

MOHAMED SALEH BAWAZIR

v.

**"M. V. AYESHA" EX M. V. PARDESI LYING IN PORT OF COLOMBO
AND
SEYED MANSOOR UL ISLAM, ACTING MASTER**

COURT OF APPEAL.

SENEVIRATNE, J. (PRESIDENT), T. D. G. DE ALWIS, J. AND JAMEEL, J.
APPEAL No. C.A. 32/85 WITH APPLICATION IN REVISION No. C.A. 1563/84.
H.C. COLOMBO No. 8/1984.

AUGUST 1, 2, 5 AND 6, 1985.

SEPTEMBER 16, 1985.

OCTOBER 21, 22, 24 AND 29, 1985.

Admiralty law—Admiralty jurisdiction of the High Court—Admiralty Jurisdiction Act, No. 40 of 1983—Judicature Act, No. 2 of 1978—Repeal of Ch. 1 of Administration of Justice Law No. 44 of 1973—S. 3(2) of Administration of Justice Law No. 44 of 1973—Admiralty Rules of August 1883—Action in rem—Interpretation Ordinance s. 15—Status of master to intervene—Can Judge write second order reconsidering the first?

The question being whether owing to the repeal of Chapter 1 of the Administration of Justice Law No. 44 of 1973, by s. 62 of the Judicature Act, No. 2 of 1978 and Articles 169 (6) and 168 of the Constitution there are current Admiralty Rules for the exercise of the Admiralty jurisdiction conferred on the High Court, by s. 13 (1) of the Judicature Act read with s. 2 (1) of the Admiralty Jurisdiction Act, No. 40 of 1983.

Held—

Section 3 (2) of the Administration of Justice Law No. 44 of 1973 still exists. Articles 169 (6) and 168 (1) read with Article 170 of the Constitution kept alive all the Orders-in-Council, Rules and Regulations which would apply to the High Court of the Republic of Sri Lanka. The Vice Admiralty Rules of 1883 were thus kept alive by section 3 (2) of the Administration of Justice Law read with Articles 169 (6) and 168 (1) of the Constitution.

The High Court in the exercise of its Admiralty Jurisdiction has jurisdiction to issue writs of summons and warrants of arrest in an action in rem. Although section 62 of the Judicature Act which repealed Ch. 1 of the Administration of Justice Law No. 44 of 1973 came into operation on 2nd July 1979 after the Constitution was promulgated on 7th September 1978 yet it cannot be said that the Judicature Act can in any manner amend or alter the supreme law of the land, the Constitution.

Even if the Admiralty Rules ceased to exist the High Court can resort to s. 39 to deal with *casus omissus*.

The Admiralty rules made by the Order-in-Council of 23rd August 1863 under s. 14 of the Vice Admiralty Courts Act of 1863 and proclaimed in Ceylon by Gazette No. 4559 of 7.12.1883 with effect from 1.1.1884 are not substantive law but rules in the class of subordinate or delegated legislation.

The High Court Judge having made the order of 2.11.1984 had no jurisdiction to consider the same matter over again and make a second order. The second order could be ignored.

Cases referred to:

- (1) *Government of United States of America v. The Ship 'Valiant Enterprise'* (1961) 63 NLR 340, 341.
- (2) *Abeysekera v. Jayatilleke* (1931) 33 NLR 291.

APPEAL and application in revision from order of High Court of Colombo.

Dr. H. W. Jayewardene, Q.C. with Mark Fernando, P.C., K. Kanag Iswaran, D. Phillips and Miss Keenawinna for the appellant in C. A. 32/85.

Dr. H. W. Jayewardene, Q.C. with Mark Fernando, P.C., K. Kanag Iswaran, D. Phillips and Miss Keenawinna for the appellant-petitioner in C. A. 1563/84.

H. L. de Silva, P.C. as Amicus Curiae with S. C. Crossette Tambiah and Mahinda Ranatunga for respondent in C. A. 32/85 & 1563/84.

Cur. adv. vult.

December 11, 1985.

SENEVIRATNE, J. (President, C/A)

This appeal and the Application in Revision relate to very important points of law as regards the Admiralty Jurisdiction of the High Court, and the Admiralty Law now prevailing in Sri Lanka. These questions of law which have come up for the ruling of this Court have arisen after the passing of the Judicature Act, No. 2 of 1978, which by Gazette No. 40/16 of 15.6.79 came into operation from 2.7.1979, and the Admiralty Jurisdiction Act, No. 40 of 1983, which came into operation from 1.11.83. The main question for determination is, whether, due to the repeal of Chapter 1 of the Administration of Justice Law No. 44 of 1973 by section 62 of the Judicature Act, No. 2 of 1978, there are current Admiralty Rules for the exercise of the Admiralty jurisdiction conferred on the High Court, Colombo by section 13(1) of the Judicature Act read with section 2(1) of the Admiralty Jurisdiction Act, No. 40 of 1983.

The facts of this case are as follows:

The plaintiff-appellant/plaintiff-petitioner Mohamed Saleh Bawazir carrying on business under the name style and firm of "M. S. Bawazir and Company, Kenya" filed this action in rem in the High Court of Colombo on 23.2.84 against "M. V. Ayesha," ex M. V. Pardesi lying in the Port of Colombo. The action was for breach of contract relating to carriage of goods, a load of cement in the ship M. V. Ayesha ex Pardesi. Indorsement of the plaintiff's claim was for a sum of US \$ 685,000. The plaint was supported on 23.2.84, and the Court issued writ of summons and warrant of arrest on M. V. Ayesha, which papers were served on Seyed Mansoor UL Islam, the Acting Master of the Ship, who is now the Intervenant-petitioner-respondent to this appeal, and the application in revision. UI Islam filed an appearance, and later filed objections dated 08.01.85 to the claim of the plaintiff-appellant/plaintiff-petitioner.

The objections were set out as follows:—

Paragraph 9—

"Although section 13(1) of the Judicature Act, No. 2 of 1978 has vested Admiralty Jurisdiction in this Court, and although the scope and content of that jurisdiction has been provided by the Admiralty Jurisdiction Act, No. 40 of 1983, no rules regulating the practice and procedure for the invocation and exercise of that jurisdiction have been made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka."

Paragraph 10—

"In the circumstances set out in the foregoing paragraph this Court has no power or authority to entertain this action or any action therein to grant any relief therein to the plaintiff."

The Attorneys for the plaintiff filed motion that the application of UI Islam to appear be refused, and that the action be set down for ex parte trial. This motion of the plaintiff came up for inquiry on 28.09.1984, and learned counsel on behalf of the plaintiff submitted that UI Islam being the Master of the Ship had no status to appear on behalf of the owners in the manner he sought to appear and in the circumstances of this action, and moved that his appearance be struck off. After hearing parties, the learned judge ruled that UI Islam the Intervenant-Petitioner has raised a question of jurisdiction in the petition filed, and that UI Islam will be heard for the present only on

these objections. Learned President's Counsel for the Intervient-Petitioner objected to the jurisdiction of the Court, on the ground that though the Court was vested with mere jurisdiction in Admiralty matters, the Court had no rules in force to exercise that jurisdiction; as such proceedings in this case, that is the entertainment of the action filed, the issue of writ of summons, and warrant of arrest, already done, were void, and ought to be set aside. After hearing parties at length, the learned judge by his Order dated 02.11.1984 held as follows:

"I hold section 62 (Judicature Act) effectively repealed Chapter 1 of the Administration of Justice Law. That is to say, it repealed the nature, scope and extent of Admiralty jurisdiction which was the current law on the subject in England and it also repealed the Rules of Procedure used for the expression of that jurisdiction and published in the Subsidiary Legislation, Volume 1, 1956", and the learned judge finally summed as follows: ".....In the result, since the coming into operation of the Judicature Act, no Rules have in fact been available to the Court to exercise its jurisdiction. All these provisions in Act, No. 40 of 1983 which assume the existing means for the implementation of the powers of the Court enacted by section 2 therein are inoperable until the means for the exercise are available The Court could not, therefore, lawfully have issued the writ of summons in rem and warrant of arrest against the aforesaid Vessel on 23.02.1984.....In the exercise of the inherent jurisdiction of this Court, I set aside the order for the issue of Writ of summons in rem and warrant of arrest made by this Court on the 23rd of February, 1984, on M. V. Ayesha ex Ni. V. Pardesi lying in the Port of Colombo, and I release the Vessel from further arrest".

The present appeal and the application in revision is in respect of this order.

After the above order was delivered in the case, the learned judge made another Order on 26.11.1984—in that Order he has stated that his attention was drawn later to section 15 of the Interpretation Ordinance, to the Articles 168(1), (2) and 169(6) of the Constitution, and section 3(2) of the Administration of Justice Law. As such he thought it fit to hear the Attorney General as *amicus curiae* on these matters and had also noticed both parties. At the hearing on 09.11.1984 Mr. Azeez, the Deputy Solicitor General has appeared as *amicus curiae*. Learned President's Counsel has represented the Intervient-Petitioner UI Islam and learned counsel for the plaintiff has

stated that he was not participating in the proceedings. The learned Judge has proceeded to hear parties and delivered his order on 26.11.1984, in which he has stated that he was confirming the conclusions made in his judgment delivered on 02.11.1984. These later proceedings are completely irregular, in that the High Court Judge had acted with proper jurisdiction when he made his order on 02.11.1984, and had no jurisdiction to consider the same matter over again and make two orders. Both parties very correctly have ignored the second order made by the learned judge.

At the hearing of this appeal H. L. de Silva, President's Counsel marked his appearance for the Intervenant-petitioner/respondent UI Islam. The learned counsel for the plaintiff-appellant/petitioner Dr. H. W. Jayewardene, Q.C., objected to an appearance for UI Islam on the ground that UI Islam had no status in this action, as this Court by its earlier order dated 15.03.1985, had ruled that UI Islam as the Master of the ship had no status in this action, which is an action in rem for breach of contract. After hearing submissions at length this Court adopted the dicta of H. N. G. Fernando, J. (later C.J.) in the case of the *Government of United States of America v. The Ship "Valiant Enterprise"* (1) and ruled as follows:—

"While reiterating that the respondent had neither the status nor right to be a party and to be heard in the main action filed by the plaintiff (claim based on breach of contract) we decide to hear the counsel for the respondent only on the question of jurisdiction as amicus curiae (paragraphs 9 & 10 of the petitions) to assist Court in determining this important and substantial question of law".

For the determination of this matter, the main consideration has to be given to the relevant provisions in the following statutes—

- (1) Administration of Justice Law No. 44 of 1973 (date of operation 01.01.1974).
- (2) Judicature Act No. 2 of 1978 (date of operation 02.07.1979).
- (3) Admiralty Jurisdiction Act No. 40 of 1983, (date of operation 01.11.1983) and
- (4) The Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

To place these statutes in their proper perspective the origin and history of the Admiralty Law, and the rules have to be considered. With the capitulation of the Dutch Possessions in Ceylon to the British

Troops, on 15th February 1796, trade and commerce with England began. Commerce received an impetus because the English were mainly interested in trade and commerce. Due to this commercial-development, the Admiralty Law of England had to be introduced into this country. In England up to about 1840 the Admiralty Law was based on the common law. The need to have the Admiralty Law implemented in Ceylon through local institutions was first recognised in the Charter of Justice of 1833 for Ceylon which was the result of the Colebrooke-Cameron Report. Under this Charter a new system of Judicature—Supreme Court, District Court—was established in Ceylon but it did not establish a Court of Admiralty in Ceylon. Article 4 of this Charter provided for the issue of Commissions by the Lord High Admiral or the Commissioners of England to the Supreme Court of Ceylon for exercise of Admiralty jurisdiction. After that the Parliament of England passed the—“Vice Admiralty Courts Act 1863” “to facilitate the appointment of Vice Admirals and of Officers in Vice Admiralty Courts in Her Majesty’s Possessions abroad and to extend the jurisdiction”. In this Act the schedule “A” —“List of Existing Vice Admiralty Courts to which this Act applies”—included Ceylon. At this time there was no Court of Admiralty established in Ceylon; the Admiralty jurisdiction of the Supreme Court was exercised on Commissions issued by the Admiralty authorities in England. Section 14 of the above Act laid down “that Her Majesty may by Order in Council establish rules touching the practice to be observed in the Vice Admiralty Courts, and that such rules when laid before the Parliament shall apply to all British Possessions in which Admiralty Courts were established”. This 1863 Act was amended by the Vice Admiralty Courts (Amendment Act) 1867. Though section 14 of the Vice Admiralty Courts Act of 1863 provided for the making of the rules by Her Majesty in Council, rules were only made by an Order in Council of 22nd August 1883, which rules became operative in Ceylon by Gazette No. 4559 of 07.12.1883 with effect from 1st January, 1884. The Vice Admiralty Rules of 1883 are found now in the Ceylon Legislative Enactments (Subsidiary Legislation) Vol. 1 Cap. 9. The next piece of legislation pertaining to this law in England was the —Colonial Courts Admiralty Act of 1890. This Act for the first time provided for the establishment of Colonial Courts of Admiralty in the Colonies. This Act of 1890 stabilised the English Law of Admiralty in Ceylon, and this law prevailed till the Administration of Justice Act of 1956 and the Supreme Court Act of 1956 of England.

As regards the development of the Admiralty Law in Ceylon, I have already referred to the Charter of Justice of 1833, which provided for the exercise of Admiralty Jurisdiction in Ceylon on commissions issued by the Admiralty Court and the Vice Admiralty Courts of England. This provision made in the Charter of Justice 1833 was further consolidated by the Courts Ordinance of 1889 section 3 proviso. The first law that was passed in Ceylon pertaining to Admiralty Law was the Ceylon Courts of Admiralty Ordinance (1891) C.L.E. (Volume. 1) Chapter 9, which Ordinance became operative from 2nd March, 1892. This Ordinance was a landmark in the Admiralty Law of Ceylon. Section 2 of this Ordinance declared—"The Supreme Court of the Island of Ceylon shall be a Colonial Court of Admiralty, and such Court shall have jurisdiction, subject to the provisions and limitations contained in the said Colonial Courts of Admiralty Act, 1890". Section 4 of this Act gave a limited Admiralty Jurisdiction to the District Courts. Two sections in this Ordinance are relevant to the matter that has to be determined in this appeal. Section 22(1) provided that "rules of Court for regulating the procedure and practice in the Colonial Court of Admiralty, and the District Courts *in the exercise of the jurisdiction* (emphasis is mine) may be made by the judges of the Supreme Court". The most relevant section is section 23 which provided that the rules of the Vice Admiralty Courts Act, should have effect in the Colonial Court of Admiralty and in the District Court until rules are made under this Ordinance. The Supreme Court did not make rules as enabled by section 22(1), and thus the rules made under the Vice Admiralty Act, that is Order-in-Council of 22nd August, 1883, which became operative from 1st January 1884, became and continued to be the rules in respect of the Colonial Court of Admiralty created by section 2 of this Ordinance. These rules continued to be in force, when the Administration of Justice Law No. 44 of 1973 prevailed and till the operation of the Judicature Act No. 2 of 1978, on 2nd July, 1979. The main question now before this Court is whether section 62 of this Judicature Act had the effect of repealing these Admiralty Rules now included in Subsidiary Legislation, Volume 1, Cap. 9. The Ceylon Courts of Admiralty Ordinance was in force till it was repealed by section 3(1)(a) of the Administration of Justice Law, which became operative from 1.1.74. Section 3(2) of the Justice Law kept alive the Admiralty rules of 1883. Section 3(2) of the Justice Law is as follows:-

"Unless and until rules are made under this Law, all rules in force immediately before the appointed date relating to the *exercise of*

jurisdiction of Courts established under the several enactments repealed by this law shall mutatis mutandis apply to the exercise of jurisdiction by the Court vested with such jurisdiction under this Law." (underlined for emphasis).

Chapter 1 of the Justice Law had the title "The Judicature" and consisted of sections 5 to 54. Section 15(1) of the Justice Law provided for the making of rules by the Supreme Court regarding the form and manner of proceeding to be observed in all subordinate Courts. No rules were made by the Supreme Court under section 15(1) of the Justice Law of 1973, for the exercise of the Admiralty Jurisdiction by the High Court, and section 3(2) of the Justice Law kept alive the Admiralty Rules made by the Order in Council of 1883. Section 62 of the Judicature Act No. 2 of 1978 repealed Chapter 1 of the Administration of Justice Law No. 44 of 1973. It is this repealing section that has created the legal problem to be determined in this case.

Learned Queen's Counsel for the plaintiff-appellant/petitioner submitted that it should be noted that the saving clause, section 3(2) of the Justice Law is not included in Chapter 1 of the Justice Law. The learned President's Counsel for the Interventient-petitioner-respondent submitted that Chapter 1 of the Justice Law included the rule making section 15(1), which had to be related to the saving clause Section 3(2), and in this manner the reference to Chapter 1 only in the said section 62 caught up section 3(2) of the Justice Law. The next important piece of legislation pertaining to the Admiralty Law is the Admiralty Jurisdiction Act, No. 40 of 1983 operative from 1.11.83. This Act provided in section 11(3) that rules may be made under Article 136 of the Constitution regulating the practice and procedure of the High Court in the exercise of jurisdiction under this Act. (underlined for emphasis). Article 136 is the provision in the Constitution empowering the Supreme Court to make rules. Section 7(1) of this Act provided for the High Court— "to issue in accordance with the rules, made under this Act, a warrant for the arrest and detention of that vessel or property". Rules as contemplated by the rule-making section referred to above have not been made by the Supreme Court. It was submitted by the learned President's Counsel for the Interventient-petitioner-respondent that though section 13(1) of the Judicature Act, No. 2 of 1978 read with section 2 (1) of the Admiralty Jurisdiction Act No. 40 of 1983 conferred a bare Admiralty Jurisdiction in the High Court, the High Court cannot exercise such jurisdiction as there were no rules to do so, in view of the appeal of

Chapter 1 Justice Law made by section 62 of the Judicature Act. The contention of the learned Queen's Counsel for the plaintiff-appellant-petitioner was that section 62, Judicature Act No. 2 of 1979 has not repealed, the rules kept alive by section 3(2) of the Justice Law. Though Chapter 1 of the Justice Law has been repealed section 3(2) of the Justice Law has not been repealed up to today. It was submitted that in any event the rules were kept alive by section 3(2) Justice Law read with Article 169(6) of the Constitution (1978).

Before making a determination on the above submissions, I will proceed to consider the Admiralty Jurisdiction of the High Court as it is constituted today, in view of a submission made by the learned President's Counsel for the Intervenant-petitioner-respondent. The Administration of Justice Law No. 44 of 1973 operative from 1.1.74 changed the structure of the Judicature of Sri Lanka, and for the first time in the history of the Judicature created the High Court by section 5(1). The Justice Law vested in the High Court both civil and criminal jurisdiction—sections 19 and 20 of the Justice Law. Section 23(1) laid down that "the Minister by Order published in the Gazette may appoint any High Court to have Admiralty Jurisdiction and assign to such High Court any Zone or Zones for Admiralty purposes". By Gazette No. 92/6 of 1.1.74, the Minister of Justice appointed the High Court of Colombo as the High Court for Admiralty purposes. In this manner the High Court of Colombo was conferred with Admiralty Jurisdiction. Section 6(1) of the Justice Law provided "that Sri Lanka shall be divided into the Zones set out in the schedule". The schedule to the Justice Law created 16 Judicial Zones. Section 16 of the Justice Law provided that the Minister shall establish within each Zone "one Court to be called the High Court" to be held by "one Judge who shall be called the High Court Judge". Thus, the Justice Law established 16 High Courts, of which one was that of the Colombo Zone on which the Admiralty Jurisdiction was conferred. Article 105(1)(c) of the Constitution (1978), created, "The High Court of the Republic of Sri Lanka," that is one High Court, and further Article 169(6) laid down that "unless the Parliament otherwise provides—

- (6) " The several High Courts established under Chapter 1 of the Administration of Justice Law No. 44 of 1973, shall be deemed for all purposes to constitute a single Court created and established by Parliament called the High Court of the Republic of Sri Lanka having jurisdiction throughout the Republic of Sri Lanka to be exercised in the several zones. "

Thus the Constitution and establishment of the High Court under the 1978 Constitution was different from that of the High Courts under the Justice Law of 1973. This change in the Constitution and structure of the High Court under the (1978) Constitution was also made use of by the learned President's Counsel for the Interventient-petitioner-respondent, to support his contention that the rules even if kept alive by section 3(2) of the Justice Law, had no application to the High Court as presently constituted under the Constitution (1978). He submitted that the rules even if kept alive under section 3(2) of the Justice Law did not confer on the re-structured High Court of Sri Lanka in terms of Article 169(6) of the Constitution, Jurisdiction envisaged under the Justice Law, and that the contend of Jurisdiction High Court under the (1978) Constitution, and thus the Admiralty Jurisdiction conferred by the Judicature Act, No. 2 of 1978 on the High Court was different from that of the Admiralty Jurisdiction of the High Court under the Justice Law. I am not at all attracted by these submission because, whether the High Court under the Justice Law consisted of different High Courts established in 16 different Zones or whether as under the (1978) Constitution— "the several High Courts established under Chapter 1 of the Administration of Justice Law No. 44 of 1973, shall be deemed for all purposes to constitute a single Courtcalled the High Court of the Republic of Sri Lanka having jurisdiction throughout the Republic of Sri Lanka to be exercised in different Zones", the essence of the jurisdiction of the High Court under both these laws is the same. Can it be said that the jurisdiction of the High Court as the highest Original Court or criminal jurisdiction has been made different, or has been affected by the change effected by section 169(6) of the Constitution of (1978). Section 3(2) of the Justice Law which kept alive the rules made by several repealed enactments, has not in any manner been affected by change in the Constitution of the High Court effected by Article 169(6) of the (1978) Constitution.

The main thrust of the attack on the jurisdiction of the High Court, to have dealt with this action in rem, was on the basis that section 62 of the Judicature Act, which repealed Chapter 1 of the Administration of Justice Law (i.e. sections 5(1) to section 54) repealed section 15(1) of the Justice Law which contained the rule making power granted to Supreme Court, and when this section got repealed, by implication section 3(2) of the Justice Law, which kept alive the rules made under the Ceylon Courts of Admiralty Ordinance got repealed. It must be

emphasised that section 3(2) is included in sections 1 to 4 of the Justice Law, which are not sections in chapter 1 of the Justice Law, which got repealed by the Judicature Act and a significance must be attached to this. The contention was that the repeal of section 15(1) of the Justice Law in effect repealed section 3(2) of the Administration of Justice Law, and with it the rules kept alive by this section and that in consequence those rules "were dead and ceased to exist". This submission was made on the basis that the rules kept alive by section 3(2) of the Justice Law must by reason of section 15 of the Interpretation Ordinance be deemed to have been made under section 15(1) of the said Law. When the Court put to the learned President's Counsel for the Intervient-petitioner-respondent the position that these Admiralty rules kept alive were not made by virtue of the powers conferred on the Supreme Court by section 15(1) of the Justice Law, the answer given was that these rules are deemed to have been made under the said section by operation of section 15 of the Interpretation Ordinance. These rules which are said to be now dead have their birth in section 23 of the Ceylon Courts of Admiralty Ordinance 1892. That section does not state that these rules should be "deemed to be rules of Court made" by the Supreme Court in terms of section 22(1) of the said Ordinance. Section 23 only states – "have effect in the Colonial Courts of Admiralty " as rules of Court under this Ordinance. The Supreme Court did not make rules of Court under section 22, so that these rules became the rules of the Ceylon Courts of Admiralty Ordinance directly by operation of law, that is section 23. Even section 3(2) of the Justice Law does not state that the "rules kept in force" should "be deemed to have been made" under section 15(1) of the Justice Law, and further the legislature – Justice Law – has not even made the contents of section 3(2) a subsection of section 15(1) of the Justice Law. In fact this point of view is emphasised by section 3(2) of the Justice Law itself which opens as follows –

· "unless and until rules are made under this law, all rules in force immediately before the appointed date apply to the exercise of jurisdiction by the Court vested with such jurisdiction under this law"

The words "unless and until" have taken effect, because the rules pertaining to the Admiralty Jurisdiction have not been made by the Supreme Court under section 15(1) of the Justice Law. In this Court arguments were strongly based on section 15 of the Interpretation Ordinance.

Section 15 of the Interpretation Ordinance is as follows:

"When any rules made under any enactment which has been repealed are kept in force by the repealing enactment, whether passed before or after the commencement of this enactment, such rules shall be deemed for all purposes to have been, and to be, made under the corresponding provisions of such repealing enactment, and shall be enforceable as if they had been so made."

The submission is that that the Admiralty Rules of the repealed Admiralty Ordinance kept alive under section 3(2) of the Justice Law, are deemed to have been made under section 15(1) of the Justice Law and that when section 15(1) of Justice Law was repealed by the Judicature Act section 62, there was no saving clause included in the Judicature Act in respect of the rules deemed to have been made under section 15(1) of the Justice Law. In my view this submission ignores two vital matters:—

- (1) That the rules were not made under section 15(1) of the Justice Law, but were rules that come into force by operation of law, section 23 of the repealed enactment, viz. Ceylon Courts of Admiralty Ordinance repealed by (section 3(1)(a) of the Justice Law) and kept alive by section 3(2) of the Justice Law, and as such had no relation to section 15(1) of the Justice Law. Section 3(2) of the Justice Law in the structural scheme of the Justice Law is a section independent of section 15(1) of the Justice Law.
- (2) The above submission ignores the fact that up to date section 3(2) of the Justice Law has not been repealed.

Section 15 of the Interpretation Ordinance has the following limbs:—

- (1) When any rules made under any enactment,
- (2) Which has been repealed,
- (3) Are kept in force by the repealing enactment,
- (4) Shall be deemed for all purposes to have been made under the corresponding provisions of such repealing enactment.

In limb (1), the word "enactment" should be related to the Ceylon Courts of Admiralty Ordinance and particularly to section 23. In limb (2), the word "repealed" has to be related to section 3(1)(a) of the Justice Law, and limb (3) has to be related to section 3(2) of the

Justice Law, and limb (4) has also to be related to section 3(2) of the Justice Law. The submission that section 3(2) of the Justice Law has been repealed by the Judicature Act, section 62 read with section 15(1) of the Justice Law, and section 15 of the Interpretation Ordinance cannot be accepted.

Section 3(2) Justice Law provided that the rules kept alive by this section "shall..... apply to the exercise of jurisdiction by the Court vested with such jurisdiction under this law". Under the Justice Law Admiralty jurisdiction was exercised by the High Court of Colombo. The Judicature Act No. 2 of 1978 which came into force on 2nd July 1979 repealed Chapter 1 of the Justice Law – Judicature. With that repeal the High Court created by the Justice Law, section 5(1) and the Admiralty jurisdiction created by section 23(1) Justice Law was "dead". It is due to this situation that as will be shown later Article 169(6) of the Constitution (1978) has to be considered with section 3(2) of the Justice Law.

Up to today section 3(2) of the Justice Law exists, and some significance has to be attached to it. The Administration of Justice Law has been repealed in parts from time to time by several enactments. The Administration of Justice Law No. 44 of 1973, and Administration of Justice (Amendment) Law No. 25 of 1975 was amended by the Civil Procedure Code (Special Provisions) Law No. 19 of 1977, and the Civil Procedure Code (Amendment) Law No. 20 of 1977, now consolidated as Civil Procedure Code, Cap. 101 incorporating all amendments up to 31st December, 1977. The Administration of Justice (Amendment) Law No. 25 of 1977, the part which dealt with Partition Actions, sections 332(1) onwards were repealed and amended by the Partition Law No. 21 of 1977. Justice Law No. 44 of 1973, Chapters (2), Criminal Procedure and (4) Appeals Procedure have been repealed and amended by the Code of Criminal Procedure Act No. 15 of 1979, (date of operation – 2nd July, 1979 by Gazette No. 40/16 of 15.6.79). The Constitution of 1978 also effected amendments to the Justice Law. These enactments referred to above, and other enactments which had the effect of repealing or amending the Justice Law did not touch section 3(2) in question, and this section still exists as law.

Submission was made that certain Articles of the Constitution (1978) have kept alive the Admiralty rules to wit – Articles 105(1)(c) read with Articles 111, 169(6) and 170. Articles 105(1)(c) and 111

deal with creation and the jurisdiction of the High Court. Section 169(6) has constituted "a single High Court" called the High Court of the Republic of Sri Lanka. It is the second part of this Article, that is relevant to these submissions –

"..... Accordingly –

- (1) Subject to the provisions of the Constitution,
- (2) And of any existing written law, all provisions relating to High Courts, contained in such Law shall, mutatis mutandis, apply to the High Court of the Republic of Sri Lanka".

Limb (2) above is important for the consideration of the matter before this Court –

"Subject to any existing written law."

Article 170 of the Constitution defines that "law" – means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.

"Existing law" and "existing written law" – mean any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continue in force:

"Written law" means any law and subordinate legislation and includes Orders, Proclamations, Rules, By-laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same.

In the Interpretation of the "written law" the words.....

"Rules and Regulations" are relevant and important to this matter under consideration. There is no doubt that Article 169(6) read with Article 170 kept alive all the Orders in Council, Rules and Regulations, which would "apply to the High Court of the Republic of Sri Lanka". (Article 169(6) last limb). The Constitution was promulgated on 7th September, 1978. Section 62 of the Judicature Act which has created the problem before this Court, came into operation on 2nd July, 1979. It cannot be said that the Judicature Act can in any manner amend or alter the supreme law of the land, the Constitution.

Another matter to be considered is that, both before and after the Constitution, that is 7th September 1978, section 3(2) of the Justice Law continued to exist unrepealed and unaffected inasmuch as by Article 169(6) the High Court of the Republic of Sri Lanka replaced the High Courts created under the Justice Law. It would thus be for all purposes a Court "vested with jurisdiction under this law" as stated in section 3(2) of the Justice Law. Another matter for consideration is that the Vice Admiralty Rules were in existence and in operation before and at the time of the (1978) Constitution was promulgated. Under Article 170 read with Article 168(1) the Vice Admiralty Rules are kept alive, and will continue to be in operation unless Parliament otherwise provides, or until the Supreme Court makes rules—Article 136 Constitution (1978) read with section 11(3), Admiralty Jurisdiction Act No. 40 of 1983.

I hold that the Admiralty Rules which came into force under section 23 of the Ceylon Courts of Admiralty Ordinance have been kept alive, and are still kept alive by section 3(2) of the Justice Law, read with Articles 169(6) and 168(1) of the Constitution, and that the High Court has properly exercised its jurisdiction in the issue of writ of summons and warrant of arrest in this action in rem. The Judicature Act, section 13(1) read with the Admiralty Jurisdiction Act No. 40 of 1983, section 2 has conferred the Admiralty Jurisdiction on the High Court of Colombo.

I will now consider, whether in the event of section 3(2) of the Justice Law, not being in force, whether there are other provisions of law "which enables the High Court the exercise of jurisdiction." In my view in the Judicature Act itself there is section 59, which grants such powers to exercise jurisdiction.

Section 59 is as follows:—

"If any matter.....

- (1) In consequence of the coming into operation of the provisions of this Act,
- (2) In respect of any matter, or question of procedure not provided for by this Act the court shall have the power.....may require".

Section 59 directly deals with a *casus omissus* created in the instances marked Nos. (1) and (2) above, that is if as a result of section 52 of the Judicature Act, the Admiralty Rules ceased to exist, the High Court could have resorted to this solitary provision. This kind of provision is found in all diligent pieces of legislation, as the draftsman cannot visualise or contemplate the different situations that will arise in the operation of an enactment. There are provisions in the Admiralty Jurisdiction Act No. 40 of 1983, which can be made use of in a situation dealt with in this appeal. Section 11(1) deals with savings and transitional provisions in respect of Admiralty proceedings "pending in the High Court of Colombo on the day immediately preceding the appointed date", for the operation of this Act, that is 1.11.83. Section 11(2) states—among other things that the rules—

"under the law in force before the appointed date shall be deemed to have been published. and given under this Act or the rules made thereunder."

I have considered whether section 11(2) is connected solely to section 11(1), in that the rules are made operative only in respect of pending applications dealt with under section 11(1). Having considered the matter, I am of the view that the wording of 11(2) quoted above does not connect this provision to 11(1) only though it is placed as 11(2). Section 11(3) provides for the making of rules in respect of Admiralty Jurisdiction under Article 136 of the Constitution. I am of the view that the juxtaposition of section 11(2) between sections 11(1) and 11(3) and its wide and unrestricted wording indicate the intention of the legislature that section 11(2) should apply to two instances, first covered by section 11(1) pending actions and secondly before the rules are made under section 11(3).

Section 12 of the Admiralty Jurisdiction Act is a like section as section 59 of the Judicature Act cited above. Section 12 deals with a situation where "question of procedure arises in respect of which no provision or adequate provision has been made by or under this Act or any other enactment or any rule", and it goes on to lay down that in such instance "the Court shall have power to make such orders and give such directions which the Court exercising Admiralty Jurisdiction in England would have the power to make and give in like circumstances or any rule" This action also deals with any possible *casus omissus* in the Admiralty Jurisdiction Act, and the wording clearly shows that this section is made in contemplation of the Admiralty Rules, made for the Admiralty Courts in England.

I now consider the submission made by the learned Queen's Counsel for the plaintiff-appellant that the rules made under the Vice Admiralty Act of 1863 were substantive law (not mere rules of procedure) as Her Majesty in Council had the power to legislate to Ceylon which was then a British possession and a colony. The right of the Crown—His/Her Majesty in Council to legislate to British Colonies, Possessions and Protectorates by Order-in-Council always existed as a part of the Prerogative power or the residual power of the Crown. The right of the Crown to legislate to the Colonies was curtailed or removed when a local legislature was set up, and the right to legislate was voluntarily abdicated or restricted by Order-in-Council. In fact a Constitution for a Colony has always been granted by the Crown by Order-in-Council, and such Order-in-Council giving the Constitution sets out the limits of the power of His/Her Majesty to legislate to such a Colony by Order-in-Council. A well known instance of the Queen legislating to Ceylon by Order-in-Council is found in the Privy Council case of *Abeysekera v. Jayatilaka* (2). In this case the Privy Council held as follows:—

“His Majesty the King is vested with legislative power, inherent in him by his title derived from conquest and cession of Ceylon, in so far as he has not parted with any of them by acts of his own.” (judgment delivered November 9, 1931).

The Sovereign's power to legislate to Ceylon by Order-in-Council always existed and began to be whittled down with the advance made in the Constitutional status granted to Ceylon. Such constitutional status was in fact granted by Constitutions created by Order-in-Council of His/Her Majesty. Such Constitutions which granted Ceylon advanced Constitutional status are the Orders in Council—

- (1) Ceylon State Council Order-in-Council 1931—amendment Orders-in-Council 1934 and 1935. Under section 98 of this Order-in-Council Her Majesty reserved the right to revoke, alter and amend the order with the advice of the Privy Council. Under this Constitution Her Majesty also retained the general power to legislate to Ceylon by Order-in-Council.

- (2) The Ceylon (Constitution) Order-in-Council, May 17, 1946—in section 30, sub-section 4, Her Majesty reserved the right with the advice of the Privy Council to revoke, add to, suspend or amend the order. Further, under this Constitution the sovereign still retained the power, and the right to legislate to Ceylon by Order-in-Council.
- (3) Ceylon Independence Order-in-Council 1947—by section 4(1) of this Constitution, there was for the first time a cessation of the power of Her Majesty in Council to legislate to Ceylon. The power of Her Majesty's Council to legislate to Ceylon which existed since 15th February, 1796, ceased by this Order-in-Council of 19th December, 1947.

It is in this background that it has to be considered whether the Admiralty Rules made by the Order-in-Council of 23rd August, 1883, under section 14 of the Vice Admiralty Courts Act of 1863, and proclaimed in Ceylon by Gazette No. 4,559 of 7.12.1883 with effect from 1.1.1884 contained substantive law or delegated/subsidiary Legislation. These rules made by this Order-in-Council are included in the Legislative Enactments—Subsidiary Legislation of Ceylon, Volume 1, Chap. 9 (1956 Ed.). Learned Queen's Counsel for the plaintiff-appellant submitted that the fact that Legislative Enactments included these rules as Subsidiary Legislation does not make this Order-in-Council mere rules and not substantial law.

A consideration of the authorities show that His/Her Majesty by Orders in Council made substantive law by power derived from the prerogative or residual power vested in His/Her Majesty, and also made rules under various laws passed by Parliament when the laws so provided for the rules to be made by Order-in-Council. Craies on Statute Law—(7th Ed.) Page 289 Chap. 13—Delegated Legislation states as follows:—

"In addition to the common law and statute law, the law of the land includes a great deal of what may be termed subordinate or "delegated" legislation. It comprises Orders-in-Council, departmental orders, rules, regulations, schemes, by-laws etc., made under statutory powers. Prerogative Orders-in-Council are not delegated legislation. They are the exercise by the Sovereign (albeit with advice) of her residual powers to legislate without the authority of Parliament—consequently they are original legislation."

Another authority – Law in the Making – C. K. Allen (7th Ed.) Chief Spheres of Delegated Legislation, Page 535 states as follows:–

“Orders of the Privy Council are of two kinds. They may take the form of an original exercise of the prerogative, independent of the law making power of Parliament. To this class, for example, belong legislative Orders for the Crown Colonies, or regulations for trade and commerce in time of war. A second, much larger, and constantly growing class of Orders in Council consists of those which are issued in accordance with powers expressly delegated to the Council by Acts of Parliament.”

Constitutional and Administrative Law – Hood Phillips, (3rd Ed.) Page 562, Chap. 30 – Delegated Legislation: In this Chapter Hood Phillips considers the various bodies and authorities that make Delegated Legislation and the first body mentioned by Hood Phillips is the Queen in Council – power to issue statutory Orders in Council.

The Vice Admiralty Courts Act of 1863 provided in section 14 that “Her Majesty may, by Order-in-Council, from time to time establish rules touching the practice to be observed in Vice Admiralty Courts. . . .” Section 16 of this Act provided that “rules and tables of fees in force in any Vice Admiralty Courts shall as soon as possible after they have been received in the British possession . . . be entered by the Registrar in the public books or records of the Court.” These rules were made by Order-in-Council on 23rd August, 1883, and proclaimed in Ceylon by Gazette No. 4,559 of 7.12.1883 with effect from 1.1.1884. The preamble to the proclamation of these rules is as follows:–

“Whereas by Act passed entitled Vice Admiralty Courts Act, “1863”, it was amongst other things provided that “Her Majesty may, by Order-in-Council, from time to time establish rules touching the practice to be observed in the Vice Admiralty Courts The rules and tables of Fees annexed hereto should, on and from the first day of January, 1884, be the rules and tables for all Vice Admiralty Courts.”

It is quite patent from these Vice Admiralty Rules made under the Vice Admiralty Courts Act 1863 by an Order-in-Council were delegated legislation which derived its authority from section 14 of the said Act. I hold that the Admiralty Rules published in Subsidiary Legislation, Volume 1, Chap. 9 as Admiralty Rules are not substantive law, but are delegated Legislation/Rules.

I hold that the learned High Court Judge has erred in law in deciding that the Admiralty Rules published in Subsidiary Legislation, Volume 1, Chapter 9 are not in force now, having been repealed by the operation of section 62 Judicature Act No. 2 of 1978, which repealed Chapter 1 of the Administration of Justice Law No. 44 of 1973. I hold that the Admiralty Rules which came into force under section 23, Ceylon Courts of Admiralty Ordinance have been kept alive, and are still kept alive by section 3(2) of the Justice Law read with Article 169(6) of the Constitution (1978), and that the High Court Judge who made the order in this case has validly exercised the jurisdiction in the issue of writ of summons and warrant of arrest in this action in rem. The Judicature Act No. 2 of 1978, section 13(1) read with section 2 of the Admiralty Jurisdiction Act No. 40 of 1983 has conferred Admiralty Jurisdiction on the High Court of Colombo and the Admiralty Rules kept alive as stated above enable the exercise of the Admiralty Jurisdiction. The order of the learned High Court Judge dated 2nd November, 1984 is set aside and the High Court of Colombo is directed to proceed with the action.

The appeal and the Application in revision are allowed. The appeal is allowed with costs fixed at Rs. 10,000.

T. D. G. DE ALWIS, J. — I agree.

JAMEEL, J. — I agree.

Appeal and application in revision allowed.