the existence of a lawful contract of tenancy between the applicant respondent (Nicholas) and the respondent-appellant (O.L.M. Macan Markar Ltd.) can be inferred on the documentary evidence which has been tendered in evidence", and came to the conclusion "that the documents further clearly indicate that the respondent-appellant was at no time willing to give the tenancy to the applicant-respondent or to accept him as the tenant of the said premises. One could not therefore, say that there was an agreement arrived at between the respondent – appellant and the applicant-respondent, which would be necessary to create a lawful contract of tenancy". As such the Board of Review set aside the decision of the Rent Board and dismissed the application of Nicholas for a certificate of tenancy. The present application is for a Writ of Certiorari to quash that order of the Rent Board of Review made on 20.11.79 – marked (D).

The petitioner has moved in this writ to quash the decision of the Board of Review on the grounds set out in paragraph 10 of the petition, which are as follows :–

(*a*) the decision of the said Board of Review bears on record an error of law, in that the Board of Review has made order without jurisdiction and/or in excess of the jurisdiction and in contravention of the statutory provisions in the law ;

(*b*) the decision of the Rent Board in ordering the name of the petitioner be entered in the Rent Register as a tenant is final and conclusive, and is not reviewable by the Board of Review. (This ground is a reference to section 37 (6) of the Rent Act).

Learned President's counsel for the petitioner stressed that as regards the appeal in respect of the order made under Section 35(2) of the Rent Act, to issue a certificate of tenancy, the respondent was entitled only to appeal "upon matters of law". The Board of Review has really made its decision on the facts and taken a different view of the facts and the documents produced, and set aside the order of the Rent Board. Learned counsel for the petitioner submitted that the Board of Review did not have before it even a mixed question of fact and law, but had only a decision of the Rent Board on questions of fact which the Board of Review had no jurisdiction to set aside. Learned counsel submitted that the Board of Review could have set aside the

findings on questions of fact if there was no evidence before the Rent Board to come to the conclusion it had arrived at, or on the evidence available before the Rent Board, no reasonable person can come to that conclusion. Learned counsel for the petitioner amplified these submissions by making these particular points, that for the Board of Review to set aside the conclusion of the Rent Board the primary facts as found by the Board must be such that all such facts point out to a contrary conclusion and as such the decision of the Rent Board was perverse, that there must be a manifest error of facts on the face of the record, or that there must be a manifest error of law on the face of the record. Such kind of errors were not present in the order of the Rent Board. Learned Counsel further submitted that, even if two views were possible on the evidence, oral and documentary before the Board, and the Board has taken a view that cannot be said to be unreasonable, the Board of Review had no power to set aside such a view. The submission was that the Board of Review had no power or jurisdiction to substitute its own view of the facts, in place of another reasonable possible conclusion on the facts made by the Rent Board.

The objections filed by the respondent to this application were that –

(*a*) the Rent Board of Review had jurisdiction to hear the said appeal and to make the order marked (D) ;

(*b*) the Board of Review addressed its mind to all vital questions of fact and law including documentary and oral evidence in making the order (D) ;

(*c*) the petition of the petitioner does not disclose any fundamental lack of jurisdiction or any error on the face of the record, or any failure to follow the principles of natural justice to justify the interference by this court by way of Writ of Certiorari, in particular where the statutory provision makes the decision of the Board of Review final and conclusive ;

In the course of the submissions of the learned Queen's counsel for the 1st respondent, the learned President's counsel for the petitioner interposed, and stated as follows :

"I do not say that the Board of Review had no jurisdiction to entertain the appeal. I say that it had no jurisdiction to make the order it made. The Rent Board on material before it held that there was a contract of tenancy. The Board of Review on the same

material held that there was no contract of tenancy. A Tribunal as this Board may err within the jurisdiction. Then a Writ of Certiorari does not lie – *Sangaralingam v. Colombo Municipal Commissioner* (1)".

I will deal first with a submission made by the learned Queen's counsel for the 1st respondent, which submission goes to the root of this application, and in respect of which if I hold with the 1st respondent, this application for the writ must fail in limine. The learned Queen's counsel for the 1st respondent made this submission on Section 40 (11) of the Rent Act, which states that –

"The decision of the Board of Review on any appeal . . . . . shall be final and conclusive".

Learned Queen's counsel submitted that in view of Section 40(11), there can be no appeal from an order of the Board of Review nor can there be an application for any writ in respect of an order of the Board of Review. Learned Queen's counsel contention was that the phrase "final and conclusive" should be interpreted as follows :–

No more proceedings after the order of the Board of Review as between the parties and the Board of Review. Learned Queen's counsel contended that the phrase "final and conclusive" in section 40(11) of the Rent Act covered the phrase or was equivalent to the phrase – "shall not be called in question in any court or any other expression of similar import" in Section 22 of the Interpretation (Amendment) Act No. 18 of 1972. Placing this interpretation on the words "final and conclusive" in Section 40(11) of the Rent Act, the learned Queen's counsel submitted that the present application cannot stand, as the exceptions set out in the proviso to the Section 22 of the said Act are not present in respect of this Application.

Learned President's counsel for the petitioner submitted that the words in Section 22 of the Interpretation (Amendment) Act No. 18 of 1972 relied on by the learned Queen's counsel cannot be considered as embracing the phrase "final and conclusive". The phrase "final and conclusive" – was one of the several ouster clauses introduced into modern legislation, and this phrase merely meant – not subject to appeal, not appealable, and this phrase did not exclude the judicial review by way of writs, and was in no way equivalent to the ouster clauses, such as "shall not be called in question in any court or any other expression of similar import" Learned Queen's counsel for the

1st respondent submitted that the word "final" meant "no more proceedings" and "conclusive" meant – was ultimately or finally binding on the parties.

I will now consider the law pertaining to this submission. Maxwell – Interpretation of Statutes (12th Ed.) at page 153 – Chapter 7 – Presumptions Against Ousting Established Jurisdiction – states as follows :

> "A strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of a superior court".

H.W.R. Wade – Administrative Law (5th Ed.) at page 598 – "finality clauses"–

> "Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review . . . . . statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing, but justice is better'".

Lord Atkin cited in Judicial Review of Administrative Action – De. Smith (4th Ed.) at page 366 –

> "It is clear, furthermore, that a finality clause does not affect their power to award a declaration that a decision or order made by a statutory body is invalid. Even such words as 'final and conclusive' are in effect to abridge or attenuate judicial review. The only practicable effects of a finality clause appear to be to take away a right of appeal where one already exists".

Even our Interpretation (Amendment) Act No. 18 of 1972 has not completely taken away the powers of judicial review of the Court of Appeal, but has only restricted the grounds on which judicial review can be done.

A case decided before the Interpretation (Amendment) Act No. 18 of 1972 – (date of operation 11.5.72) held that the mere use of the word "final" did not exclude the powers of judicial review of the Supreme Court – the case of *A. T. S. Paul, Petitioner v. E. M.*

Wijerama and 9 Others, Respondents – Application for Mandate in the nature of Writs of Prohibition, Certiorari and Mandamus (2) – This case decided as follows :–

- "Section 18 of the Medical Ordinance which provides that a decision of the Medical Council under the Medical Ordinance shall be subject to appeal to the Minister whose decision shall be final is not a bar to certiorari proceedings to quash a purported decision of the Medical Council made without due and proper inquiry and in breach of principles of natural justice".

In *Gilmore's Application* (3) the Court of Appeal considered the effect of the provision of Section 36(3) of the National Insurance (Industrial Injuries) Act, 1946, which provided that any decision of a Medical Appeal Tribunal on a question arising under the Act "shall be final" *Gilmore's Case (supra),* was an application for a Writ of Certiorari to quash the decision of such a tribunal. In that application for a Writ of Certiorari, it was granted by all parties that the award of compensation by the Medical Appeal Tribunal had on the face of it an error of law, and the question that arose was whether Section 36(3) was a bar to the Court to grant a Writ of Certiorari to quash that award. The Court of Appeal held that the writ should be granted as there was an error of law on the face of it.

Denning, L.J. in his judgment laid down as follows :

"I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means 'without appeal'. It does not mean "without recourse to certiorari". It makes the decision final on fact, but not on the law. Notwithstanding that the decision is by a statute made "final" certiorari can still issue for excess of jurisdiction or for error of law on the face of the record" (Page 801C).

- The case of *Anisminic Ltd. v. Foreign Compensation Commission and Another* (4) was an appeal to the House of Lords, in which it was considered whether a more strongly worded ouster clause would oust the judicial jurisdiction of a superior court. Section 4(4) of the Foreign Compensation Commission Act 1950 laid down that :

"the determination of the Foreign Compensation Commission could not be called into question in any Court of law". The House of Lords by majority decision held that when the Commission rejected

the appellant's claim for compensation they took into consideration a factor which they had no right to take into account and accordingly their decision was a nullity. (Page 217C).

This case distinguished an error going to the jurisdiction of the tribunal, from an error within the jurisdiction of the tribunal. It held that a review of a decision for an error of law apparent on the face of the record and within jurisdiction can be excluded by a no certiorari provision, but an error going to jurisdiction rendered the tribunal's decision a nullity notwithstanding a no certiorari clause. The appeal was allowed and the decision of the tribunal set aside. In view of this exposition of the law in the authoritative texts and the decisions, both of the Supreme Court and the Courts of England, I hold that the words "final and conclusive" in Section 40(11) of the Rent Act, does not bar the present application for a Writ of Certiorari to quash the order of the Rent Board of Review.

In this Application the function of this Court is to make a judicial review of the order made by the Rent Board of Review. There is a fine distinction between, "appeal" and "judicial review". When hearing an appeal the court is concerned with the merits of the decision in appeal. The question before court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review the question before the court is whether the decision or order is lawful, that is, according to law. As such in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong, or whether the order of the Rent Board of Review is right or wrong. The function of this court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside.

I will now consider the principles that will apply in making a judicial review of the order made by the Rent Board of Review. These principles which are set down in several cases in England have been put in an explicit nutshell in Halsbury : Laws of England (4th Ed.) Vol. I – Paras 35 – 70 – Administrative Action Control Over Inferior Tribunals – Para 63, Errors of Law, Fact states :

"The range of meanings that can reasonably be ascribed to a statutory expression is a question of law. – (*Edwards v. Bairstow*) (5) but whether facts as found fall within the ambit of that expression may be held to be a question of fact – *(Edwards v.*

Bairstow) (supra) on which the decision of the competent authority will not be disturbed unless it is perverse (or is such that no reasonable authority properly instructed in the law could have arrived at) or is erroneous because a wrong legal approach has been adopted. In some cases the Courts have adopted a slightly wider jurisdiction to hold inferences or conclusions of fact to be erroneous in law if they are clearly unreasonable".

The universally accepted authoritative decision on this aspect of the law is the decision in the case of – *Edwards (Inspector of Taxes) v. Bairstow and Another (supra)*. The respondents were assessed for payment of income tax in respect of a transaction which was "an adventure in the nature of trade". The Commissioners of Income Tax to whom the appeal was made discharged the assessment on the ground that the transaction was not an "adventure in the nature of trade". The Crown stated a case for the opinion of the High Court on the ground that the decision of the Commissioners was erroneous in point of law. From the High Court, this case stated went to the Court of Appeal. Both the High Court and the Court of Appeal held that the case stated for determination was purely a question of fact, and it was not open to either court to interfere with it. From the Court of Appeal this matter went up in appeal to the House of Lords. The House of Lords allowed the appeal, and laid down on what principles it would allow an appeal even where the case stated showed questions of fact and showed no misconception of law.

Viscount Simonds at page 53 (E) said :

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think. . . . . that the commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained".

The oft quoted dictum on this aspect of the law is set out in the judgment of Lord Radcliffe, Page 57 (H) :

> "When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to

the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination . . . . . I do not think that it matters much whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination".

Lord Radcliffe finally summed up as follows :

"The court is not a second opinion, where there is reasonable ground for the first . . . . . Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado". (page 59 E).

The House of Lords applying these principles held "that the finding that the transaction was not 'an adventure in the nature of trade' must be set aside because the Commission had acted either without evidence or on a view of the facts that could not reasonably be entertained.", and "the assesment must be confirmed". The principles laid down in the *Bairstow case (supra)* have been followed in the case of *D. S. Mahawithana, Appellant v. Commissioner of Inland Revenue* (6). This case considered the taxability of profits from an adventure in the nature of a trade in the instance of a case stated to the Supreme Court under Section 78 of the Income Tax Ordinance. The principles laid down in *Edwards v. Bairstow (supra)* have been followed in another leading case *Global Plant Ltd. v. Secretary of State for Health and Social Security* (7).

As the Rent Act gives the right of appeal to the Board of Review, "upon matters of law", a like section which is relevant to the interpretation of this section is Section 31 (D) (2) of the Industrial Disputes Act, which is as follows :

"The appeal to the Supreme Court from an order of the Labour Tribunal can be made only on questions of law".

In view of Section 44 of the Rent Act and Section 31 (D) (2) of the Industrial Disputes Act, the question arises, what are questions of law, and what are questions of fact ? The cases referred to above, the

Bairstow Case, an appeal *the Global Plant Ltd. Case,* an appeal, Re *Gilmore's Application (supra)*–application for writ of certiorari *Anisminic Case, (supra)* an appeal, dealt with the issue what are questions of law and questions of fact.

A long line of cases of the Supreme Court dealing with Section 31 (D) (2) of the Industrial Disputes Act have laid down, what are questions of fact and questions of law Such a leading case is – *Caledonian (Ceylon) Tea & Rubber Estates Ltd. v. J. E. Hillman* (8), the recent cases are– *Bank of Ceylon v. Collettes Ltd.* (9) *Kalawana Election Petition – (Rajapakse v. Gunasekara)* (10). A close study of the principles set down in these English and Ceylon cases referred to above show that the principles adopted by a superior court in considering a writ against an order of an inferior tribunal or court or an appeal on questions of law from an inferior court or tribunal are almost the same or have come closer. However De Smith Judicial Review of Administrative Action (4th Ed.) – Page 129 – states as follows :

"The criteria adopted by the courts for distinguishing between questions of law and questions of fact have not been uniform. . . . . Moreover, criteria applied in one branch of the law may be largely irrelevant in another : it may be unwise to rely upon the fine distinctions drawn in income tax appeals or workmen's compensation appeals as authoritative guidance in appeals from other inferior tribunals or applications for certiorari to quash determinations of the national insurance commissioners or medical appeal tribunals for error of law on the face of the record. (In respect of this opinion) the relevant note 9 to this passage states as follows – Nevertheless, the important decision of the House of Lords in *Edwards v. Bairstow (supra)* a tax case in which the concept of a question of law was given a broad interpretation, has been influential in other contexts. It has been applied, e.g. in *R. v. Medical Appeal Tribunal, ex p. Gilmore (supra)* a case of certiorari to quash for patent error of law, and in rating. . . . . and arbitration cases, and in a case involving the scope of the obligation to pay social security contributions *(Global Plant Ltd. v. Secretary of State for Social Services (supra)* and in a case concerning the registration of common land. . . . . and in unfair dismissal cases). Subject to these qualifications, it is possible to make some meaningful

generalisations about the tests applied by the courts to discriminate between law and fact in administrative law. But we must first enter another linguistic maze".

The above observations were made as a prelude to consider the order made by the Rent Board of Review in respect of which this application has been made. The duty of the Board of Review was to consider the appeal "upon matters of law". (Either party has omitted to brief this court with the petition of appeal filed in the Rent Board of Review). The Rent Board of Review has gone on the premise that the Rent Board had before it a question of law to be decided, that is, whether there was a lawful contract of tenancy between the petitioner and the 1st respondent. The Board of Review had also held that this was dependant on the construction of documents as to whether from the documents produced a lawful contract can be inferred. It has posed to itself the question – can a lawful contract be inferred from the documents ? The documents filed in this case are common business letters. The documents are not that kind of documents containing a contract clothed in legal terms and phraseology. The Board of Review has stated as follows : "The Rent Board has arrived at their decision that the documents tendered indicate that the appellant-respondent is the tenant of the premises in question. An analysis of the documents, however, indicates that such an inference is not justified on a plain reading of the documents". Thus, it is clear that the Rent Board has come to one conclusion "on a plain reading of the documents", and the Board of Review has come to a different conclusion, "on a plain reading of the documents". The Rent Board has taken into account that the petitioner Nicholas gave evidence. The Rent Board has taken into account that the sheet anchor of the 1st respondent's case was that their books or registers had George Steuart & Co. as tenant, but that those books were not produced. The Board of Review has not taken into account that Nicholas gave evidence. It has glossed over the non production of the documents by the 1st respondent. Further, the Rent Board of Review has held that George Steuart & Co. has acquiesced in the 1st respondent deeming it to be the tenant. This is an erroneous conclusion on the facts and documents as George Steuart & Co. has consistently denied that it was the tenant of the 1st respondent. The Rent Board of Review has referred to and based its decision on three cases – firstly, the case of *Ceylon Transport Board, Appellant v. W. A. D. Gunasinghe,* (11). In this case Weeramantry, J. held that where a Labour Tribunal makes a

finding of fact for which there is no evidence – a finding which is both inconsistent with the evidence and contradictory of it – the restriction of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the order based on such a finding if the Labour Tribunal is under a duty to act judicially. The Rent Board of Review though it relied on this case has not shown that there was no evidence for the finding of the Rent Board and that the finding was inconsistent with the evidence and contradictory of it. In my view what the Rent Board of Review has done is that it has on the same material substituted the finding of facts and the opinion of the Rent Board, with its own finding of facts and its opinion. What the Rent Board of Review has done is to come to a different conclusion on the facts of the case, from that of the Rent Board, and to give that finding a legal decoration or embellishment by reference to three cases – *Gunasinghe's Case, the Bairstow Case* and an Income Tax case – *Inland Revenue v. Fraser* (12). The main question before the Rent Board was to determine, who was the tenant of Flat No. 47, whether it was the petitioner or George Steuart & Co. It was established and admitted that the 1st respondent was the landlord. It was established that the party who in fact paid rent was George Steuart & Co. and that it did so after deducting the same from the salary of the petitioner. It was proved that the advance rent was paid by a cheque issued by the petitioner. The occupier of the premises was Nicholas, and under the Rent Act, the tenant has to be an occupying tenant. In these circumstances the Rent Board had to make a decision as to who was the tenant. The term "tenant" is a legal term, but a commonly understood and a known term. The order of the Rent Board shows that it correctly directed itself as to who is a "tenant". Its finding from the facts that Nicholas was the tenant, is an inference of fact as set out in the judgment of Viscount Simonds in the *Bairstow Case (supra)* "What are the characteristics of an adventure in the nature of trade is a question of law, but, assuming that the tribunal is correctly directed on the law, its inference from the facts whether a particular transaction is, or is not, an adventure in the nature of trade, is an infererice of fact". Viscount Simonds – further states (Para. F) – "It is a question of law what is murder ; a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction". I hold that the decision of the Board of Review is not in accordance with the principles of the cases cited by it in the course of the order, nor in accordance with the principles set out

in the cases referred to in the course of the judgment. The Rent Board properly directing itself as to who is a "tenant" has drawn an inference of fact that the petitioner was the tenant of the said premises. It cannot at all be said that there was no evidence to come to this finding, or that this finding is inconsistent with or contradictory of the evidence before the Rent Board. As stated earlier, what the Rent Board of Review has done is to substitute its own view of facts in place of the findings of the Rent Board. I hold that the Rent Board of Review has acted without jurisdiction or in excess of jurisdiction in holding that the petitioner was not the tenant of the 1st respondent in respect of Flat No. 47 Galle Face Court 2.

Due to these reasons, I grant a Mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution, and quash the findings of the Rent Board of Review.

Before I part with this judgment, I must make the observation that the Rent Board has made two orders. The first order was to grant a certificate of tenancy to the petitioner under section 35 (2). The Rent Board has made the second order to enter the name of the petitioner in the Rent Register. This order has to be interpreted, as an order to enter the petitioner's name in the Rent Register under Section 37 (1) of the Rent Act, and has to be considered as an order made under Section 37 (6). The said section states that – "the decision of the Board shall be final and conclusive". If so, the order under Section 37 (6) will not be an appealable order under Section 40 (4) of the Rent Act. The application made by the petitioner to the Rent Board for a certificate of tenancy marked "A" does not include an application to enter his name in the Rent Register under Section 37 (6) of the Rent Act. The Rent Board has made that second order in consequence of the order made under Section 35 (2) of the Act. I will not express an opinion as counsel were not heard on this aspect of the matter referred to by me.

Application for Writ of Certiorari is allowed with costs fixed at Rs. 1,500.

SIVA SELLIAH, J. – I agree.

Application for Writ of Certiorari allowed.