1955 *Present :* **Gratiaen J.**

V. PARAMASIVAM, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 234—In the matter of an application for registration of an Indian resident as a Ceylon citizen under Act No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Citizenship by registration—Residential qualification—Standard of proof required—Quantum of evidence—Power of Supreme Court to order fresh inquiry.

The qualifications of a person to be registered as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act have to be proved on a balance of probability (as in civil proceedings) and not "beyond reasonable doubt" (as in criminal trial).

When an appeal is preferred to the Supreme Court by an applicant who has been refused citizenship the Supreme Court has inherent jurisdiction to order, if necessary, a fresh inquiry.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardene, with *S. P. Amarasingham*, for the applicant appellant.

H. A. Wijemanne, Crown Counsel, with *R. S. Wanasundera*, Crown Counsel, for the respondent.

Cur. adv. vult.

June 23, 1955. GRATIAEN J.—

This is an appeal by an Indian Tamil against an order refusing to register him as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. A Deputy Commissioner who held an inquiry into his application, purporting to act judicially, decided that the appellant had not established that he possessed the requisite residential qualification, namely, "uninterrupted residence" (as defined in the Act) since 1st January 1946.

The appellant, who is unmarried, was born in Ceylon on an estate in the Kegalla District where his father was employed as a sub-kangany and his mother as a labourer. He declared in his affidavit that he had paid only one visit to India, in 1949, and the duration of that isolated visit (which was confirmed by official documents) admittedly does not disqualify him for registration. He also stated that he had never remitted money to India at any time. There was no evidence to contradict these assertions, or the assertion that he has no dependants in that country. He has also declared in his affidavit that he owns no property there of any kind.

The appellant's evidence at the inquiry was to the effect that, until he was about 12 or 13 years of age, he lived with his parents on the estate where they worked. Having then apprenticed himself under a tailor at Wahakula, he established himself in that trade at the Yataderiya Bazaar where he has lived and been engaged in business ever since 1935. In February 1940 he started a subsidiary trade as a dealer in arecanuts, and it is common ground that since 1946 he has also been a licensed rubber dealer in the same locality. The story, if true, is one of steady progress in business in a specified locality in Ceylon.

The record of the proceedings betrays a lamentable failure on the part of the Deputy Commissioner to appreciate the nature of his judicial functions under the Act. In particular, he grossly misdirected himself as to (1) the standard of proof which is required whenever an applicant is called upon to establish that he possesses the statutory qualifications for claiming the privilege of Ceylon citizenship, and (2) the kind of evidence and the *quantum* of evidence which may be received and accepted as proof of those qualifications.

The appellant had been called upon only to prove that he was "resident" in Ceylon within the meaning of the Act during the period 1936 to 1946. He had apparently satisfied the authorities in all other respects as to his qualifications for registration. For instance, I observe from the record that the Deputy Commissioner, in replying to a departmental questionnaire concerning the appellant at the close of the inquiry, specifically stated that "permanent settlement had been established", and that the appellant was "free from any disability or incapacity which rendered it difficult or impossible for him to live in Ceylon according to its laws".

The burden of establishing a *prima facie* case of "residence" in this country during the relevant period was of course on the appellant. This and all other qualifications had to be proved on a balance of probability (as

in civil proceedings) and not "beyond reasonable doubt" (as in a criminal trial). Still less was the appellant required (as some Deputy Commissioners imagine) to undertake the impossible task of establishing his residence, "with mathematical certainty" and by documentary proof, within the geographical boundaries of this Island on every single day during the ten-year period which had terminated long before the issue arose for adjudication at all.

The Act nowhere imposes artificial restrictions of any kind either as to the nature of the evidence which would suffice to prove the fact in issue or as to the kind of witness who should be regarded as reliable. All these are matters which must obviously be left to the common sense of the tribunal whose duty it is to assess the evidence conscientiously, dispassionately, judicially and without bias. Certainly it is quite improper to enter upon a judicial function "with the verdict pre-determined".

At a very early stage of the proceedings, the appellant tendered in evidence his books of account which he said would confirm his oral testimony as to the nature, the scope and the continuity of his business activities in Ceylon since about January 1943. The Deputy Commissioner, without even a superficial examination of the tendered documents, pronounced that they were of no probative value whatsoever. The record reads as follows :—

> "Applicant produces his account books from 1943 onwards, all of which are written in Tamil, and I inform him that I am unable to accept them as proof of residence, *as he could have been away during the period and the books could have been posted by his employees.*"

This was obviously a most unjust conclusion to reach before the entries in the books (all of which had previously been produced at the preliminary inquiry before an "investigating officer") had been scrutinised and before even the handwriting of the appellant had been tested. Indeed, even if the books had been entered up by his employees, they might very well have contained intrinsic evidence that the appellant himself was on the spot actively and personally attending to his business affairs since 1943. Moreover, records of an established business would often justify the presumption that the activity had commenced at a much earlier date.

The books having been rejected out of hand, the applicant offered to call witnesses who could corroborate his evidence from personal knowledge. The Deputy Commissioner then made the following discouraging communication to him :—

> *"I inform applicant that unless he can produce documentary evidence from 1st July 1936 I will not be able to accept oral evidence."*

The issue having been prejudged, the rest of the proceedings were but a farce.

The appellant was permitted to call certain witnesses, but their oral evidence had virtually been rejected in advance. A Sinhalese man called Punchi Banda testified that he had known the appellant ever

since he began to work as a tailor in 1935, but his evidence was considered worthless because he was unable in 1954 to specify the "particular date in 1935" when he first met the appellant. Punchi Banda also stated that since 1940 the appellant, having prospered in his tailoring business, opened a tailoring shop in 1940 in premises taken on rent from Punchi Banda himself. This evidence was rejected "without hesitation" in accordance with the Deputy Commissioner's predetermined formula, because no receipts could be produced for the earlier years of the tenancy, and because the receipts (for which the counterfoils were available) in respect of the later period were unstamped.

The next witness called was an Indian merchant who claimed to have been a well-known merchant at Yataderiya from 1929 until 1950. It transpired, however, that his own application for registration as a Ceylon citizen was (through no fault of his own) still pending. The appellant was peremptorily informed that no purpose would be served by allowing the evidence of this witness to continue. The reason recorded was as follows :—

> "As the witness has not yet proved his residence in Ceylon, I am not able to accept his statement that he has been in Ceylon in 1935."

The last witness called was a Ceylon Muslim doing business in the locality who claimed to have hired sewing machines to the appellant for a number of years since 1935 at Rs. 5 a month. The hiring, as far as he could remember at this distant period of time, commenced in 1935. The evidence was rejected on the ground that he could not remember "the particular month". Finally, the probative value of a stamped receipt for a sewing machine purchased from the Singer Sewing Machine Co. during the latter part of the ten-year period was ignored.

This is really not the way to discharge the responsible function of adjudicating upon questions of fact in connection with issues of great moment to non-nationals claiming the privilege of Ceylon citizenship under the Act. The credibility of witnesses cannot be assessed by the application of rigid departmental formulae, and learned Crown Counsel very properly concedes that the reasons for rejecting the evidence in this particular case are quite unsound. I am therefore left to decide for myself as best I can whether the evidence on record does establish a *prima facie* case for registration. If, in the ultimate result, I find myself unable to reach a conclusion either way on this issue, the only alternative is to remit the case for a fresh inquiry according to law before another Deputy Commissioner.

It was suggested to me at the argument that this Court possesses no jurisdiction under any circumstances to order a fresh inquiry because the Act does not expressly authorise such a procedure. I do not take such a narrow view of the appellate functions of this Court under the Act. We have the power, and in appropriate cases the duty, to order a fresh inquiry so as to prevent injustice either to the individual or the State. Let us suppose, for instance, that the conclusions reached by the

original tribunal on issues of fact were completely vitiated by misdirection, and that the appellate tribunal, not having heard and seen the witnesses, was unable in the particular case to reach any safe conclusion on the facts. It was suggested in argument that in that event this Court, lacking the requisite foundation for deciding whether or not a *prima facie* case exists for registration, cannot but dismiss the applicant's appeal. This would indeed be a travesty of the judicial process ; it assumes that a person, who may in fact possess the qualifications for Ceylon citizenship must, notwithstanding the intentions of Parliament expressed in the Act, forfeit this privilege merely because he had been refused a fair hearing by " an unjust judge ". I could have understood an argument that in such a situation this Court should automatically allow the application. But that solution would prove equally unsatisfactory if in certain cases it results in the registration of a disqualified non-national.

An analogy may be drawn from the jurisdiction of the Court of Criminal Appeal in England which cannot (as in Ceylon) order the re-trial of a person accused of an indictable offence. Nevertheless, there is inherent power to quash a conviction and order a *venire de novo* if the earlier proceedings had amounted to a " mis-trial ", that is to say, if, for one vitiating reason or another, there had virtually been no trial at all on the first occasion. Under the Indian and Pakistani Residents (Citizenship) Act of Ceylon, there would be quite as much justification for the exercise of this inherent jurisdiction in the interests of the individual applicant, because Parliament assumes that an application for registration would not be denied except after a fair and proper statutory inquiry by the Commissioner or by a Deputy Commissioner. Let us consider an extreme hypothetical case which I hope will never occur. If the officer vested with original jurisdiction under the Act had demonstrably functioned not as an impartial judge but as what Sir Frederick Pollock would call a " passive registrar of a foregone (executive) decision ", the reason of the thing dictates that the appellate tribunal could, and must, order a fresh and (for the first time) a *judicial* inquiry in accordance with the true intent of the Act. Equally am I convinced that, even in cases which are less extreme, the same power and the same duty exist whenever justice cannot be achieved by other means.

But in the present case I am satisfied that there is no necessity to invoke our inherent jurisdiction. There is already sufficient material on the record to justify the conclusion that the appellant has (by oral and documentary evidence which has not been rejected by the original tribunal for any acceptable reason) made out a *prima facie* case for registration. Here is a man who was born in this country in 1921, and who claims to have continuously resided (except for one brief visit abroad) and progressively established himself in business *in a particular locality*, ever since 1935. If he had in truth lived and carried on business in the Yataderiya Bazaar continuously since 1936, he must have become a very familiar figure to the inhabitants of the village. If not, the officer who in the first instance investigated the appellant's case under Section 8 of the Act ought to have had little difficulty in finding evidence to disprove

this claim. The books of account produced by him contain a series of entries commencing on 19th December 1942, and their genuineness has not been disproved. I find nothing in the record to justify a suspicion that the Sinhalese witness and the Muslim witness who corroborated his evidence were untruthful or had any reason to be partial. I therefore hold that a *prima facie* case for registration has been made out, and I direct the Commissioner to take action under the Act accordingly. It is of course still open to any member of the public duly objecting to the appellant's registration to rebut this *prima facie* case, upon proper material, before a final decision is reached. The Commissioner must pay to the appellant a sum of Rs. 210 as costs of this appeal.

Application allowed.