[Privy Council]

1969 *Present :* **Lord Hodson, Viscount Dilhorne, Lord Donovan, Lord Pearson, Lord Diplock**

C. KODEESWARAN, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

Privy Council Appeal No. 38 of 1968

S. C. 408/64—D. C. Colombo, 1026/Z.

Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due—Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law.

A civil servant in Ceylon is entitled to sue the Crown for arrears of salary which have accrued due, by the terms of his appointment, in respect of services which he has rendered during the currency of his employment. In such a case the fact that his appointment as a Crown servant is terminable at will, unless it is expressly otherwise provided by legislation, is not relevant.

" Although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the ' common law ' of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae* (*Samed v. Segutamby,* 25 N. L. R. 481) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law."

APPEAL from a judgment of the Supreme Court reported in *(1967) 70 N. L. R. 121.*

Sir Dingle Foot, Q.C., with *C. Ranganathan, Q.C., M. P. Solomon, S. C. Crossette-Thambiah* and *M. I. Hamavi Haniffa,* for the plaintiff-appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo* and *H. L. de Silva,* for the defendant-respondent.

Cur. adv. vult.

1*—J 10714—2,255 (1/70)

December 11, 1969. [*Delivered by* LORD DIPLOCK]—

The appellant has been for many years a civil servant in Ceylon. He is one still. He brings this action against the Attorney-General as representing the Government of Ceylon. Its subject matter is the salary which he has received as a civil servant. He says that he was entitled to be paid more under the terms of his appointment and claims the balance which he alleges he has earned but which the Government of Ceylon has refused to pay him. He is a Tamil and the balance of salary that he claims is due to him is an increment which was denied to him because he did not pass a test in the Sinhala language. The requirement that he should pass such a test as a condition precedent to his being paid the increment was imposed by a Treasury Circular expressed to be issued in implementation of the Official Language Act, 1956. In the action he claims that the Official Language Act is unconstitutional and void and that the circular which was issued to implement the Act and which purported to vary the existing terms of his appointment is also void and ineffective to disentitle him to the increment to which he would have been entitled under those terms.

The appellant's action, if it lies at all, thus raises issues of the highest constitutional importance, all of which were argued before the District Judge. There is however a preliminary issue, viz. whether a civil servant has any right of action against the Crown for salary due in respect of services which he has rendered. If, as the Attorney-General contends, there is no such right of action, the broader constitutional issues as to the validity of the Official Language Act and as to the right of the Ceylon Government to impose a language test upon its civil servants as a condition of entitlement to higher pay, cannot be raised by the plaintiff in the present action. It fails *in limine.*

This preliminary issue was decided in the plaintiff's favour by the District Judge. He accordingly went on to deal with the other issues which he also decided in favour of the plaintiff. On appeal to the Supreme Court (Fernando C.J. and Silva J.) the preliminary issue was argued first. On this issue that Court reversed the decision of the District Judge. This made it unnecessary for the two judges who constituted the Supreme Court to enter upon the consideration of the remaining issues which had been dealt with in the judgment of the District Judge. They accordingly heard no argument and expressed no views on them. The learned Chief Justice expressly stated that had it been necessary to decide these other issues he would have exercised his discretion to convene a full court of five judges to adjudicate upon them in view of their outstanding constitutional importance.

Upon this appeal, their Lordships have also confined their consideration to the preliminary issue whether or not a civil servant has any right of action in Ceylon against the Crown for salary due in respect of services which he has rendered. They too have heard no argument and express no view upon any of the other issues raised in the action and dealt with

in the judgment of the District Judge. They would not think it proper to do so without the assistance of the considered judgment of the Supreme Court.

The preliminary issue is, however, one of importance in its own right. It falls to be decided by the law of Ceylon. English law is relevant only to the extent that it has been adopted as part of that law.

In the case of most former British colonies which were acquired by conquest or cession, the English common law is incorporated as part of the domestic law of the now independent State because it was imposed upon the colony by Order in Council, Proclamation, or otherwise under the prerogative powers of the Crown. But in the case of Ceylon, upon the acquisition of the maritime areas which had previously been settled by the Dutch, the Crown did not impose English law.

By Proclamation of 23rd September 1799, it was proclaimed—

> " 1. WHEREAS it is His Majesty's gracious command that, for the present and during His Majesty's will and pleasure, the temporary administration of justice and police in the settlements of the island of Ceylon, now in His Majesty's dominion, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations, as may be rendered a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable.
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> 2. We therefore, in obedience to His Majesty's commands, do hereby publish and declare, that the administration of justice and police in the said settlements and territories in the island of Ceylon, with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all courts of judicature, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities herein-before mentioned, and to such other deviations and alterations as we shall by these presents, or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justices to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

In 1835 this was extended to the whole of the island.

The first problem raised by this Proclamation is whether the Supreme Court were right in thinking that its subject matter is restricted to private law applicable to transactions between subject and subject so as to exclude the whole of the former Roman-Dutch public law applicable

to transactions between subject and sovereign. The words of the Proclamation must be understood in the meaning attaching to them in the closing years of the eighteenth century and in the light of the historical circumstances in which the Proclamation was made. The East India Company which captured Trincomalee and Colombo from the Dutch in 1795 abolished the existing system of administration through local officials. This led to a revolt in 1797. Governor North was sent out from England and the Proclamation marks his restoration of the old system of civil administration. Furthermore, as the Proclamation itself indicates, the British occupation was expected to be temporary only. It was not until the Peace of Amiens in 1802 that Ceylon became a Crown Colony. Read in this historical context, the actual wording of the Proclamation with its references to "police" (which at that date was commonly used in the generalised sense of "civil administration") to "institutions" and to "ministerial officers", is in their Lordships' view more apt to indicate an intention to restore in the recently acquired territory the previously existing system of law as respects the civil administration of Ceylon, rather than to exclude this branch of public law from its ambit.

But even if the relationship between the Government of the United Provinces and its civil servants in Ceylon had formerly possessed the legal characteristics of a contract of service and they had been entitled to sue that government for arrears of salary, it does not follow that a corresponding contractual relationship and right of suit between the British Crown and its civil servants in Ceylon was created by the Proclamation.

As was pointed out by Lord Stowell in *Ruding v. Smith* [1] when territory is acquired by conquest or cession "no small portion of the ancient law is unavoidably superseded. . . . The allegiance of the subjects and all the law that relates to it—the administration of the law in the sovereign and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change". In the Cape Colony, of which Lord Stowell was speaking, Roman-Dutch law continued in force by virtue of a Proclamation almost contemporaneous with that applicable to Ceylon but which omitted any reference to "police", "institutions" or "ministerial officers". What he said, however, would in their Lordships' view apply also to Ceylon to abrogate any rule of law previously in force there under the government of the United Provinces if it was incompatible with the British concept of the exercise of sovereign authority by the Crown. It is therefore necessary to consider first whether the existence of a relationship which possessed any of the legal characteristics of a contract between the Crown and a person appointed by the Governor in Ceylon to serve in the civil administration of the territory would have offended against the fundamental concept of the rights and immunities of the sovereign at the close of the eighteenth century.

[1] *(1821) 2 Hag. Con. at p. 282.*

In their Lordships' view there is no such incompatibility. In the eighteenth century the principal officers of the executive government of a colony were appointed directly by the Crown in England by letters patent. This method of appointment may well have been inconsistent with the creation of a contractual relationship between the Crown and the appointee, but the Proclamation was local in its ambit and would not affect the legal relationship between these officers and the Crown. It applied only to subordinate officers in the civil administration of the government of Ceylon who were appointed locally by the Governor and removable by him. It is now well established in British constitutional theory, at any rate as it has developed since the eighteenth century, that any appointment as a Crown servant, however subordinate, is terminable at will unless it is expressly otherwise provided by legislation ; but as pointed out by Lord Atkin in *Reilly v. The King* [1] " a power to determine a contract at will is not inconsistent with the existence of a contract until so determined ". In *Reilly's Case* Lord Atkin, while finding it unnecessary to express a final opinion as to whether the relationship between the Crown and the holder of a public office was constituted by contract, remarked " that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other ". Their Lordships thus see nothing inconsistent with British constitutional theory in the Governor of Ceylon being empowered by the Proclamation of 1799 to enter into a contract on behalf of the Crown with a person appointed to an office in the civil administration of the colony as to the salary payable to him, provided that such contract was terminable at will.

It does not follow, however, even if the Governor was empowered to enter into contractual relations with a civil servant in the Colony as to the payment of salary, that the servant would have a right of suit against the Crown for salary unpaid. A general Crown immunity from suit in respect of obligations *ex contractu* if it existed in the eighteenth century in England might also give rise to the inference that notwithstanding the contractual nature of a civil servant's claim to salary in Ceylon the sovereign attribute of immunity from suit was not intended to be waived by the Proclamation. But by the eighteenth century it had been established that, although no writ could issue against the sovereign, monies due to the subject under a contract with the Crown could be claimed in the English courts by the Procedure of Petition of Right. Their Lordships have not been referred to any case as early as the eighteenth century in which a Petition of Right was brought by a civil servant for arrears of salary ; but in 1820 it was taken for granted by Chitty in " The Prerogatives of the Crown " that a Petition of Right would lie " where the King does not pay a debt, as an annuity or *wages* etc. due from him ". This was a work of high authority which would be familiar to the judges of Ceylon in the first half of the nineteenth century. Stuart Robertson in his " Civil Proceedings by and against the Crown " published in 1908

[1] *(1934) A. C. 176 at p. 180.*

states categorically that " payment for services rendered may be claimed by Petition of Right " and cites two such petitions brought in the eighteen-sixties of which one was successful and the other settled. It was not until cases decided in 1926 and after that any doubt was cast upon this proposition. Their Lordships will advert to these cases later. It is at present sufficient to state that, as the English law stood at the time of the Proclamation, there was no sufficient ground in constitutional theory to justify the inference that the Crown must have intended to deprive a civil servant engaged in Ceylon of any remedy in the courts of that country for arrears of salary, if a remedy had previously been available under Roman-Dutch law as applied in the island.

If therefore under the Roman-Dutch law, as it was applied in Ceylon under the government of the United Provinces, a person holding office in the civil administration of that Government was entitled to a remedy in the courts for arrears of salary agreed to be paid to him, that remedy was preserved by the Proclamation and the plaintiff is entitled to avail himself of it as against the Crown.

It is not, however, essential that it should be demonstrable that such a remedy was in fact exercised before the British occupation, for although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the " common law " of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae* (*Samed v. Segutamby*[1]) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law. The absence of any supporting precedent for the proposition in Roman-Dutch law, as applied in the United Provinces, may be due to a number of reasons. It may have been " taken for granted " law in the United Provinces or it may deal with circumstances which did not exist there or did not attract the attention of writers on Roman-Dutch law in the eighteenth century; or it may be a development of the common law of Ceylon itself either before or after 1799, of which the nascence and growth may be impossible to trace in the absence of any reports of decisions before 1833 and very incomplete reports thereafter until towards the end of the nineteenth century. Even a clear conflicting precedent in the eighteenth century jurisprudence or doctrine of the United Provinces would not necessarily be a conclusive indication that a later decision of a Ceylon court is

[1] *(1924) 25 N. L. R. 481.*

erroneous. As Wood Renton J. pointed out in *Colombo Electric Tramway Co. v. Attorney-General*[1] little is known as to the precise extent to which the doctrines of Roman-Dutch law which were applied in the United Provinces themselves were actually introduced into Ceylon while it was under Dutch rule, and if authority were found in the eighteenth century law of the United Provinces which was inconsistent with an old-established line of decisions by the courts of Ceylon, the inference may well be that the authority relates to a part of the law of the United Provinces which was regarded as unsuitable to conditions in Ceylon and was never introduced there.

There is old established precedent in the Supreme Court of Ceylon that an action lies at the suit of an officer in the civil administration for unpaid salary earned during the period of his appointment. In the case of *Jansz v. Tranchell*[2], this was treated by the Supreme Court as " taken for granted " law and conceded by The Queen's Advocate. The court did not find it necessary to cite any previous authority or to express any view as to the origin of the right of action, but there may have been many unreported instances of this practice known to the judges. The actual point argued was whether such arrears of salary constituted a debt which could be attached by a creditor, but the existence of a debt recoverable by suit by the civil servant against the Crown was an essential step in the reasoning. In 1868 a similar point came before the Supreme Court of Ceylon in *Fraser's Case*[3]. This was a claim for arrears of salary by a civil servant who held concurrent offices under the Imperial Government and the Government of Ceylon. It was held that as respects salary due in respect of his office under the Government of Ceylon prior to his dismissal, this was a debt due to him from the Crown in Ceylon for which he was entitled to bring an action against The Queen's Advocate, though he failed on the facts as nothing was due to him. The Court in this case ascribed the origin of his right of action to Roman-Dutch law and cited the Proclamation of 1799.

Here then is authority dating back more than a hundred years that, under the common law of Ceylon, an action does lie at the suit of a civil servant for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid.

The Supreme Court in its judgment in the present appeal appears to have regarded these authorities as over-ruled by the decision of the Judicial Committee of the Privy Council in *Siman Appu v. The Queen's Advocate*[4]. In their Lordships' opinion this is not so. *Siman Appu's Case* was concerned with the general question whether a subject had any right of suit against the Crown in Ceylon for breach of contract. The contract sued upon was not one of service and *Fraser's Case* was cited only on the point as to whether an action lay against the Crown on a contract. The Judicial Committee upon the material then before them were unable to conclude with any certainty that a right of suit in

[1] *(1914) 16 N. L. R. 161 at p. 173.*
[2] *(1865) Ram. 160.*
[3] *(1868) Ram. 316.*
[4] *9 A. C. 571.*

contract against the Government of the United Provinces had formerly existed under Roman-Dutch law, but they nevertheless held that whatever may be the exact origin of the practice of suing the Crown in contract it was then (*i.e.* by 1884) incorporated into the law of Ceylon.

In the present appeal their Lordships have had their attention drawn to a passage dealing with this topic in the third book of *De Jure Belli ac Pacis* by Grotius—

> " According to civil law also a person can be said to be bound by his own act, either in this sense, that an obligation results not from the law of nature alone but from the municipal law, or from both together, or in the sense that the obligation gives a right to action in a court of law. Therefore we say that a true and proper obligation arises from a promise and contract of a king, which he has entered into with his subjects, and that this obligation confers a right upon his subjects ; such is the nature of promises and contracts as we have shown above ; and this holds even between God and man.
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> Now if the acts are such as may be done by a king, but also by any one else, municipal law will be binding in his case also ; but if they are the acts of the king as king, municipal law does not apply to him. This distinction has not been observed with sufficient care by Vazquez. *Nevertheless, from both these acts a legal action may arise, at least so far that the right of the creditor may be declared ; but compulsion cannot follow on account of the position of the parties with whom the business is conducted.* For it is not permissible for subjects to compel the one to whom they are subject ; equals, however, by the law of nature, have this right against equals, and superiors against inferiors even by municipal law."

The words italicised strongly support the view that there existed in the United Provinces as early as the seventeenth century a right to bring a declaratory action against the government in respect of a contract entered into with the government, although execution could not be obtained upon the judgment. This bears a strong resemblance to the practice in Ceylon described by Cayley C.J. in *Jayawardena v. Fernando* [1] and it may well be that had this passage from Grotius been drawn to the attention of the Board in *Appu's Case* they would have ascribed the then current practice in Ceylon to a Roman-Dutch origin.

The significance of *Appu's Case* is that it recognises the development of an indigenous common law of Ceylon by the decisions of the courts of that country even though the origin of a particular proposition of law cannot be traced back to the Roman-Dutch law of the United Provinces in the eighteenth century. The judgment upholds those parts of the judgments in *Jansz's Case* and *Fraser's Case* which recognised that the subject could bring an action in contract against the Crown in Ceylon although it does not ascribe this, as the Court in *Fraser's Case* had done, to the Roman-Dutch law in force in Ceylon under the Government of the

[1] *(1881) Supreme Court Circular p. 77.*

United Provinces. It was not concerned with and casts no doubt on the correctness of those parts of the judgments in *Jansz's Case* and *Fraser's Case* which held that unpaid salary due to a civil servant for services rendered during his period of service constituted a debt for which he was entitled to sue the Crown.

Consistently with the attitude adopted by the Board in *Siman Appu's Case* to old established precedent in decisions of the courts of Ceylon it would in their Lordships' view be wrong after this lapse of time to depart from the principle laid down in *Jansz's Case* and *Fraser's Case* that a civil servant in Ceylon is entitled to sue the Attorney-General on behalf of the Crown for arrears of salary.

In coming to the contrary conclusion in the instant appeal, the Supreme Court of Ceylon relied upon the decision of the Privy Council in the Indian Case of *High Commissioner for India v. Lall* [1]. In India, unlike Ceylon, the source of the common law is English common law; but on the assumption, which their Lordships think erroneous, that *Fraser's Case* had been over-ruled by *Appu's Case* the Supreme Court concluded that any right of the appellant to sue for arrears of salary fell to be determined by that branch of English law relating to the sovereign attributes or prerogative of the Crown which must have been introduced into Ceylon as a necessary consequence of the transfer to the Crown of sovereignty over the island. If this ascription of the origin of the appellant's right of suit to English public law were right *Lall's Case* would have been very much in point and in view of the importance attached to it in the judgment of the Supreme Court and the full argument which has been addressed to them upon it, it is appropriate that their Lordships should deal briefly with it.

As has already been pointed out the current of authority for a hundred years before 1926, though sparse, was to the effect that arrears of salary of a civil servant of the Crown, as distinguished from a member of the armed services, constituted a debt recoverable by Petition of Right. These authorities, including the decision of the House of Lords in *Sutton v. A. G.* [2], are conveniently summarised in a penetrating article by Sir Douglas Logan on "The Civil Servant and his Pay" (1945) 61 L.Q.R. 260 in which he commented on the decision in *Lucas v. Lucas* (1943 P. 68), where Pilcher J., adopting the reasoning of Lord Blackburn in the Scots case of *Mulvenna v. Admiralty* (1926 S.C. 842), reached a contrary conclusion.

Unfortunately, none of these earlier authorities was drawn to the attention of the Board in *Lall's Case*. Most of the argument and of the judgment in that case dealt with the question whether the dismissal of the civil servant was void under the relevant statutory provisions relating to his service, but the Board did decide that, notwithstanding that his purported dismissal was void, he had no right of action for arrears of pay. *Lall's Case* can be distinguished from the instant case in

[1] *(1948) A. I. R. (P. C.) 121.* [2] *(1923) 39 T. L. R. 294.*

that the terms on which Mr. Lall was engaged contained no express provision as to the pay he was to receive for his services. But the Board did not base their decision exclusively on this. They too adopted as a correct statement of the law the judgment of Lord Blackburn in *Mulvenna v. The Admiralty* (*ubi sup*).

Lord Blackburn's reasoning in *Mulvenna's Case* had not been concurred in by the other two members of the Court of Session, Lord Sands and Lord Ashmore, nor has it been subsequently treated in Scotland as correctly laying down the law. See *Cameron v. Lord Advocate* (1952 S.C. 165). The conclusion which Lord Blackburn reached was that it " must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in the terms of their contract, they have no right to their remuneration which can be enforced in a civil court of justice, and that their only remedy under their contract ' lies in an appeal of an official or political kind ' ".

The only cases cited in support of this proposition were the well-known cases which establish that the Crown has power to determine the employment of a public servant at will. He treated as an ineluctable consequence of this, too plain to call for further explanation, that a civil servant had no claim in law to arrears of salary accrued due before his dismissal.

In their Lordships' view this is a *non sequitur*. A right tc terminate a contract of service at will coupled with a right to enter into a fresh contract of service may in effect enable the Crown to change the terms of employment *in futuro* if the true inference to be drawn from the communication of the intended change to the servant and his continuing to serve thereafter is that his existing contract has been terminated by the Crown and a fresh contract entered into on the revised terms. But this cannot affect any right to salary already earned under the terms of his existing contract before its termination.

In the opinion of their Lordships Lord Blackburn's reasoning in *Mulvenna's Case* is defective and his conclusion is contrary to authority and is wrong. That portion of the judgment in *Lall's Case* which adopts it as a correct statement of the law must be regarded as given *per incuriam* since the relevant and prestigious authorities to the contrary appear not to have been cited to the Board.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed on the preliminary issue upon which alone it was decided by the Supreme Court.

Although in their Lordships' opinion a civil servant in Ceylon does have a right of action against the Crown for arrears of salary which accrued due during the currency of his employment, this answer to the preliminary issue does not dispose of the Crown's appeal to the Supreme Court from the judgment of the District Judge. There are the other important constitutional issues to be decided upon which neither the

Supreme Court nor their Lordships have heard argument. As already indicated, their Lordships would think it inappropriate to enter upon any of these matters without the benefit of the considered opinion of the Supreme Court of Ceylon thereon. They accordingly express no opinion upon any of the other issues as to the constitutionality of the Official Language Act or the effect of Treasury Circular No. 560 of 4th December 1961, or of any other material facts upon the plaintiff's contract of employment. The case should be remitted to the Supreme Court for further consideration of these other issues and their Lordships will humbly advise Her Majesty accordingly.

The respondent must pay the costs of this appeal to their Lordships' Board and of the appeal to the Supreme Court.

Appeal allowed on a preliminary issue.