Privy Council Appeal No. 9 of 1966

M. T. K. S. S. A. N. Mohamed Sahib – – – – *Appellant*

v.

The Commissioner for the Registration of Indian and Pakistani Residents, Colombo – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
LORD PEARSON

[*Delivered by* LORD PEARSON]

This is an appeal by special leave from an order of the Supreme Court of Ceylon dismissing the appellant's appeal from the Deputy Commissioner's refusal to register the appellant as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act of Ceylon. Their Lordships have been informed by counsel that the appellant is a brother of Seyed Mohamed Shareef, who made a successful appeal to their Lordships' Board in a partly similar case (reported in 1966 Appeal cases at page 47); and that on a further inquiry before a different Commissioner Seyed Mohamed Shareef's application for registration was granted; and that the appellant's other brother Mohamed Hussain Abdul Cader, who is mentioned in the record, succeeded eventually in his application for registration under the Act.

But the applications of those two brothers for registration under the Act were made within the proper time. In the present case the Supreme Court has decided that the appellant's application cannot be entertained and must be rejected because it was made out of time. The issue in the present appeal is whether that decision was correct.

The Act was enacted on 5th August 1949, and it was, as appears from its long title, an Act to make provision for granting the status of a citizen of Ceylon by registration to Indians and Pakistanis who had the qualification of past residence in Ceylon for a certain minimum period. Section 4 (1) provided that any Indian or Pakistani resident to whom the Act applied might, irrespective of age or sex, exercise the privilege of procuring registration as a citizen of Ceylon for himself or herself and should be entitled to make application therefor in the manner prescribed. That was the general provision, but it was subject to special provisions for a wife not living apart from her husband and for a minor dependent on his father or his widowed or unmarried mother. Such persons could not make separate applications: the husband or father or mother could

procure registration for himself or herself and additionally for the wife or the minor. There was also provision for an " extended privilege ", whereby on the death of a person qualified for registration his widow or his or her dependent child could, if certain conditions were fulfilled, apply for registration. These special provisions of section 4 do not assist the appellant. It is not claimed on his behalf that he was at any relevant time dependent on his father or mother. He may have been dependent on one of his brothers, but there was no provision in the Act enabling a person to acquire registration for himself and in addition for a dependent brother.

Section 5 of the Act provided as follows:

> " The privilege or extended privilege conferred by this Act shall be exercised in every case before the expiry of a period of two years reckoned from the appointed date; and no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay."

The " appointed date " was defined by section 24 as meaning 5th August 1949. Accordingly the period within which the privilege was exercisable under section 5 expired on 5th August 1951.

Section 7 provided for the making of applications for registration, and section 8 provided for the verification of applications by investigating officers.

Section 10 (which was at one time section 9) provided, so far as is relevant to this case, as follows:

> " (1) Where, upon the consideration of any application, the Commissioner is of opinion that a prima facie case has not been established, he shall cause to be served on the applicant a notice setting out the grounds on which the application will be refused and giving the applicant an opportunity to show cause to the contrary within a period of three months from the date of the notice.
>
> . . . . . .
>
> (3) Where cause is shown by the applicant within the aforesaid period, the Commissioner may . . .
>
> (*a*) make an order appointing the time and the place for an inquiry and cause a copy of that order to be served on the applicant;
>
> . . . . . ."

Section 15 contained provisions as to inquiries, and subsection (4) was as follows:

> " The proceedings at an inquiry shall as far as possible be free from the formalities and technicalities of the rules of procedure and evidence applicable to a court of law, and may be conducted by the Commissioner in any manner, not inconsistent with the principles of natural justice, which to him may seem best adapted to elicit proof concerning the matters that are investigated."

Section 16 provided, so far as is relevant to this case, as follows:

> " (1) An appeal against an order refusing . . . an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant . . .
>
> (2) Each appeal under this section shall be preferred within three months of the date of the order by means of a petition setting out the facts and the grounds of the appeal.
>
> . . . . . ."

The appellant made an application for registration under the Act. His application was dated 4th December 1956, more than five years after the expiry of the period referred to in section 5 of the Act.

The Deputy Commissioner served on the appellant a notice dated 5th August 1957 stating " I have decided to refuse your application under that Act dated 4th December 1956 on the grounds specified in the Schedule hereto unless you show cause to the contrary within a period of three

months from the date hereof by letter addressed to me ". The Schedule was as follows:

" You have failed to prove

1. That you are an Indian or Pakistani Resident. No evidence has been offered that your origin or the origin of an ancestor of yours was in Prepartition British India or an Indian State.

2. That you were resident in Ceylon from 1.1.36 to 8.6.51 without absence exceeding 12 months on any single occasion.

3. That you were on the date of your application possessed of an assured income of a reasonable amount or had some suitable business or employment or other lawful means of livelihood to support yourself.

4. That you had permanently settled in Ceylon."

Thus there was in these grounds of refusal set out in the Schedule to the notice no mention of the application being out of time.

At the inquiry a substantial amount of evidence was adduced in relation to the four issues arising under the four grounds of refusal set out in the Schedule to the notice. On 15th September 1958 the Commissioner gave his judgment. He was satisfied under the first issue as to the Indian origin, and under the third issue as to the appellant's means of livelihood. He was not satisfied under the second issue as to the alleged extent of the past residence in Ceylon and consequently was not satisfied under the fourth issue that the applicant was permanently settled in Ceylon. Accordingly he made an order refusing the appellant's application to be registered as a citizen of Ceylon under the Act.

The appellant appealed to the Supreme Court of Ceylon against the Commissioner's refusal of his application. On the hearing of the appeal to the Supreme Court the respondent's counsel took the objection that the application was out of time. Their Lordships have been informed that some notice was given, perhaps only very shortly before the hearing, by the respondent's counsel to the appellant's counsel of the intention to take this objection. At any rate it was taken at the hearing and the Supreme Court considered it and held that it must prevail. Tambiah J. in his judgment after referring to the appellant's application, which was in Form 1A, and to its date, which was 4th December 1956, and to sections 5 and 24 of the Act, said " Therefore, if the appellant's application is regarded as the application in Form 1A, signed by him on 4th December 1956, then his application should not have been entertained by the Deputy Commissioner nor should it be entertained by this Court ". At the end of his judgment Tambiah J. said " It is with regret that I dismiss the appellant's appeal, since his application should not have been entertained by the Deputy Commissioner nor could it be entertained by this Court. On the facts, no doubt, a good deal could be said on behalf of the appellant. The Commissioner has misdirected himself on a number of matters, but it is unnecessary for me to go into the facts in view of my finding that the appellant had not made an application within the prescribed time ".

One of the contentions put forward on behalf of the appellant in the Supreme Court was that the appellant had made an earlier application through his brother Mohamed Hussain Abdul Cader, because that brother had made his own application for registration on 4th August 1951 (just within the prescribed period) and in it he had under the heading in the prescribed form " Names, addresses and relationship to the applicant of all dependants " entered the name of the appellant. But this was part of the information which the brother had to give in his own application made on his own behalf, and Tambiah J., speaking of this application, said " I find nothing in it to suggest that the appellant's brother had made any application on behalf of the appellant ". In the present appeal the application of the appellant's brother was not produced and was apparently not relied upon. In any case there is no reason to doubt the correctness of Tambiah J.'s conclusion.

It was contended in the present appeal that the Supreme Court ought not to have considered it to be an established fact that the appellant's application was out of time. It was said that the necessary evidence was not available, as the point was raised for the first time on the hearing of the appeal in the Supreme Court and, if the point had been raised in the course of the inquiry before the Commissioner, it might have appeared that the appellant had made some earlier application within the prescribed period and that the application dated 4th December 1956 was merely an amplification of or supplement to the earlier application. It was also said that the maxim "*Omnia praesumuntur rite esse acta*" should be applied in support of the appellant's argument, and accordingly that, when the Commissioner entertained an application which on the face it appeared to be out of time, it should be inferred that there were special facts (*e.g.*, an earlier application of or to which this application was a mere amplification or supplement) which justified him in doing so.

Reference was made to certain notes found in the Commissioner's Office and evidently relating to interviews in connection with the application of the appellant's brother Mohamed Hussain Abdul Cader. There was one note "Write Mr. Bernard Aluwihare. Reference your interview with the Commissioner on 28.11.56, please see me with your client on 3.12.56 at 10 a.m. at this office." After this there is another note "Get dependant brother to fill in Form 1A".

Their Lordships are unable to accept the appellant's contention in relation to these matters. The plain fact is that the appellant's application is dated 4th December 1956 and there is nothing in it to suggest that it is an amplification of or supplement to a previous application or that there was any previous application. The maxim "*Omnia praesumuntur rite esse acta*" can be turned against the appellant, because it must be assumed *prima facie* that the complete file or complete set of relevant records was produced from the Commissioner's Office and there was no trace of any earlier application. Moreover it is fairly clear that the office notes give the clue to what happened. It was observed in November or December 1956, when Mohamed Hussain Abdul Cader's application was under consideration, that no application had been made by or on behalf of the appellant, and it was suggested he should then make one. That is the meaning of the words "Get dependant brother to fill in Form 1A." The date of the interview at which apparently this suggestion was made was 3rd December 1956. On the following day, 4th December 1956, the appellant made his application by filling in Form 1A. The inference is that this was his first application. It may well be said that the appellant was misled by this suggestion, evidently emanating from the Commissioner's office, into making an application which was more than five years out of time. This is a matter which affects the question whether any order for costs should be made against the appellant, but it does not bear upon the issues in the appeal.

It was also contended on behalf of the appellant that the Supreme Court should not have considered the respondent's objection that the application was out of time, because the scope of the inquiry and of the resulting appeal was limited to the four issues arising out of the four grounds for refusal set out in the Schedule to the Commissioner's notice, and because the objection was a new point raised for the first time on appeal. Three Ceylon cases were cited:

M. K. Marianthony v. Commissioner for Registration of Indian and Pakistani Residents (1957) 58 N.L.R. 431.

Caruppiah v. Commissioner for Registration of Indian and Pakistani Residents (1960) 62 N.L.R. 17.

S. S. Seyed Ali Idroos v. The Commissioner for the Registration of Indian and Pakistani Residents (1960) 62 N.L.R. 109.

In their Lordships' opinion the principles sought to be relied on are sound and well-established, but they are not applicable to the present case. The provisions of section 5 of the Act are clear and emphatic, and their effect is unmistakable. They are not merely directory provisions. They

are imperative provisions and they restrict the jurisdiction of the Commissioner, and consequently that of the Supreme Court hearing an appeal from the Commissioner. It is provided that " no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay ". A Court must take notice of a limitation of its jurisdiction.

In *Davies v. Warwick* [1943] K.B. 329 C.A. which was a case under the Rent Restriction Acts, Goddard L.J. said at p. 336 " The cases cited show that the effect of section 3 of the Act of 1933, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it ".

In *Snell v. Unity Finance Company Limited* [1964] 2 Q.B. 203 C.A. Diplock L. J. referring to the case of *Smith v. Baker and Sons,* said

> " That case was not concerned with points of law which went to either of those matters which it is the duty of the court itself to take even if neither party does, that is, points of law which go (1) to the jurisdiction of the Court or (2) to the illegality of the contract sued upon. It is a clear rule of public policy that such points should be taken by the court irrespective of the wishes of the parties; and, if not taken by the judge at trial, should be taken of its own initiative by an appellate court."

Their Lordships are of opinion that the Supreme Court reached the right conclusion, and accordingly they will humbly advise Her Majesty that this appeal should be dismissed. There will be no order as to costs.

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In the Privy Council

M. T. K. S. S. A. N. MOHAMED SAHIB

v.

THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, COLOMBO

DELIVERED BY

LORD PEARSON

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