NANAYAKKARA

v.

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SRI LANKA AND OTHERS

COURT OF APPEAL.
RANASINGHE, J. AND TAMBIAH, J.
C. A. APPLICATION 1186/80.
DECEMBER 11, 1980 AND FEBRUARY 2, 1981.

Writs of Certiorari and Prohibition—Disciplinary proceedings against employee—Employer a corporate body established by Statute—Manual of Procedure regarding disciplinary control over employees—Whether relationship one of master and servant—Does the Writ lie.

Regulations made under Statute—Such regulations not published in Government Gazette—Written law—Does such non-publication affect validity of regulations—Are they part of Statute—Interpretation Ordinance (Cap. 2), sections 2 (gg.), 17 (1) (e)—Institute of Chartered Accountants Act, No. 23 of 1959, sections 10, 12.

The petitioner was appointed as Stores Clerk of the 1st respondent, a body corporate established under Act No. 23 of 1959. His letter of appointment required the petitioner, inter alia, to conform to the rules, regulations, and by-laws of the 1st respondent already in force and those issued from time to time and also to comply with regulations contained in the Manual of Procedure. By section 10 of the Act, the Council of the 1st respondent Institute was empowered to appoint a Secretary and such other officers and servants as it may deem necessary. Section 12 of the Act empowered the Council to make regulations and, in particular, in respect of the exercise of disciplinary control over officers and servants. A Manual of Procedure applicable to the 1st respondent's employees was filed marked R1 in these proceedings.

Certain charges were brought against the petitioner for "violation of Institute regulations" and the 3rd and 4th respondents to this application were appointed to hold an inquiry. This they did and their report was also forwarded thereafter. Before action was taken on the basis of this report, certain allegations were made by the petitioner against the 3rd and 4th respondents in regard to the conduct of the inquiry and the Secretary of the Institute (2nd respondent) was to hold an inquiry into these allegations. Before this inquiry was held, the petitioner made the present application to the Court of Appeal praying for a writ of prohibition to prevent the 2nd respondent from directing the 3rd and 4th respondents to proceed with the inquiry, for a similar writ prohibiting the 3rd and 4th respondents from proceeding with the inquiry and for a writ of certiorari to quash the proceedings of the inquiry held by the 3rd and 4th respondents. While denying in their affidavits the allegations made by the petitioner, the respondents also took certain preliminary objections to the petitioner's application, namely, that the relationship between the parties being purely one of master and servant, the writs did not lie; that as the proceedings against the petitioner were not finalized the application was premature; that there was no statutory obligation on the 1st respondent to hold an inquiry; and that the petitioner also had a remedy under the Industrial Disputes Act

Held

(1) An examination of the regulations in the Manual of Procedure showed that the petitioner's employment had a statutory flavour which differentiated it from the ordinary relationship of master and servant. The Manual of Procedure gave rights to the employee and imposed obligations on the employer going beyond the ordinary contract of service and regulating, inter alia, the grounds and procedure for dismissal. The requirement that there must be a hearing or inquiry also brought in the requirement that the principles of natural justice must be observed. The remedy by way of certiorari was therefore available to an employee.

(2) The regulations in the Manual of Procedure are regulations framed under the statute, which empowered the Council of the 1st respondent Institute to make regulations in respect of certain matters. The fact that these regulations had not been published in the Government Gazette did not affect their validity and the procedural requirement in section 17 (1) (e) of the Interpretation Ordinance, which was relied on on behalf of the 1st respondent is merely directory. There was no such requirement in the statute, namely, Act No. 23 of 1959.

(3) However, the 3rd and 4th respondents having completed their inquiry and forwarded their report to the 2nd respondent a writ of prohibition could not issue as that stage had long passed. A writ of certiorari also would not issue at this stage as the disciplinary proceedings taken against the petitioner have not been finalized. The 2nd respondent to whom the 3rd and 4th respondents had forwarded their report had still to make their final order which may or may not affect the rights of the petitioner. It was not desirable that the Court should interfere with disciplinary proceedings before such proceedings have terminated.

Cases referred to

(1) *University Council of Vidyodaya University v. Linus Silva, (1964) 66 N.L.R. 504; 67 C.L.W. 22; (1965) 1 W.L.R. 77; (1964) 3 All E R. 865.*

(2) *McDavitt v. McArthur, (1919) 15 Tax. I. R. 6*

(3) *Ridge v. Baldwin, (1963) 2 All E. R. 66; (1964) A.C. 40; (1963) 2 W.L.R. 935.*

(4) *Kanda v. Govt. of Malaysia, (1962) A.C. 322; (1962) 2 W. L. R. 1153.*

APPLICATION for Writs of Certiorari and Prohibition.

Nimal Senanayake, with *K. Gunaratne* and *Miss S. M. Senaratne*, for the petitioner.

D. C. Jayasuriya, for the 1st respondent.

Lyn Weerasekera, for the 2nd to 4th respondents.

Cur. adv. vult.

February 27, 1981.

TAMBIAH, J.

The 1st respondent is a body corporate with perpetual succession established under the Institute of Chartered Accountants Act, No. 23 of 1959; the 2nd respondent is its Secretary and the 3rd and 4th respondents are officers of the Institute holding the posts of Director of Studies and Training II and Director of Administration.

Section 10 of the Act empowers the Council of the 1st respondent to appoint a Secretary and such other officers and servants as it may deem necessary.

The petitioner was appointed to the post of Stores Clerk with effect from 1st May, 1980. The letter of appointment (annexure P1) stated, inter alia, that the petitioner was required to conform to the rules, regulations and by-laws of the Institute of Chartered Accountants already in force and those that will be issued from time to time, and to comply with the regulations contained in the Manual of Procedure.

By letter dated 7th July, 1980 (annexure P2) the 2nd respondent informed the petitioner that certain charges have been brought against him "for the violation of Institute regulations" and that the 3rd and 4th respondents have been appointed to conduct the inquiry and further required the petitioner to submit his explanation within 3 days. The charges were:

(1) Shouting at and being rude to a superior officer, Mrs. S. Weeratunga, on 2nd July, 1980, in the presence and hearing of members of the minor staff.

(2) Not carrying out orders of Mrs. S. Weeratunga promptly regarding despatch of study lessons.

(3) Talking in a disparaging manner in the presence of other staff about superior officers when instructions were given to despatch promptly study lessons to certain students.

(4) Being out of the seat regularly for considerable periods of time and thereby adversely affecting the progress of the work and causing inconvenience to students who call for study lessons.

The petitioner sent his explanation denying the charges. By letter dated 2nd September, 1980 (annexure P14), the 3rd and 4th respondents informed the petitioner of an additional charge, viz., failure to maintain the records connected with the stores which amounted to negligence of duties entrusted to the petitioner.

The report of the 3rd and 4th respondents, together with the statements recorded and documents marked at the inquiry held by

them into the 5 charges against the petitioner, was forwarded by them to the 2nd respondent on 17th September, 1980. It is the 2nd respondent's position that he was unable to take action on the basis of the report forwarded to him, as the petitioner by his letter of 17th September, 1980, addressed to him, made serious allegations against the 3rd and 4th respondents in regard to the conduct of the inquiry; that he informed the petitioner that he would be holding an inquiry into the said allegations on 1st October, 1980; he was unable to hold the inquiry in view of the notice issued by this Court on 29th September, 1980.

The petitioner questions the validity of the proceedings had against him by the 3rd and 4th respondents on the grounds that the latter two are biased against him and that they failed to observe the rules of natural justice and/or that he has been deprived of the right to a fair hearing. He has prayed for the issue of a mandate in the nature of a writ of prohibition prohibiting the 2nd respondent from directing the 3rd and 4th respondents from proceeding with the inquiry on charge sheets P2 and P14. He has prayed for a similar writ prohibiting the 3rd and 4th respondents from continuing or in any way proceeding with the inquiry on the said charge sheets. He has also prayed for a mandate in the nature of a writ of certiorari to quash the proceedings of the inquiry held by the 3rd and 4th respondents.

The respondents in their affidavits have denied the allegation of bias and prejudice made against the 3rd and 4th respondents and have stated that every opportunity and facility was afforded to the petitioner at the inquiry to meet the charges alleged against him. Their further position is that in law, the petitioner has no *locus standi* to make this application, that his application is misconceived and that he is not entitled to the relief prayed for.

At the hearing into the application, both learned Counsel for the 1st respondent and learned Counsel for the 2nd to 4th respondents took objections *in limine*. Learned Counsel for the 1st respondent submitted:

(1) Though section 10 of the Act empowered the Council to appoint its officers and servants, the petitioner was engaged under an ordinary contract of service. The relationship between the petitioner and the 1st respondent is that of master and servant. Such a contract of employment is

beyond the scope of certiorari and prohibition. Reliance was placed on the case of *University Council of Vidyodaya University v. Linus Silva* (1).

(2) The proceedings against the petitioner have not been finalised. No final order has yet been made against the petitioner affecting his rights. The application of the petitioner is premature. Learned Counsel for the 2nd to 4th respondents contended:

(1) There is no statutory obligation on the employer to hold an inquiry and give the petitioner a hearing.

(2) No order has been made by the 2nd respondent on the basis of the report prepared by the 3rd and 4th respondents. No prejudice has yet been caused to the petitioner.

(3) The 2nd respondent would in due course decide what action he would take on the report made by the 3rd and 4th respondents. If the decision is adverse, the petitioner has his remedy under the Industrial Disputes Act.

It seems to me that the fact that the petitioner would have an alternative remedy is a matter to be taken into consideration by this Court in arriving at a conclusion as to whether it should, in the exercise of its discretion, issue a writ of certiorari to quash the proceedings of the inquiry held by the 3rd and 4th respondents.

We decided to deal with the other preliminary objections raised by learned Counsel, for, if their contention was right, it would be unnecessary to go into the merits of the application.

Section 12 of Act No. 23 of 1959 empowers the Council of the Institute to make regulations and in particular, in respect of the matter of the exercise of disciplinary control over officers and servants of the Council (S. 12 (2) (f)). The respondents have annexed to their affidavit a copy of the Manual of Procedure (annexure R1) which they state is applicable to employees of the Institute. Section 1, para 1, in R1 states that all employees of the Institute other than watchers and gardeners are covered by the Shop and Office Employees Act and the regulations made under this Act. Para 2 states that regulations stipulated in the Manual are

framed to meet the present requirements of the Statute and may be amended, repealed or substituted by new regulations made by the Institute as and when necessary. Para 3 states that employees of the Institute are required to abide by these regulations strictly. Para 4 brings in the Establishment Code, in matters not provided for in the Manual of Procedure. Section II, para 12 in R1 deals with Termination of Employment, and states—"Disobedience, misconduct, insubordination, fraud, neglect of duty, breach of any regulation framed by the Institute or conduct which is likely to bring the Institute into disrepute will render an employee liable for termination of service without any prior notice or compensation notwithstanding any of the conditions of employment." Section III, para 22 in R1 is headed "Non-compliance of Rules, Regulations", etc., and is in the following terms :

"22.1 All employees of the Institute should comply with all existing rules and regulations and those that may be framed from time to time by the Council.

22.2 Any employee who does not comply with any Regulation, Rule or Direction framed or given by the Council or an officer authorised on that behalf or who acts contrary to the Rules and Regulations laid down in this Manual of Procedure or Institute Staff circulars shall be liable to disciplinary action and punishment by the Council.

22.3 Disciplinary action against any employee will be taken after an inquiry is held."

The petitioner's Counsel submitted: that the regulations contained in R1 have been made by the Council by virtue of the statutory power given it by section 12 of Act No. 23 of 1959; section 2 (gg) of the Interpretation Ordinance states that "written law" shall mean and include all Ordinances and Acts of Parliament and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants, and process of every kind made or issued by anybody or person having authority under any statutory or other enactment to make or issue the same in and for Ceylon or any part thereof; the regulations have therefore become provisions of Act No. 23 of 1959 and have acquired statutory force.

Learned Counsel for the 1st respondent, on the other hand, based his argument on section 17 (1) (*e*) of the Interpretation Ordinance, which enacts as follows:

> section 17 (1): Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules:
>
> (e) : all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the Ordinance or Act of Parliament.

He submitted that in terms of section 17 (1) (*e*), there is a mandatory requirement of law that all rules (which includes regulations (section 17 (2)) should be published in the Government Gazette and that this condition precedent must be complied with in order to give validity to the regulations. He referred us to the Australian case of *McDevitt v. McArthur* (2), cited by S. D. Hetop in his *Cases and Materials on Review of Administrative Action* at p. 46. I reproduce the entire passage:

> "The local Marine Boards Act, 1889, empowered the Marine Boards to make by-laws with respect to certain matters and provided that such by-laws should be of no effect until, *inter alia,* a copy thereof had been published in the Government Gazette. The Marine Board of Hobart made a by-law purporting to incorporate by reference certain regulations made by the Sovereign in Council pursuant to the Merchant Shipping Act, 1894. The Court decided that the by-law was invalid, Nicholls, C.J. saying (1919) 15 Tas. L.R. 6, at p.7): "The statute provides that, before by-laws shall bind the people, they shall be published. I believe this to mean they shall be published to all the people of the State, in such a manner that the average intelligent citizen can, by reading them, learn what duties and restrictions they impose upon him.... I am prepared to lay down that, when by-laws are to be published in the Gazette, then what is there published must be sufficiently complete to leave a reader, who can and will understand ordinary English, free from uncertainty as to any enacting part of the by-law."

He then expressed the opinion that the by-Law was void, either for uncertainty or for non-publication. Crisp, J. and Ewing, J. held that the by-law was void for non-publication."

In the case cited, there was express provision in the Local Marine Boards Act, 1899, requiring the publication of the by-laws in the Government Gazette. There is no such requirement laid down in section 12 of Act. No. 23 of 1959.

I cannot accept the submission of learned Counsel for the 1st respondent that the Regulations in the Manual of Procedure (R1) were not framed under the Statute. Section 12 of Act No. 23 of 1959 empowers the Council to make regulations in respect of the following, amongst other matters—salaries, allowances, conditions of service (S. 12 (2) (*d*)) and the exercise of disciplinary control over officers and servants of the Council (S. 12 (2) (*f*). The respondents themselves tendered in evidence the Manual of Procedure (R1) which they stated is applicable to the employees of the Institute (para. 4 of the Statement of Objections). The regulations in R1 deal with, *inter alia,* such matters as probation, confirmation, increments, promotions, termination of employment, hours of work, disobedience, disciplinary action, holidays and leave, overtime payment and payment for work during holidays, and payment of provident fund. These regulations are referable to the power given to the Council under the Statute to make regulation and it must be assumed that these regulations were framed under Act No. 23 of 1959. Para. 2 of section 1 expressly states that the Regulations stipulated in the Manual are framed to meet the present requirements of the Institute. Learned Counsel for the 1st respondent conceded that as regards disciplinary matters, apart from the regulations contained in R 1, the Council has not framed other regulations. One wonders why charges were framed against the petitioner and inquiry into the charges was held, unless it be that the 1st respondent felt it was bound by the Manual of Procedure.

It is common ground that the regulations in R1 have not been published in the Government Gazette. Learned Counsel for the petitioner contended that the provisions of section 17 (1) (*e*) are not mandatory but merely directory and that failure to comply with the procedural requirement of publication in the Government Gazette will not affect the validity of the regulations.

Section 17 (1) (*e*) of the Interpretation Ordinance does not expressly declare what shall be the consequence of non-compliance with the requirement that the regulations be published in the Government Gazette. The provisions of Section 17 (1) (*e*) casts an obligation on the rule making authority to publish the regulations in the Government Gazette over which the petitioner has no control.

Allen in his "Law and Orders" (2nd Edn.) at pp. 165 and 166 states:

> "Of course, if the Statute expressly indicates what the effect of non-compliance is to be, the matter is plain; but in many cases it merely gives its command and says nothing about the consequences of disobedience. The Courts then have to look at the general intendment of the section, and often the whole statute, and, although there can be no invariable rule, the general principle of interpretation is well stated by Maxwell: 'Where the prescriptions of a Statute relate to the performance of a public duty; and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only'. . . . .".

To hold that the regulations in R1 have no legal effect by reason of non-publication in the Gazette would work injustice to the petitioner and to other employees of the 1st respondent who have no control over the Council, which is the body that is entrusted with the duty of publishing the regulations in the Government Gazette, for, it would open the door for the 1st respondent to tell such persons, at its convenience—"by virtue of the terms of your employment you are bound by the regulations in the Manual of Procedure, but the Institute of Chartered Accountants is not, as the regulations have not been published in the Government Gazette." I uphold the contention of petitioner's Counsel that the procedural requirement contained in section 17 (1) (*e*) is merely directory and not mandatory, and that non-compliance with this requirement does not effect the validity of the regulations in the Manual of Procedure (R1).

In *Ridge v. Baldwin* (3), in considering the application of the principles of natural justice to cases of dismissal, Lord Reid distinguished 3 classes of cases (1) the pure master and servant cases which are governed by the law of contract and the servant has no right to be heard. But Lord Reid added—"But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them." (2) Cases where a person holds office at pleasure. Such an officer has no right to be heard. (3) Dismissal from an office where there must be something against a man to warrant his dismissal. Such an officer has a right to be heard before dismissal.

Though at common law, a master is not bound to hear his servant before he dismisses him, and the master can dismiss his servant at any time and for any reason or for none and if the dismissal is in breach of contract, the servant's only remedy is damages for breach of contract (Linus Silva's case at p. 507). It seems to me that in the present case, the regulations in the Manual of Procedure, which have become part of Act No. 23 of 1959, have made inroads into the common law, by regulating the grounds of removal of an employee (S. II, para 12), and the procedure for removal, viz., after inquiry (S. III, para 22.3). I agree with the submission of learned Counsel for the petitioner that the petitioner's employment has a statutory flavour, which differentiates his employment from the ordinary relationship of master and servant.

The Manual of Procedure (R!), gives rights to the employee and imposes obligations on the employer, which go beyond the ordinary contract of service. An employee can be dismissed only on specified grounds and he is entitled to an inquiry before dismissal. Limitations or restrictions have been placed on the employer's power of dismissal—he cannot dismiss his employee capriciously but only for specified reasons and he must hold an inquiry before dismissal. If there is to be a hearing or an inquiry, then the essential characteristics of natural justice have to be observed, viz., the accused person must know the case which is made against him and he must be given a fair opportunity to correct or contradict it. *(see, Kanda v. Govt. of Malaysia* (4) at 337, P.C.) The hearing must also be by an impartial tribunal which must act honestly, and in good faith. If an employee is dismissed for unspeci-

fied reasons or if there is a breach of these essential principles of natural justice, then the order of dismissal may become liable to be questioned on certiorari. It is to be noted that in Linus Silva's case (supra) though Lord Morris of Borth-Y-Gest held that Linus Silva's relationship to the University Council was that of master and servant, he stated (ps. 517, 518)—"It is to be observed further that there is no provision in the Act giving a right to be heard nor any provision as to any right of appeal to any other Body. The present case is not one therefore in which there has been a failure to comply with statutory provisions." The submission that the relation was that of master and servant to which the remedy of certiorari has no application, therefore fails.

The 3rd and 4th respondents have completed their inquiry and have forwarded their report to the 2nd respondent. The question of the issue of a writ of prohibition therefore does not arise as the stage has long passed. There remains for our consideration the further relief claimed by the petitioner, for the issue of the writ of certiorari to quash the proceedings of the inquiry held by the 3rd and 4th respondents.

Both learned Counsel for the 1st as well as 2nd to the 4th respondents contend that no final order has yet been made by the 2nd respondent, on the basis of the said report, affecting the rights of the petitioner. The 2nd respondent, would in due course decide what action is to be taken against the petitioner on the basis of the said report. The petitioner may be exonerated or found guilty and dismissed, or otherwise punished. The application for an order of certiorari is premature, they submitted.

It would seem that the disciplinary proceedings taken against the petitioner are at an intermediate stage and have not been finalised. The 3rd and 4th respondents have concluded their inquiry into the charges framed against the petitioner, and have sent the evidence recorded, oral and documentary, and their report to the 2nd respondent, who will in due course make the final order. The final order may or may not affect the rights of the petitioner. In disciplinary proceedings, it is not desirable that the Courts should interfere before the proceedings have terminated. If interference were made by Courts at intermediary stages, it would result in unnecessary delay.

I might add that the question whether a writ of certiorari can lie to quash the proceedings of an inquiry held by persons who have been given power merely to investigate into charges against an employee and report to the officer concerned for taking necessary action, has not been argued before us.

The application is refused, but I make no order as to costs.

RANASINGHE, J.—I agree.

Application dismissed.