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INSTITUTE OF ADVANCED
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IN THE PRIVY COUNCIL No. 20 of 1959

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL
of Ceylon (Defendant) .. .. Appellant

- and -

R.B. HERATH (Plaintiff) .. .. Respondent

P.B. ATTANAYAKE (Defendant)
Pro-forma Respondent

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CASE FOR THE RESPONDENT
R.B. HERATH

Record

1. This is an appeal from a Judgment and Decree of a Divisional Bench of the Supreme Court of Ceylon (Basnayake C.J., Pulle and De Silva J.J.) of the 6th March 1958 allowing an appeal from a judgment and decree of the District Court of Colombo of the 7th February 1956. p.41, p.76 p.32, p.36

2. The main question for determination on this
20 appeal is one of the validity of certain proceedings taken by the Land Commissioner under the Land Redemption Ordinance.

3. The Respondent (Plaintiff in the original proceedings) instituted proceedings against the Appellants in the District Court of Colombo. The accrual of the cause of action was thus stated in his plaint, dated the 1st May, 1954:-

> "2. The 1st defendant is the Attorney General and is sued in this action as re-
30 presenting the Crown pp.10-11
>
> 3. On Deed No.6032 dated 28th October 1946 attested by A.M.K. Tillekaratne of Kandy Notary Public and by prescriptive possession the plaintiff was entitled to hold and possess the lands and premises described in the

Record

schedule hereto on payment of dues and/or performance of service to the Pathini Devale Hangurankette. The said lands and premises form part of the Kapu panguwa belonging to the said Pathini Devale Hanguranketha. The said lands and premises are of the reasonable value of Rs.10,000/-.

4. The Land Commissioner purported to acquire the said lands and premises on behalf of the Crown under the provisions of the Land Redemption Ordinance and on an order made under Section 36 of the Land Acquisition Act 9 of 1950 read with Section 3(5) of the Land Redemption Ordinance officers of the Crown took possession of the said land and premises from the Plaintiff on or about 8th March 1954.

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5. The Plaintiff states that the said lands and premises do not fall within any of the categories of lands that are liable to be acquired under the Land Redemption Ordinance and the Land Commissioner had no authority in law to acquire them and their purported acquisition and all steps and proceedings taken in respect thereof were void and ineffectual to vest title to the said lands or a right to possession of them on the Crown.

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6. The Plaintiff states that even if the said lands are liable to be acquired under the Land Redemption Ordinance the proceedings under the said Ordinance had commenced before the enactment of the Land Acquisition Act No. 9 of 1950 and the proceedings should have been continued in terms of the said Ordinance by a reference to the District Court and that the steps taken under the provisions of the Land Acquisition Act including the order under Section 36 thereof are bad and void.

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7. By reason of the averments contained in the last two preceeding paragraphs of this plaint the Crown is not entitled to the said lands and premises or to the possession thereof and its taking possession and continuance in possession is a denial of the Plaintiff's rights in the said lands and premises.

Record

8. The Crown has placed the 2nd Defendants in possession of the said land and premises under a permit of licence to occupy it and the 2nd defendant is in possession of the same at the instance of and under the Crown. The said possession is unlawful and in derogation of the plaintiff's rights in the said land and premises."

4. The Respondent therefore prayed -

10 "(a) for declaration of title to the said land and premises.

(b) in addition to or in the alternative to (a) for a declaration of his rights to possession of the said lands and premises.

(c) that the plaintiff be restored to and quieted in the possession thereof.

(d) for ejectment of the (2nd) defendant from the said lands and premises."

5. The Appellant in his amended answer dated 8th
20 September 1954 stated:-

p.17

"1. Answering paragraph 1 of the plaint this defendant while admitting that the present holder of the office of Attorney General resides in Colombo denies that this Court is thereby vested with jurisdiction to hear and determine this action.

2. Answering paragraph 3 of the plaint this Defendant admits that the said lands form part of the Kapu Panguwa of the Pathini
30 Devale but denies

(a) that they are of the value of Rs.10,000/-

(b) that the Pathini Devale was at any material date the "owner" of the said lands within the meaning of that terms as used in the Land Redemption Ordinance.

3. (a) Answering paragraphs 4, 5, 6 and 7 of the plaint this Defendant denies all and singular the averments therein save and except as hereinafter expressly admitted.

Record

(b) Further answering paragraphs 4, 5, 6 and 7 of the plaint this defendant states that upon a determination by the Land Commissioner to acquire the said lands for the purposes of the Land Redemption Ordinance the Minister on the 10th day of May 1951 made a written declaration under Section 5(1) of the Land Acquisition Act No.9 of 1950 (read with section 3(5) of the Land Redemption Ordinance as amended by Section 62 of the said Act) that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under the Act. The said declaration was published and exhibited in accordance with the said Section 5(1) and the directions of the Minister. 10

p.18

(c) The Acquiring Officer for Nuwara Eliya District thereupon took proceedings for the acquisition of the said lands in accordance with law. The order of the Minister under Section 36 of the Land Acquisition Act was published in Government Gazette No.10,634 of 29th January 1954. 20

4. Answering paragraph 8 of the plaint this Defendant states that the 2nd defendant is in possession of the said land on a permit issued by the Crown but denies otherwise the allegations in the said paragraph."

p.18

6. The Appellant further stated -

"6. (a) that the lands referred to in the plaint and acquired by the Crown fell within the description lands which are liable to be acquired under the Land Redemption Ordinance. 30

(b) that in any event, the declaration made by the Minister under Section 5(1) of the Land Acquisition Act (read with Section 3(5) of the Land Redemption Ordinance) is conclusive proof that the said lands are needed for the purpose which is deemed to be a public purpose.

(c) that accordingly it is not open to the Plaintiff to canvass in these proceedings the question whether the said lands fall within the categories of land which are liable to acquisition under the Land Redemption Ordinance. 40

Record

(d) that title to the said land was vested absolutely in the Crown upon the publication of the order under Section 36 of the Land Acquisition Act No.9 of 1950 read with Section 3(5) of the Land Redemption Ordinance.

(e) that unless and until the said order under Section 36 is quashed or set aside in appropriate proceedings in an appropriate Court the Plaintiff is not entitled to a declaration of title or to ejectment of the Crown land and its agents.

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(f) that in any event the averments in the plaint do not entitle the plaintiff to relief claimed in the prayer to the plaint.

7. (a) The Plaintiff sued the Land Commissioner and the Assistant Government Agent, Nuwara Eliya in action No.L3632 of the District Court of Kandy for a declaration that the lands described in the plaint in this action are not liable to be acquired under the provisions of the Land Redemption Ordinance and for an injunction restraining the said Assistant Government Agent from proceeding with the acquisition of the said land. p.18

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(b) The said action was dismissed with costs.

(c) The Defendant pleads that the decision in the said case is Res Adjudicata of the matters in issue in the present action between the Plaintiff and the Crown, and that accordingly the plaintiff cannot maintain this action against the Crown." p.19

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7. The Appellant therefore prayed that the Respondents action be dismissed with costs

8. The 2nd Defendant in the original proceedings in his answer adopted substantially the same position as that taken up by the Appellant. p.15

9. The trial proceeded on nineteen issues which were framed and answered as under. pp.22-

10. An issue as to jurisdiction was framed and answered as follows:-

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Record	Issue	Answer
p.23 p.25, l.29	"12. (a) Does either of the defendants reside within the jurisdiction of this Court?	Yes.
p.25, l.30	(b) If not has this Court Jurisdiction to hear the case?	Does not arise."

p.22-23

11. The other issues were framed and answered as follows:-

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Record	Issue	Answer
p.35	"1. Do the lands and premises described in the schedule to the plaint form part of the Kapu Panguwa belonging to the Pathini Devala Hanguranketa? (This is admitted by the defendants).	Yes.
	2. Was the plaintiff entitled to the possession of them on Deed No.6032 of 28th October 1946?	Yes.
	3. Did the Land Commissioner purport to acquire the said lands for the Crown under the Land Redemption Ordinance and Land Acquisition Act as pleaded in paragraph 4 of the plaint?	Yes.
	4. Did the Crown take possession of the said lands on 8th March 1954?	Yes.
	5. Do the said lands fall within the categories of lands liable to be acquired under the Land Redemption Ordinance?	Yes.
	6. If not are all the steps and proceedings taken in respect thereof void and ineffectual to vest title in the said lands or a right of possession of them in the Crown?	Does not arise.

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	Issue	Answer	Record
	7. Even if the said lands are liable to be acquired under the Land Redemption Ordinance were the continuation of proceedings began under the Land Redemption Ordinance under the Land Acquisition Act banned and illegal and void as pleaded in paragraphs 6 of the plaint?	No.	
10	8. If the proceedings under the Land Redemption Ordinance or the continuation of them under the Land Acquisition Act are void and ineffectual is the plaintiff entitled to a declaration that he is entitled to the possession of the said lands?	Does not arise.	
20	9. Is the plaintiff entitled to a writ of possession against the defendants and their ejectment?	No.	
	10. Is the plaintiff the owner of the lands described in the schedule to the plaint?	No.	
30	11. If issue 10 is answered in the negative is the plaintiff entitled to a declaration in terms of paragraph (a) of the prayer?	No.	
	12. (Vide paragraph 10 of this Case).		
	13. Did the Minister on or about 10th May 1951 make a declaration under Section 5 sub-section 1 of the Land Acquisition Act read with Section 3 sub-section 5 of the Land Redemption Ordinance?	Yes.	
40	14. If issue 13 is answered in the affirmative is it open to the plaintiff to challenge the validity of the acquisition on the ground contained in paragraph 5 of the plaint?	No.	

Record	Issue	Answer	
	15. Were the lands described in the plaint needed for a public purpose?	Withdrawn.	
	16. If issue 15 is answered in the affirmative was the Crown acting contrary to law in proceeding to acquire the said land?	Withdrawn.	
	17. Was an order under section 36 of the Land Acquisition Act published in respect of the lands described in the schedule to the plaint?	Yes.	10
	18. If Issue 17 is answered in the affirmative has title to the said lands vested absolutely in the Crown?	Yes.	
	19. Did the Crown take possession of the land referred to in the plaint in pursuance of Section 36 of the Land Acquisition Act?	Yes.	20
	20. If issue 19 is answered in the affirmative <u>is</u> plaintiff entitled to a possessory decree?	No.	
	(The averments in paragraphs 7(a) and 7(b) of the answer are admitted by the plaintiff.)		30
	21. Is the decision in D.C. Kandy L.3632 res judicata in regard to issue 5?	No."	

p.26 — 12. At the trial it was agreed between the parties that the documents were to be marked without formal proof and that thereafter Counsel should make their respective submissions.

p.35, l.22 — 13. At the close of the trial the learned District Judge (Mr. A.L.S. Sirimane) delivered Judgment dismissing the Respondent's action with costs. 40

14. The learned District Judge dealt with the question whether the land in question was one that could validly have been acquired under the Ordinance in question, in the following terms:- | Record

"Acting under the Land Redemption Ordinance the Land Commissioner has acquired the land and permitted the 2nd defendant to remain in possession. The plaintiff now sues the Crown and the 2nd defendant and the main contention for him is that the land is not one which can be acquired under that ordinance because it is submitted that the 2nd defendant is not the owner.

p.32, l.12

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Section 3(1)(b) of the Land Redemption Ordinance 61 of 1942 as amended by 62 of 1947 is as follows:-

"Section 3(1) - The land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that that land was at any time before or after the date appointed under Section 1 but not earlier than the 1st of January 1929 (a) (b) transferred by its owner or his executors or administrators to any other person or the heirs executors or administrators of any other person in satisfaction or part satisfaction of a debt which was due from that owner or his predecessor in title to that other person and which was secured by a mortgage of that land subsisting immediately prior to the transfer...."

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It will be seen that these lands would come directly under this section if the 2nd defendant was their "owner".

If one thinks of ownership of land as a right completely unfettered by any kind of restriction whatsoever then the rights of the 2nd defendant (as has been argued for the plaintiff) fall short of that conception. For a Paraveni Nilakaraya has to perform certain services to the temple. But subject to the performance of services his "ownership" - if one may use the term at this stage is absolute. I think the correct position is that the Paraveni Nilakaraya is the owner of the land

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Record

and the temple the overlord entitled to services from the owner. The Nilakarayas cannot, of course partition the land because the services are indivisable. In the case reported in 19 N.L.R. page 361 where it was held that a Nindagama land cannot be partitioned Ennis J. made the remark at page 363. In my opinion a Paraveni Nilakaraya holds the rights which under Maarsdorp's definition constitute ownership, but he nevertheless does not possess the full ownership. 10

If the Nilakaraya refuses or neglects to perform the services the temple can only sue for damages (section 25 of the Services Tenures Ordinance Chapter 323). But the Nilakaraya's rights in the land itself remains entirely unaffected by the right of the temple to claim his services. He can alienate it by will - if he dies intestate. It would pass to his heirs. He can secure a debt by mortgaging it and of course can transfer it in satisfaction of that debt. All such transactions would be valid and recognised by law and, I think the Land Redemption Ordinance was designed to apply to all these agricultural lands which could be mortgaged or transferred in satisfaction of a debt. 20

It is true that a Nilakaraya is sometimes referred to as a Paraveni tenant in legal texts but that does not alter his rights over the land. 30

I am of opinion that the subject matter of this action belongs to the class of lands referred to in section 3 of the Land Redemption Ordinance."

15. The learned District Judge next dealt with the question whether the decision of the Land Commissioner could be questioned by way of an action in the District Court:- 40

p.33, l.20

"I am also in agreement with the submission made by Crown Counsel that in the circumstances of this case the discretion exercised by the Land Commissioner under section 3 cannot be questioned by filing an ordinary action in the District Court.

Record

It will be seen from section 3 that: "If the Land Commissioner is satisfied that the land was transferred by its owner..." etc. he can acquire it. Here of course the Land Commissioner has to act judicially but his decision in this case whether the 2nd defendant is the "owner" is not a question of fact depending on evidence.

10 In these circumstances I am of opinion that the decision in the case of Leo vs. The Land Commissioner (57 N.L.R. page 178) would apply. If the plaintiff was dissatisfied with the Land Commissioner's order under Section 3 his remedy was to make an application to the Supreme Court for a mandate in the nature of a writ of certiorari quashing that order.

There are further difficulties in the way of the plaintiff. Having failed to adopt
20 what (in my opinion) was the correct legal procedure to question the Land Commissioner's order under section 3(1) - if indeed that order was wrong - he is now precluded from proceeding any further by the provision of Section 3(4) which is in the following terms:-

> "Section 3(4) - The question whether any land which the Land Commissioner is authorised to acquire under sub-section 1 should or should not be acquired shall subject to
> 30 any regulations made in that behalf be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final"

Gratiaen J. in the course of his judgment in Leo vs. The Land Commissioner (supra) after analysing Section 3 and showing that the Commissioner when acting under sub-section 1 has to act judicially and his decision then be-
40 comes amenable to certiorari, pointed out that his act under sub-section 4 is purely administrative. It is apparent (say his Lordship) "from this analysis that the Commissioner's final decision under Section 3(4) is purely administrative in character and does not involve the exercise of judicial or even quasi-judicial functions. He is guided at that state solely by consideration of

p.34

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policy and expediency and by his individual judgment so that the Courts have no power to interfere with that discretion by certiorari".

I think it is quite clear that the plaintiff cannot challenge the validity of the acquisition and it is hardly necessary to proceed further.

I would like to observe however, that though (admittedly) the Land Commissioner decided to acquire these lands on or about 20th March 1949 there is no provision of law which requires him to take the procedural steps for acquisition within any specific period of time. 10

In this instance by the time the Crown took the procedural steps the Land Acquisition Ordinance Chapter 203 had been repealed and replaced by the Land Acquisition Act 9 of 1950. The notice of survey (P3) dated 16th January 1950 is obviously under Section 6 of the Land Redemption Ordinance. The notice itself is headed "Notice of survey of land for the purpose of the Land Redemption Ordinance". 20

16. The learned District Judge rejected in the following words the plea Res Judicata set up by the Appellant:-

"On the question of res judicata however I am inclined to agree with the plaintiff. He had filed an action in June 1952 D.C. 3632/L in the District Court of Kandy (vide P22) against the Land Commissioner and the Government Agent Nuwara Eliya. That action was dismissed (Decree P23) as the plaintiff was absent on the day fixed for hearing. The defendants in that case are different, they cannot represent the Crown - besides in the present plaint plaintiff avers that the Crown took possession in March 1954 and bases a claim on this fact too. In my opinion the earlier decree is not res judicata." 30 40

(p.130)

(p.138)

17. The Respondent appealed to the Supreme Court of Ceylon from the said Judgment of the learned District Judge.

pp.39-40

18. The grounds of appeal were:-

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"(a) The said judgment is contrary to law and against the weight of evidence led in the case.

(b) the Plaintiff-Appellant respectfully submits that the premises in question are not these transferred by its owner in satisfaction of a mortgage debt within the meaning of Section 3(1) of the Land Redemption Ordinance.

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(c) the dealings relied on by the Crown were by Paravani nilakarayas and the interest dealt with by them were those of tenants.

(d) it is submitted that the said land and premises do not fall within any of the categories of lands referred to in Section 3 of (1) of the Land Redemption Ordinance.

(e) it is submitted that the learned Judge had misdirected himself in holding that it was not open to a Court to inquire into the validity of the determination to acquire and the proceedings taken thereafter.

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(f) it is respectfully submitted that where the plaintiff claims that his rights in and to a land or to the possession of it are unaffected by proceedings purported to have been taken to acquire it on the ground that the said proceedings were void and ineffectual to vest title in the Crown, it is open to a Court to inquire into and decide upon the validity of the said proceedings.

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(g) it is further submitted that the determination having been made on or about 20th March 1949 the provisions of the Land Acquisition Ordinance applied to the acquisition in terms of Section 3(5) of the Land Redemption Ordinance and the proceedings had in terms of the Land Acquisition Act No.9 of 1950 were void and/or ineffectual to vest title in the Crown.

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(h) it is submitted that the determination under Section 5(1) and the order under Section 36 of the Land Acquisition Act were in any event not validly made and were void and ineffectual.

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(i) it is submitted finally that the plaintiff's action was not a possessory action but one for declaration of his title and/or his right to possession and proof of possession by him followed by dispossession by the Defendants was not necessary."

p.41

19. The Appeal in the Supreme Court was heard by Basnayake C.J. Pulle J. and De Silva J.

20. Basnayake C.J. who delivered the Judgment stated:- 10

p.41, l.16

"It was agreed at the hearing of this appeal that the decision on the questions of law which are common to this appeal and the appeal in the case of Ladamuttu Pillai v. Attorney General & others (S.C. Minutes of 31.1.58) which was argued earlier should be regarded as equally binding in this case."

The said Case is reported in Vol. 59 Ceylon New Law Reports at page 313. The matters decided in this case, in so far as they are relevant to the instant appeal are:- 20

(a) Where a statute encroaches upon the property rights of the subject and its language admits of more than one construction, that which is in favour of the subject and not one against him must be preferred.

(b) A statutory functionary like the Land Commissioner may be sued nomine officii.

(c) When a statute provides that a decision made by a statutory functionary shall be "final" or "final and conclusive", the words "final" and "final and conclusive" do not have the effect of ousting the jurisdiction of the Courts to declare in appropriate proceedings that the decision of the public functionary, when he has acted contrary to the statute, is illegal. 30

(d) Certiorari does not exclude a regular action when both the remedies are available.

p.41, l.19

21. Basnayake C.J. went on to say:- 40

"As the judgment in that case was delivered on 31st January last, only the following

questions need be decided for the purposes of this appeal:- Record

(a) whether a praveni nilakaraya is the owner of the lands comprised in his share of the paraveni panguwa within the meaning of the expression "owner" in section 3(1)(b) of the Land Redemption Ordinance, No. 61 of 1942, and

10 (b) whether the legality of a declaration by the Minister under section 5(1) of the Land Acquisition Act, No. 9 of 1950, as modified for the purpose of the Land Redemption Ordinance, can be canvassed by way of a suit against the Attorney-General,

(c) whether the plaintiff is precluded by the Order of the Minister under section 36 of the Land Acquisition Act from seeking the relief he claims, and

20 (d) whether the dismissal on 23rd October 1953 of the plaintiff's action No.L.3632 against the Land Commissioner and the Assistant Government Agent, Nuwara Eliya, in the District Court of Kandy, operates as res judicata and bars this action."

22. Basnayake C.J. quoted the correspondence between the parties and stated:-

"I have quoted in full the correspondence between the officers of the Government and the plaintiff produced at the trial as they
30 show the plaintiff's bona fides and that from the very outset he took up the stand that the two lands in question were not lands that fall within the ambit of section 3(1)(b) of the Land Redemption Ordinance. His representations do not seem to have received the careful attention they deserved. For if they, especially the representation that the Government sought to acquire, had been examined more closely, all these years of litigation might have been
40 avoided."

23. Basnayake C.J. referred to the system of land tenure under the Kandyan Kings:-

"It would be helpful if a brief reference is made to the system of land tenure under p.53, l.12

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the Kandyan Kings before the questions arising on this appeal are discussed. In this judgment I shall for the sake of convenience refer to the grantee of a gama (village) be it a nindagama, viharagama or dewalegama, as the ninda lord.

A village or gama in respect of which services (rajakariya) were performed are of four kinds, viz., gabadagama, nindagama, viharagama and dewalagama. A gabadagama is a royal village which was the exclusive property of the Sovereign. The Royal Store or Treasury was supplied from the gabadagama, which the tenants had to cultivate gratuitously in consideration of being holders of paraveni panguwas. A nindagama is a village granted by the Sovereign to a chief or noble or other person on a sannasa or grant. Similarly, a village granted by the Sovereign to a vhiare is a viharagama and to a dewale is a dewalagama. Each gama or village consisted of a number of holdings or minor villages. Each such holding or minor village was known as a panguwa. Each panguwa consisted of a number of fields and gardens. Panguwas were of two kinds, viz., praveni or paraveni panguwa and maruwena panguwa. A praveni panguwa is a hereditary holding and a maruwena panguwa is a holding given out to a tenant for each cultivation year or for a period of years. The holder of a panguwa was known as a nilakaraya. They were of two kinds: Praveni or paraveni nilakarayas, and maruwena nilakarayas. The paraveni nilakarayas, are generally those who were holders of panguwas prior to the Royal Grant and the ninda lord is not free to change them. They were free to transmit their lands to their male heirs, but were not free to sell or mortgage their rights. They were obliged to perform services in respect of their panguwas. The services varied according as the ninda lord was an individual, a vihare or a dewale. In the case of vihares or dewales personal services were such as keeping the buildings in repair, cultivating the fields of the temple, preparing the daily dana, participating in the annual procession, and performing services at the daily pooja of the vihare or dewale. In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to

render services or pay dues. Though the pang-uwa was individible, especially after a praveni nilakaraya's right to sell, gift, devise, and mortgage his panguwa came to be recognised, the practice came into existence of different persons who obtained rights from a nilakaraya occupying separate allotments of land for convenience of possession. The maruwena nilakaraya though known as a tenant-at-will held on a tenancy which lasted at least for one cultivation year at a time. Unlike the praveni nilakaraya he could be changed by the ninda lord; but it was seldom done. He went on year after year, but was not entitled to transmit his rights to his heirs. On the death of a maruwena tenant his heirs are entitled to continue only if they receive the tenancy. Though in theory maruwena tenure was precarious, in fact it was not so. So long as he paid his dues the ninda lord rarely disturbed him. Besides the praveni and maruwena panguwas in a nindagama, viharagama or dewalagama, there were also lands owned absolutely by the ninda lord both ownership and possession being in him.

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Under the Kandyan Kings and during the early British period there were also lands held by nilakarayas directly under the Sovereign. The holders of these lands were not free to gift, sell, bequeath or mortgage their rights. Their rights are transmissible only to their male heirs and the possession reverted to the state on the failure of the male heirs or breach of the Conditions of Tenure. The rights of the State in respect of such lands called in early British legislation "Service Parveny Lands" were declared by Regulation 8 of 1809 thus:

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> Whereas there is reason to believe that abuses prevail with respect to the Lands called service Parveny Lands, in prejudice of the Rights of Government, and to the impoverishment of Families holding the said Lands.
>
> His Excellency The Governor in Council deems it necessary to declare, conformably to the ancient Tenure of the said Lands, and it is hereby declared accordingly -

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1st. That all such Lands are held, as in former times, immediately under Government:

2ndly. That the privilege of succeeding thereto is in the Male Heirs only, of those who die possessed of such Lands, and that the same revert to His Majesty's use on failure of such Male Heirs or breach of the Conditions of Tenure: 10

3rdly. That the same are not capable of alienation of Gift, Sale, Bequest or other Act of any party, or of being charged, or incumbered with any Debt whatsoever:

4thly. That the said Lands, are not liable to be sold by virtue of any Writ of Execution or other legal process of any Court or Courts in this Island: 20

The Service Praveni Lands Succession Ordinance of 1852, however, extended to female heirs the right of succession to persons who die possessed of service praveni lands. It also declared that service praveni lands were capable of alienation, gift, sale, devise or other act or of being charged or encumbered with any debt. Similar legislation was not enacted in respect of service tenure lands not owned by the State but by a ninda lord. The Service Tenures Ordinance which applies to such lands did not give the nilakaraya power to sell, gift, devise, or mortgage his panguwa but provided for the commutation of his services by a money payment and imposed a period of limitation of one year in respect of the recovery of arrears of personal services and two years in the case of commuted dues. The right to recovery of services or dues if not enforced for ten years was to result in the loss for ever of the ninda lord's rights and on the nilakaraya becoming the owner (section 24). The Ordinance also deprived the proprietor of the right to proceed to ejectment against the nilakaraya (section25) on his failure to render personal services or dues.

He was permitted to recover the value of the services by seizure and sale -

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(a) of the crop or fruits of the panguwa, or failing them,

(b) of the personal property of the nilakaarya, or failing both,

(c) by the sale of the panguwa, subject to the personal services, or commuted dues in lieu thereof.

10 The proceeds of sale have to be applied in payment of the amount due to the proprietor, and the balance, if any, is to be paid to the evicted nilakarayas. If there is a prior encumbrance upon the holding the balance is to be applied to satisfy such encumbrance. Despite these far-reaching changes the character of the ninda lord or proprietor remained the same. In course of time it seems to have been assumed, though no express legislative 20 provision in that behalf was made, that the nilakarayas of a ninagama, viharagama or dewalagama had the same rights of alienation, gift, and mortgage as the holder of a service praveni land."

24. Basnayake C.J. referred to the position of the ninda lord in regard to the holding:-

"Though the nilakaraya's rights in respect of his holding became enlarged in the course of time it was never at any time doubted that 30 the ninda lord was the owner of the soil and the legislation relating to service tenure lands recognised that position of the ninda lord and did not alter but preserved it. Sections 21 and 27 of the Buddhist Temporalities Ordinance refers to the nilakarayas as "temple tenants" (section 21) and speaks of the transfer of "a praveni pangu" tenant's interest in any land held of a temple"(section 27), and gives implied legislative 40 recognition to the alienability of a nilakaraya's rights and not the land. It leaves no doubt as to what the praveni nilakaraya may transfer. Section 54 of the Partition Act No.16 of 1951 also proceeds on the footing that the nilakaraya is not the owner of

p.55, l.37

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his panguwa, for it provides "Every praveni nilakaraya shall, for the purposes of this Act, be deemed to be a co-owner of the praveni panguwa of which he is a shareholder". Today the ninda lord stands in the shoes of the Royal Grantor subject to the restrictions or conditions imposed by the sannasa or grant and the nilakarayas continue as tenants of the grantee, though with far greater rights than they ever enjoyed under the Kandyan Kings. Despite the extension of their rights the nilakarayas had to render services or pay commuted dues to the ninda lord. If over the line of succession of the nilakarayas of a panguwa became extinct the possession of the land would revert to the ninda lord. As the nilakaraya was free to sell his rights the ninda lord was free in course of time by purchase to enlarge his rights of ownership by adding to his rights those of the nilakaraya."

25. Basnayake C.J. next referred to the use of the word "proprietor" in the Service Tenures Ordinance:-

p.56, l.19

"It is not clear why the Service Tenures Ordinance refers to the ninda lord as proprietor and not as owner. The same expression is used in the Parition Act No.16 of 1951. Now to my mind there is no difference between the expressions proprietor and owner in the context in which the former expression is used. The Oxford Dictionary defines "proprietor" as one who holds some thing as property; one who has the exclusive right or title to the use or disposal of a thing; an owner. Webster's Dictionary defines the expression thus: "One who has the legal title or exclusive right to anything, whether in possession or not; an owner." The ninda lord is the owner of his service lands without possession and the nilakaraya is the possessor of those lands without ownership."

26. Basnayake C.J. went on to deal with the concepts of "ownership" and "possession":-

p.56, l.30

"The writers on Jurisprudence, both ancient and modern, bring out clearly the difference between the concepts of ownership and possession. For the purpose of this judgment it is

sufficient to quote a passage from Salmond, one of the modern writers. (Salmond on Jurisprudence, 11th Edn. p.302).

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'No man is said to own a piece of land or a chattel, if his right over it is merely an encumbrance of some more general right vested in some one else ... In its full and normal compass corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. This compass, however, may be limited to any extent by the adverse influences of jura in re aliena vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he none the less remains the owner of the thing, while all the others own nothing more than rights over it. For in him is vested that jus in re propria which, were all encumbrancers removed from it, would straightway expend to its normal dimensions as the universum jus of general and permanent use. He, then, is the owner of a material object, who has a right to the general of residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons.'

How true these words are of the ninda lord and the nilakaraya. The latter cannot be said to be the owner of the land as his rights are merely an encumbrance of a general right vested in the ninda lord and the receipt of personal services or commuted dues in none the less the owner of the land."

27. Dealing further with the concepts of "ownership" and "possession" Basnayake C.J. stated:-

p.57, l.13

"Apart from legal concepts even laymen in the Kandyman provinces will not regard the nilakarayas as the owner of the nindagama. The difference between ownership and possession is so clearly ingrained in the minds of the people in the Kandyan Provinces that the lands of the nindagama are spoken of as lands of the ninda lord and not of the nilakaraya. They

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would speak of ninadgama lands as lands belonging to the Dalada Milagawa or Sri Maha Bodhi or Ridi Vihare or to such and such a family. In the instant case the reference in the mortgage bond (1D4) to the mortgagor "being in possession of" the lands referred to therein by virtue of the deed recited and the absence of any reference to title are significant and to my mind indicate that the mortgagor and the notary realised the difference between the rights of the ninda lord and the nilakaraya." 10

28. Basnayake C.J. next referred to the relevant authorities and stated:-

p.57, l.27

"Learned Counsel for the Crown has not been able to cite a single decision of this Court in support of his contention that a nilakaraya of a service panguwa is its owner. In fact the decisions of this Court are the other way. They hold that a nilakaraya is not the owner and that it is not competent for him to institute a partition action as he is not the owner of the land of which he is in possession." 20

He referred to the following authorities:-

(a) Jotihamy v. Dingirihamy (1906) 3 Balasingham Reports. 67.

(b) Kaluwa v. Rankira (1907) 3 Balasingham Reports. 264.

(c) Appuhamy v. Menike. 19 N.L.R. 361.

He concluded:- 30

p.59, l.3

"Our legislation has always assumed that the ninda lord is the owner of the nindagama and in the decisions of this Court too the ninda lord has always been regarded as the owner of the service lands of the nindagama and the praveni nilakaraya as his tenant. However extensive the rights of a praveni nilakaraya may have become in the course of time still he never became the owner of his holding he remained a nilakaraya." 40

29. Basnayake C.J. next dealt with the relevant provision of law under which the Land Commissioner

purported to acquire the land in question, namely Section 3(1)(b) of the Land Redemption Ordinance:-

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"I shall now turn to section 3(1)(b) of the Land Redemption Ordinance. It speaks of agricultural land "transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer secured by a mortgage of the land." In the instant case the transfer was by the praveni nilakaraya of his interests in the holding of which as I have said above he is not the owner. It was not the land that was transferred, but the right to possess and enjoy it with the attendant rights of a praveni nilakaraya subject to the rendering of services or payment of commuted dues. The debt was not due from the owner but from his tenant the 2nd defendant. The debt of the praveni nilakaraya the 2nd defendant was not secured by a mortgage of the land but by a mortgage of the 2nd defendant's rights as praveni nilakaraya. It will therefore be seen that section 3(1)(b) has no application whatsoever to the transactions evidenced by deeds 1D4 and 1D5. The Land Commissioner had therefore no authority under section 3(1)(b) of the Land Redemption Ordinance to acquire the lands. His determination that the lands should be acquired is not one to which sub-section (4) applies as the determination which is declared by that provisions to be final is a determination in a case in which "he is authorised by sub-section (1) to acquire the lands". The meaning and effect of sub-section (4) has been discussed in my judgment in Ladamuttu Pillai v. Attorney-General (supra). In this case too the Land Commissioner's decision is not final as he has by a wrong construction of the expressions "owner" and "land" in section 3(1)(b) given himself a jurisdiction he did not have."

p.59, l.10

30. Basnayake C.J. considered the action of the Acquiring Officer to be far-reaching in its effect and indeed even illegal:-

"There is a further circumstance which appears in document P15 which cannot be allowed to pass unnoticed. The acquiring

p.60, l.4

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officer appears to have acquired the interests of the dewale as well. His act is clearly illegal. The praveni nilakaraya did not, and could not in law, transfer to his creditor the rights of the ninda lord, the dewala, nor did he purport to do so. The authority granted by section 3(1)(b) is to acquire land transferred by the owner in satisfaction or part satisfaction of a debt which was due from the owner and which was immediately prior to such transfer secured by a mortgage of the land. The ninda lord owed no debt, his rights were not secured by a mortgage, he did not transfer his rights to the 2nd defendant. Clearly the Land Commissioner had no authority to acquire the ninda lord's rights and his determination to acquire his rights being illegal cannot be final. 10

The result of this intrusion on the rights of the ninda lord is that the dewale has been illegally deprived of its rights to the services it received in respect of these lands of the kapu panguwa and the 2nd defendant who possesses the lands under a tenure which obliged him to render services or pay commuted dues is now in occupation of them by virtue of the permit given to them by the Crown without any such obligation. The Land Commissioner's action in acquiring the interests of the nilakaraya and the dewale are both illegal and must be declared null and void." 20 30

31. Basnayake C.J. next dealt with the question whether the legality of the relevant declaration of the Minister concerned could be questioned in the present proceedings:-

p.60, l.41

"We are here concerned with the modified sub-sections (1) and (2) of section 5 of the Land Acquisition Act. They read as follows:-

'(1) Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the province or district in which such land is situated to cause such declaration in the Sinhalese, Tamil and 40

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English Languages to be published in the Gazette and exhibited on some conspicuous places on or near such land.

(2) A declaration made under sub-section (1) in respect of any land shall be conclusive evidence that such land is needed for a purpose which is deemed to be a public purpose.'

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It would appear from the copy of the declaration 1D1 that the Minister purporting to act under section 5 of the Land Acquisition Act on 10th May 1951 made the following declaration:-

'Declaration under Section 5 of the Land Acquisition Act, No. 9 of 1950

Whereas the Land Commissioner has determined that the land described in the Schedule hereto shall be acquired for the purpose of the Land Redemption Ordinance, No. 61 of 1942:

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Now therefore, I, Dudley Shelton Senanayake, Minister of Agriculture and Lands, do hereby declare under section 5(1) of the Land Acquisition Act, No.9 of 1950 (read with section 62 of that Act) that the said land is needed for a purpose which is deemed to be a public (sic) and will be acquired under that Act.'

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It would appear from the recital that the foundation of the declaration is the determination of the Land Commissioner under section 3(4) of the Land Redemption Ordinance. I have shown above that the lands in question are not lands the Land Commissioner is authorised by section 3(1)(b) to acquire and that his determination is in consequence not final and that it being not a determination which he is authorised to make under the statute is bad in law and does not afford the Minister legal authority to make the declaration he has made. Where there is no valid determination under

p.61, l.40

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that Ordinance the Minister can make no declaration under section 5(1) of the Land Acquisition Act as modified and therefore the declaration he has made in respect of the lands in the instant case is a nullity and is of no effect in law and is therefore not the statutory declaration contemplated in section 5(1).

Where the declaration which purports to be made under section 5(1) is a nullity it does not become "conclusive evidence" of the fact that the land is needed for a purpose which is deemed to be a public purpose; because it is only a valid declaration that is given that effect by the Act. The opening words of section 5(2) make the position clear. They are "A declaration made under sub-section (1)", i.e., a declaration validly made under that sub-section, and not "A declaration which purports to be made under sub-section (1)" though not validly made thereunder. Similarly the publication of an invalid declaration in the Gazette will not be "conclusive evidence" of the fact that a declaration under sub-section (1) was duly made, for sub-section (3) also provides that the publication of a <u>declaration under sub-section (1)</u> in the Gazette shall be conclusive evidence of the fact that <u>such</u> declaration was duly made. An invalid declaration has the same effect as if no declaration was ever made and cannot be acted on and confers no authority for taking the steps consequential on a valid declaration under the Land Acquisition Act as modified and does not therefore have the conclusiveness given by section 5(2) to a valid declaration."

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32. Dealing further with the question of the legality of the declaration of the Minister, Basnayake C.J. stated:-

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p.62, l.37

"The copy of the declaration produced by the Attorney-General 1D1 is in English alone. Neither copies nor originals of the Sinhalese and Tamil declarations have been produced nor is there any evidence that the Minister ever made them. I am of the view that sub-section (1) of section 5 of the Act requires the Minister to make a declaration in each of the

three languages and the requirements of the section are not satisfied if he does not do so.

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Sub-section (1) of section 5 further requires the Minister to direct the acquiring officer of the province or district in which the land which is to be acquired is situated to cause such declaration in the sinhalese, tamil and English languages to be published
10 in the Gazette and exhibited in some conspicuous places on or near the land. There is no evidence that such a direction was given nor is there any evidence that the acquiring officer of the province or district in which the land is situated caused the declaration to be published in the Gazette in Sinhalese and Tamil. Learned Counsel for the Crown tendered at the trial, not the Gazette in which the declaration was pub-
20 lished, but an extract from the Gazette certified by an Assistant Land Commissioner 1D2 in which the declaration appears in the English language alone. This Court has always regarded the requirement that a publication should be made in English, Sinhalese and Tamil as imperative. Failure to publish in all three languages has been regarded as vitiating the publication. The cases of H. Foenander v. M. Ugo Fernando 4 S.C.C. 113, and Dias v. A.G.A.
30 Matara, 3 N.L.R.175, are two of the cases that take that view. Apart from the fact that the declaration is invalid for the reason that the condition precedent to the making of the declaration is absent these other defects I have pointed out above also affect its validity."

33. Basnayake C.J. dealt with the contention of the Appellant that there was an Order made by the appropriate Minister under the relevant law and
40 that the Respondent could succeed only if that Order were set aside:-

"Learned counsel for the Attorney-General contended that the Order made by the Minister under section 36 of the Land Acquisition Act was in the way of the plaintiff and that he could not succeed unless and until that Order is set aside. That contention would be sound only if the Order he had made is one which

p.64, l.20

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the Minister was entitled to make under the Act and he had complied with its requirements in doing so. But the Order in the instant case is one which he had no power in law to make and in the making of which he has not complied with the requirements of the Act.

* * * * *

The publication of a void Order under section 36 authorising the acquiring officer to take possession of a land does not have the effect of vesting that land in Her Majesty as pro- 10 vided in section 37(a) of the Act. No question of setting aside the Order therefore arises. There being no Order under section 36 in existence in law the Land Commissioner had no power to alienate the two lands in question under section 5(1) of the Land Redemption Ordinance. That being the case the 2nd defendant's possession is illegal and he is liable to be ejected from the two lands."

p.65, l.1

34. Basnayake C.J. next dealt with the plea of 20 <u>res judicata</u> raised by the Appellant. Having dealt with the origin, in law, of this plea and its place in English law, Basnayake C.J. stated:-

p.67, l.34

"In this country our Civil Procedure Code very properly makes provision to ensure the observance of the doctrine of <u>res judicata</u> and the maxims <u>nemo debet bis vexari pro una et eadem cause</u> and <u>interest reipublicae ut sit finis litium</u>. The provisions are sections 34, 207 and 406." 30

Basnayake C.J. took the view that the whole of the law of res judicata, in Ceylon, was contained in the relevant sections of the Civil Procedure Code and that one should not go outside it in deciding any question appertaining thereto. He next examined the relevant sections and eventually stated:-

p.72, l.16

"I now come to the explanation to section 207. According to it for a matter to be <u>res adjudicata</u> the previous action which is plea- 40 ded as a bar to the subsequent action must be -

(a) for the same cause of action, and

(b) between the same parties.

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In the "same cause" is included every right to property, or to money, or to damages, or to relief of any kind which can be claimed, set up or put in issue between the parties upon the cause of action for which the action is brought. The instant case and the Kandy case are not between the same parties. The relief now claimed could not have been claimed in the Kandy case and the matters in issue except one are not the same."

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35. Basnayake C.J. made the following observation on the attitude of the Appellant in raising the plea in the instant appeal:-

p.72, l.28

"Before I conclude I wish to observe that I find myself unable to appreciate the Crown in raising the plea of res judicata in the instant case. In the amended answer in the Kandy case the officers of the Crown who were represented by the Crown Proctor and who must undoubtedly have acted on the advice of the Crown legal adviser took the plea that the Court had no jurisdiction to hear and determine the action. If the legal advisers of the Crown were satisfied of the soundness of that plea, and I must assume that they were so satisfied, then the decree of dismissal of the action was one made without jurisdiction. It is settled law that a judgment or decree of a Court acting without jurisdiction does not operate as res judicata. Why then did the Crown being satisfied that the Court had acted without jurisdiction raise the plea of res judicata in the instant case? We have had no explanation from the learned counsel appearing for the Attorney-General. In this connexion I wish to repeat the remarks of the Lord Chief Baron in the case of Deare v. Attorney-General (1 Y. & C. Ex.p.208) quoted by me in the citation from the judgment of Farewell L.J. in Ladamuttu's case (supra):

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'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of Justice when any real point of difficulty that requires judicial decision has occurred.' "

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36. Basnayake C.J. concluded his Judgment as follows:-

p.73, l.9

"As this is the fourth appeal in which we have been called upon to decide whether a statutory functionary has acted within the ambit of his powers I wish to state that where statutory functionaries are vested with extraordinary powers such as those granted under the Land Redemption Ordinance they should show the greatest care in exercising such powers entrusted to them by the legislature in the faith that they would regard them as a sacred trust and show the greatest consideration to the rights of the citizen. They should always give close attention and due consideration to the representations of those affected by the exercise of such powers, ever mindful of the fact that it is not every citizen that has the means to assert his rights in the Courts if the functionary does not treat their representations with the consideration they deserve. In the instant case it would seem that in establishing his claim the plaintiff has had to spend more than the compensation he has been offered. The greater the powers entrusted to a statutory functionary the greater should be the care with which they are exercised.

I allow the appeal with costs and direct that decree be entered as prayed for with costs."

p.73

Pulle J. (in a separate judgment) and De Silva J. agreed with the Judgment of Basanayake C.J.

37. The Appellant obtained Conditional Leave to Appeal to Her Majesty in Council on the 24th April 1958. Final Leave was granted on the 27th June 1958.

38. The Respondent submits that the Decree of the Supreme Court of Ceylon dated the 6th March 1958 is right and should be affirmed for the following, among other,

R E A S O N S

(1) BECAUSE the Land Commissioner can be sued nomine officii;

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(2) BECAUSE, notwithstanding that a decision of the Land Commissioner is declared final and conclusive the Courts have jurisdiction to declare that such decision is either ultra vires or contrary to Statute or is illegal;

(3) BECAUSE the particular provision of law, namely section 3(1)(b) of the Land Redemption Ordinance, refers to agricultural land transferred by the "owner" of such land;

10 (4) BECAUSE in this case the "transfer" was not by the "owner" of the land in question;

(5) BECAUSE the declaration of the Minister of Agriculture and Lands under section 5 of the Land Acquisition Act was a nullity in that the foundation for such declaration was the said defective order made by the Land Commissioner;

(6) BECAUSE the said declaration of the Minister of Agriculture and Lands was in English
20 alone;

(7) BECAUSE the said section 5 of the Land Acquisition Act required the Minister to make such declaration in each of the three languages namely English, Sinhalese and Tamil;

(8) BECAUSE the omission to make the declaration in the three languages affects its validity;

(9) BECAUSE the Judgment of the Supreme Court is right and should be upheld.

SIRIMEVAN AMERASINGHE.

No. 20 of 1959

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL
of Ceylon (Defendant) .. Appellant

- and -

R.B. HERATH (Plaintiff).. Respondent

P.B. ATTANAYAKE (Defendant)
.. Pro-forma Respondent

CASE FOR THE RESPONDENT
R.B. HERATH

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