1956 *Present :* T. S. Fernando, J.

R. M. APPUHAMY, Appellant, *and* B. D. MENDIS, Respondent

S. C. 198—C. R. Badulla-Haldumulla, 3,230

Public Servants (Liabilities) Ordinance (Cap. 88)—Section 2 (1) (a)—Protection of Ordinance not available against actions based on unjustified enrichment or for recovery of money paid on a consideration which has failed.

By an informal writing the defendant, who was a public servant, had agreed to transfer certain immovable property to the plaintiff. The document contained an acknowledgment of the receipt of a sum of Rs. 250 " as advance this day on that account ". When the defendant subsequently failed to transfer the property as agreed upon, the plaintiff instituted the present action for the recovery of the sum of Rs. 250 paid in advance.

Held, that the action did not fall within the class of actions described in section 2 (1) (*a*) of the Public Servants (Liabilities) Ordinance.

APPEAL from a judgment of the Court of Requests, Badulla-Haldumulla.

T. B. Dissanayake, for the execution-purchaser appellant.

G. P. J. Kurukulasuriya, with *E. L. P. Mendis*, for the defendant respondent.

Cur. adv. vult.

December 21, 1956. T. S. FERNANDO, J.—

In execution of a decree entered against the defendant-respondent ordering him to pay to the plaintiff a sum of Rs. 250 a land belonging to the defendant was seized and put up for sale by the Fiscal, and at the sale it was purchased by the present appellant. The defendant applied to court to set aside the sale on the ground (i) of certain irregularities alleged by him in the conduct of the sale and (ii) that he was a public servant entitled to plead in this case the protection of the Public Servants (Liabilities) Ordinance (Cap. 88). The issues in regard to the alleged irregularities have not been answered by the learned Commissioner of Requests as he treated another issue (issue 9) as to whether the cause of action upon which the defendant was sued was barred by the provisions of section 2 of the Public Servants (Liabilities) Ordinance as a preliminary issue an answer to which in favour of the defendant was conclusive in the case.

The Commissioner has found that (*i*) the defendant was a public servant who came within the class of public servants entitled to plead the Ordinance, and (ii) it is open to the defendant to plead the benefit of the Ordinance at the stage of execution notwithstanding that judgment has been entered against him, and learned counsel for the appellant does not canvass these findings. He has however strenuously contended that these findings are of no avail to the defendant in this case as the latter must show further that the action upon which he has been sued is an action of the kind described in section 2 (1) of the Ordinance. Both counsel before me were agreed that the action filed against the defendant does not come within the class of actions described in section 2 (1) (*b*) or 2 (1) (*c*). The present appeal therefore hinges upon the question whether it is an action *upon any promise, express or implied, to repay money paid or advanced to him* and thus falling within the class of actions described in section 2 (1) (*a*).

It is therefore necessary to consider the real nature of the action in which the defendant was sued by the plaintiff. By an informal writing P1 the defendant had agreed to transfer to the plaintiff certain premises situated at Bandarawela on the plaintiff paying to him a sum of Rs. 4,250 before a date specified in the writing. P1 further contained an acknowledgment of the receipt of a sum of Rs. 250 "as advance this day on that account". The plaintiff alleged in his plaint that the defendant had failed to transfer the property as agreed upon and had failed and

neglected to pay back the sum of Rs. 250 paid as advance. He therefore claimed that a cause of action had arisen to him to sue the defendant for the recovery of the said sum of Rs. 250. The writing P1 not being notarially attested could not have been sued upon in respect of the promise to transfer the immovable property, but was available as evidence of the receipt by the defendant of Rs. 250 which sum was no doubt paid by way of earnest money. Indeed, the receipt of this sum was admitted by the defendant in his answer. On the day fixed for trial judgment was entered against the defendant in terms of section 823 (2) of the Civil Procedure Code on default of his appearance, and I shall therefore proceed to consider the question now before me on the assumption that the assertion in the plaint that it was the defendant who failed to carry out the terms of the agreement embodied in P1 by transferring the property is established. As it was the defendant who failed to complete the transaction of the sale of the property, the plaintiff became entitled in law to a refund of the money advanced by him on the informal agreement. This was a case where the action for recovery of the money lay either on the basis of an unjustified enrichment of the defendant or on the principle that money paid on a consideration which has failed may be recovered as money had and received.

If the real nature of the action be as stated by me above, can it be said that it fell within the class of actions described in section 2 (1) (*a*) of the Ordinance ? Learned Counsel for the defendant conceded what is, no doubt, obvious that the action was not based upon any express promise, but he argued that there was an implied promise by the defendant to repay the sum of Rs. 250 paid to him by the plaintiff as an advance on the consideration which had been agreed upon at Rs. 4,250. I am of opinion that the actions described in section 2 (1) (*a*) are principally actions for the recovery of sums paid out as loans or on transactions in the nature of loans and that they do not in the context embrace actions based on the quasi-contractual obligations referred to by me in the paragraph above.

As Dalton J. said in *Samarasundera v. Perera* [1], " the limits within which public servants are protected are very carefully prescribed by the Ordinance ", and Courts should be watchful to grant the protection of the Ordinance only in respect of actions which fall strictly within the terms of section 2.

I am of opinion that the answer to issue 9 should have been that the cause of action sued upon in this case did not fall within the exempted classes specified in section 2 (1) (*a*) of the Ordinance. I would therefore set aside the order made by the learned Commissioner on 8th December 1955 and remit the case to the Court of Requests for the inquiry to be continued on the other issues that were framed. The appellant will be entitled to the costs of this appeal and of the proceedings so far held in the Court of Requests on the application to set aside the sale.

Appeal allowed.

[1] *(1950) 31 N. L. R. at 295.*