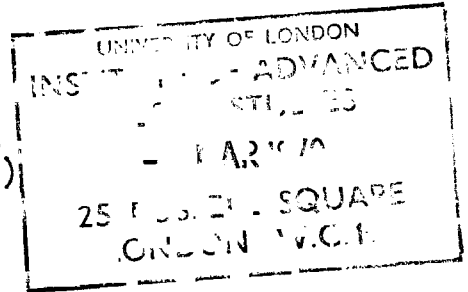


P.C.A. NO. 38 of 1968
IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

CHELLIAH KODEESWARAN
(Plaintiff-
Respondent)
Appellant



- and -

10 THE ATTORNEY-GENERAL OF
CEYLON
(Defendant-
Appellant)
Respondent

CASE FOR THE RESPONDENT

1. - This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 30th August, 1967, allowing an appeal from, and setting aside, a Judgment and Decree of the District Court of Colombo, dated the 24th April, 1964, whereby, in an action by the Appellant (a Clerk who, on the 1st November, 1952, was appointed to a Clerkship in the General Clerical Class of the General Clerical Service of Ceylon) against the Respondent (as representing the Crown) praying for, inter alia, a declaration that he was entitled to an increment of salary, which, he alleged, fell due on the 1st April, 1962, it was held that he was entitled to the said increment notwithstanding his admitted non-compliance with the terms of Treasury Circular No.560, Ex P9 dated the 4th December, 1961, which non-compliance, the Respondent alleged, disentitled him to the said increment.

pp.209-232
p.233

pp.174-199
p.200

Ex.P9,p.357

It was the Appellant's case that the

said Circular was issued in implementation of the Official Language Act No.33 of 1956 which enacts that Sinhala shall be the one Official Language of Ceylon and that both the said Circular and the said Act contravene Article 29 (2)(b) and (c) of the Ceylon (Constitution) Order in Council, 1946, in that they confer on the "Sinhala Speaking Community" an advantage which is not conferred on members of the "Tamil Speaking Community" and are therefore illegal and invalid and not binding on him. He maintained therefore that his failure to show the required degree of proficiency in the Official Language could not lawfully affect his right to the increment in his salary which, he claimed, he had earned.

10

2. - The main question for determination on this appeal is whether or not, the Supreme Court was wrong in deciding that the Appellant, a public officer in the service of the Crown, is, by the law of Ceylon, not entitled to maintain this suit for his wages, or any part thereof, or otherwise to enforce the terms of his engagement.

20

Incidental and related questions raised at the trial in the District Court and in the arguments on appeal in the Supreme Court, e.g. the validity or otherwise of the said Treasury Circular No.560 (Ex.P9) and the Official Language Act No.33 of 1956, were noticed but not considered and adjudicated on by the Supreme Court which Court held that it was not necessary to do so for, in its view, the Appellant, being a public servant in the service of the Crown, could not, in any event, maintain this action.

Ex.P9,
p.357

30

3. - The facts, briefly stated, are as follows :-

The Appellant (hereinafter also referred to as "the Plaintiff") instituted this action in the District Court of Colombo against the Respondent (hereinafter also called "the Defendant") as representing the Crown and by his Plaint, dated the 10th October, 1962, stated, inter alia, as follows :-

40

"2. The Plaintiff was appointed to a Clerkship in the General Clerical Class of the General Clerical Service of Ceylon on the 1st November, 1952, and at all dates material to this action has been holding permanent employment under the Government of Ceylon.

p.11,11.40-
43

10 "3. The Plaintiff was on the 1st October, 1959, promoted to be a Clerk in the Executive Clerical Class Grade II of the General Clerical Service of Ceylon and placed on the salary scale of Rs.1,620 - Rs.120 - Rs.3780 per annum.

p.12,11.1-
4

20 "4. In accordance with the terms of the Plaintiff's employment under the Government of Ceylon, the Plaintiff had earned and was entitled to the payment of an increment of Rs.10/- per month with effect from the 1st April, 1962.

p.12, 11.5-
8

30 "5. The Government Agent, Kegalle, acting for and on behalf of the Government of Ceylon, however, by his letter, dated 28.4.62, . . . informed the Plaintiff that the said annual increment which fell due on 1.4.1962 has been suspended as the Plaintiff has not passed any of the proficiency tests prescribed in paras. 2(a) and (b) of Treasury Circular No.560 of the 4th December, 1961, and did not pay the said increment to the Plaintiff."

p.12,11.9-
16

40 4. - Continuing, the Plaintiff, questioned the validity of the said Treasury Circular and the Official Language Act, 1956, in implementation of which the Circular, he alleged, was issued. He said, in his Plaint:-

"6. The Plaintiff states that the said Treasury Circular No.560 of 4th December, 1961, is invalid and not

p.12,11.17-
33

binding on the Plaintiff as the requirements contained in the said Treasury Circular are :-

"(a) unreasonable, in that it is not possible for the Plaintiff who is a member of the Tamil Speaking Community not conversant with the Sinhala Language to attain the degree of proficiency postulated in the Circular within the time prescribed. 10

"(b) illegal in that they are made in the implementation of the Official Language Act No.33 of 1956 the provisions of which are null and void inasmuch as, in contravention of Article 29 of the Ceylon Constitution Order in Council, they impose on members of the Tamil Speaking Community, whose mother tongue is Tamil, disabilities which members of the Sinhala Speaking Community are not made liable to and/or confer on persons of the Sinhala Speaking Community an advantage which is not conferred on persons of the Tamil Speaking Community." 20 30

5. - By his Answer, dated the 25th January, 1963, the Defendant, on behalf of the Crown, denied the averment in the Plaint that a cause of action had arisen to the Plaintiff for a declaration as prayed. He said, inter alia :-

p.14,11.20-
28

"4. . . . this Defendant denies that in accordance with the terms of employment of the Plaintiff under the Government, the Plaintiff is entitled as of right to the payment of Rs.10/- per month or any other sum whatsoever by way of increment with effect from 40

1st April, 1962. This Defendant further states that the payment of an increment to a public officer is dependent on a certificate that the officer concerned has discharged his duties with efficiency, diligence and fidelity and has earned his increment.

10 "5. this Defendant states that the Treasury Circular letter No.560 of 4th December 1961, is not invalid and that it is binding on the Plaintiff. This Defendant further denies that the requirements of the said Circular letter are unreasonable or are illegal. Further answering, this Defendant states -

p.14,1.29
to
p.15. 1.4

20 "(a) that the said Circular letter was not issued by the Acting Secretary to the Treasury under any power, authority, duty or function vested in or imposed upon him by or under the Official Language Act, No.33 of 1956, but in his capacity of Permanent Secretary to the Ministry in charge of the administration and conditions of service in the Public Service;

30 "(b) that in any event the provisions of the Official Language Act, No.33 of 1956, are not null and void and do not impose on members of the 'Tamil Speaking Community' disabilities to which the 'Sinhala Speaking Community' are not liable and/or confer on the 'Sinhala Speaking Community' an
40 advantage which is not conferred on persons of the 'Tamil Speaking Community'.

"6. By way of still further answer.... p.15,11.5-
11

this Defendant pleads as a matter of law that the 'Tamil Speaking Community' is not a 'Community' within the meaning of Section 29 of the Ceylon (Constitution) Order in Council, and denies that the Official Language Act, No.33 of 1956, is in contravention of the said Section 29 of the said Order in Council or that the provisions of the said Circular letter are illegal." 10

pp.15-17
p.199
p.203,1.23
to
p.204,1.30

6. - Issues framed at the trial were, after a consideration of the oral and documentary evidence which both sides had produced, answered thus by the learned District Judge :-

"(1) Is the Plaintiff entitled in terms of his employment under the Government of Ceylon to an increment of Rs.10/- a month which fell due on 1st April 1962?"

Answer : "Yes"

20

"(2) Was the said increment withheld by the Crown or its agents in terms of Treasury Circular No.560 of 4th December, 1961?"

Answer: "Yes"

"(3) If so is the said Treasury Circular invalid?"

Answer : "Yes, in the sense that by it it was sought to implement what was bad in law."

30

"(4) Was it a term of the Plaintiff's contract of service under the Government that he should work in English?"

Answer : "Yes"

"(5) Are the terms and conditions sought to be imposed by Circular No.560

part of the terms and conditions of the Plaintiff's Contract of Service?"

Answer : "No"

"(6) If not, is the Defendant entitled to impose the said conditions -

"(a) Unilaterally?

"(b) By a Treasury Circular?"

Answer : to (a): "No"

10

" (b): "No"

"(7) If anyone or more of these Issues are answered in favour of the Plaintiff is the Plaintiff entitled to the declaration asked for in the Plaintiff?"

Answer : "Yes"

"(8) Does the Plaintiff disclose a cause of action against the Crown?"

Answer : "Yes"

20 7. - By his Judgment, dated the 24th April, 1964, incorporating the said Answers to Issues, the learned District Judge held that the Plaintiff was entitled to the increment he claimed and to the costs of the action.

8. - The views of the learned District Judge were to the following effect :-

30 (A) An enforceable contract of service was entered into between the Crown and the Plaintiff when, on the 16th October, 1952, the Plaintiff was appointed to the General Clerical Class of the General Clerical Service of Ceylon. This was the effect in law of : (i) the Letter of Appointment, dated the 16th October, 1952 (Ex.P 16) sent to the Plaintiff by the Deputy Secretary to the Treasury; (ii) the Agreement,

p.178,11.11-
20
p.183,11.15-
17

Ex.P.16,p.
250

Ex.P17, p.
253

dated the 4th November, 1952 (Ex. P 17) between the Government of Ceylon and the Plaintiff whereunder the Plaintiff agreed (a) not to demand his discharge from, or leave, the service of the Government, except under certain conditions, as to notice, etc., and (b) to pay into the General Treasury a sum of money equal to the full amount of his salary for the month next preceding that in which he might leave the service without notice; and (iii) the terms of the Minute on the General Clerical Service as published in the Ceylon Government Gazette Extraordinary, dated the 1st October, 1955 (Ex.P 1) 10

Ex. P1, p.
271

p.183,11.15-
17

(B) The said contract of service was terminable at Her Majesty's pleasure.

p.179,11.11-
14

(C) Before the Crown exercised its right to dismiss the Plaintiff from its service without cause stated, the Plaintiff could institute proceedings against the Crown for the recovery of salary due to him. 20

9. - Other views of the learned District Judge were to the following effect :-

p.196,11.4-
31

(D) The terms of the contract of service between the Crown and the Plaintiff could be lawfully altered only by the Public Service Commission - and not by any Minister of the Government.

p.186,11.14-
16

(E) The Plaintiff had brought his action in proper form - he had properly invoked the jurisdiction of the District Court to grant a declaratory decree against the Crown. 30

p.194,11.38-
39
pp.187-194

(F) The Official Language Act, 1956, is bad in law because it contravenes Article 29 of the Ceylon Constitution. At the time of its enactment, the Act directly or indirectly gave to the Sinhala Speaking Community an advantage which other Communities in Ceylon did not have.

Ex.P9,p.357

The Treasury Circular No.564 of 4th December, 1961 (Ex P 9) was issued in 40

implementation of the said Act and, consequently, was also invalid.

10. - A Decree in accordance with the Judgment of the learned District Judge was drawn up on the 24th April, 1964, and against the said Judgment and Decree the Defendant appealed to the Supreme Court of Ceylon on the several grounds set out in his Petition of Appeal. p.200
- 10 11. - The appeal came up for hearing before a Bench consisting of H.N.G. Fernando C.J. and G.P.A. Silva J. who, by their Judgment, dated the 30th August, 1967, allowed the appeal and set aside the Judgment and Decree of the District Court. The learned Judges of the Supreme Court awarded costs of the appeal to the Defendant-Appellant but did not make any Order as to costs in the District Court. pp.201-208
- 20 12. - Delivering the main Judgment of the Supreme Court, H.N.G. Fernando C.J. (with whom G.P.A. Silva J. agreed) after narrating the facts, said that the first question to be decided was whether or not the relationship between the Crown and its servants in Ceylon is regulated by Roman-Dutch Law or English Law as altered or modified in its application in Ceylon. He referred to, but did not accept, the argument advanced on behalf of the Plaintiff-Respondent that the nature of the relationship should be determined by Roman-Dutch law. He examined the early authorities upon which the argument purported to be based but was in agreement with the submission made on behalf of the Crown that while the said early authorities supported the view that in Ceylon the Crown could be sued upon a contract they did not support the argument that it was Roman-Dutch law that had made that possible. He accepted the view that "the waiver of immunity from suit by the Crown in Ceylon consisted merely of the acknowledgment of a right to sue the Crown in lieu of the right under English law to proceed by way of a petition of right." p.211,11.17-20
- 30 p.211,1.20
to
p.219,1.10
p.218,1.35
to
p.219,1.10
p.215,11.15-27
- 40 13. - The learned Chief Justice next p.215,1.28
to
p.217, 1.32

referred to the decision of the Board in Siman Appu v. The Queen's Advocate (1884) 9 App. Cas. 571, P.C. which made it clear that in Ceylon the right of the subject to institute an action against the Crown was in accordance with an extensive practice which then existed in Ceylon and was not founded on the Roman-Dutch law. Continuing, he said :-

p.219,11.2-10

"The right to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply in Ceylon. It follows that the question whether the Plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon."

14. - The learned Chief Justice next examined and applied the decisions of the Board in Rangachani's Case (1937) A.I.R. P.C. 27, Venkata Rao's Case (1937) A.I.R. P.C. 31, and in High Commissioner for India v. Lall (1948) A.I.R. P.C. 121, and the decisions in Gould's Case (1896) A.C. 575, and in Mulvenna v. The Admiralty (1926) S.C. 842. For reasons that he gave, he came to the following clear conclusion :-

p.223,11.
6-16

"Prior to the operation of the Ceylon Constitution Order in Council 1946 the nature of the rights of a public servant in Ceylon was similar to that of a public servant in India . . . Upon the reasoning of the Indian decisions cited above, a public servant in Ceylon had no right of redress by action in the Courts for a breach of rules and regulations prescribing the salaries and conditions of service of public officers. It would seem to follow therefore that

the grounds of the decision in Lall's Case (supra) in particular, holding that a public servant had no right to sue for his wages, were applicable also in the case of members of the public service of Ceylon."

15. - The learned Chief Justice considered also inter alia the decisions in Reilly v. King p.225, l.24
10 [1934] A.C. 176, Robertson v. Minister of Pensions [1948] 2 All. E.R. 767 and Sachs v. Donges (1950) (2) S.A.L.R. 265. He found to
nothing in those decisions to cause him to alter the views he had already expressed. He said :-
p.228, l.20

"I do not consider it useful to refer to other cases cited during the argument, many of which were conceived with alleged wrongful dismissals of servants of the Crown.
20

"It suffices for me that we have not been referred to any decision holding, despite objection directly taken on behalf of the Crown, that a Petition of Right or civil suit lies against the Crown to enforce the performance of the terms of the engagement of a servant of the Crown, not being terms laid down by statute. The Ceylon decision in Fraser's Case (Ram.316) is thus quite exceptional.
30

"The decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denies to this Plaintiff a right to sue for the increment alleged to be due to him under the Minutes."
40

16. - On the subject as to whether or not the

provisions of the Ceylon Constitution have affected the said principle, the learned Chief Justice referred to the provisions of Articles 57, 58, 60 and 61 of the Ceylon (Constitution) Order in Council and pointed out that the powers of appointment and dismissal which were those of the Sovereign in early English law were, in Ceylon, now exercisable by the Public Service Commission. Following an examination inter alia, of Parts V and VII of the Constitution he said that the subject of the public service had been assigned to the Minister of Finance and he found no difficulty in assuming that the Minutes and Circulars referred to in this case, which were issued by the Secretary to the Treasury or his Deputy, were in fact issued under the authority of the Minister of Finance who would adhere to decisions of Parliament. He noted also the fact that it had not been suggested during the argument that the act of the Plaintiff's head of department in withholding the Plaintiff's increment had infringed or usurped powers which, under the Constitution, are vested in Parliament, the Cabinet, the Public Service Commission or the Minister of Finance. He was clear that the head of department had acted under the provisions of a Circular issued by a fully competent authority.

p.229,11.10-
13

10

p.229,11.14-
37

20

17. - The learned Chief Justice was clear that the principle which denied to the Plaintiff the right to maintain this action against the Crown had not been affected by any provisions of the Constitution of Ceylon. He said :-

30

p.230,11.6-
15

"I find nothing in the relevant provisions of the Constitution (which have just been examined) which can in any way be construed as altering or affecting, either expressly or by implication, the principle that the terms of a public officer's engagement to serve the Crown in Ceylon do not entitle him to institute a suit to recover earned wages or to enforce the terms of his engagement. The case of Silva v. The Attorney-General (60 N.L.R.

40

145) is easily distinguishable for we are not here concerned with anything resembling the dismissal from service of a public officer by an authority not legally competent to dismiss him."

18. - As to the argument advanced on behalf of the Plaintiff that "although the Crown or the Executive Government in Ceylon has a power freely to alter the terms and conditions of service prescribed in the relevant Minutes in force at the time of the Plaintiff's promotion to the Executive Clerical Class, that power was unlawfully exercised when the Treasury Circular No.560 was issued in December 1961", the learned Chief Justice said that the argument was founded on submissions that the said Circular must be regarded as being invalid having been issued in implementation of the Official Language Act, 1956, which, because it contravened Article 29 of the Constitution, was ultra vires and void - submissions upon which it was not, in his view, necessary to adjudicate. He said :-

p.230,11.16-
21

p.230,1.32
to
p.231,1.1

"In considering whether this Court should now make any pronouncement as to the validity of the Act of 1956, I take note of the reluctance of the American and Indian Supreme Courts to make such pronouncements. The principle is thus expressed in Cooley, 'Constitutional Limitations' (8th Ed.) p.332 :-

p.231,11.1-
10

'It must be evident to anyone that the power to declare a Legislative Enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.' "

In further support of this principle, learned Chief Justice referred to Burton v. United States (196 U.S. Reports at p.295)

p.231,11.11-
18

and Silver v. Louisville N.R. Co. (213 U.S. Reports) at p. 191).

19. - As to the instant case, the learned Chief Justice said, in conclusion :-

p.231,11.19-
25

"In the instant case it is not even clear whether the question of the compulsion of a statute does arise. I have already reached the conclusion that under our Law a public servant has no right to sue for his wages. Accordingly the Plaintiff is not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant Minutes and regulations had not been altered or modified by the Treasury Circular No.560." 10

p.231,11.26-
33

The position of the Crown here is not that there was an alteration in the terms and conditions of service in consequence of which the Plaintiff has become disentitled to the increment. The Crown's position is that the Plaintiff cannot sue for the increment, even if the Minutes and regulations provide for such a payment. Since such in my opinion is the correct position in law, this Court should not now venture to rule upon the submissions as to the invalidity of the Language Act. 20 30

p.231,11.33-
36

"As a note of caution I must say also that the ruling on that submission made by the learned District Judge in this case must not be regarded in any way as a binding decision."

p.232,11.1-
12

20. - The learned Chief Justice said finally that the Court had not called upon Counsel for the Defendant-Appellant to submit his arguments on the question of the validity of the Official Language Act, 1956. He said that at the close of the hearing of the appeal he had indicated that if the findings of the Court on the other issues which arose in the 40

10 case and necessitated a consideration of the said question he would, acting under Section 51 of the Courts Ordinance, have referred the question for decision of a Bench of five or more Judges, which course was not now necessary. He expressed his "firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arises for decision, must receive consideration by a Bench constituted under Section 51."

20 It is respectfully submitted that if notwithstanding the reasoning and decision of the Supreme Court (which, in the Respondent's submission, are plainly correct) it is held that the Supreme Court was in error and that this action by the present Appellant is, by the law of Ceylon, maintainable against the Crown, then this appeal should be remitted to the Supreme Court with appropriate directions for arrangements which will ensure adjudication on (a) the other issues set out in the present Respondent's Petition of Appeal filed in the Supreme Court or (b) on the grounds upon which the learned District Judge was persuaded to hold in favour of the Appellant.

30 21. - A Decree in accordance with the Judgment of the Supreme Court was drawn up on the 30th August, 1967, and against the said Judgment and Decree this appeal is now preferred to Her Majesty in Council, the Appellant having obtained Leave to Appeal by Order of the Supreme Court, dated the 6th November, 1967, and the 21st December, 1967.

In the Respondent's respectful submission the appeal should be dismissed, with costs throughout, for the following among other

R E A S O N S

1. Because, by the law of Ceylon, the Plaintiff, as a public officer in the service of the Crown, is not entitled to maintain this action or seek any relief in a Court of law in respect of any salary or increment thereof alleged to be due to him or to enforce the terms of his engagement by the Crown.

2. Because no provision in the Constitution of Ceylon affects in any way the principle which denies to the Plaintiff the right to maintain this action 10

3. Because for reasons stated therein the Judgment of the Supreme Court was right and ought to be affirmed.

E.F.N. GRATIAEN

R.K. HANDOO

P.C.A. No.38 of 1968

IN THE PRIVY COUNCIL

ON APPEAL FROM THE
SUPREME COURT OF CEYLON

B E T W E E N :

CHELLIAH KODEESWARAN
Appellant

- and -

THE ATTORNEY-GENERAL
OF CEYLON
Respondent

~~THE~~
CASE FOR THE RESPONDENT

HATCHETT JONES & CO.,
90 Fenchurch Street,
London, E.C.3.