1958

No. 18 of 1956.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

HERBERT ERNEST TENNEKOON, Commissioner for the Registration of Indian and Pakistani Residents, Colombo . . . *Appellant*

AND

PUTHUPATTI KITNAN DURAISAMY of Glentilt Estate, Maskeliya . . . . . *Respondent.*

Case for the Respondent

RECORD.

1. This is an appeal from the Judgment and decree of the Supreme Court of Ceylon dated the 18th February, 1955, allowing the Respondent's appeal under Section 15 of the Indian and Pakistani Residents Citizenship Act, No. 3 of 1949 (hereinafter referred to as " the Act ") against an order dated the 25th January, 1954, made by the Appellant under Section 14 (7) (*b*) of the Act, refusing the Respondent's Application under Section 4 of the Act for the registration of himself, his wife and his four children as citizens of Ceylon. pp. 28–35. pp. 21–23.

2. The Act provides for the granting to Indian and Pakistani residents in Ceylon of the status of citizens of Ceylon by registration, upon the conditions and in the manner provided by the Act. Section 22 of the Act provides as follows :—

" In this Act, unless the context otherwise requires :—

' Indian or Pakistani resident ' means a person—

(*a*) whose origin was in any territory which immediately prior to the passing of the Indian Independence Act, 1947, of the Parliament of the United Kingdom formed part of British India or any Indian State ; and

(*b*) who has emigrated therefrom and permanently settled in Ceylon ;

and includes—

(1) a descendant of any such person ; and

(2) any person, permanently settled in Ceylon, who is a descendant of a person whose origin was in any territory referred to in the preceding paragraph (*a*)."

3. The questions which arise for determination on this appeal are :—

(A) What is the true interpretation of the words " permanently settled " occurring in the definition of " Indian and Pakistani Resident " in Section 22 of the Act ; and

(B) Whether the Respondent was a person permanently settled in Ceylon, within the meaning of the Act.

pp. 1–6. 4. On the 29th March, 1951, the Respondent applied in writing under Section 4 of the Act for the registration as citizens of Ceylon of himself, his wife and four children Ramakrishnan, Rajambal, Rajeswari, and Rajalakshmi. The application was made in the statutory form prescribed by regulations made under Section 21 of the Act.

p. 15, ll. 24–31. 5. On the 21st August, 1952, the Respondent, in reply to a query regarding certain remittances he had made to persons in India, gave the Appellant the following information :—

" (A) The remittances made to my aged mother and 2 crippled sisters in India, monthly Rs. 70, were on special permit obtained from the Exchange Controller, Colombo.

(B) Yes, the remittances were made through Estate Group Scheme, as the Controller of Exchange has authorised me to do so and according to the printed substances in the ' B ' forms, it is considered that I have declared as temporary resident in Ceylon . . ." .

p. 16, l. 22–p. 17, l. 6. 6. On the 9th September, 1952, the Appellant caused to be served on the Respondent a notice under Section 9 (1) of the Act that he had decided to refuse the application unless the Respondent showed cause to the contrary within a period of three months from the said date by a letter addressed to the Appellant. The ground of refusal (which is required by Section 9 (1) of the Act to be set out in the notice) was stated as follows :—

" You failed to prove that you had permanently settled in Ceylon : the contrary is indicated by the fact that, in seeking to remit money abroad, you declared yourself to be temporarily resident in Ceylon."

p. 17, ll. 10–40. 7. The Respondent showed cause under Section 9 (2) of the Act by his letter dated the 26th September, 1952, in which, *inter alia*, he stated :—

" The remittances made by me, viz., Rs. 70 monthly to India on special permit from the Controller of Exchange, were purely meant for living expenses of my mother and two crippled sisters who have no other support than from me.

As I have no interest whatsoever in India now and will have not to remit the amount to India after the expiry of the above three persons, mother being 65 years old, one sister is having convulsions and the other a chronic case . . ."

8. On the 9th January, 1954, the Appellant caused to be served on the Respondent a notice under Section 9 (3) (*a*) of the Act intimating to him the time and place of the inquiry to be held into the Respondent's application. By the said notice the Respondent was required to attend the inquiry with documents and witnesses on which he relied to prove that he complied with the requirement which was set out in the following terms :— p. 18, l. 20–p. 19, l. 15.

> " That you had permanently settled in Ceylon ; the contrary is indicated by the fact that, in seeking to remit money abroad, you declared yourself to be temporarily resident in Ceylon."

9. The inquiry was held on the 25th January, 1954, in which the Respondent and two witnesses gave evidence in support of the application. The Respondent deposed, *inter alia*, as follows :— pp. 21–22.

> " From 1953 onwards I have been supporting my mother and sister. Before the Exchange Control I used to send Rs. 25 per month for the maintenance of my mother and sister. I applied to the Controller for a permit in December, 1949. The Controller sent me a General Permit to the Superintendent of the estate, and informed me that I had to remit money through the Estate Group Scheme. Under this permit I sent money to India, through the Estate Group Scheme from 1950, March, about Rs. 50 a month. I had a renewal permit from 7th April, 1951, authorising me to send Rs. 70 a month. Under this permit I sent three sums of Rs. 70 a month in May, 1951, June, 1951, and in July, 1951. I signed ' B ' Forms under the Estate Group Scheme for the various sums I had remitted to India since 1950 through the Estate Group Scheme, and for each remittance I perfected a ' B ' Form wherein I made a declaration that I was temporarily resident in Ceylon. I ceased sending money from July, 1951, when I came to know definitely that remitting money will affect my citizenship rights through the Estate Group Scheme. It is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India. About March, 1951, I had invested two thousand rupees in the business of a boutique in the Glentilt Bazaar. There were three other shareholders in the shop. From 1952, July, I became the sole owner of this business. I am negotiating to buy the building in which the business is carried on for a sum of Rs. 8,000 but no deed has been executed in my favour as yet." p. 21, l. 32–p. 22, l. 11.

10. At the conclusion of the inquiry, order was made under Section 14 (7) of the Act refusing the Respondent's application. The said order contained the following passages :— p. 22, l. 34–p. 23, l. 35.

> " Applicant's domicile of origin is clearly India and there is a presumption that this domicile continues, unless the applicant has adopted a Ceylon domicile of choice, that is, in other words, he had permanently settled in Ceylon. The burden of proof that he had changed his Indian domicile or, in other words, that he had permanently settled in Ceylon as required by Section 6 read with Section 22 of the Act lies on him. p. 23, ll. 4–14.

In rebuttal of the presumption referred to the applicant had proved (A) long and continuous residence in Ceylon from 1934 up to date, (B) that his children were born in Ceylon and (C) that he had invested a sum of rupees two thousand in the business of a boutique in Glentilt Bazaar . . .

p. 23, ll. 23–28. The applicant has admitted that he has made several remittances to India from March, 1950, to July, 1951, through the Estate Group Scheme, by perfecting ' B ' Forms wherein he declared that he was temporarily resident in Ceylon. The applicant is an educated man and he knew the implications of declaring that he was temporarily resident in Ceylon . . ." 10

11. On the 24th April, 1954, the Respondent preferred to the Supreme Court an appeal under Section 15 (1) of the Act against the order refusing
p. 25, ll. 8–20. his application. The Respondent's grounds of appeal included the following :—

" (A) The declaration referred to in the said Order was a requirement which the Department of Exchange Control has imposed and waived alternatively for the purposes of Exchange Control only. Such declaration is not relevant to the question whether the Appellant was permanently settled in Ceylon. 20

(B) The circumstances in and the purpose for which the declaration was made have not been considered in determining what evidential value should be attached to the said declaration.

(C) The declaration referred to in the said Order is not conclusive on the question whether or not the Appellant had permanently settled in Ceylon. The question whether the Appellant had permanently settled in Ceylon should have been decided on a consideration of all the evidence available."

12. The appeal was argued before H. N. G. Fernando, Acting Puisne
pp. 26–27. Justice, who, by his order of the 6th of August, 1954, reserved the case for the decision of two or more judges according as His Lordship the Chief Justice might determine. On the 7th and 8th February, 1955, the case was finally argued before Gratiaen, J., and Sansoni, J. 30

13. At the hearing of the appeal, counsel for the Commissioner argued, *inter alia*, that every applicant for registration under the Act must prove that he emigrated from his country of origin in the strict sense that he had left it from the very outset with the intention of abandoning his domicile of origin. In regard to this argument, it is submitted that the word " emigrate " is capable of a more general meaning, and that having regard to the purpose of the Act, the word should be interpreted in that general sense. It is further submitted that, in any event, the question of fact whether the Respondent " emigrated " from India could not be raised in appeal, since it was not a ground set out either in the notice under Section 9 (1) or in the notice under Section 9 (3) (*a*) of the Act. 40

14. On the 18th February, 1955, Gratiaen, J. (with whom Sansoni, J., agreed), delivered judgment allowing the Respondent's appeal with costs and directing the Appellant to take steps under the Act on the basis that a *prima facie* case for registration had been established. pp. 28–34.

15. Regarding the interpretation of the words " permanently settled in Ceylon," Gratiaen, J., in his judgment, expressed the following view :— p. 31, l. 39–p. 32, l. 16.

> " We agree with the Crown that the words ' permanently settled in Ceylon ' mean nothing less than ' having acquired a domicil of choice in Ceylon ' ; indeed, they mean something else as well, namely, that the applicant has also made a deliberate decision to renounce his former political status. Once these exacting statutory tests have all been satisfied, the man's previous residence in this country assumes (unless it has already done so) the requisite degree of ' permanency ' and Ceylon has become his ' home.' His solemn ' election between the two countries ' in favour of Ceylon dispels any suspicion that his association with Ceylon may be merely casual or migratory. The concept of ' permanent settlement ' doubtless involves two elements, the fact of residence as well as the intention permanently or at least indefinitely to remain in this country. But in the context of the Act, the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a ' clear understanding ' of its implications. The condition laid down in Section 6 (1) is thus fulfilled. The gravity of the consequences of registration must be assumed to provide an adequate safeguard against an application by a person who does not genuinely intend to renounce his former status as a citizen of his country of origin."

It is submitted that the Learned Judges are right in holding that the requisite mental element in permanent settlement is proved by the fact that an applicant has elected to apply for registration and that they have erred in holding that the words " permanently settled in Ceylon " mean nothing less than " having acquired a domicile of choice in Ceylon." It is respectfully submitted that the requisite mental element is something less than the animus required to prove a domicile of choice.

16. Regarding the meaning of the word " emigrated " in the definition of Indian and Pakistani Resident, Gratiaen, J., said :— p. 29, ll. 35–45.

> " It has been suggested than an applicant must always prove that he ' emigrated ' from his country of origin in the sense that he had left it from the very outset with a firm resolve to abandon his domicile there. This could not have been the intention of an enactment designed to achieve a realistic purpose. Be that as it may, the language of the amending Act has virtually dispensed with the qualification of having ' emigrated ' in the strict sense suggested. An applicant who cannot come within the ambit of paragraph (*a*) is now invariably ' included ' in the definition because his father was of Indian or Pakistani ' origin ' ; so that ' emigration ' has ceased to be, even if it ever was, a vital qualification."

17. On the question whether, on the facts proved, the Respondent p. 33, l. 40–p. 34, l. 6. could be regarded as having been permanently settled in Ceylon the Learned Judge said :—

> " He and his wife have resided in Ceylon since 1934. Their minor children live with them and attend school in this country. He has always enjoyed the benefits of fixed employment in Ceylon ; his modest savings have been invested here and he has no ties with India except those of natural affection for his widowed mother and his two sisters (whom he dutifully wishes to support). He has ultimately made a genuine decision to cement his long association with this country by claiming the privileges of Ceylon citizenship with a clear understanding of the consequences which will result from registration. We can conceive of no better example of the kind of ' suitable ' person whom Parliament had in mind when the Act passed into law."

18. Regarding the effect of the Appellant's declaration that he was p. 34, ll. 6–15. temporarily resident in Ceylon the Learned Judge said :—

> " He has satisfied all the onerous statutory conditions prescribed, and the circumstances that, in a very different context, he incorrectly described his residence in this country as ' temporary ' in order to facilitate (in violation of the ' exchange control ' regulations) the forwarding of the usual subsistence allowances to his mother and his sisters abroad cannot disqualify him. Indeed, even if the question had arisen for determination by an ' understanding ' judge on the issue of domicil, this isolated circumstance would have carried no weight in view of the other compelling factors established in his favour."

pp. 36–37. 19. On the 16th March, 1955, the Appellant made application to the Supreme Court for conditional leave to appeal to the Privy Council. The application was argued before Basnayake, A.C.J., and Gratiaen, J., on the 16th and 17th June, 1955. At the conclusion of the Argument their Lordships made order allowing the Appellant's application and reserved their reasons. Reasons were given by their Lordships in separate pp. 38–42. judgments dated 20th December, 1955. Basnayake, A.C.J., in his judgment, referred to two conflicting lines of decisions on the meaning and p. 40, ll. 32–34. scope of the words " civil suit or action " and said :—

> " In this state of the decisions of this court I formed the view, though not without hesitation, that the better course would be to grant the leave applied for."

20. The Appellant's application for final leave was allowed on the p. 47. 2nd February, 1956.

~~21. By Order of The Right Honourables The Lords of The Judicial Committee of The Privy Council dated 8th May, 1957, this Appeal was consolidated with Privy Council Appeal No. 23 of 1956.~~

22. The Respondent respectfully submits that the orders of the Supreme Court allowing Conditional Leave and Final Leave to the Privy

Council are wrong for the reason that the judgment of the Supreme Court, from which the Appellant seeks to appeal to the Privy Council, was not in a civil suit or action within the meaning of Section 3 of the Appeals (Privy Council) Ordinance No. 31 of 1909 (Chap. 85).

23. The Respondent respectfully submits that this appeal should be dismissed with costs for the following, among other

REASONS

(1) BECAUSE this appeal is not properly before Her Majesty the Queen in Council.

(2) BECAUSE the mental element involved in permanent settlement is proved by the fact that an applicant has applied for registration under the Act with knowledge of the implications of such registration.

(3) BECAUSE, in any view of the law relating to the proof of permanent settlement, the facts recorded as proved in the order of the 25th January, 1954, refusing the Respondent's application taken with the fact that the Respondent, with full knowledge of the consequences of registration under the Act, has made application for such registration are sufficient to establish his permanent settlement in Ceylon.

(4) BECAUSE the Respondent's statement that he was temporarily resident in Ceylon is not conclusive and carries little weight when viewed against all the circumstances proved in the Respondent's favour.

(5) BECAUSE the judgment of Gratiaen, J. (except his holding that " permanently settled in Ceylon " meant nothing less than " having acquired a domicile of choice in Ceylon "), and should be upheld.

WALTER JAYAWARDENA.

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