1957 *Present :* Gunasekara, J., and T. S. Fernando, J.

S. SOCKALINGAM CHETTIAR, Appellant, *and* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 107—Application D 1586

IN THE MATTER OF AN APPEAL UNDER SECTION 15 OF THE INDIAN AND PAKISTANI RESIDENTS (CITIZENSHIP) ACT, No. 3 OF 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration as citizen—Prima facie case not established—Failure to show cause—Refusal of application—Right of appeal—Service of notice to applicant—Proof—Sections 9 (2), 15, 20.

(i) Appeal lies against an order made under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act.

Sivan Pillai v. Commissioner for Registration of Indian and Pakistani Residents (1953) 54 N. L. R. 310, not followed.

(ii) It is provided by Section 20 of the Indian and Pakistani Residents (Citizenship) Act that a notice which is required to be served on an applicant "shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business".

Held, that there should be clear and unambiguous evidence to prove the facts necessary to raise the presumption of law for which provision is made by the Section. Evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the applicant, which bears certain post marks and endorsements, is not sufficient to prove that the notice was sent to the applicant by post in a registered letter, which was eventually returned undelivered.

APPEAL from an order made under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act.

S. Thangarajah, for the applicant-appellant.

J. W. Subasinghe, Crown Counsel, for the respondent.

Cur. adv. vult.

January 21, 1957. GUNASEKARA, J.—

This is an appeal from an order made under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, refusing an application made by the appellant for the registration of his wife and himself as citizens of Ceylon.

It was contended by the learned crown counsel, on the authority of the decision of Swan J. in *Sivan Pillai v. Commissioner for Registration of Indian and Pakistani Residents*,[1] that an order made under section 9 (2) is an administrative act and is therefore not appealable. With all respect to the learned judge, it seems to me that this view is in conflict with the express terms of section 15 of the Act, which provides that " an appeal against an order refusing . . . . . an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant ". An order made under section 9 (2) is such an order, and therefore, according to the plain meaning of the language of section 15, is an order against which an appeal may be preferred. There appears to be no ground for reading into section 15 a provision excluding from its operation orders made under section 9 (2). I therefore hold that the order in question is an appealable order.

The application was made on the 3rd August 1951. A deputy commissioner who considered the application was of opinion that a *prima facie* case had not been established, and it therefore became necessary for him, in terms of section 9 (1), to cause to be served on the appellant a notice setting out the grounds on which the application would be refused and giving the appellant an opportunity to show cause to the contrary within a period of three months from the date of the notice.

[1] *(1953) 54 N. L. R. 310.*

The necessary notice was signed by the deputy commissioner on the 7th September 1955. On the 14th December 1955 he made the order that is the subject of this appeal, holding, among other things, that the notice had been duly served on the appellant.

The order does not state upon what material this finding is based. The learned crown counsel has submitted to us that it is based on the evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the appellant, which bears certain post marks and endorsements. It is contended for the respondent that the right conclusion to be drawn from this evidence is that the notice was sent to the appellant by post in a registered letter, which was eventually returned undelivered. If that is the right conclusion the fact that the letter was returned undelivered proves of course that actually the notice was not served on the appellant. But the learned crown counsel seeks to rely on the provision in section 20 of the Act that a notice which is required to be served on an applicant "shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business".

The presumption of law for which provision is made by this section is one that the applicant is not permitted to rebut (*Marimuthu v. Commissioner for Registration of Indian and Pakistani Residents*[1]). Moreover the evidence relied on for proof of the facts necessary to raise the presumption would ordinarily be evidence that the applicant has had no opportunity of challenging or contradicting. For both reasons the evidence must be conclusive before these facts can be held to be proved.

If the notice that had been served on the appellant had been "sent to him by post in a registered letter addressed to his last known place of residence or of business", clear and unambiguous evidence furnishing conclusive proof of those facts should have been readily available in the files and registers kept in the Commissioner's office. The learned crown counsel has not been able to point even to an office minute, or other entry in any official record or register, stating that the notice was so sent to the appellant or sent to him at all. I agree with a contention that was advanced by Mr. Thangarajah that the fact that the notice and the envelope are in the file is insufficient by itself to prove conclusively that what the envelope contained when it was posted was the notice.

[1] *(1956) 57 N. L. R. 307.*

The deputy commissioner himself has not held that the notice has been sent to the appellant in a registered letter addressed to his last known place of residence or of business and that it must therefore be deemed to have been duly served on him. The effect of his finding is that it was in fact served. The presence of the document in the file, however, proves the contrary, and there is no sufficient evidence of the facts that must be proved before it can be deemed to have been served.

The order appealed from must be set aside and the respondent must be directed to cause to be served on the appellant a fresh notice in terms of section 9 (1) of the Act and to proceed thereafter in due course of law. The appellant must have his costs of appeal, which I would fix at Rs. 105.

Postscript

Since the above judgment was written my brother has drawn my attention to the case of *K. Easiah v. Commissioner for Registration of Indian and Pakistani Residents*,[1] where Gratiaen J. has expressed agreement with Swan J.'s conclusion in *Sivan Pillai's case*.[2] Gratiaen J. points out that both are cases in which the appellant failed to avail himself of the opportunity given to him by a notice in terms of section 9 (1) of the Act to show cause why his application should not be refused, and says that Swan J. has held "that in such circumstances the remedy by way of appeal to this Court was not available", and that he himself agrees with this conclusion but "would prefer not to attempt to solve the difficult question whether the order under appeal is of a judicial, a quasi-judicial or a purely administrative character". He goes on to consider the appeal on its merits and dismisses it on the ground that there is no error made by the tribunal of first instance to which the appellant can point. The appeal was dismissed, as in the later case of *Marimuttu*[3] (where Gratiaen J. delivered the judgment of the court), and was not rejected as in *Sivan Pillai's case*.

As I read the judgment in *Easiah's case*, what was decided was not that the applicant had no right of appeal and therefore the appeal could not be entertained, but that in the circumstances of that case the appeal could not succeed.

T. S. FERNANDO, J.—I agree.

Order set aside.

[1] *(1953) 58 N. L. R. 37.* [2] *(1953) 54 N. L. R. 310.*
[3] *(1956) 57 N. L. R. 307.*