1977 *Present :* **Samerawickrema, J., Rajaratnam, J., Sirimane, J., Weeraratne, J., and Sharvananda, J.**

H. R. AMARADASA and ANOTHER, Petitioners

and

THE LAND REFORM COMMISSION and ANOTHER,

Respondents

S. C. 869, 870, 871 and 872/74—Application for Mandates in the nature of Writs of Certiorari

Writs of Certiorari—Land Reform Law, No. 1 of 1972, section 13—Order made by Land Roform Commission declaring certain alienations null and void—Appeal to Minister—Order affirmed—Duty to act judicially—Need to observe audi alteram partem *rule—Effect of the breach of rules of natural justice—Order a nullity—Interpretation Ordinance as amended by Act No. 18 of 1972, section 22.*

The petitioners, in each of these applications, prayed for the issue of writs of certiorari to quash the orders made by the Land Reform Commission (1st respondent) and the Minister of Agriculture and Lands (2nd respondent) in the purported exercise of their powers under section 13 of the Land Reform Law, No. 1 of 1972. The 1st respondent made order declaring the alienation by way of donations by the 1st petitioner in favour of 4 of his children, who are severally the 2nd petitioners in each of these applications, null and void. The 1st petitioner and the child in whose favour the alienation were made in each case preferred appeals to the 2nd respondent. The 2nd respondent on appeal refused to vary the order made by the 1st respondent.

The petitioners stated that the alienations were a *bona fide* parental distribution of property, not calculated to defeat the purposes of the Land Reform Law. The ground on which the writ of certiorari was sought was that the respondent had made order without giving the petitioners an opportunity of being heard or showing cause against the order declaring the alienation null and void. This was not disputed by the 1st respondent.

Held (SAMERAWICKREMA, J. dissenting) :

(1) That it was incumbent on both the Land Reform Commission and the Minister, who had to review the finding of the Commission, to give to the parties a reasonable opportunity of presenting and stating their case before arriving at a determination. In the exercise of their powers under section 13 both the Commission and the Minister are under a duty to act judicially and each has to observe the rule of *audi alteram partem* and respectively accord both an original hearing and an appellate hearing before making their determination. The parties are entitled to a reasonable hearing at both levels.

(2) That therefore the determination of the Commission being vitiated by its failure to act in accordance with the norms of natural justice is a nullity. The fact that the Minister affirmed it in appeal, therefore, could not give it any sanction in law despite the fact that section 13 (5) made the decision of the Minister final and conclusive.

(3) That by appealing to the Minister the petitioners are in no way prevented from now asserting the nullity of the decisions given. There was no suggestion of waiver and by appealing the petitioners were in fact not affirming but disaffirming the validity of the decision appealed against.

(4) That section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972 entitled the petitioner to challenge the decisions on the ground of the breach of principles of natural justice in prerogative writ proceedings such as these.

Cases referred to:

Cooper v. Wandsworth Board of Works (1863) 14 C. B. N. S. 180

Russe v. Duke of Norfolk, (1940) 1 All E. R. 109.

Wiseman v. Borneman, (1969) 3 All E. R. 275 ; (1969) 3 W.L.R. 706 ; (1971) A. C. 297.

Pearlberg v. Varty, (1972) 2 All E.R. 6 ; (1972) 1 W. L. R. 534.

R. v. Payne (1896) 1 P. B. 577.

Attorney-General v. Times Newspaper Ltd. (1973) 3 W. L. R. 298 ; (1973) 3 All E. R. 54 ; (1974) A. C. 233.

Leary v. National Union of Vehicle Builders, (1970) 2 All E. R. 713 ; (1970) 3 W.L.R. 434 ; (1971) Ch. 34.

Spackman v. Plumstead Board of Works, (1885) 10 A.C. 229.

Board of Edocation v. Rice, (1911) A.C. 179.

Ridge v. Baldwin, (1964) A.C. 40 ; (1963) 2 All E.R. 66 ; (1963) 2 W. L. R. 935.

Durayappah v. Fernando, 69 N. L. R. 265 ; (1967) 2 A. C. 337 ; (1967) 2 All E. R. 152 ; (1967) 3 W. L. R. 269.

Board of Trustees, Maradana Mosque v. Mahmud, 68 N. L. R. 217 ; (1967) 1 A.C. 13 ; (1966) 1 All E. R. 545 ; (1966) 2 W. L. R. 921.

Shareef v. Commissioner for Registration of Indian and Pakistani Residents, 67 N. L. R. 433 ; (1966) A. C. 47 ; (1965) 3 W. L. R. 704.

McDowell v. Standard Oil Company, (1927) A. C. 632.

Turner v. Shearer, (1972) 1 W L. R. 1387 ; (1973) 1 All E. R. 397.

Reg v. Shearer, (1972) 1 W. L. R. 1540 : (1972) 3 All E.R. 1121 ; 57 Cr. App. R. 113.

General Medical Council v. Spackman, (1943) A. C. 627.

Annamunthodo v. Oilfields Worker's Trade Union, 60 C. L. W. 96 ; (1961) A. C. 945 ; (1961) 3 All E. R. 621 ; (1961) 3 W.L.R. 650.

Anisminic Ltd. v. Foreign Compensation Commission, (1969) 1 All E. R. 208 ; (1969) 2 A. C. 147 ; (1969) 2 W. L. R. 163.

R. v. Electricity Commissioners, (1924) 1 K. B. 171.

Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust, (1937) A. C. 898 ; (1937) 3 All E. R. 324.

Local Government Board v. Arlidge, (1915) A. C. 120.

Padfield v. Minister of Agriculture, (1968) 1 All E. R. 694 ; (1968) 2 W. L. R. 924 ; (1968) A. C. 997.

Franklin v. Minister of Town & Country Planning, (1948) A. C. 87

Jayawardena v. Silva, 72 N. L. R. 25.

Jayawardena v. Silva, 73 N. L. R. 289 ; (1970) 1 W. L. R. 1365.

Fernando v. Jayaratne, 78 N. L. R. 123.

APPLICATIONS for *Writs of Certiorari.*

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, J. C. Ratwatte, Miss S. Fernando* and *C. S. Hettihewa*, for the 2nd petitioner.

E. D. Wickremanayake, Additional Solicitor-General, with *V. C. Gunatileke,* Deputy Solicitor-General, *J. C. Boange,* State Counsel, and *G L. M. de Silva,* State Counsel, for the 1st and 2nd respondents.

Cur adv. vult.

June 16, 1977. SAMERAWICKREMA, J.

Land Reform Law, No. 1 of 1972, provided for a ceiling on agricultural land which may be owned by any person. Section 3 (1) and (2) of the said law reads—

"3. (1) On and after the date of commencement of this Law the maximum extent of agricultural land which may be owned by any person, in this Law referred to as the "ceiling" shall—

(*a*) if such land consists exclusively of paddy land, be twenty five acres ; or

(*b*) if such land does not consist exclusively of paddy land, be fifty acres, so however that the total extent of any paddy land, if any, comprised in such fifty acres shall not exceed the ceiling on paddy land specified in paragraph (*a*).

(2) Any agricultural land owned by any person in excess of the ceiling on the date of commencement or this Law shall as from that date—

(*a*) be deemed to vest in the Commission ; and

(*b*) be deemed to be held by such person under a statutory lease from the Commission."

In terms of section 18, a person who owned an extent of agricultural land over the maximum permitted is required to make a declaration in the prescribed form of the total extent of agricultural land that was held by him. Though Law No. 1 of 1972 came into force on the 26th August 1972, section 13 (1) of that law required any person who had alienated any agricultural land on or after 29th May, 1971, to report such alienation to the Commission and under section 13 (2) the Commission is empowered for certain circumstances to declare such alienation null and void.

The file of the Land Reform Commission was available to Counsel at the hearing of this application. They referred us to certain matters contained in documents in that file. It appears that the first petitioner has in his return stated that he owned 122 acres paddy and 158 acres of other land. After he had made sales and other alienations, nearly fifteen in number, including

the four alienations in favour of his children, which are the subject matter of the applications before us, he was left with 67A. 1R. 0P. and his wife with 25A. 1R. 14P. of agricultural land. In the form prescribed under section 18 the declarant has to set out the extent of land owned by him, the extent of land owned by his spouse, the extent of land owned by each of his children, irrespective of age. If he has made any alienation after 29th May, 1971, section 13 requires him to make a return and the form prescribed under that provision requires him to set out *inter alia* the extent of land he had owned before he made the first alienation, and he has to attach separate forms giving the details of each alienation including the extent of land alienated and the extent of land in excess of the ceiling held by him prior to that alienation. In the affidavit filed by him in these proceedings, the 2nd petitioner states he joined the 1st petitioner in making the declaration under section 18 in respect of Charleswick Estate. Apart from the form and declaration under section 18 the 1st petitioner appears to have made about 15 returns setting out alienation made by him.

In the exercise of powers under section 13 (2) of the Land Reform Law, the 1st respondent, the Land Reform Commission, made order declaring alienation by the first petitioner in favour of four of his children who are severally the 2nd petitioners in the applications before us, null and void. The first petitioner and the child in whose favour the alienation was made in each case preferred appeals to the Minister of Agriculture and Lands. The Minister refused to vary the order made by the 1st respondent, the Land Reform Commission.

Separate applications have been filed in this Court for certiorari in respect of each alienation declared null and void by the 1st petitioner and the child in whose favour the alienation had been made by him. The ground on which a mandate in the nature of a writ of certiorari is sought is that the 1st respondent had made order without giving the petitioners an opportunity of being heard or showing cause against the order declaring the alienation null and void.

The relevant provisions of the Land Reform Law reads—

"13 (1) Where on or after May 29, 1971, any person who owned agricultural land in excess of the ceiling has alienated any agricultural land to any other person, such alienor shall, within three months of the date of commencement of this Law, report such alienation to the Commission in the prescribed form.

(2) Where the Commission finds that any alienation of agricultural land on or after May 29, 1971, has been calculated to defeat the purposes of this Law the Commission may by order made under its hand declare that such alienation is null and void. Every such order shall be sent by registered post to the alienor and alienee of the agricultural land to which that order relates.

(3) Any alienor or alienee aggreved by an order made under subsection (2) may within three weeks of the receipt of such order appeal to the Minister in the prescribed form, and the Minister may on such appeal make such order as the Minister may deem fit in the circumstances of the case.

(5) Where no appeal has been preferred under sub-section (3) within the time allowed therefor against the order made under subsection (2), such order, or where an appeal has been preferred, the order as amended, varied or modified on appeal shall be published in the Gazette. The order as published shall be final and conclusive and shall not be called in question in any court, whether by way of writ or otherwise.

(6) Where the Commission under the provisions of sub-section (2) declares that any alienation is null and void, no right, title or interest shall be deemed to have passed to the alienee under the instrument of such alienation and such agricultural land shall vest in the Commission and the alienee shall be deemed to hold such land under a statutory lease from the Commissioner."

Mr. Jayawardene appearing for the petitioners submitted that the alienor and the alienee should be heard by the Commission before they declare any alienation null and void. He pointed out further that the Commission had to decide whether the alienation was "calculated to defeat the purposes of the law" and that therefore the Commission had to address its mind to the intention of the alienor and alienee at the time the alienation was made. The word "calculated" according to the Oxford Dictionary has two meanings—

(1) Reckoned, estimated, devised with forethought.

(2) Fitted, suited, fit, apt; of a nature or character proper or likely to.

In the case of *Turner v. Shearer,* (1972) 1 W.L.R. 1387, Shaw, J. held that the phrase "to be calculated to deceive" in section 52 of the Police Act, 1964 meant "likely to deceive or reasonably likely to deceive". In arriving at his decision he relied on a dictum of Lord Cave, L. C. in *Macdowell v. Standard Oil Company,* (1927) A.C. 632, where he states —

> "It has been long ago decided and is quite clear that the word "calculated to deceive" which are found in section 11 of the Trade Marks Act, 1965 do not mean "intended to deceive" but "likely or reasonably likely to deceive or mislead the trade or the public."

In the case of *Regina* v. *Davison,* (1972) 1 W.L.R. 1540 Brown, J. held that in section 5 of the House to House Collection Act, 1939 the words "calculated to deceive" meant "likely to deceive". Dicta in judgments also indicate the use of the word "calculated" in the same sense. In *Rex* v. *Payne,* (1896) 1 Q.B. 577 at 580, which dealt with a matter of contempt the following dictum appears —

> "....the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending."

In *Attorney-General* v. *Times Newspapers Ltd.,* (1973) 3 W.L.R. p. 298 at 318, appears the following dictum by Lord Diplock—

> "In my view these cases support the proposition I have already stated; that contempt of Court in relation to a civil action is not restricted to conduct which is calculated (whether intentionally or not) to prejudice the fair trial of that action...."

Should section 13(2) be read as meaning "any alienation has been intended or designed to defeat the purposes of this law" or "as any alienation has been of such a nature that it is likely to defeat the purposes of this law." If one has regard to the consequences of an order to the parties who made the alienation one would be inclined to give the former meaning; but if one has regard to the purposes of the law and the nature of the administrative tribunal who is vested with functions of making the decision one will be inclined to give provision to the latter meaning. As I find it possible to come to a decision on these applications without expressing any definite view on the interpretation of the provision for another case in which it may arise.

The principle that, where a statute provides for an order to be made which will prejudice the rights of a party, even if the statute is silent on the question, the Court will imply a rule that the principles of natural justice should be applied is one that is followed by our Courts. The dictum of Byles, J. in *Cooper* v. *Wandsworth Board of Works* that 'although there are no positive words requiring that the parties shall be heard, the justice of the common law will supply the omission of the legislature' has been consistently applied. The principles of natural justice however are not fixed or rigid but are flexible and depend on the circumstances of each case. The oft quoted dictum of Tucker, L.J. in *Russel v. Duke of Norfolk,* (1940) 1 A.E.R. 109 at 118, is apposite—

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is sitting, the subject matters that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting the case."

The basis for the rule that the principles of natural justice will be implied into a statutory provision and the circumstances in which that rule will be applied must be considered. The basis of the rule appears to be that Parliament is not to be presumed to take away a party's right without giving him an opportunity of being heard. The circumstances in which the rule will be applied appears to flow from this and the rule will be applied whenever, on the terms of the provisions of a statute taken by themselves, a party's rights may be taken away without his being given a fair opportunity of being heard. The position is lucidly stated by Lord Guest in his speech in the House of Lords in *Wiseman* v. *Borneman,* (1969) 3 A.E.R. 274 at 279—

> "It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the Statute is silent on the question, the Courts will imply into the statutory provision a rule that the principle of natural justice should be applied. The implications will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their

interest. In other words parliament is not be presumed to act unfairly. The dictum of Byles, J. in *Cooper* v. *Wandsworth Board of Works* is clear to the effect and has been followed in many subsequent cases."

It is necessary that a Court should consider the provisions of the statute and decide whether such provision do or do not afford a party an opportunity of being heard before an order is made which has the effect of taking away his rights. In the case of *Wiseman* v. *Borneman*, Lord Reid said—

"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the Courts have, without opposition from Parliament, supplemented procedure laid down in legislation where they have found it to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

In the case of *Pearlberg* v. *Varty*, (1972) 2 A.E.R. p. 6 at p. 16, Lord Pearson addressed his mind to the same subject—

"Where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the application, it by no means shows that he suffers an injustice in not being heard on that application. Ex parte applications are frequently made in the Courts. I have never heard it suggested that it is contrary to natural justice on the ground that at that stage the other party is not heard. The fact that it is possible to get an order obtained on ex parte application to the Court amended or anulled without delay does not, in my view, bear on the point. The fact is that he is not heard on the making of the application. And that is the taxpayer's complaint here. He can appeal against the assessment; and on the hearing of an appeal he can if he wishes put forward any point he would have made if heard on the application. His liability to tax will not be finally determined without his being heard, if he wishes to be heard."

In the same case Lord Hailsham of St. Maryleborne, L.C.

"It is true of course that the Courts will lean heavily against any construction of a Statute which would be manifestly unfair. But they have no power to amend or

supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the Statute accords him."

Section 13 which is the statutory provision under consideration provides that the order of the Commission is to be published in the Gazette if no appeal is made against it and if there is an appeal the order as amended varied or modified in appeal is to be published. Meanwhile the order is to be sent to both the alienor and the alienee and either of them may appeal to the Minister. On an appeal the Minister has the very wide power of making any order as he may deem fit in the circumstances of the case. Subsection 6 refers to the effect of an order of the Commission but in the context it is clear that is to be read subject to subsection 5 and it is an order of the Commission which is not appealed against or an order as amended, varied or modified in appeal that is to have the effect provided for. In any event, even if the order of the Commission is in strict theory in force from the time it is made, the only effect is that the alienee is deemed to be a statutory lessee. Accordingly, in terms of the provisions of the law, his possession of the property and his enjoyment of rights in respect of it are intact pending an appeal.

On an examination of the provisions of section 13 it appears that there is in fact an opportunity to the parties to show cause by way of an appeal to the Minister before their rights are in fact prejudicially affected. In the case of such statutory provisions, on the statements of law which I have set out above, it is not possible to imply a rule that the parties should have an opportunity of being heard by the Land Reform Commission as well. On one view of the matter it may appear to be better that they should have such an opportunity but as Lord Hailsham has pointed out, this is not sufficient to give the Court power to imply into the statute the requirements of natural justice. It is only where on the provisions of the statute the rights of parties will be taken away without an opportunity of showing cause that the Court has power to do so.

In this matter when the 1st petitioner reported the alienation in the prescribed form in terms of section 13(1) he had an opportunity of giving his reasons why the alienation should not be declared null and void as there is a cage in the form for that purpose. The two appeals filed by the alienor and alienee, the 1st and 2nd petitioner, set out their grounds and reasons and to the petition filed by the 2nd petitioner there was annexed an affidavit of the 1st petitioner.

Mr. Jayawardene relied on the decision in *Leary* v. *National Union of Vehicle Builders,* (1970) 2 A.E.R. 713. In that case, which dealt with the expulsion of a Trade Union member, it was held that the lack of natural justice before the committee of the branch union which was the trial body was not cured by the appellate body granting a full rehearing. But the basis of that decision was that the appellate body had a strictly appellate jurisdiction and could not grant a rehearing. At p. 720 Megarry, J. said—

> "Now in the present case the hearing by the appeals council seems to me to have been in substance a complete rehearing, with the witnesses called and heard, and complete liberty of action for the plaintiff to present his case in full. Indeed, the members of the quite differently constituted branch committee might well have been put in some practical difficulty if they had been required to devote two days to disposing of the case. Nevertheless it was not to the appeal council that the rules confided the issue of expulsion or not. It may be that the matter was properly brought before the appeals council by the combined effect of r.2(13), r.6(1) and the decision of the executive committee ; but any such jurisdiction is merely appellate. If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had ? ".

The Minister's powers are by no means strictly appellate and go even beyond a rehearing. In fact an appeal to him rather resembles an appeal to Caesar by a Roman citizen. The order of the Commission is not to be published until the time for appeal was passed and on appeal he has the very wide power of making any order as he may deem fit in the circumstances of the case. I should not be understood to say that the Minister is empowered to act arbitrarily or capriciously, but within the limits of fairness and impartiality he has the widest and almost untramelled powers to make any decision.

The point made against the order of the 2nd respondent apart from any infirmity in respect of the proceedings and the order of the Land Reform Commission is that he did not give the petitioners hearing on the appeals. The principles of natural justice do not require that a party should be given an oral hearing. Powers and functions under the Land Reform Law are generally administrative though the power of declaring an alienation null and void is quasi-judicial. There may well be a large number of alienations between the 29th May, 1971, and the

coming into force of the Land Reform Law. It would not be feasible to insist an oral hearing in all the cases relating to the said alienations. The Minister may, however, be well advised to grant an oral hearing in an appropriate case even though it may not be obiligatory in law for him to do so but the failure to give an oral hearing, particularly where there had been no request for one, cannot be a ground for invalidating the Minister's order. In view of the recent amendments to the Interpretation Ordinance the only grounds on which this Court may issue a writ of certiorari quashing the Minister's order is—

(*a*) that he has acted *ex facie* without jurisdiction.

(*b*) that he has failed to observe the principles of natural justice.

In fact the only ground taken on behalf of the petitioners was the latter. This Court is therefore precluded from going into the validity or sufficiency of grounds on which the Minister's order was made.

I desire to refer to one matter that was raised in the course of the argument. It was suggested that an order declaring an alienation null and void entailed the consequence that no compensation to anyone was payable in respect of the land which was the subject matter of the alienation. The learned Additional Solicitor-General stated that his understanding of the provisions was not to that effect. It appears to me that a forfeiture of compensation in respect of alienation altogether to both the alienor and alienee would require express provision which is not found in the Land Reform Law.

The first petitioner had died pending the hearing of the application but the learned Additional Solicitor-General had no objection to the proceedings being continued on the application made by the 2nd petitioner in each case. The applications fail and are accordingly dismissed. The matter appears to have been argued as a test case and therefore I am not disposed to make any order as to costs.

RAJARATNAM, J.

I have before me the draft judgments prepared by Samerawickrema, J. and Sharvananda, J. which have received by respectful consideration and with the greatest respect I regret my inability to agree with Samarawickrema, J.'s order. On the other hand I agree with the order and reasons of Sharvananda, J.

It is settled law and a settled principle accepted in both judgments " that Parliament is not to be presumed to take away the parties' rights without giving an opportunity of being heard in their interest. In other words Parliament is not to be presumed to act unfairly. When the Land Reform Law states in s. 13 (2) :

> " Where the Commission finds that any alienation of agricultural land on or after May 29, 1971 has been calculated to defeat the purposes of this law, the Commission may by order made under its hand declare that such alienation is null and void..... ".

it is clear that the Commission acts as a quasi judicial tribunal making a quasi judicial decision. I agree with Sharvananda, J. that it has all the ingredients and features laid down by the Privy Council in Duraiappa's case for a judicial determination, and its decision is on the question whether the alienation after a certain date " *has been calculated to defeat the purposes of this law* ". I am unable to agree with Samerawickrema, J. that the words " calculated to defeat " does not necessarily imply designed to defeat or intended to defeat, but can even mean likely or reasonably likely to defeat. Lord Cave's observation in Macdowell's case was in regard to a different statute where the object of the law was to include all Trade Marks likely or reasonably likely to mislead the trade or public. Section 13 (2) of the Land Reforms Law however does not empower the Commission to declare all alienations after May 29, 1971, as null and void. It contemplates only such alienations as are " *calculated to defeat the purposes of the Law* ", so that I cannot agree with the proposition that in regard to this law the words " calculated to defeat " means likely or reasonably likely to defeat and not necessarily intended or designed to defeat the law.

Moreover I find it difficult again to agree that without determining the strict meaning of the words calculated to defeat it is possible to determine the rest of the questions before us. In my view the Commission can in certain circumstances necessarily infer the calculation to defeat the law but these circumstances can be explained and the law demands that the person against whom this inference is to be made must be given an opportunity to be heard and to explain. I agree with Sharvananda, J. that the *audi alteram* rule must apply at this stage. The finding of the Commission which is a quasi judicial decision has a finality unlike in the decision taken in the *Wiseman v. Borneman* case, and the *Pearlberg* case referred to.

Now s. 13 (3) refers to the appeal to the Minister which either the aggrieved alienor or alinee may make and the Minister may on such appeal make such order as the Ministry may deem fit

in the circumstances of the case. Is this like an appeal of a Roman citizen to Caesar where the Minister may make any order as he deems fit in the circumstances of the case. If it can be likened to an appeal to Caesar, then the Minister can make any order "which he may deem fit in the circumstances", and he has an unfettered discretion to dispence a favour to some and deny it in similar situation to others. If that is so, this provision offends s. 18(1) of the Constitution which ensures to all equal protection of the laws and it is unlikely it would have passed through the careful scrutiny of the Constitutional Court. On the other hand if the Minister himself has to make a quasi judicial decision in appeal in the circumstances of the case, he must have the material facts and the reasons for the order of the Commission to make "any order which he may deem fit in the circumstances". In which case, it is necessary that the material facts must include the case of the aggrieved alienor and alinee together with the reasons for the quasi judicial finding of the Commission.

I agree with respect with the order and reasons set out by Sharvananda, J. and the applications of the petitioners therefore must succeed.

SIRIMANE, J.

I regret I am unable to agree with the judgment of Samerawickrema, J. I agree with the view that when the Land Reform Commission has to make a determination under section 13(2) of the Land Reform Law, No. 1 of 1972, as to whether an alienation is null and void as one calculated to defeat the provisions of that Law or not, and the Minister in appeal from such a determination under section 13(3), acts in a quasi judicial capacity and must therefore observe the rule of natural justice that the alienor and the alienee must be given an opportunity of being heard before an order adversely affecting their rights is made.

For the reasons set out in the judgment of Sharvananda, J., with which I agree, I would allow the applications and quash the orders declaring the alienations null and void.

WEERARATNE, J.

I am in agreement with the majority view that the *audi alteram partem* rule has not been properly observed at the stage at which it should have been applied in the course of the statutory proceedings in respect of these applications. The rule is so fundamental and vital, in regard to the manner in which justice has to be administered in proceedings of a certain character, that I prefer not to let the matter rest with a mere agreement

by me. The said rule constitutes one of a trilogy of basic principles of fair procedure required of a tribunal under a duty to act judicially.

The body in question is the 1st Respondent, the Land Reform Commission which is charged by the appropriate provisions of the Land Reform Law to find whether any alienation of agricultural land on or after May 29, 1971, has been calculated to defeat the purposes of that law. In the event of the Commission making such a finding it may by order declare that such alienation is null and void.

The petitioners aver that the said Commission has acted contrary to and in violation of the principles of natural justice in making the order declaring an alienation, in which they were parties, null and void. They state that no opportunity was given to them to be heard, before the said order was made on the ground that the alienations had been "calculated to defeat the purposes" of the Land Reform Law. The Writ of Certiorari called for in the applications could, if allowed by the Court, quash the decisions of the Commission if there is disclosed a failure to observe the said rule. If I were to put it succinctly an essential pre-requisite to the issue of such a Writ is that the Commission must be clothed with the character of a body exercising at least quasi-judicial functions, in that it is under a duty to act judicially. Some of the more obvious characteristics of a body exercising such functions if we were to consider the authorities, are primarily that there must be something in the nature of a "Lis" before such a body, which would then proceed to weigh the pros and cons of the matter. Facts would necessarily have to be considered in that process and a decision made.

In contrast a Minister or body performing purely ministerial or administrative functions acts "in a prescribed manner in obedience to the mandate of a legal authority, without regard to his own judgment or the property of the act to be done." (Ferris on Writs, at page 238). Such a body has to examine the question before it by way of expediency or policy and consequentially is under no duty to act judicially, *Franklin v. Minister Town and Country Planning,* (1948) A. C. 87, House of Lords. It seems to me that even though there is a wealth of authority, and commentaries on this subject, there is no need to proceed beyond what has been just stated, to describe the Land Reform Commission as a body which must act judicially under section 13 of that Law, for it is invested with all the characteristics of such a body. The "Lis" before it is the precise question whether "any alienation of agricultural land on or after May 1971 has been calculated to defeat the purposes of this Law" The Com-

mission would naturally have to weigh the facts before it and make an order which must necessarily decide and declare whether the alienation is a valid one under the said provisions, or null and void. This order may on an appeal to the Minister under section 13(5) of the law be "amended, varied or modified" by him, and when once published in the Gazette shall be final and conclusive. Nevertheless the fact that an order of the Commission was altered by the Minister would not change the character of the body constituted in the manner described earlier and whose duty it was to act judicially.

If then the said Commission is obliged to act judicially, the question does arise as to whether the alienee, who is obviously a party interested, as much, if not more than the alienor in this matter before the Commission, should and must necessarily be heard by the Commission before an order adverse to him is made. The case *Pearlberg v Varty,* (1972) 2 A.E.R. page 6. has been referred to by my brother Samerawickrema, J. who draws attention to a passage in the judgment of Viscount Dilhorne to the effect that when a person affected can be heard *at a later stage and* can then put forward all the objections he could have preferred, he would not suffer an injustice is not ing heard at some earlier stage.

If we examine the context in which Viscount Dilhorne made the proposition just mentioned it would be observed that his words applied to the facts of the case he was dealing with. There the Commissioner in a Revenue case had only to determine whether a *prima facie* case is made out when dealing with a matter involving a late assessment proposed to be made, which could only be done with the leave of a Commissioner "given on being satisfied by an inspector.....of the Board that there are reasonable ground for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person." The Commissioner granted leave without giving the tax-payer an opportunity to be heard. The tax-payer thereafter complained that these assessments were invalid on the ground that the Commissioner had acted *ultra vires* in granting leave without giving him an opportunity to be heard. The House of Lords held that since the Commissioner had

merely to decide whether a *prima facie* case is made out there was no requirement for the tribunal to hear both parties and that the determination was an administrative decision. There was provision however for the tax-payer to appeal against this decision. We find similar situations in our country as for instance when tax officials make arbitrary or late assessments when the tax-payer sends no returns. Such an assessment is an administrative act and there is always the right to appeal to a Board which is required to act judicially and hear both parties. The present matter is however quite different. The Land Reform Law has provided for a Land Reform Commission and invested it with very wide powers to decide the question whether any "alienation has been calculated to defeat the purposes of this law," and after a consideration of the material placed before it, the Commission has the statutory authority to declare any such alienation null and void. It is as shown earlier abundantly clear that this Commission has the duty to act judicially, in which event it would have to observe that rule of natural justice and bear not only the alienor but also the alienee as shown in some detail earlier. Even though there is an appeal which the alienee has to the Minister, the Commission acting judicially would perforce have to hear the alienee before an order adverse to him is made. In this connection it must be noted that even the alienor has not been heard in the manner required and in the spirit of the "*aldi alteram partem*" rule of natural justice. There may be a mistaken belief that when the alienor fills column 21 of the form furnished to him by the Commission which requires him to state "why the alienation should not be declared void" it would be tantamount to his being given an opportunity to be heard. There could be no compliance with the rule in this manner because such a course presupposes that any alienation within the period set out in the provision is void *unless* the alienor proves that it is *not* calculated to defeat the purposes of the law. That is not the law, since the statute does not provide for such a presumption to be available to the Commission. On the contrary it seems to me that in the context of section 13, the said Commission upon an alienation reported to it under this section if it is, *prima facie* inclined to hold that it was calculated to defeat the purposes of the law, to be void, is under a duty

to call upon the alienor and the alienee to show cause why the alienation should not be declared void. In doing so however the Commission would have to indicate the particular characteristics pertaining to the alienation which would lead to the inference that it was calculated to defeat the purposes of the law. The "*audi alteram partem*" rule is based on fairness and I find it difficult to see how a fair hearing could be given unless the course just referred to is followed. The hearing may of course be by way of written submissions or orally. The law relating to this is indeed quite clear and this Court could always take the view that the statutory proceedure is insufficient to ensure justice and consequently not frustrate the apparent purpose of the Legislature and give effect to the implied duty of the Commission to grant a hearing in a manner contemplated by the rule.

The statutory provisions dealing with an appeal to the Minister might at first blush appear to grant extraordinary & powers A scrutiny of these powers however shows that like any appellate body the order of the Commission could be "amended, varied or modified" by the Minister. My brother Samerawickrema, J. in his judgment states that "The Minister's powers are by no means strictly appellate and go even beyond a re-hearing." He likens the appeal to the Minister to "an appeal to Caesar by a Roman citizen". He states however that the Minister whilst having the widest and almost untramelled powers must nevertheless act within the limits of fairplay. What evoked this comment may perhaps be the words in section 13 (3) of the law which sets out that the "Minister may on such appeal make such order as the Minister may deem fit in the circumstances of the case". We must necessarily examine this power in order to satisfy ourselves as to the scope of that power. The first question we would ask ourselves is whether the Minister acts in appeal as an administrative authority under a duty to act judicially. When we apply the texts applicable to such a latter body we find that he would have a 'Lis' in the form of an appeal before him. The parties, both alienor and alienee, if they appeal as they have done, would have to be heard since it is provided by law. Then there has to be a final decision by the

Minister. These as would be observed constitute the essential facts of a body that is expected to act judicially. Quite apart from any other consideration, here we find the Minister entertaining an appeal from the Commission which as I have shown earlier is obliged to act judicially. Surely the Legislature would not have intended an order of such a Commission which has acted as a judicial body, which order is final and conclusive unless amended, varied or modified by the Minister in appeal would be dealt with by the Minister by "subjective" standards based on policy or expediency rather than by "objective" standards of a body required to act judicially. The argument that "subjective" standards could be applied would depend on the view one takes of the words "as the Minister may deem fit in the circumstances of the case." In this connection if we were to draw any inference from the matters relating to a Ministerial appeal, as shown above, the words "may deem fit in the circumstances of the case," could not be spelt out as being the power to do as he pleases. He would possess such a power to do so only "..... when a statute under which a tribunal is set up permits it to reach its decision on its own knowledge and without any evidence, then if it has observed the formalities prescribed by the statute and has not excluded any evidence to it, its decision cannot be impugned." (Halsbury, 3rd edition page 66). It must be borne in mind that the Minister can do what he deems fit only *"in the circumstances of the case."* Therefore the Minister could act only within those limits, and his decision must necessarily be on precisely the same issues which the Land Reform Commission has to answer.

Having regard to what I have stated above, it seems clear that the Land Reform Commission has acted in breach of a fundamental principle of natural justice by not complying with the *"audi alteram partem"* rule. Thus the proceedings before the Commission including its order would necessarily be void. The Minister would not have had before him the necessary material in order to exercise his powers under the provisions of sections 13 (3) and (5) of the Law, since the Commission had not invited the petitioners to place their case before it, in the manner and

spirit required by the rules of natural justice as described earlier. In this state of the matter it seems clear that the order made by the Minister in appeal from the finding of the Commission would indeed be bad and consequently void.

On the question whether the word "calculated" in section 13(2) of the Land Reform Law should be interpreted in the context of the provisions as "intended" or "designed" and not "likely" or "reasonably likely", I am in agreement with the reasons given by my brother Sharvananda, J. to the effect that it is the former meaning that should be given and not the latter. The reasoning given by my brother, if I may say so with respect, analytically leads to the conclusion he arrives at namely that the law should be construed to mean "any alienation....intended or designed to defeat the purposes of the law" on the other hand we do not got much assistance from the two cases cited by Counsel appearing on behalf of the respondents, since the learned judges in delivering their judgments in those cases do not state their reasons for construing the words "calculated to deceive" as "likely of reasonably likely" to deceive. Viscount Cave in the case of *Mc Dowall v. Standard Oil Co.*, (1927) A. C. 632, in interpreting the Trade Marks Act where the said words appear, merely states "it is quite clear that they mean likely or reasonably likely". Browne, J. in the second case, *R. v. Davison,* (1972) 3 A.E.R. 1121, states "when one reads the paragraph as a whole it plainly means likely to deceive." The wording of the provisions in each of these cases are to a large extent similar. In the Trade Marks case (1927 AC 632) the mark used was alleged as "calculated to deceive", whilst in the case relating to the unauthorised use of badges, a badge had been used, in the house to house collection for charity, "so nearly resembling a prescribed badge...." I find my brother's reasoning sufficiently compelling to justify the interpretation he has given to the provision, which he has sought to interpret.

I accordingly hold that the orders of the Land Reform Commission and the Minister must be quashed. The writs of certiorari as applied for by the petitioners must therefore issue

quashing the orders made by two respondents under the Land Reform Law.

As this was regarded as a test case I make no order as to costs.

SHARVANANDA, J.

I have read the judgment in draft of Samerawickrema, J. I regret my inability to agree with his judgment.

These are applications filed by the petitioners praying for the issue of writs of certiorari quashing the orders made by the two respondents, i.e. the Land Reform Commission and the Minister of Agriculture and Lands, in the purported exercise of their powers uder section 13 of the Land Reform Law, No. 1 of 1972, declaring the alienations made by way of donations by the 1st petitioner in favour of the 2nd petitioner in each of the above applications null and void. The impugned instruments of alienations are Deeds Nos. 3589 to 3592 dated 29.12.71, and attested by C. E. Pindeniya, N. P. The 1st petitioner is the father, and all the donees are his children. The 1st petitioner states that at the time of the execution of the said deeds, the 1st petitioner was old, being over 67 years of age, and that in anticipation of his death, he distributed, by these deeds, certain undivided portions of Charleswick Estate, which was of extent 86 acres belonging to him, to his children to set them up in life. The petitioners state that it was a *bona fide* parental distribution, not calculated to defeat the purposes of the Land Reform Law. They complain that they were not heard by the respondents prior to these alienations being declared void by the latter and that no opportunity was given to them to show cause why the alienations should not be declared void on the alleged ground that they were calculated to defeat the purposes of the Land Reform Law and that no reasons were given by the 1st respondent as to how or why it reached such a prejudicial finding against them. Their prayer for relief is based on their allegations that the respondents have exercised their statutory powers against them without observing the fundamental principles of natural justice that a person should be heard, *audi alteram partem*, before action is taken against him.

As the applications raised an important question of law, as to whether the exercise of power by the Land Reform Commission and the Minister under section 13 of the Land Reform Law is controlled by the doctrine of *audi alteram partem* and, if so, the legal consequences of non-observance of that principle in such exercise, the applications were referred by the Honourable the Chief Justice, under section 14(3) of the Administration of Justice Law, to a bench of five Judges, and as all the applications were based on similar allegations, they were all heard together.

Every tribunal or other body exercising judicial or quasi-judicial functions is expected to observe certain fundamental rules of natural justice in the exercise of its power. These rules must guide it in the discharge of its judicial functions. In *Spackman v. Plumstead Board of Works,* (1885) 10 A.C. 229, it was held that in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than the substantial requirements of justice shall not be violated, for he is not a judge in the proper sense of the word. In morden administrative law, 'natural justice' finds expression in two principals: that a Judge must not be biased in his adjudication and that no man shall be condemend unheard. The situations in which a duty will arise to act judicially according to natural justice cannot be exhaustively catalogued. *Prima facie,* a duty to act judicially can be spelt in the exercise of a power to determine questions affecting the rights of subjects. The judicial element is inferred from the nature of the power. A duty to act judicially in conformity with the rule of *audi alteram partem* is imposed by the common law on administrative bodies whose decisions prejudicially affect individuals or property. *Prima facie,* a duty to act judicially will arise in the exercise of a power to deprive a party of his property, rights or legal status. Thus, a person or body determining a justiceable controversy between parties, or between itself and a single party, must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to him—*Board of Education v. Rice,* (1911) A.C. 179; *Ridge v. Baldwin,* (1964) A.C. 40; *Duraiappa v. Fernando,* 69 N.L.R. 265 P.C. It is contrary

to natural justice that a party's contentions may be overruled by considerations in the judicial mind which the party has no opprotunity of controverting and that the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based on false premises.

In a statute empowering an official or body to give a decision adversely affecting the rights, liberty or property of an individual, a legal presumption usually operates that the *audi alteram partem* rule has to be observed. It is a general principle of statutory construction that in the absence of plain statutory language to the contrary, any provision giving power to a tribunal to make an order which will affect the interests of an individual is to be construed as a power which will not be exercisable unless the person affected has had the opportunity to be heard. It is to be construed in accordance with the rule of *audi alteram partem* and not in derogation therefrom. "The justice of the common law will supply the omission of the legislature."—per Byles, J. in *Cooper v. Wandsworth Board of Works*, 14 C.B.N.S. 180 at 194.

Lord Guest, in *Wiseman v. Borneman*, (1969) 3 A.E.R. 275 at 279, formulated the presumption thus:

> "It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent on the question the Courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly."

In *Duraiappa v. Fernando*, 69 N.L.R. 265, the Privy Council predicated three matters to be borne in mind when considering whether an implied duty to observe the *audi alteram partem* rule should be inferred: *first*, the nature of the complainant's

interest ; *secondly,* the conditions under which the administrative authority is entitled to encroach on those interests (e.g., where misconduct is proved) ; and *thirdly,* the severity of the sanction that it can impose. It stated that it is only upon a consideration of all these matters that the question of the application of the principle can be determined. In *Board of Trustees, Maradana Mosque v. Mahmud,* 68 N.L.R. 217, the Privy Council interfered with the decision of the Minister of Education to implement the policy of taking over schools which were not being maintained properly and set aside the judgment of the Supreme Court which held that the act in question was purely ministerial. It held that the Minister, in making an order in terms of section 11 of the Assisted Schools and Training Colleges Act, No. 8 of 1961, that the school (Zahira College, Colombo) of which the appellants were the proprietors should cease to be unaided, that it should be deemed an Assisted School and that the Director of Education should be its Manager, was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice in satisfying himself whether there had been a contravention of the provisions of the statute.

In the case of *Shareef v. Commissioner for Registration of Indian and Pakistani Residents,* 67 N.L.R. 433 P.C., the facts were as follows : The appellant made application for registration as a citizen of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. He produced his school certificate to prove the fact of his uninterrupted residence in Ceylon between 1936 and 1943. The Deputy Commissioner who held the inquiry in terms of section 10 of the Act refused application on the ground that the school certificate produced by the appellant was not genuine. The finding of the Deputy Commissioner was based chiefly on a report of an investigating officer and upon a letter written by an Inspector of Schools on the basis of a report made to the Inspector by some person. These reports were not disclosed to the appellant at the inquiry. During the whole conduct of the inquiry, the appellant was never told the details of the case

against the genuineness of the school certificate and he was never given a proper opportunity of answering that case. In quashing the order of the Deputy Commissioner, the Privy Council observed that :

> "When conducting the inquiry under sections 10, 13 or 14, he (the Deputy Commissioner) is acting in a semi-judicial capacity. In this capacity he is bound to observe the principles of natural justice.....that the *party should be given fair notice of the case made against him and that he should be given adequate opportunity at the proper time to meet the case against him.*"

The relevant provisions of section 13 of the Land Reform Law (herein referred to as the Law) read as follows :—

> 13. (1) Where on or May 29, 1971, any person who owned agricultural land in excess of the ceilling has alienated any agricultural land to any other person, such alienor shall, within three months of the date of commencement of this Law, report such alienation to the Commission in the prescribed form.
>
> (2) Where the Commission *finds that any alienation of agricultural land on or after May* 29, 1971, *has been calculated to defeat the purposes of this Law*, the Commission may by order made under its hand declare that such alienation is null and void. Every such order shall be sent by registered post to the alienor and alienee of the agricultural land to which that order relates.
>
> (3) Any alienor or alinee aggrieved by an order made under section 2 may, within three weeks of the receipt of such order, appeal to the Minister in the prescribed form, and the Minister may on such appeal make such order as the Minister may deem fit in the circumstances of the case.
>
> (5) Where no appeal has been preferred under sub-section (3) within the time allowed therefor against the order made under sub-scection 2, such order, or where an

appeal has been preferred, the order, as amended, varied or modified on appeal, shall be published in the Gazette. The order so published shall be final and conclusive and shall not be called in question in any Court, whether by way of writ or otherwise.

(6) Where the Commission under the provisions of sub-section 2 declares that any alienation is null and void, no right, title or interest shall be deemed to have passed to the alienee under the instrument of such alienation and such agricultural land shall vest in the Commission and the alienee shall be deemed to hold such land under a statutory lease from the Commission.

The Commission referred to herein is the Land Reform Commission which is a corporate body constituted in terms of section 43 of the Law. Section 13(2) thus vests the Commission with the power of making an order declaring certain alienations null and void. Section 13(6) states the consequences of such declaration. The order that is made by the Commission, subject to appeal, divests the alienee of his rights to that land. The case falls within the principle of *Cooper v. Wandsworth Board of Works,* 14 C.B.N.S. 180, where it was held that no man is to be deprived of his property without having an opportunity of being heard. According to the criteria laid down by the Privy Council in *Durayappa v. Fernando,* the determination in issue has all the ingredients and features of a quasi-judicial decision.

The jurisdictional fact that vests the Commission with the power to make the order under section 13(2) of the Law is the finding that " any alienation of agricultural land on or after May 29, 1971, *had been calculated to defeat the purposes of the Law.*" The purposes of this Law, as set out in section 2, are—

(*a*) to ensure that no person shall own agricultural land in excess of the ceiling ; and

(*b*) to take over agricultural land owned by any person in excess of the ceiling.

The Land Reform Law, No. 1 of 1972, was certified on 26th August, 1972, and came into operation on 26th August, 1972. It was gazetted as a Bill on 28th June, 1972.

The word '*calculated*' in such contexst normally means 'designed' or 'intended'. But, the *prima facie* meaning can be displaced by the context in which the word is used and the subject matter. It can be well appreciated that the words 'calculated to deceive' found in section 11 of the English Trade Marks Act should have been construed as "likely or resonably likely to deceive or mislead" the trade or public—see Lord Cave in *Macdowell v. Standard Oil Company,* (1927) A.C. 632. The words of a statute are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature had in view. What must be ascertained is their meaning in the section of the statute. The question arises whether the words "any alienation ..... *has been calculated to defeat* the purposes of the Law" appearing in section 13(2) of the Law should be construed to mean "any alienation has been intended or designed to defeat the purposes of the Law", or "any alienation was likely to defeat the purposes of the Law". It is to be noted that the Land Reform Law does not invalidate, *ipso facto, all* alienations made on or after May 29, 1971, by a person owning any extent in excess of the ceiling. It seeks to avoid only alienation of a certain character. If the likely result of such alienation made after May 29, 1971, on that person's proprietory land structure is the test, as would be the case if the word 'calculated' is to be read in the sense of 'likely', then all alienations made after that date by such persons will be struck, as every alienation by such person will tend to defeat the purposes of the Law. The Legislature never intended such a construction or result. In my view, the Legislature did not intend to guillotine honest or *bona fide* alienations. It intended to avoid alienations which were executed in anticipation of the Law, with a view to forestalling the provisions of that Law by reducing the extent of land that would be taken over as being in excess of the ceiling fixed by that Law. Moreover, the words

"*as to be calculated*", which were the words construed in *Turner v. Shearer*, (1972) 1 W.L.R. 1387, and *Regina v. Davison*, (1972) 1 W.L.R. 1540, reach out for the effect, divorced from any *means rea*. But, here, the words "has been calculated", in the context, refer to past transactions and underline the animus behind the impugned act. In my view, what the Legislature sought to strike down was the alienation which was done with a view to defeating the proposed legislation. Before the Commission decides to make an order under section 13(2), it has come to an objective determination that the relevant alienation was designed to defeat the purposes of the Law.

The Commission will have to have material other than the mere conveyances to arrive at the finding that the alienation was motivated by the selfish desire to foil the Law. The animus of the executants will have to be probed into. It was then obligatory on the Commission to give the parties a fair opportunity to correct or controvert any incriminating circumstance or material which tended or pointed to that conclusion. The parties may be able to explain away any suspicious featue, or to demonstrate the falsity of the premises or the unsustainability of the finding. It is not disputed that the Commission did not disclose its hand to the parties or give to the parties an opportunity of explanation and possibly the correction of misapprehension. Thus, there was a total breach of the principles of natural justice.

What is the effect of such breach ? In *General Medical Council v. Spackman*, (1943) A.C. 627 at 644 and 5, Loard Wright said :

> "If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

In *Annamunthodo v. Oilfields Workers' Trade Union* (1961) A.C. 945, the Privy Council held that an order of expulsion of a member of a Trade Union was invalid for want of the observance of the rules of natural justice.

Breach of natural justice goes to jurisdiction and renders the decision or determination void, not voidable. The omission, like the disregard of any other mandatory procedural requirement, denudes the action of its statutory authority and makes it ultra vires and a nullity. The leading case of *Ridge v. Baldwin*, (1964) A.C. 40, settled this point. The majority of the Law Lords emphasised that a decision given without regard to the principles of natural justice is void and that a body with a power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. In the view of Their Lordships, failure to give a hearing to the party affected by its decision results in the tribunal acting without jurisdiction. As Lord Wilberforce said in *Anisminic v. Foreign Compensation Commission*, (1969) 1 A.E.R. 208 at 244 :

> "There are certain fundamental assumptions which, without explicit re-statement in every case, necessarily underline the remission of the power to decide, such as the requirement that a decision must be made in accordance with the principles of natural justice and good faith."

Lord Pearce, at page 233, observed :

> "Lack of jurisdiction may arise in various ways....., or while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct."

Their Lordships, in the Anisminic case, re-emphasised that if a tribunal had failed in the course of the inquiry to comply with the requirements of natural justice, its decision is a nullity. Such decision is however deemed to be valid, at least as against third parties, until it is successfully impeached by the person aggrieved. "If the decision is challenged by the person aggrieved on the grounds that the principle has not been obeyed, he is entitled to claim that as against him, it is void *ab initio* and has never been of any effect." Per Lord Upjohn in *Duraiappa v. Fernando*, 69 N.L.R. 265 at 274.

Section 13(3) provides for an appeal by an alienor or alienee, who is aggrieved by an order made under section 13(2), to the Minister in the prescribed form within 3 weeks of the receipt of such order; and on such appeal, the Minister may make such order as he may deem fit in the circumstances. Section 13(5) provides that where no appeal has been preferred under sub-section (3)....., such order, or where an appeal has been preferred, the order as amended, varied, or modified on appeal, shall be published in the Gazette and that such order so published shall be final and conclusive.

It was the submission of the Additional Solicitor-General that in the scheme of the Law, the order made under section 13(2) by the Commission is only an interim order and that it became final and acquired legal force in terms of section 13(5) only if the aggrieved party did not appeal to the Minister, or, if the appeal is affirmed, amended, varied, or modified by the Minister. He urged that it was sufficient if an opportunity of being heard was afforded at the stage of appeal by the Minister and that it was not necessary for the Land Commission, prior to making its order under section 13(2) to hear the parties. He referred us to the judgments of the House of Lords in *Wiseman v. Borneman*, (1969) 3 A.E.R. 275, and *Pearlberg v. Varty*, (1972) 2 A.E.R. 6, in support of his contention.

In *Wiseman v. Borneman*, (1969) 3 A.E.R. 275, the tribunal had, under section 28(5)(*b*) of the English Finance Act 1960, merely to determine on the material before it, *whether there* was a *prima facie case* for proceeding to take steps for tax assessment. This was a most limited decision. There was no question of the tribunal binding the taxpayer. In this context Lord Reid, very properly, observed:

> "It is, I think, not entirely irrelevant to have in mind that it is very unsual for there to be a judicial determination of the question whether there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires

that he should first seek the comments of the accused or the defendant on the material before him. So, there is nothing inherently unjust in reaching such a decision in the absence of the other party."

In the course of their judgments, Lord Guest, Lord Donovan and Lord Wilberforce however expressed the view that there is no difference in principle, as far as observance of the rules of natural justice is concerned, between decisions which are final and those which are not. "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth." (see Tucker L. J. in *Russel v. Duke of Norfolk,* (1949) 1 A.E.R. 109 at 118.)

In *Pearlberg v. Varty,* (1972) 2 A.E.R. 6, the Commissioner of Taxes granted leave under section 6(1) of the Income Tax Management Act, 1964, to the raising of assessments on the taxpayer for certain years. This section provided that such assessments "may only be made with the leave of a General or Special Commissioner given on being satisfied by an Inspector that there are reasonable grounds for believing that tax has, or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person". The taxpayer claimed that those assessments were invalid on the ground that the Commissioner had acted *ultra vires* in granting leave without giving him an opportunity to appear and be heard. The House of Lords rejected the contention of the taxpayer on the ground that the function of the Commissioner in granting leave under section 6 (1) was administrative and not judicial and that the Commissioner's decision to give leave did not make any final determination of the rights of the taxpayer. It was held that the Commissioner's decision was in the class of purely administrative preliminary decisions, taking away no rights, and in respect of which neither reason nor justice requires the persons concerned to be heard before the decision is made. It merely enabled the Inspector to raise an assessment. The determination of the rights and liabilities, if there is any dispute about them, came later when the

person who has been assessed for tax appeals against the assessment and his appeal is heard in a judicial or quasi-judicial proceeding.

In line with these judgments of the House of Lords is the judgment of the Privy Council in the local case of *Jayawardene v. Silva*, 73 N.L.R. 289 :

Under the terms of section 130 of the Customs Ordinance, the Collector of Customs is given authority, where a person is concerned in exporting out of Ceylon any goods, the exportation of which is restricted, contrary to such restrictions, to impose a forfeiture of treble the value of the goods, or a penalty of Rs. 1,000 at his election. By the terms of section 145, all penalties and forfeitures which are incurred and sued for are recoverable in the name of the Attorney-General in the District Court. It was argued that the Collector was performing a judicial or quasi-judicial function in electing to impose a forfeiture rather than a penalty. The Privy Council endorsed the view of the Supreme Court that the proper test for deciding whether the function performed by a tribunal, such as the Collector, was *quasi-judicial* was framed in the case of *Duraiappa v. Fernando* (*supra*) and agreed with the Supreme Court in rejecting the contention that the Collector was, under section 130, performing a quasi-judicial function. On this issue, Lord Guest, giving the judgment of the Privy Council, stated as follows :

> " The Collector had the two functions to perform under section 130. In the first place he had to decide as a preliminary matter whether an offence was committed and, if so, whether the appellant was concerned in it. It is agreed that this was a preliminary decision which did not bind the appellant. The issue would be tried when and if the Attorney-General took proceedings under section 145. *The rights of the appellant were not in any way affected by this decision.* Having so decided, so to speak, that a *prima facie* case existed under section 130, the ultimate decision being left to the District Court, the Collector then had to elect between imposing forfeiture of treble the value of the goods

or a penalty of Rs. 1,000. When the Collector came to perform the second function of election, this was no doubt an important matter, but a question purely within his discretion..... What he did was not to fix the extent of the appellant's liability, but to fix a ceiling beyond which the District Court, if it gave judgment for the Attorney-General, could not go ..... The only effect which can be said to flow from the Collector's right of election is that he is given power to fix Rs. 1,000, or some greater sum involving treble the value of the goods and that it would be an advantage to the subject if he could persuade the Collector at that stage to fix the lower sum. But this is purely a matter of convenience to the subject and his rights are adequately preserved. Their Lordships do not consider that at this stage the Collector had made any determination or decision which could be described as quasi-judicial."

"*The Collector makes no adjudication when he elects to seize goods as forfeit.* Similarly there is no adjudication on the facts by the Collector when he makes his election under section 130 and the only determination having the legal effect of adjudication is that which the Court will make in an action brought by the Attorney-General. There is thus no sanction attached to the Collector's election on the nature of any compulsion to make payment." (see the judgment of the Supreme Court in *Jayawardene v. Silva*, 72 N.L.R. 25 at 33).

The nature of a report made by a Commissioner appointed under the Commissioners of Inquiry Act came up for consideration by this Court in *Fernando v. Jayaratne*, 78 N.L.R. 123 and it was held that since the Commissioner had no legal authority to determine question affecting the rights of individuals, he was not exercising judicial or quasi-judicial functions. In the course of my judgment in that case, I stated that :

"The only power that the Commissioner has is to inquire and make a report and embody therein his recommendation. He has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*, nor does he make a judicial decision. The report of the respondent has no binding force ; it is not a step in consequence of which legally enforceable rights may be created or extinguished."

In my view, the determination made by the Land Reform Commission under section 13(2) differs fundamentally in respect of the sanction attaching to it, from the preliminary finding of "a *prima facie* case" in *Wiseman v. Borneman*, or the "granting of leave" to make an assessment in *Pearlberg v. Varty*; or the investigatory power of the Commissioner of Inquires in *Fernando v. Jayaratne*; or the order of forfeiture made by the Collector in *Jayawardene v. Silva*. The decisions referred to in these cases had no binding effect, nor any impact on the interests of the subject. On the other hand, the Commission's finding forms an integral and necessary part of a process that culminates in an action adverse to the subject. It cannot be equated to a provicional decision which does not take effect until a prescribed period for lodging objections has expired. A provisional decision is a decision conditioned to become final on the other party failing to show satisfactory cause to the contrary. The opportunity for hearing in such cases is afforded by the opportunity for lodging objections. An *order nisi* in proceedings in a trial Court is an example of a provisional order. No decision has been made. The final order in such proceedings is however not in the nature of an appeal. An appeal contemplates two definitive orders. The original order is binding until it is superseded in appeal. The right of appeal does not militate against the existence of a right to a precedent hearing, and if that is denied, to have the decision declared null and void. One of the characteristic attributes of a judicial proceeding is that it terminates in a decision that is binding and conclusive until it is annualled in appeal. It is because his interest is prejudically affected by the declaration made by the Commission that the alienor or alienee is granted a right of appeal, and being aggrieved in terms of section 13(3), he appeals to the Minister. The declaration operates to annual the alienation, unless it is reversed or modified by the Minister on appeal. The declaration does not require the adoption or confirmation by another body for it to acquire legal force. It is binding on the parties, unless it is rescinded or modified by the Minister on appeal. In the case of *Rex v. Electricity Commissioners*, (1924) 1 K.B. 171, the scheme that the Commissioners were empowered to make could

not take effect until confirmed by the Minister of Transport and approved by the Houses of Parliament. In the process, these bodies could alter or even reject it. It was argued by the Attorney-General that the Commissioners came to no decision at all and that they acted as advisors and merely recommended an order embodying a scheme, and until it was approved by the bodies, it decided nothing and did not affect the rights of subject. In rejecting the argument, Atkin, L.J. said :

> " In the provision that the final decision of the Commissioners is not to be operative until it has been approved by the two Houses of Parliament, I find nothing inconsistent with the view that in arriving at the decision of Commissioners themselves are to act judicially ..... I know no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval even where the approval has to be that of both Houses of Parliament. "

The Privy Council, in *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust,* (1937) A.C. 898 at 917, quoted with approval Atkin, L.J's statement of the law that " a proceeding is none the less a judicial subject to prohibition or certiorari because it is subject to confirmation or approval by some other authority ". *A fortiori*, the proceeding before the Commission is no less a judicial proceeding because, on an appeal to the Minister in terms of the law, it may be reversed or modified. It is vested by law with more than a provisional status and hence a duty to act judicially arises in the conduct of it, and an antecedent hearing should be granted to the party who will be affected by it.

Section 13(3) gives the parties a right of appeal to the Minister in the prescribed form and the Minister is empowered to make such order as the Minister may deem fit. Though the power so vested in the Minister is of the widest amplitude, yet it is an appellate jurisdiction that the Minister exercises and not an original jurisdiction. In terms of this section, the petitioners appealed to the Minister, but the Minister affirmed the

order of the Land Reform Commission, stating that he "saw no reason to interfere with the said order of the Land Reform Commission". In the petition of appeal, the petitioners did not specifically adduce, as a ground of appeal, the fact that they were not heard by the Commission. Apart from the chance of stating their grounds of grievance in their petition of appeal, they were not provided with any other opportunity of supporting their appeal with oral or written submissions. The petitioners complain that even in appeal they were denied the right of hearing.

In *Local Government Board v. Arlidge*, (1915) A.C. 120, Lord Haldane stated :

> "When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties an opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same.....The Board was not bound (on an appeal) to hear the respondent orally, provided it gave him the opportunity (of stating his case in writing)."

It is the duty of the Minister who has to review the finding of the Commission to act judicially. As such, it is incumbent upon him, before coming to a decision, to give a reasonable opportunity to the appellants, whose rights were in issue, to represent or state their case.

Section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, specifies the grounds on which this Court may issue a writ of certiorari quashing a statutory authority's order :

(*a*) that it has acted, *ex facie*, without jurisdiction, and

(*b*) that it has failed to observe the principles of natural justice.

According to Lord Hodson, in *Ridge v. Buldwin,* (1963) 2 A.E.R. 66 at 114, the three features of natural justice are :

(1) the right to be heard by an unbiased tribunal ;
(2) the right to have notice of charges of misconduct ; and
(3) the right to be heard in answer to those charges.

"Natural justice does not invariably require that the parties be entitled to an oral hearing. It will sometimes be fair to determine an issue on the basis of written representations ; but the parties concerned must still be appraised of and given a proper opportunity of replying to any allegations against them or other relevant evidential material."—Halsbury's Laws of England (4th Edition) Vol. 1 at p. 93.

Natural justice generally requires that persons liable to be directly affected by proposed decisions or proceedings be given sufficient notice of what is proposed, so that they may be in a position—

(*a*) to make representations on their own behalf ; or

(*b*) to appear at a hearing or inquiry (if one is to be held) ; and

(*c*) effectively to prepare their own case and to answer the case (if any) they have to meet.
(vide S. A. de Smith on Judicial Review of Administrative Action (3rd Edition) at p. 172.)

Although one who is entitled to the protection of the rule of '*audi alteram partem*' is prima facie entitled to put his case orally, yet, in a number of contests, the rule will be satisfied by an opportunity to make written representations to the deciding body. If the rule is to have reality, the party must know in good time the case he has to meet. In order to protect his interests, he must be enable to controvert, correct or comment on material that may be relevant to the decision. Notice is the first limb of a proper hearing. The Land Reform Law does not create any presumption against alienations of agricultural land effected on or after May 29, 1971. By the mere execution of any such alienation, neither the alienor nor the alienee is placed

on the defensive. They will have to be confronted with other evidence or telltale. It is to be borne in mind that the party directly affected by the declaration made by the Commission under section 13 (2) is the alienee. On such declaration, section 13(6) makes the alienation null and void and directs that no title or interest shall be deemed to pass to the alienee under the instrument of alienation. The finding under section 13(2) must have reference to the alienee's object of acquisition also. The question of his participation in the calculation to defeat the Law is relevant to deprive him of the property acquired by him. His acquisition also should be colourable. If after investigation, the Commission forms a tentative opinion on the material available to it that the alienation comes within section 13(2), there is a breach of natural justice if the Commission does not disclose the particulars of the grounds on which its opinion was based and invite the comment or explanation of the party potentially prejudiced by such conclusion. On the facts before the Court, the Commission does not appear to have observed the canons of natural justice and fairness. By its cyclostyled letter dated 23.5.74, the Commission communicated its order without again, disclosing its reasons for its findings that the alienation came within the mischief envisaged in section 13(2). The party aggrieved with the order is given a right of appeal by section 13(3) to the Minister in the prescribed form. Cage 9 of the prescribed form requires the matters urged in support of tne appeal to be sent out by the appellant. In this context, the question whether reasons should be given for the adverse finding by the Commission assumes significance. There is no general rule that reasons should be given for decisions by an administrative body, but postulates of natural justice may warrant a departure. A person prejudicially affected by a decision must be sufficiently notified of the case against him to enable him to exercise meaningfully his right of appeal. How can the appellant be expected to set out in his petition of appeal all matters to be urged in support of the appeal if he is not notified of the grounds of the adverse decision by the Commission ? He should not be driven to surmise. It is said that natural justice is satisfied if the Minister decides the appeal on the basis of the written

representations contained in the petition of appeal. For this proposition to be tenable, principles of fairness require that the Commission should at least apprise the parties of the reasons for its decision to enable the party affected by its order to substantiate his appeal.

The observation of Lord Upjohn in *Padfield v. Minister of Agriculture*, (1968) 1 A.E.R. 694 at 719, has relevance to this context :

> "If a tribunal does not give reasons for its decision, it may be, if circumstances warrant it, that a Court may be at liberty to come to the conclusion that it had no good reason for reaching that conclusion and directing a prerogative order to issue accordingly."

We were supplied copies of the various prescribed forms under the Law. In respect of the report referred to in section 13(1), the relevant forms are Form 3 and Form 3 : 1. Cage 22 of that form contains the questionnaire : Why alienation should not be declared null and void ? This question proceeds on the hypothesis that the alienation is presumed to be null and void and casts the burden on the alienor to rebut the presumption. In my view, the prescribed form (Form 3 : 1) is ultra vires in respect of cage 22 and is not warranted by the provisions of the Law. The Minister could not, in the exercise of his regulation-making power under section 62, have prescribed a form which is not in conformity with the provisions of the Law. On this view of the matter, it cannot be said that the alienor had an opportunity of giving his reasons in advance why the alienation should not be declared null and void. The Law did not require him to displace any such presumption. It is said that the Minister was entitled to decide the appeal on the written submissions incorporated in the petition of appeal and that the demands of natural justice had been satisfied by this opportunity to make written submissions in the absence of any request for oral hearing. There would have been some substance in this contention had the order of the Commission fully set out the grounds of the decision

appealed from, so that the appeallant would have been in possession of all the arguments against him when the time came for him to formulate the matters to be urged by him in support of the appeal. In my view, in the circumstances, insofar as the appellate hearing by the Minister consisted only of the consideration of the petitioners' petition of appeal and no other hearing was afforded to the parties it was not an adequate hearing satisfying the requirements of natural justice. But, even on the assumption that the appellate hearing by the Minister was sufficient in the circumstances, Mr. Jayawardene contended that a deficiency of natural justice in proceedings before the original tribunal cannot be cured by a sufficiency of natural justice before the appellate tribunal and he referred us to the judgment of Megarry, J. in *Leary v. N. U.*, (1970) 2 A.E.R. 713, 718—20. In that case, after consideration of the authorities, Megarry, J. held that a failure of natural justice in the trial body cannot be cured by a sufficiency of natual justice in an appellate body. Professor S. A. de Smith, in his article on Administrative Law appearing in Halsbury's Laws of England (4th Edition) at page 97, paragraph 77, summarises the legal position thus :

> "The effect of a failure to accord an adequate hearing or opportunity to be heard prior to a decision may be repaired by rescission or suspension of the original decision followed by a full and fair hearing or re-hearing ; but, if this subsequent hearing is conducted by an appellate body, the decision may still be open to challenge on the ground that the person aggrieved has been denied a right to an original hearing and then to an appellate hearing."

In the exercise of their powers under section 13, both the Commission and the Minister are under a duty to act judicially and each has to observe the rule of *audi alteram partem* and respectively accord an original hearing and appellate hearing before making its determination, and the parties are entitled to a reasonable hearing at both levels. The provision of only one hearing

does not satisfy the requirements of law. In my view, as stated earlier, the parties were not given any opportunity of being heard by the Commission and they did not have an adequate hearing by the Minister on appeal. But, even if one assumes that the parties were given a sufficient hearing in law by the Minster, that will not cure the fundamental infirmity in the Commission's decision. The determination of the Commission is vitiated by its failure to act in accordance with the norms of natural justice and, accordingly, is destitute of legal effect. Notwithstanding that the decision of the Minister is made final and conclusive by section 13 (5), that decision cannot give validity to a determination which is a nullity—*Ridge v. Baldwin* (*supra*). If it was, in law, a nullity, the fact that the Minister affirmed it in appeal cannot give it any sanction in law. One cannot appeal against a nullity. There was no decision in law to appeal against. The Minister's decision gets vitiated by the vice in the original decision. A super-structure cannot be erected on a nullity—it has to fall as there is no foundation.

By appealing to the Minister. the petitioners are in no way prevented from now asserting the nullity of the respondents' decision. There is no question of waiver. By appealing within the statutory framework, the petitioners were not affirming the validity of the decision appealed against. Indeed, they were disaffirming it—*Ridge v. Baldwin*, (1964) A.C. 40; *Annamunthodo v. Oilfield Workers' Trade Union* (1961) A.C. 945. So that even if the point had not been canvassed before the Minister and the order of commission was affirmed by the Minister in appeal and rendered final and conclusive by publication in the Gazette, the petitioners are entitled to challenge the decision on the ground of breach of principles of natural justice in a prerogative writ proceedings—section 22 of the Interpretation Ordinance as amended by Act 18 of 1972. It is of the utmost importance to uphold the right and indeed the duty of the Courts to ensure that powers are not exercised in breach of principles of justice when the exercise of such powers impinges on the basic rights of citizens.

For the reasons set out above, the applications of the petitioners succeed. The petitioners are entitled to the issue of writs of certiorari quashing the orders made by the respondents in the exercise of their powers under section 13 of the Land Reform Law. The said orders are declared null and void. As the matter was argued as a test case, I allow the applications, but make no order as to costs.

Applications allowed.