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(18), 1963

No. 43 1962

Supreme Court of Ceylon,
No. 234 (Final) of 1960.

District Court of Puttalam,
Case No. 6327.

IN HER MAJESTY'S PRIVY COUNCIL ON AN APPEAL FROM THE SUPREME COURT OF CEYLON

Between

Asoka Kumar David *also known as* David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam......... *Plaintiff-Appellant*

Appellant

AND

M. A. M. M. Abdul Cader of "Haniffa Villa" Puttalam.... *Defendant-Respondent*

Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
19 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.
74131

No. ....

SUPREME COURT OF CEYLON,
No. 234 (FINAL) OF 1960.

DISTRICT COURT OF PUTTALAM,
CASE No. 6327.

IN HER MAJESTY'S PRIVY COUNCIL ON AN APPEAL FROM THE SUPREME COURT OF CEYLON

BETWEEN

ASOKA KUMAR DAVID *also known as* DAVID ASOKA KUMAR OF GARDINER THEATRE, KURUNEGALA ROAD, PUTTALAM......... *Plaintiff-Appellant*

Appellant

AND

M. A. M. M. ABDUL CADER OF "HANIFFA VILLA" PUTTALAM.... *Defendant-Respondent*

Respondent

RECORD OF PROCEEDINGS

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* *The Plaintiff-Appellant has considered these documents as unnecessary for the due hearing of the appeal to the Privy Council, but they have been printed and included in this record of proceedings at the instance of the Defendant-Respondent.*

LIST OF DOCUMENTS NOT PRINTED

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1	Journal Entries	5-6-59 to 20-4-61	
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No. 1

Plaint of the Plaintiff

IN THE DISTRICT COURT OF PUTTALAM

No. 6327
Class: V
Claim: Rs. 35,000/-
Nature: Money
Procedure: Regular

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.—*Plaintiff*

Vs.

M. A. M. M. Abdul Cader "Haniffa Villa" Puttalam.— *Defendant*

10

On this 5th day of June 1959.

The plaint of the plaintiff abovenamed appearing by S. C. Shirley Corea, his proctor states as follows:—

1. The defendant resides and the cause of action hereinafter set out arose at Puttalam within the jurisdiction of this Court.

2. The plaintiff is and was at all material times the proprietor of a Cinema called the Gardiner Theatre, Puttalam.

3. The defendant is and was at all material times the Chairman of the Urban Council of Puttalam and as such the local authority responsible for the issue of licenses under the Rules made under the Public Performances Ordinance (Cap. 134).

20

4. By letter dated 14th November and 7th December 1958 the plaintiff duly applied to the defendant for a license for his Cinema under the said Rules.

5. The plaintiff's cinema is in all respects a fit and proper building suitable for public performances, and the plaintiff has paid the necessary fee for the license and has thus and otherwise fulfilled all necessary and/or reasonable conditions entitling him to the issue of a license.

6. The defendant however wrongfully and maliciously refused and neglected to issue the required license to the plaintiff.

30

7. As a result the plaintiff has been prevented from having Public exhibitions of films at his cinema and has thereby suffered loss and damage which he estimates at Rs. 7000/- per month.

8. A cause of action has accordingly accrued to the plaintiff to sue the defendant for damages at Rs. 7000/- per month from January 1959 until the said license is duly issued.

No. 1
Plaint of the
Plaintiff—
5. 6. 59
—*continued*

WHEREFORE the plaintiff prays for judgment against the defendant:—

(*a*) in a sum of Rs. 35000/- and continuing damages at Rs. 7000/- per month until the said license is duly issued.

(*b*) for costs; and

(*c*) for such other and further relief as to the Court shall seem fit.

SGD: S. C. SHIRLEY COREA
Proctor for Plaintiff

Settled by—
K. SHINNYA ESQ.
S. NADESAN ESQ., Q.C.
Advocates.

10

No. 2
Answer of the
Defendant—
24. 9. 59

No. 2

Answer of the Defendant

IN THE DISTRICT COURT OF PUTTALAM

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.— *Plaintiff*

No. 6327

Vs.

M. A. M. M. Abdul Cader, "Haniffa Villa" Puttalam.— *Defendant* 20

This 24th day of September, 1959.

The answer of the Defendant abovenamed appearing by S. M. M. Cassim, his Proctor, states as follows:—

1. The defendant admits the local jurisdiction of this Court but pleads specifically in-limine that the plaint discloses no cause of action against this defendant.

2. Subject to and without prejudice to the above plea the defendant denies all and singular the averments in the plaint which are not hereinafter expressly admitted.

3. The defendant puts the plaintiff to the proof of the averments in paragraph 2 of the plaint. 30

4. Answering to paragraph 3 the defendant admits that he was at all material times the Chairman of the Urban Council Puttalam. The defendant further admits that the Chairman, ex-officio, as the executive officer of the said Council was the local authority to whom application had to be made for the issue of the license.

5. Answering to paragraph 4 the defendant admits the letters referred to therein but denies that the Plaintiff duly applied for the said license.

6. Answering to paragraph 5 the defendant denies that in November or December 1958 the Plaintiff had paid the necessary fees for the license and ful-
10 filled conditions entitling the Plaintiff to the issue of a license.

7. The defendant specifically denies the averments in paragraph 6 of the plaint and states that a license was issued to the Plaintiff refused to accept by reason of conditions that were lawfully and properly inserted therein.

Wherefore the defendant prays:—

(*a*) that the Plaintiff's action be dismissed.

(*b*) for costs and such other and further relief as to this Court shall seem meet.

SGD: S. M. M. M. CASSIM
Proctor for Defendant

Settled by—
20 M. A. M. BAKI ESQ.
M. RAFEEK ESQ.
E. G. WICKREMANAYAKE ESQ., Q.C.
Advocates, Colombo.

No. 3
Issues Framed & Addresses to Court—
18. 2. 60

No. 3

Issues Framed & Addresses to Court

18–2–60 **D.C. Puttalam Case No. 6327**

Adv. Mr G. G. Ponnambalam, Q.C., with Adv. Mr. Ratnayake instructed by Mr. S. C. S. Corea for the plaintiff.

Adv. Mr. E. G. Wickremenayake with Adv. Mr. M. A. M. Rafeek and Adv.
30 Uvais instructed by Mr. Cassim for the defendant.

Adv. Mr. Ponnambalam suggests the following issues:—

1. Is and was the plaintiff at all material time the proprietor of the Gardiner Theatre, Puttalam?

No. 3
Issues Framed
& Addresses
to Court—
18. 2. 60
—*continued.*

2. Did the plaintiff by his letters 14–11–58 and 7–12–58 duly apply for a Public Performances License for his cinema?

3. Did the defendant wrongfully and maliciously refuse and neglect to issue the licence?

4. If issues 1, 2 and 3 are answered in the affirmative what damages is the plaintiff entitled to?

Adv. Mr. Wickremenayake has no objections to these issues.

He suggests further:

5. Does the plaint disclose a cause of action against the defendant?

6. If not, can the plaintiff maintain this action? 10

Adv. Mr. Wickremenayake moves that issues 5 and 6 be argued first as they affect the entire action. Adv. Mr. Ponnambalam consents. I proceed to hear the arguments on issues 5 and 6 first.

Advocate Mr. Wickremenayake addresses court:—

States that the action must be founded on some legal principle. Refers to Public Performances Act No. 7 of 1912 — Chapter 134. The rules are published in the Govt. Gazette of the 4th April 1919. These rules are applicable to areas other than the Municipal areas other than Colombo, Kandy and Galle. That has been amended by Gazette Notification in the Govt. Gazette of 16th November 1951 which amends rules made under Section 3 of the Public Performances Ordinance Chapter 20 134. Refers to Rule A3 and A5. There is no obligation or duty cast on him to hold an inquiry at all. Refers to form A. One is governed by the rules of the Act. If a person refuses to do maliciously or with an improper motive he fails to carry out his duties. When there is an obligation on the part of any person to do anything whether contractual or not, failing to do what he is not bound to do could not give rise to action under those circumstances. A few have a right to do a thing or refrain from doing a thing. If one does it with an improper motive, the impropriety of the matter may not make a matter actionable. There is no action if he does not apply for a licence. The fact that he duly applied for a licence does not mean he had to be granted a licence. It is up to the chairman and it is at his discretion to 30 issue or cancel a licence after making an inquiry. Terms should not be dictated to by some other officer. When an application is made for a licence, the chairman has to go through the merits of the application. There is one theatre which has already got a licence. A licence for the second theatre was applied and an alternative was imposed that is to run the show on alternate days. Malice connotes the improper motive. According to the rules, the Chairman has the right to issue or not to issue licences and the person applying has no right to demand a licence. Even if there is a cause of action, it is against the local authority. The chairman of the Local Board is a corporation. The chairman is an executive of the corporation.

The Urban Council has its executive officer and one has to get a licence from the local authority — Local Authority being the chairman of the Urban Council but in the case of any area where there is no local body it is the Govt. Agent of that District. In any case the person who is carrying out or representing somebody as in the case of the chairman, he represents the Council. The Govt. Agent is representing the Crown. Submits that the action is completely misconceived.

No. 3 Issues Framed & Addresses to Court— 18. 2. 60 —*continued*

Adv. Mr. Ponnambalam in reply:—

Submits that Mr. Wickremanayake used the word discretion and that is absolutely arbitrary. A right vested in a person is normally clothed with some authority.
10 The submissions made by Counsel for the defendant would mean as if the chairman is the local authority. States that the submissions made by Mr. Wickremanayake would mean that the chairman can throw any applications made to the waste paper basket. He is not answerable to anybody. Applications made for building houses are similar to applications for performances and there will be absolute discretion on the part of the chairman. If the word discretion is to be interpreted, in the way Mr. Wickremanayake seeks to interpret he submits that no licensing authorities are vested with that discretion under the Public Performances Act and regulations framed therein. In respect of buildings applications the chairman has the discretion. The showing of films were suspended for the building of a cinema.
20 The Chairman acts in his discretion not to issue a Public Performances Licence. When a person applies for a licence, plans and specifications of the building are also supplied. Submits that the defendant can use his discretion to ruin somebody. I seek justification by referring to certain sections. Refers to A3 and A5. A3 is not relevant to the submissions made by Mr. Wickremanayake at the moment. A5 seems to be the only rule. Interpretation of the word "may". Does it connote something. Does it not apply for the word "shall". Submits that the word may will have to be interpreted to shall. The only conditions which he may enforce are the conditions which would ensure the safety and comfort of the public. He should take steps to prevent the people getting crushed. The conditions must be enforced to
30 ensure the comfort of the people attending the cinema. Any person can take the advantage of the word "discretion". The discretion must be in the interest of the public. It would be fantastic to imagine that this interpretation is the arbitrary will. The chairman is not a continuing personality but a temporary encumbent in office. States that the local authority is not the Urban Council but the chairman. The Chairman of the local authority is called upon to handle this purely as a matter of finance to the extent in so far as he happened to be the Chairman. The Kachcheri system of the Government performs certain functions on behalf of the Government. Cites Section 546, 461 of the C.P.C. Section 34 of the Urban Council Ordinance. States Public Performances are not covered by these sections.

40 Mr. Wickramanayake in reply:—

Reads Section 34 of the Urban Council's Ordinance.

Refers to the Priviso in that section.

The Chairman acts as an Agent of the Council.

No. 3 Issues Framed & Addresses to Court— 18. 2. 60 —*continued*

Cites 56 N.L.R. at page 169. Section 80 of the Urban Council Ordinance No. 61 of 1939. There is Machinery for people who do not carry out their duties. In the case of buildings there are certain limits to the discretion. One has to read the context before word "may" can be interpreted to "shall".

Order on 17–3–60.

SGD:
District Judge.
18–2–60.

No. 4 Order of the District Court— 17. 3. 60

No. 4

Order of the District Court

10

17–3–60 **D.C. Puttalam Case No. 6327**

ORDER

This is an action by the plaintiff against the defendant for the recovery of Rs. 35,000/- as damages together with further damages at Rs. 7000/- per mensem from the date of plaint as the defendant wrongfully and maliciously refused and neglected to issue to the plaintiff a licence under the Public Performances Ordinance (Cap. 134) for the exhibition of films at his cinema. The defendant filed answer denying liability and specially pleading that the plaint did not disclose a cause of action against the defendant.

At the trial the following issues were raised:— 20

1. Is and was the plaintiff at all material times the proprietor of the Gardiner Theatre, Puttalam?

2. Did the plaintiff by his letters 14–11–58 and 7–12–58 duly apply for a Public Performances Licence for his cinema?

3. Did the defendant wrongfully and maliciously refuse and neglect to issue the licence?

4. If issues 1, 2 and 3 are answered in the affirmative what damages is the plaintiff entitled to?

5. Does the plaint disclose a cause of action against the defendant?

6. If not, can the plaintiff maintain this action? 30

As the last two issues affected the entire action parties agreed that they should be tried first. Learned Counsel for the defendant who suggested the last two issues,

based his arguments on two points. Firstly, he contended that the local authority had the absolute discretion either to issue or refuse to issue a licence and his decision could not be challenged. Secondly, he contended that even if an action could be maintained it must be brought against the Local Authority and not against (as in this case) an individual in his private capacity. As regards his first contention Learned Counsel for the defendant relied on the wording of the rules A5 and A6 framed under the Public Performances Ordinance (Cap. 134) appearing in Volume 2 of the Subsidiary Legislation at page 143. The relevant part of rule A5 is as follows:—

10 "On receipt of an application for a licence the local authority after such inquiry as he thinks fit, and after the payment of the fees mentioned in rule A3, may if he sees no objection, grant a licence, subject to the condition as he may consider necessary in the interests of the safety and the comfort of the public . . . . "

Rule A6 reads "Any licence granted under rule A5 may at any time be withdrawn, suspended, or modified by the local authority at his discretion."

It is contended that these rules give the local authority the sole discretion of deciding whether or not to issue a licence, and that if the local authority even maliciously or capriciously refuse to issue a licence that decision cannot be challenged 20 in a Court of law. I am unable to agree with that contention. In the recent case of Ladamuttu Pillai vs. The Attorney-General, reported in 59 New Law Reports at page 313, his Lordship the Chief Justice has discussed at length the exercise of powers by statutory functionaries. In that case a decision of the Land Commissioner under the Land Redemption Ordinance of 1942 was in question. By section 3(4) of that ordinance the determination of the Land Commissioner was even declared to be "final", unlike the decision of the local authority in the present case. His Lordship the Chief Justice in the course of his judgment (at page 329) states:—

"Now, when an Ordinance or an Act provides that a decision made by a statu- 30 tory functionary to whom the task of making a decision under the enactment is entrusted shall be final, the Legislature assumes that the functionary will arrive at his decision in accordance with law and the rules of natural justice and after all the prescribed conditions precedent to the making of his decision have been fulfilled, and that where his jurisdiction depends on a true construction of an enactment he will construe it correctly. The Legislature also assumes that the functionary will keep to the limits of the authority committed to him and will not act in bad faith or from corrupt motives or exercise his powers for purposes other than those specified in the statute or be influenced by grounds alien or irrelevant to the powers taken by the statute an act unreasonably. To say that the word "Final" has the 40 effect of giving statutory sanction to a decision however wrong, however contrary to the statute, however unreasonable or influenced by bad faith or corrupt motives, is to give the word a meaning which it is incapable of bearing and which the Legislature could never have contemplated. The Legislature entrusts to responsible officers the task of carrying out important functions which affect the subject in the

No. 4
Order of the
District
Court—
17. 3. 60
—continued

faith that the officers to whom such functions are entrusted will scrupulously observe all the requirements of the statute which authorises them to act. It is inconceivable that by using such a word as "final" the Legislature in effect said, whatever determination the Land Commissioner may make, be it within the statute or be it not, be it in accordance with it or be it not, it is final, in the sense that the legality of it cannot be agitated in the Courts. No case in which such a meaning has been given to the word "final" was cited to us. The word "final" is not a cure for all the sins of commission and omission of a statutory functionary and does not render legal all his illegal acts and place them beyond challenge in the Courts. The word "final" and the words "final and conclusive" are familiar in enactments which seek to 10 limit the right of appeal; but no decision of either this court or any other court has been cited to us in which those expressions have been construed as ousting the jurisdiction of the Courts to declare in appropriate proceedings that the action of a public functionary who has acted contrary to the statute is illegal.

To read the word "final" in the sense which the learned counsel for the Crown seeks to place upon it would amount to giving the public functionary authority to act as he pleases. It is unthinkable that the Legislature would give such a blank authority to a functionary however highly placed. Such powers are rarely given even when the country is at war or is facing a crisis. It must be presumed that the Legislature does not sanction illegal act on the part of functionaries. If it intends 20 to sanction unauthorised and illegal acts it should say so in plain and unmistakable terms and not use a word of such doubtful import as "final". That the subject should not be harassed by unauthorised action on the part of statutory functionaries is as much the concern of the Legislature as of the Courts and once a piece of legislation has been put on the statute book the Legislature as well as the public looks to the Courts to exercise their controlling authority against illegal and unjust use of the powers conferred thereby, and the Courts will be failing in their legitimate duty if they denied relief against illegal action on the part of statutory functionaries . . . "

His Lordship also sets down the principles governing the exercise of the functions by statutory functionaries (at page 330) and one of them is that "A discre- 30 tion does not empower a statutory body or functionary to do what he likes merely because he is minded to do so — he must in the exercise of his discretion do, not what he likes, but what he ought". I think the observations of His Lordship the Chief Justice and the citations contained in his judgment afford ample authority for the view that the decision of the local authority refusing to grant a licence can be made the subject of appropriate legal proceedings in a Court of Law I am therefore of opinion that the first contention of learned counsel for the defendant fails.

There remains to consider the second contention. It is admitted that the local authority appointed under the Public Performances Ordinance (Cap 134), rele- 40 vent for the purposes of this action, is the Chairman Urban Council Puttalam. It is to be noted that according to the Caption in the plaint the defendant's name is given as M. A. M. M. Abdul Cader, "Haniffa Villa" Puttalam. He is therefore being sued in his private capacity. It was not contended that the defendant acted in his private capacity in refusing or neglecting to issue the licence applied for by

No. 4 Order of the District Court— 17. 3. 60 —*continued*

the plaintiff. In fact para 3 of the plaint specifically states that the defendant was at all material times the Chairman of the Urban Council Puttalam. Can this action be maintained against the defendant in his private capacity? In issuing or refusing to issue a licence under the rules framed under the Public Performances Ordinance the defendant was clearly acting in pursuance of the provisions of those rules as the competent local authority appointed to act. The defendant was therefore acting in his capacity as Chairman Urban Council Puttalam. He could not indeed have acted in any other capacity for it is only as Chairman Urban Council Puttalam (being the local authority appointed under the Public Performances Ordinance) 10 was he empowered to receive applications and issue licences if he saw no objection. The allegation of malice does not in my view make any difference as regards the capacity in which he was acting. The defendant therefore was acting as the Chairman of the Urban Council Puttalam when he refused or neglected to issue a licence to the plaintiff. I am, therefore, of opinion that the plaintiff cannot sue the defendant in his private capacity for something he has done in his capacity as the Chief Executive officer of the Urban Council Puttalam. I hold therefore that the plaint does not disclose a cause of action against the defendant in his private capacity. I answer the last two issues raised as follows:—

5. No.
20 6. No.

I dismiss plaintiff's action with costs.

SGD: D. Q. M. SIRIMANE
District Judge
17–3–60

Judgment pronounced in open Court.

SGD: D. Q. M. SIRIMANE
District Judge
17–3–60

No. 5

No. 5 Petition of Appeal to the Supreme Court— 24. 3. 60

30

Petition of Appeal to the Supreme Court

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.— *Plaintiff*

Vs.

S.C. 234(F)/1960.
D.C. Puttalam No. 6327

M. A. M. M. Abdul Cader, "Haniffa Villa" Puttalam.— *Defendant*

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre,
40 Kurunegala Road, Puttalam — *Plaintiff-Appellant*

Vs.

M. A. M. M. Abdul Cader "Haniffa Villa" Puttalam.— *Defendant-Respondent*

No. 5
Petition of
Appeal to the
Supreme
Court—
24. 3. 60
—*continued.*

To:

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 24th day of March 1960.

The petition of appeal of the Plaintiff-Appellant abovenamed appearing by S. C. Shirly Corea his Proctor states as follows:—

1. The Plaintiff-Appellant instituted the above action against the Defendent-Respondent for damages in respect of his wrongfull and malicious refusal to issue a Public Performance Licence for the Plaintiff-Appellant's Cinema.

2. At the trial on the 18th February 1960 the following issues were raised:— 10

   1. Is and was the plaintiff at all material times the Proprietor of the Gardiner Theatre, Puttalam?

   2. Did the plaintiff by his letters 14–11–58 and 7–12–58 duly apply for a Public Performance Licence for his Cinema?

   3. Did the defendant wrongfully and maliciously refuse and neglect to issue the licence?

   4. If issues 1, 2 and 3 are answered in the affirmative what damages is the plaintiff entitled to?

   5. Does the plaint disclose a cause of action against the defendant?

   6. If not, can the plaintiff maintain this action? 20

3. The last two issues being issues of law were taken up for argument as preliminary issues.

4. The contention of the Defendant-Respondent was (*a*) that no action lay in as much as the grant or refusal of a licence was in the absolute discretion of the Defendant-Respondent and (*b*) that in any event the action should be against "The Chairman, Urban Council, Puttalam" and not against the Defendant-Respondent in his private capacity.

5. The learned District Judge having reserved his order delivered the same on 17th March 1960 holding against the Defendant-Respondent on his first contention but with him on the second contention set out at paragraph 30 4 above, and in the result dismissing the Plaintiff-Appellant's action with costs.

No. 5 Petition of Appeal to the Supreme Court— 24. 3. 60 —*continued*

6. Being aggrieved by the said order the Plaintiff-Appellant begs to appeal therefrom to Your Lordhsip's Court on the following among other ground that may be urged by Counsel at the hearing of this appeal:—

(*a*) the said order is contrary to law and is misconceived.

(*b*) it is respectfully submitted that this action could not be instituted against "The Chairman Urban Council Puttalam" in as much as the Chairman is not a *legal person.*

(*c*) the cause of action was the malicious use of his official powers by the Defendant-Respondent and therefore he was liable in his private capa-
10 city.

WHEREFORE the Plaintiff-Appellant prays that Your Lordships' Court be pleased:—

(*a*) to set aside the said order of the Learned District Judge and direct that the action proceed to trial;

(*b*) to order costs of this appeal and of the trial;

(*c*) to grant such other and further relief as to Your Lordships' Court may seem meet.

SGD: S. C. SHIRLEY COREA
Proctor for Plaintiff-Appellant

20 *Settled by:*
K. SHINYA ESQ.,
S. NADESAN ESQ., Q.C.
Advocates.

No. 6

No. 6 Judgment of the Supreme Court— 24. 3. 61

Judgment of the Supreme Court

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

D.C. Puttalam Case No. 6327

S.C. 234 (F) 1960 — Asoka Kumar David of Gardiner Theatre, Kurunegala Road, Puttalam.—*Plaintiff-Appellant.*

30 *Vs.*

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam.— *Defendant-Respondent.*

Present: De Silva, J., Tambiah, J.

Counsel: S. Nadesan, Q.C., with Nimal Senanayake, for the Plaintiff-appellant H. V. Perera, Q.C., with M. Rafeek, M. T. M. Sivardeen and M. A. M. Baki, for the Defendant-Respondent.

Argued on: 14th March, 1961.

Decided on: 24th March, 1961.

No. 6 Judgment of the Supreme Court— 24. 3. 61 —continued.

Tambiah, J.

The Plaintiff-appellant brought this action claiming damages assessed at Rs. 35,000/- and continuing damages of Rs. 7,000/- per month until the defendant-respondent issued a licence for his cinema, called the Gardiner Theatre, at Puttalam. In this plaint, the plaintiff averred, inter alia, as follows:—

1. The plaintiff is and was at all material times the proprietor of a Cinema called the Gardiner Theatre, Puttalam.

2. The defendent is and was at all material times the Chairman of the Urban Council of Puttalam and as such the local authority responsible for the issue of licences under the Rules made under the Public Performances Ordinance (Cap 134). 10

3. By letter, dated 14th November and 7th December, 1958 the plaintiff duly applied to the defendant for a licence for his Cinema under the said Rules.

4. The plaintiff's Cinema is in all respects a fit and proper building suitable for public performances, and the plaintiff has paid the necessary fee for the licence and has thus and otherwise fulfilled all necessary and/or reasonable conditions entitling him to the issue of a licence.

5. The defendant however wrongfully and maliciously refused and neglected to issue the required licence to the plaintiff.

6. As a result the plaintiff has been prevented from having public exhibitions 20 of films at his cinema and has thereby suffered loss and damage which he estimates as Rs. 7,000/- per month.

7. A cause of action has accordingly accrued to the plaintiff to sue the defendant for damages at Rs. 7,000/- per month from January 1959 until the said licence is duly issued.

The Defendant in his answer, averred, *inter alia,* that the plaint disclosed no cause of action.

At the trial the following issues were raised:—

1. Is and was the plaintiff at all material times the proprietor of the Gardiner Theatre, Puttalam? 30

2. Did the plaintiff by his letters 14–11–58 and 7–12–58 duly apply for a Public Performances Licence for his Cinema?

3. Did the defendant wrongfully and maliciously refuse and neglect to issue the licence?

4. If issues 1, 2 and 3 are answered in the affirmative what damages is the palintiff entitled to?

5. Does the plaint disclose a cause of action against the Defendant?

6. If not can the plaintiff maintain this action?

At the invitation of Counsel the Learned Judge decided issues 5 and 6 as preliminary issues, and held that the plaint disclosed a cause of action, but dismissed the action as, in his view it should have been brought not against the respondant personally but as the Chairman of the Urban Council of Puttalam.

Counsel for the appellant contended that the action had been properly brought 10 against the respondent personally as he had wilfully and maliciously refused to perform a statutory duty. Mr. H. V. Perera, who appeared for the respondent, supported the judgment on the ground that the plaint disclosed no cause of action. Alternatively he urged that the action if any should have been brought not against the respondent personally but against the Chairman of the Urban Council.

Before dealing with the points of law that arise in this case it is necessary to set out the relevant provisions of the Public Performances Ordinance and the rules made thereunder. Section 3 of the Ordinance empowers the Governor (now the Minister) to make rules for the regulation of public performances, and in particular, without prejudice to the generality of the power so granted for the following pur-20 poses:—

(*a*) for the issue of licences for buildings or erections to be used for public performances, or for any particular public performance, and for the withdrawal, suspension, or modification of the conditions of such licences;

(*b*) for the payment of fees for such licences;

(*c*) for the regulation of the character of public performances;

(*d*) for the submission to the prescribed authority of a description of any public performance intended to be exhibited, and in such cases as authority thinks fit to require, for the exhibition before such authority of any such performance before the same shall be advertised or exhibited;

30 (*e*) for the issue of permits for the exhibition of such performances, and for the withdrawal, suspension and modifications of the conditions of such permits;

(*f*) for the regulation of the structural conditions of licensed buildings or erections, and for the protection of the public against fire, over crowding disorder, or other dangers;

(*g*) for the inspection of licensed buildings and erections and of performances therein;

(*h*) for the prohibition and prevention of public performances in unlicensed buildings and erections, or if unauthorised performances in licensed buildings or erections.

The relevant rules framed under these provisions are as follows, (Subsidiary Legislation of Ceylon, Vol. ii, P. 142-143):—

A2. "No person shall use or permit to be used any building or erection for the purposes of public performances unless he shall have obtained a licence for the same, and no person having obtained the licence for the same shall use the same or permit the same to be used in contravention of any of the conditions of such licence or in contravention of any of these rules." 10

A4. "Any person desirous of obtaining a licence for any building or erection for the purpose of a public performance shall apply to the local authority for a licence, specifying in his application—

1. The situation of the building or erection.

2. Its description and the materials of which it is constructed.

3. The character of the entertainment for which such premises are proposed to be used.

4. The name and permanent address of the owner of the premises to be licensed.

5. The name and permanent address of the responsible manager of the premises to be licensed. 20

6. The name and permanent address of the applicant and the nature of his interests in the building or erection to be licensed.

7. The period for which the licence is desired, and any other information which the local authority may call for . . . . "

A5. "On the receipt of an application for a licence, the local authority, after such inquiry as he thinks fit, and after the payment of the fees mentioned in rule A3, may, if he sees no objection, grant a licence, subject to the conditions as he may consider necessary in the interests of the safety and the comfort of the public. Such conditions may amongst other things 30 prescribed the number and size of the passages, entrances, and exits, the manner in which the doors shall open, the maximum number of persons to be accommodated in the building, the nature of the seating accommodation and the number and width of the passage ways to seats, the method of lighting to be employed, the precautions to be taken with respect to inflammable and explosive substances, the provision of fire-extinguishing appliances, the restrictions to be put on smoking, the ventilation to be provided . . . . "

Rule A6. "Any licence granted under rule A5 may at anytime be withdrawn, suspended, or modified by the local authority at his discretion."

For the purpose of these rules, a local authority, within the limits of any local board, is defined as the Chairman of such Board. Mr. Perera contended that the plaintiff was entitled to a licence only at the discretion of the Chairman of the Puttalam Urban Council, and had no cause of action if the discretion had been maliciously exercised.

He argued that any action, for damages in delict can be based only on the infringement of an antecedent legal right. Since the Public Performances Ordinance 10 has prohibited any building to be used for public performances except on a licence, given at the discretion of the local authority, the plaintiff had no right to the licence, even if the discretion had been maliciously exercised against him, and therefore the proper course open to him was to proceed by way of a Writ of Mandamus against the Chairman of the Urban Council of Puttalam.

The true significance of the concept of "licence" as used in jurisprudence should be borne in mind, for "like the terms '*res gestae*' and 'estoppel', 'licence' may be said to be a word of convenient and seductive obscurity." (Hohfeld, Fundamental Legal Conceptions, as Applied in Judicial Reasoning, p 184). It is necessary to distinguish between a licence simpliciter, and a licence coupled with a grant. The 20 distinction between these two concepts is discussed in the judgment of Alderson, B, in *wood v. Leadbitter* (1845) 153 English Reports, Exchequer, M & W, at p. 354 as follows; "it may be convenient to consider the nature of a licence, and what are its legal incidents, and for this purpose, we cannot do better than refer to Lord C. J. Vaughan's elaborate judgment in the case of *Thomas V. Sorrell*, as it appears in his Reports. The question there was as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintner's Company to do certain acts notwithstanding those Statutes.

In the course of his judgment the Chief Justice says (Vaughan, 351) " A dispensation or licence properly passeth no interest, nor alters or transfers property 30 in anything, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat or to fire the wood, in my chimney to warm him by as to the actions of eating, firing my wood and warming him, they are licences; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the 40 wood burnt . . . . A mere licence is revocable; but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant to which it was incident."

No. 6 Judgment of the Supreme Court— 24. 3. 61 —*continued*

As observed earlier, the grant of a licence by a local authority only legalises what would otherwise have been unlawful. And on the facts of this case there is no licence coupled with a grant.

In *Davis v. Mayor, &c., of the Borough of Bromley* (1908, IKB 170.) the precise question now before us was considered by the Court of Appeal. There it was held that an action would not lie against a local authority for maliciously refusing to approve of building or drainage plans deposited with them, even though the local authority in rejecting the plans had been actuated by improper motives and had merely pretended to exercise its power without addressing its mind to the question before it. In this case, the plaintiff who was a builder and the owner of certain house property within the District, for which the defendants were the sanitary authority, sent in certain plans for the drainage of a house which they were constructing and also for the addition of a motor house or stable; these plans were rejected by the defendants, who had a discretion, for alleged non-compliance with certain of their by laws. The plaintiff averred that the plans complied in all respects with the by laws and alleged that the defendants had rejected them from a feeling of spite arising from the previous litigation and without considering them upon their merits and the defendants had not acted *bona fide* in the exercise of their duty as the sanitary authority.

The plaintiff claimed:—

1. A declaration that he was entitled to construct the drainage of the house in accordance with the plans sent to the defendants and to connect the drains with the defendants' sewers.

2. An injunction to restrain the defendants from hindering in so constructing and connecting his drains, and

3. 500l damages.

With regard to the question whether a cause of action arose for the plaintiff to sue the defendants for damages Vaughan Williams L. J., stated as follows, at pp. 172-173:—

"We need only deal with the question whether an action will lie against this borough council as a local sanitary authority for their refusal to sanction the execution of certain building and drainage works according to plans deposited by the plaintiff. It is not contested that the Legislature has given power to this body to decide whether they will sanction such works or not; it is not suggested that in so deciding the council are exercising judicial functions and in fact they are not doing so; they are exercising a descretion vested in them by Statute and the whole object of this action is really to see if by this means the plaintiff can overrule the council's decisions. It is contended that that decision is so unreasonable as to afford ground for saying that the council was actuated by oblique motives by which they should not have been actuated, it being suggested that there was a feeling of bitterness against the plaintiff personally, the result of long litigation. Even assuming the

facts to be such as to suggest that the defendants were actuated by such motives, there remains the fact that the Legislature has vested in this body the duty of deciding whether or not its sanction shall be given to the plans sent in. In my opinion, where a statute vests in a local authority such a duty and such a power, no action will lie against that authority in respect of its decision, even if there is some evidence to show that the individual members of authority were actuated by bitterness or some other indirect motive. The intention of the Legisiature was that there should not be an opportunity of setting aside or getting rid of the decision of a local authority by bringing an action against the authority, and it is obvious that a jury would not
10 be a convenient tribunal for the trial of such action.

"If it is suggested that the result of our decision, affirming that of Lawrence J., would leave the plaintiff without a remedy, the answer is that although an action for damages will not lie, there is nevertheless a remedy where the Court can see from the facts that although the local authority has made a pretence of exercising its power, it has nevertheless in truth and in fact never addressed its mind to the question before it; in such a case a mandamus to hear and determine the matter might be obtained in the King's Bench Division. It is perfectly clear that this action will not lie, and therefore no question can arise for our decision as to whether there was any improper rejection of evidence."

20 The plaintiff has been prohibited by statute to have public performances in his building except with a licence of the local body. The Chairman of the Urban Council has been empowered to grant, withdraw, suspend or modify a licence at his discretion. If the discretion is maliciously exercised in refusing a licence, the proper remedy if any is a mandamus and not an action for damages.

There are several cases where actions for damages have been allowed against certain officers, for maliciously exercising the powers given to them. Such would be the case where for instance, a police officer arrests a person maliciously. In doing so he infringes an antecedent legal right namely, the right of personal freedom. But on the facts of the instant case no right has been infringed, which enables the
30 plaintiff to bring an action for damages.

For these reasons, we are of the view that the plaint discloses no cause of action. We dismiss the appeal with costs.

Sgd: H. W. Tambiah
Puisne Justice

L. B. de Silva J.

I agree.

Sgd: Leonard B. de Silva
Puisne Justice

No. 7
Application for Conditional Leave to Appeal to the Privy Council
21. 4. 61

No. 7

Application for Conditional Leave to Appeal to the Privy Council

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.— *Plaintiff*

Vs.

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam.— *Defendant*

and 10

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.—*Plaintiff-Appellant*

Vs.

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam.— *Defendant-Respondent*

D.C. Puttalam, No. 6327

S.C. No. 234 F/1960

Application for Conditional Leave to Appeal.

To:

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON. 20

This 21st day of April, 1961.

The humble petition of the Plaintiff-Appellant abovenamed appearing by Vernon Bertrand Stanislaus Abraham, Charles Joseph Oorloff and Mahinda Abhaya Ellepola practising in partnership under the name style and firm of "ABRAHAMS" and their assistant Leslie William Frederick Perera Jayasuriya his Proctors, states as follows:—

1. That feeling aggrieved by the judgment of this Honourable Court pronounced on the 24th day of March 1961 the Plaintiff-Appellant is desirous of appealing therefrom to Her Majesty the Queen in Council.

2. That the said judgment is a final judgment of the Court where the appeal 30 involves directly a claim respecting a civil right exceeding the value of Rs. 5,000/-.

3. That the Plaintiff-Appellant has given due notice to the Defendant-Respondent of his intention to make this application and has in the affidavit attached hereto set out the mode of service of such notice.

WHEREFORE THE PLAINTIFF-APPELLANT PRAYS for the grounds aforesaid for Conditional Leave to appeal against the Judgment of this Court dated the 24th day of March 1961 to Her Majesty the Queen in Council.

SGD: Abrahams
Proctors for Plaintiff-Appellant. 40

No. 8

Statement of Objections of the Defendant-Respondent

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.— *Plaintiff-Appellant*

Vs.

D.C. Puttalam, No. 6327
S.C. 234 F/1960

M. A. M. M. Abdul Cader, "Haniffa Villa" Puttalam.—*Defendant-Respondent*

To:

10 THE HONOURABLE THE CHIEF JUSTICE AND OTHER JUDGES OF THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON

This 28th day of June 1961.

The Statement of objections of the Defendant-Respondent appearing by M. I. H. M. Sally, his Proctor, states as follows:—

1. With reference to the averments in paragraph 1 of the Plaintiff-Appellant's petition dated 21-4-1961 the Respondent states that Your Lordships Court pronounced judgment in the said case on the 24th day of March 1961, dismissing the plaintiff-appellant's case with costs.

2. The respondent denies the averments in paragraph 2 (two) of the said peti-
20 tion.

3. The respondent admits the averments in paragraph 3 (three) of the said petition.

4. As matter of law, the respondent states that the judgment of the Supreme Court referred to in paragraph 1 (one of this statement of objections is a decision on a preliminary issue of law and is not a final judgment within the meaning of the Rule 1(*a*) of the Schedule to The Appeals (Privy Council) Ordinance (Chapter 85).

Wherefore the respondent prays—

(*a*) that Your Lordhsips' Court be pleased to dismiss the petitioner's applica-
30 tion for conditional leave to appeal against the said judgment of Your Lordships' Court to Her Majesty the Queen in Council with costs and

(*b*) for such other and furthei relief as to this court shall seem meet.

SGD:
Proctor for the Defendant-Respondent.

No. 9
Judgment of the Supreme Court granting Conditional leave to Appeal to the Privy Council
15. 12. 61

No. 9

Judgment of the Supreme Court granting Conditional Leave to Appeal to the Privy Council

S.C. Application No. 180/1961

APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL IN S.C. 234, D.C. PUTTALAM, 6327

Asoka Kumar David, alias David
Asoka Kumar of Gardiner Theatre,
Kurunegala Road, Puttalam.—*Plaintiff-Appellant*

Vs. 10

M. A. M. M. Abdul Cader, of
"Haniffa Villa", Puttalam.—*Defendant-Respondent*

Present: H. N. G. Fernando, J. & L. B. de Silva, J.

Counsel: C. Ranganathan *with* Nimal Senanayake for plaintiff-appellant;

H. V. Perera, Q.C. *with* M. T. M. Sivardeen & M. A. M. Isaki for defendant-respondent.

Argued on: 21–7–1961
Decided on: 15–12–61

H. N. G. Fernando, J.

This is an application for conditional leave to appeal to Her Majesty-in-Council 20 against the judgment of this court delivered on 24th March 1961, on an appeal to the court from a judgement and decree of the District Judge of Puttalam. The cause of action stated in the plaint was for damages alleged to have been sustained by the plaintiff by reason of the alleged malicious refusal of the defendant to issue to the plaintiff a licence under the Public Performances Ordinance (Cap. 134) authorising the use of the plaintiff's cinema for the presentation of "public performances". On a preliminary issue, namely the question whether the plaint disclosed a cause of action against the defendant, the learned District Judge held that if the refusal to grant the licence had been malicious, a cause of action for damages would enure to the plaintiff. But in his view such an action would lie, 30 not personally against the individual who had refused the licence, but rather against the person in his capacity as the authority empowered by law to grant the licence that is as the Chairman of the Urban Council of Puttalam. The District Judge dismissed the action on the ground that the action had been brought against the defendant personally and not in his capacity as the Chairman of the Council.

No. 9
Judgment of the Supreme Court granting Conditional leave to Appeal to the Privy Council 15. 12 61
—*continued*

In the Supreme Court the dismissal was affirmed but on the different ground that the proper remedy if any is by way of an application to this court for a Mandamus calling upon the proper authority to issue the licence and not by way of an ordinary action in a civil court.

Assuming that the plaintiff's action was properly dismissed, whether upon the ground stated in the District Court or alternatively that stated in the judgment of this court, it seems clear that the result of the order dismissing the action is that the question whether in the circumstances alleged in the plaint the plaintiff may recover damages on the ground that the licence was unlawfully refused has been finally terminated. The plaintiff chose to assert the existence of a right in him to sue the defendant as an individual for damages alleged to have been suffered by an alleged wrongful act of the defendant as an individual, and the effect of the judgment of this court on appeal is that the plaintiff cannot again seek in the courts to recover damages on the same ground from the defendant as an individual. Even though the ground of the dismissal of the plaintiff's action may be that the District Court has no jurisdiction to entertain it, a plaintiff who alleges that the court has such jurisdiction, is entitled to a determination on the question of jurisdiction, and a determination that there is no jurisdiction would appear to be an order finally determining the rights of the parties unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim. No indication of any such further express or implied determination is to be found in the judgment of this court against which the plaintiff now seeks to appeal.

For the argument that the decree of this court against which leave to appeal is now sought is not a final order within the meaning of the Appeals to the Privy Council Rules, counsel for the respondent relies greatly on decision of the Court of Appeal in England in *Salaman v. Warner* (1). That decision construed the meaning of the terms "final order" and "interlocutory order" in a certain rule of procedure. The defendants in that action raised the point of law that the statement of claim did not disclose any cause of action and the Judge at Chambers ordered the point to be set down for argument and disposed of before trial. The Divisional Court after hearing argument ordered that the action should be dismissed. Thereupon the plaintiff gave notice of appeal against the order dismissing his action. The question whether the order dismissing the action was final or interlocutory arose in connection with the notice of motion to appeal which was given by the plaintiff. Under *order LVIII Rule* 3 of the English Rules of the Supreme Court, the notice of appeal from a final order must be a "fourteen days' notice", while the notice of appeal from an interlocutory order is a "four day notice". The "fourteen days" and "four days" period, in this context, is not the period within which the notice must be given (that matter is dealt with in *Order LVIII Rule* 15); *Rule* 3 refers to the day which should be mentioned in the notice of motion to appeal, being the first day which can be named in the official list as the day of hearing of the motion to appeal and the notice should be given for that day. In other words, the notice of appeal against a final order must state the motion to appeal will be set down for hearing on the fourteenth day (14th) after the date of the service of the notice, whereas the day to be so specified where the appeal is against an interlocutory order must be the 4th day after service of the notice. This was the effect of *Order*

No. 9
Judgment of the Supreme Court granting Conditional leave to Appeal to the Privy Council 15. 12. 61
—*continued*

LVIII Rule 3 as it stood in 1955, and the Rule existing at the time of the decision in *Salaman v. Warner* (1) could not have been substantially different.

In considering the applicability of the decision of the Court of Appeal in construing the Rules in Ceylon regulating appeals to Her Majesty-in-Council, it is necessary to cite fairly fully from the judgments of Lord Esher, M. R. and Fry, L.J., and for convenience of comment I shall italicise parts of the *dicta* which seems to me of much importance.

"*Taking into consideration all the consequences that would arise from deciding in one way and the other respectively*, I think the better conclusion is that the definition which I gave in *Standard Discount Co. v. La Grange* (3 *C.P.D.* 67 *at p.* 71) is the right test *for determining whether an order for the purpose of giving notice of appeal under the rules* is final or not. The question must depend on what would be the result of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, which ever way it is given, will, if it stands finally dispose of the matter in dispute, *I think that for the purpose of these rules it is final.* On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of *Standard Discount Co. v. La Grange* (*supra*), and which on the whole *I think to be the best rule for determining these questions;* the rule which will be most easily understood and involves the fewest difficulties". (*per Lord Esher, M.R. at p.* 735).

"The 3rd and 15th rules of Order LVIII have raised considerable difficulties because they use the term "interlocutory order", of which no definition is to be found in the rules themselves or so far as I know, by reference to the earlier practice, either of the Common Law or of Chancery Courts. These difficulties are well illustrated by various cases that have been decided. *We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing.* The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined" (*per Fry, L.J. at p.* 736).

It will be seen that the Court of Appeal has for the purposes of the rules which regulate giving of the notice of appeal adopted a test which will enable a party or his lawyers to determine beforehand whether the order ultimately obtained in a proceeding will be final or else interlocutory; a proceeding for this purpose would appear to fall necessarily or at least ordinarily into one of three categories:—

1. If the point raised in the proceeding is such that the order ultimately made will result in the final termination of the proceeding in the court before

which it is held, *whichever way the order will go*, then the order will be "final" for the purposes of the rules.

2. If the order which will ultimately be made, whichever way it goes, will not be a final termination and if after the order is made the action will continue, then the order is "interlocutory".

No. 9 Judgment of the Supreme Court granting Conditional leave to Appeal to the Privy Council 15. 12. 61 —*continued.*

The distinction between the two kinds of orders respectively mentioned above is a straightforward one, distinguishing between orders which on the one hand are manifestly interlocutory and on the other hand manifestly final. But in the third class of case, where such a distinction is inapplicable, the Court of Appeal 10 decided that an order which if I may say so with respect, is not manifestly "interlocutory", will be regarded as being interlocutory for the purposes of the Rules.

3. The third class of case is one where, although the order may finally determine the rights of the parties in the sense that it has the effect of finally terminating the action in the court, it is nevertheless regarded as interlocutory because if the decision had been given the other way the action would have continued in that court.

With much respect to the learned Judges of the Supreme Court of Ceylon who have referred to the judgments in *Salaman v. Warner* (1) in considering the meaning of the expression "final order" in our rules regulating appeals to the Privy 20 Council, it seems to me that those parts of the *dicta* of the Court of Appeal which I have italicised did not receive due attention. In determining whether the third class of case mentioned above should be regarded as leading to an order which is final or interlocutory the Court of Appeal appears to have had strong reason for considering it proper and convenient that the order should be treated as an interlocutory order *for the purposes of determining which of the two notices required by the English Rules should be given.* I have little doubt that if what was involved was not merely the question of the day to be mentioned in the notice, but the more important and fundamental question whether an appeal lies at all, the third class of order would not have been regarded as interlocutory, having regard to the consequence 30 that it would then be non-appealable.

The decision of the Privy Council in *Abdul Rahman v. Cassim & Sons* (2), did not adopt the ruling of the Court of Appeal in *Salaman's case* (*supra*) in the same sense in which that ruling was relied upon in the argument before us. The order from which an appeal was there taken to the Privy Council was one which reversed a decree of dismissal and which remanded the suit to the original court for trial on the merits. In fact therefore the order appealed against to the Privy Council did not finally determine the rights of the parties, for those rights were left to be determined by the original court.

"The finality must be a finality in relation to the suit. If, after the order, the 40 suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under section 109 (A) of the Code"

No. 9
Judgment of the Supreme Court granting Conditional leave to Appeal to the Privy Council 15.12.61
—continued

But there is nothing in the judgment of the Privy Council to show that if the Appellate Court in India had confirmed the decree of dismissal the order of confirmation would not be a final order against which the party aggrieved had his right of appeal. The case of *Amatul Fatema V. Abdul Alim* (3) which was followed was equally one where the order appealed from, being an order which refused a stay of suit, left the rights of the parties to be determined by the courts and therefore did not finally dispose of those rights.

The decision in *Salaman's case* (*supra*) has been referred to more than once in judgments of this court relating to the construction of the term "final order" in the context now under consideration. In regard to those judgments to which our 10 attention has been drawn in the argument *Lal v. Emanuel* (4), *Palaniappa Chetty v. Mercantile Bank of India Ltd.*, (5), *Settlement Officer v. Vander Poorten* (6), I note that in each of them, although leave to appeal was properly refused, there was no necessity to rely upon the ruling in *Salaman v. Warner* (1).

As has been stated above the effect of the order made by the Supreme Court against which the plaintiff now seeks to appeal is that he is finally prevented from asserting his alleged claims as against the defendent as an individual. Unless the test laid down in *Salaman's case* (*supra*) is to be applied (and for reasons already stated that test is in my opinion inapplicable), I find no ground upon which to hold that the decree dismissing the plaintiff's action is not a final order for the purposes 20 of the rules regulating appeals to Her Majesty-in-Council.

The application for conditional leave to appeal is allowed with costs fixed at Rs. 315/-.

SGD: H. N. G. FERNANDO
Puisne Justice

L. B. de Silva, J.

I agree.

SGD: LEONARD B. DE SILVA
Puisne Justice

1. Salaman V. Warner, (1891) 1. Q.B. 734. 30
2. Abdul Rahman v. Cassim & Sons, (1933) A.I.R. 58 (P.C.)
3. Amatul Fatema v. Abdul Alim, (1920) A.I.R. 86 (P.C.)
4. Lall v. Emanuel, 33 N.L.R. 91.
5. Palaniappa Chetty v. Mercantile Bank of India Ltd., 43 N.L.R. 352.
6. Settlement Officer v. Vander Poorten, 43 N.L.R. 436.

No. 10

Decree of the Supreme Court granting Conditional Leave to Appeal to the Privy Council

S.C. Application No. 180/'61

No. 10
Decree of the Supreme Court granting Conditional leave to Appeal to the Privy Council
4. 1. 62

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an application by the Plaintiff-Appellant dated 21st April 1961 for Conditional Leave to Appeal to Her Majesty the Queen in Council against 10 the judgment and decree of this Court dated 24th March 1961 in S.C. 234/'60 (Final) D.C. Puttalam case No. 6327.

Asoka Kumar David alias David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.

Plaintiff-Appellant

Petitioner

against

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam.

Defendant-Respondent

20 **Respondent**

Action No. 6327 **District Court of Puttalam.**

This cause coming on for hearing and determination on the 21st July and 15th December, 1961 before the Hon. Hugh Norman Gregory Fernando, and the Hon. Leonard Bernice de Silva, Puisne Justices of this Court in the presence of Counsel for the Plaintiff-Appellant-Petitioner and Defendant-Respondent-Respondent.

It is considered and adjudged that this application be and the same is hereby allowed upon the condition that the applicant do within one month from this date:—

1. Deposit with the Registrar of the Supreme Court a sum of Rs. 3000/- and 30 hypothecate the same by bond or such other security as the Court in terms of Section 7(1) of the Appellate Procedure (Privy Council) Order, 1921, (Cap. 85) of the Subsidiary Legislation shall on application made after due notice to the other side approve.

No. 10
Decree of the Supreme Court granting Conditional leave to Appeal to the Privy Council
4. 1. 62
—continued.

2. Deposit in terms of provisions of Section 8(*a*) of the said Appellate Procedure (Privy Council) Order, 1921, with the Registrar a sum of Rs. 300/- in respect of fees mentioned in Section 4(2)(*b*) and 4(2)(*c*) of the Appeals (Privy Council) Ordinance (Chapter 100).

Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon for an estimate of such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

It is ordered and decreed that the Defendant-Respondent—Respondent do pay to the Plaintiff-Appellant—Petitioner the costs of this application fixed at Rs. 315/-. 10

Witness the Hon. Hema Henry Basnayake, Q.C. Chief Justice at Colombo, the 4th day of January in the year One Thousand Nine Hundred and Sixty Two and of our Reign the Tenth.

SGD: B. F. PERERA.
Deputy Registrar, S.C.

No. 11
Application for Final leave to Appeal to the Privy Council
4. 1.62

No. 11

Application for Final Leave to Appeal to the

Privy Council

IN THE SUPREME COURT OF THE ISLAND OF CEYLON 20

In the matter of an application for Final Leave under the Provisions of the Appeals (Privy Council) Ordinance (Cap. 100)

Asoka Kumar David also known as David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam presently of Asoka Cinema, Puttalam. *Plaintiff-Appellant*

Petitioner

Vs.

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam. *Defendant-Respondent* 30

D.C. Puttalam

No. 6327

S.C. No. 234 F/1960

To:

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON

This 4th day of January 1962.

The Humble petition of the Plaintiff-Appellant—Petitioner abovenamed appearing by Vernon Bertran Stanislaus Abraham, Charles Joseph Oorloff and Mahinda Abhaya Ellepola practising in partnership under the name style and firm of "ABRAHAMS" his Proctors, states as follows:—

1. That the Plaintiff-Appellant—Petitioner on the 15th day of December 1961 obtained conditional leave from this Honourable Court to appeal to Her Majesty the Queen in Council against the judgment of this Court pronounced on the 24th day of March, 1961.

2. That the Order granting Conditional Leave to Appeal was given subject to the usual conditions and no conditions were imposed under Rule 3(*b*) of the Schedule Rules of the Appeals (Privy Council) Ordinance (Cap. 100).

3. That the Plaintiff-Appellant—Petitioner has in compliance with the said conditions:—

(*a*) On the 2nd day of January 1961 deposited with the Registrar of this Court the sum of Rs. 3,000/- being security for costs of appeal under Rule 3(*a*) of the Schedule Rules and hypothecated the said sum of Rs. 3,000/- by Bond dated 3rd day of January 1962 for the due prosecution of the appeal and the payment of all costs that may become payable to the Defendant-Respondent in the event of the Plaintiff-Appellant—Petitioner not obtaining an order granting him Final Leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty the Queen in Council Ordering the Plaintiff-Appellant—Petitioner to pay the Defendant-Respondent's Costs of appeal, and

(*b*) on the 2nd day of January 1962 deposited the sum of Rs. 300/- with the Registrar of this Court in respect of the amounts and fees as required by paragraph 8(*a*) of the Appellate Procedure (Privy Council) Order 1921 made under Section 4(1) of the aforesaid Ordinance.

Wherefore the Plaintiff-Appellant—Petitioner prays that he be granted Final Leave to Appeal against the said judgment of this Court dated the 24th day of March 1961 to Her Majesty the Queen in Council.

SGD: ABRAHAMS
Proctors for Plaintiff-Appellant—Petitioner.

No. 12
Decree of the Supreme Court granting Final Leave to Appeal to the Privy Council
11. 4. 62

No. 12

Decree of the Supreme Court granting Final Leave to Appeal to the Privy Council

S.C. Application No. 1/62

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an Application dated 4th January, 1962 for Final Leave to Appeal to Her Majesty the Queen in Council by the Plaintiff-Appellant—Petitioner against the judgment and decree of this Court dated 24th March, 1961 in S.C. 234/'60 (Final)—D.C. Puttalam case No. 6327. 10

Asoka Kumar David alias David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam.

Plaintiff-Appellant

Petitioner

against

M. A. M. M. Abdul Cader, "Haniffa Villa", Puttalam.

Defendant-Respondent 20

Respondent

Action No. 6327 **District Court of Puttalam**

This cause coming on for hearing and determination on the 30th day of March, 1962 before the Hon. Hema Henry Basnayake, Q.C., Chief Justice, and the Hon. Kingsley Herat, Puisne Justice of this Court, in the presence of Counsel for the Plaintiff-Appellant-Petitioner.

It is considered and adjudged that the Application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice at Colombo, the 11th day of April, in the year One Thousand Nine Hundred and Sixty Two 30 and of Our Reign the Eleventh.

SGD: B. F. PERERA
Deputy Registrar, S.C.

No. 3 1962

Supreme Court of Ceylon,
No. 234 (Final) of 1960.

District Court of Puttalam,
Case No. 6327.

In Her Majesty's Privy Council
On an Appeal From
The Supreme Court of Ceylon

BETWEEN

Asoka Kumar David *also known as* David Asoka Kumar of Gardiner Theatre, Kurunegala Road, Puttalam . . . . *Plaintiff-Appellant*

Appellant

AND

M. A. M. M. Abdul Cader of "Haniffa Villa" Puttalam . . . . *Defendant-Respondent*

Respondent

RECORD OF PROCEEDINGS

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