1973 *Present :* **Pathirana, J., and Rajaratnam, J.**

W. S. ALPHONSO APPUHAMY, Petitioner, *and* L. HETTIARACHCHI (Special Commissioner, Chilaw) and another, Respondents

S. C. 779/72—Application for a Mandate in the nature of a Writ of Mandamus

Local Authorities (Standard By-laws) Act (Cap. 261), s. 3—Standard By-laws framed thereunder—By-law 5 of Part 15—Lease of the right to collect rents and fees from a public market belonging to a local authority—Notice calling for tenders—Issue of the lease to a tenderer other than the highest tenderer—Validity—Urban Councils Ordinance, s. 136—Constitution of Sri Lanka, Articles 16 (2) (e), 18 (1) (a)—Mandamus *or Injunction*—Ex parte *application—Duty of petition to disclose all material facts.*

Acting in pursuance of by-law 5 of Part 15 of the Standard by-laws framed by the Minister of Local Government under section 3 of the Local Authorities (Standard By-laws) Act, the 1st respondent, who was the Special Commissioner of the Town of Chilaw, called for tenders for a lease to collect the rents and fees from a public Fish Market established under section 136 of the Urban Councils Ordinance. The petitioner was the highest tenderer by stipulating the sum of Rs. 150,199 as the price which he was willing to pay for the said lease. The 3rd highest tenderer was the 2nd respondent, a co-operative society, whose tender was for the sum of Rs. 105,000.

The petitioner made the present application for a writ of *Mandamus* directing the 1st respondent to issue the aforesaid lease to him. He averred that the 1st respondent, acting in excess or abuse of his powers and motivated by political and other extraneous reasons, was taking steps to substitute the 2nd respondent in place of the petitioner as the lessee, for the sum of Rs. 150,199 which was the amount tendered by the petitioner. He further averred that the 1st respondent was under a public and statutory duty to issue the lease to him.

The 1st respondent stated in his affidavit that in the Tender Notice calling for tenders it was expressly stated that he reserved to himself the right to accept or reject any one or all the tenders.

Held, that 1st respondent had acted correctly and legally within the terms of the by-law 5. There was no statutory or public duty imposed on him to accept the petitioner's highest tender. The by-law states that the lease could be given to any *approved person* by a private treaty. In the circumstances, the provisions of Article 18 (1) (*a*) of the Constitution of Sri Lanka relating to equality of all persons before the law and their rights to equal protection of the law could not be invoked by the petitioner.

Held further, that when an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts ; the petitioner must act with *uberrima fides.*

APPLICATION for a Writ of *Mandamus.*

M. Tiruchelvam, with *Mark Fernando, S. K. Sangakkara* and *Ranil Wickremasinghe,* for the petitioner.

H. W. Jayewardene, with *A. K. Premadasa* and *J. C. Ratwatte,* for the 1st respondent.

S. S. Wijeratne, for the 2nd respondent.

E. D. Wikramanayake, Senior State Counsel, with *N. Sinnetamby,* State Counsel, as *Amicus Curiae.*

Cur. adv. vult.

January 26, 1973. PATHIRANA, J.—

The 1st respondent is the Special Commissioner appointed by virtue of an order made by the Hon'ble Minister of Public Administration, Local Government and Home Affairs dated 1.1.1972 to administer the affairs of the Town of Chilaw and to exercise the powers and perform the duties of the Chilaw Urban Council.

The Urban Council had under Section 136 of the Urban Councils Ordinance established a public market known as the "Chilaw Fish Market".

Parts 1 to 19 of the Standard by-laws framed by the Minister of Local Government were in force in that area from 28.3.1971. Acting in pursuance of by-law 5 of part 15 of the Standard by-laws (vide Local Authorities (Standard by-laws) Act (Chapter 261), the 1st respondent decided to lease the right of collecting rents and fees from the said Chilaw Fish Market for the year 1973 by calling for tenders by Notice dated 20.10.1972, marked "S". The Petitioner on 25.11.1972 duly tendered in response to the said Tender Notice. He stipulated the sum of Rs. 150,199 as the price which he was willing to pay for the said lease. When the tenders were opened by the Tender-Board of which the 1st respondent was a member, the Petitioner was the highest tenderer. The 3rd highest tenderer was the 2nd respondent, the Chilaw Fishermen Co-operative Society Limited, whose tender was for the sum of Rs. 105,000.

The Petitioner stated that having decided to lease the aforesaid right of collecting rents and fees from the Chilaw Fish Market, the 1st respondent was taking steps to substitute the 2nd respondent in place of the Petitioner as the lessee of the said Fish Market for the sum of Rs. 150.199 which was the

amount tendered by the Petitioner. The Petitioner, therefore, made this application for a Writ of *Mandamus* ordering and directing the 1st respondent to issue a lease to the Petitioner for the right of collecting rents and fees from the Chilaw Fish Market for the year 1973. His grounds were, firstly, that the 1st respondent was acting in excess or abuse of his powers and was motivated by political and other extraneous reasons in depriving the Petitioner of his legal right to the said lease, and thereby acting in violation of the Petitioner's rights. Secondly, that the 1st respondent was under a public and statutory duty to issue the lease of the right of collecting the rents and fees from the said Fish Market for the year 1973, and that the 1st respondent was attempting to act in violation of the said duty.

The 1st respondent's affidavit stated that in terms of the tender Notice calling for tenders it was expressely stated that he reserved to himself the right to accept or reject any one or all the tenders, and he had therefore a right to exercise his discretion in the best interest of the rate-payers and in doing so he was not bound to accept the Petitioner's tender. He was satisfied that the 2nd respondent, the Co-operative Society, was the most suitable of all tenders, and accordingly having inquired from it if it was prepared to accept at the highest tendered figure, namely, Rs. 150,199, with the approval of the Commissioner of Local Government, after the Petitioner made this application to this Court, he decided to accept the 2nd respondent as the lessee for the year 1973. He, therefore, rejected the Petitioner's tender. The 1st respondent further stated in his affidavit that no steps were taken to substitute the 2nd respondent in place of the Petitioner as the lessee for the year 1973 as the Petitioner was never the lessee and could not be considered as such until the tender was accepted and he entered into a lease.

After hearing Mr. Tiruchelvam, for the Petitioner, we dismissed the application with taxed costs payable to the 1st and 2nd respondents. I shall now give the reasons.

The Petitioner was fully aware when he tendered, that he did so in terms of the Tender Notice 'B' which expressly stated that the 1st respondent reserved to himself the right to accept or reject any one or all the tenders. He is, therefore, not entitled now to complain that the 1st respondent was not entitled to reject his tender.

Although the Petitioner states that the 1st respondent is under a public and statutory duty to issue the lease to the Petitioner, nowhere in his petition and affidavit does he state the nature or content of this public and statutory duty. I have examined the

relevant by-law. Under by-law 5 of part 15 of the Standard by-laws which relates to public markets a Council may lease the right to collect such rents and fees to any *approved person*—

(*a*) by private treaty ;

(*b*) by calling for tenders ; or

(*c*) by putting up the right to public auction.

The powers of the Council in this case have admittedly been vested in the 1st defendant. The 1st respondent in terms of by-law 5 had called for tenders. But there is nothing in this by-law which states that he is bound to give the lease to the highest tenderer. This is quite sensible because it is not always the highest tenderer who is usually the most suitable person to undertake the venture. The only duty cast upon the Commissioner under this by-law is that he can only lease the right to collect the rents and fees :—

(*a*) by private treaty ;

(*b*) by calling for tenders ; or

(*c*) by putting up the right to public auction.

The by-law further states that the lease may be given to '*any approved person*' by calling for tenders. The Petitioner was not the person who was approved although he tendered, as his tender was rejected by the 1st respondent.

In my view therefore, under by-law 5, there is no statutory or public duty imposed on the 1st respondent to accept the Petitioner's highest tender. I must also add that in making this decision to give the lease to the 2nd respondent after negotiating with the 2nd respondent whether it was prepared to accept the tender at the rate tendered by the Petitioner, who was the highest tenderer, the 1st respondent was still acting within the terms of by-law 5 which states that the lease may be given to any approved person by a private treaty. Whichever way one may look at the matter, the 1st respondent had acted correctly and legally within the terms of the by-law 5.

Mr. Tiruchelvam, possibly quite conscious of the weakness of his argument that there was a duty on the part of the 1st respondent to give the lease to the Petitioner by virtue of the fact that he was the highest tenderer next invoked the provisions of the Article 18 (1) (*a*) of the Constitution of Sri Lanka —Chapter VI—which deals with the fundamental rights and freedoms—by virtually dragging it by its forelock. He submitted that under this article all persons are equal before the law and entitled to equal protection of the law, and therefore, the 1st respondent, in accepting the tender of the 2nd respondent in

preference to that of the Petitioner was acting in violation of the Constitution. In my view, Article 18 (1) (*a*) of the Constitution of Sri Lanka does not have the remotest relevance or bearing on the decision of the 1st respondent to accept or reject the tender of the right of collecting rents and fees of the Chilaw Fish Market provision for which is made under by-law 5 of the Standard by-laws which are in force in the town area of Chilaw by a decision made under Section 3 of the Local Authorities (Standard by-laws) Act (Chapter 261), and adopted by resolution duly published in the Government Gazette.

I must at this stage observe that had the Petitioner made a full disclosure of all material facts in the Petition and affidavit and apprised the Court thereof, this Court may not have issued notice in the first instance.

Firstly, although in the Petition and affidavit, the Petitioner had referred to the Notice marked "B" calling for tenders, a copy of which was pleaded as part and parcel of the Petition, he had not brought to the notice of Court both in the Petition and affidavit in express language that according to the terms of the tender Notice the 1st respondent reserved to himself the right to accept or reject any one or all the tenders. Secondly, the Petitioner stated that the 1st respondent was attempting to substitute the 2nd respondent, in place of the Petitioner as the lessee of the said Chilaw Fish Market, and issue a lease to the 2nd respondent. As was stated in the affidavit of the 1st respondent, the Petitioner was never the lessee for the year 1973 and could not be considered as such until his tender was accepted, and he entered into a lease. Thirdly, according to by-law 5 the 1st respondent can lease the right of collecting rents and fees to any "approved person" by calling for tenders. This important qualification that only any person whose tender was approved by the 1st respondent was entitled to a lease was not stated in the Petition and affidavit. Fourthly, the Petition and affidavit do not state the nature of the public or statutory duty which the 1st respondent was obliged to discharge. I do not go to the extent of saying that the Petitioner had deliberately misled or deceived this Court, but I must certainly say that it would have been very helpful if a full and fair disclosure of all the material facts were placed before the Court when the application was first made and notice was asked for in the first instance.

The necessity of a full and fair disclosure of all the material facts to be placed before the Court when an application for a writ or injunction is made and the process of the Court is invoked is laid down in the case of *The King v. The General Commissioners for the Purpose of the Income Tax Acts for the*

District of Kensington—Ex-parte Princess Edmond de Poignac —(1917)[1] Kings Bench Division 486. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination. Lord Cozens-Hardy M. R., after stating that the authorities in the books are so strong and so numerous quoted the high authority of Lord Langdale and Rolfe B. in the case of *Dalglish v. Jarvie*—2 Mac. & G. 231, 238, the head note of which states :—

> "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction ; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

He then quoted the observations made in the course of the argument by Lord Langdale :—

> "It is quite clear that every fact must be stated or, even if there is evidence enough to sustain the injunction, it will be dissolved."

Lord Cozens-Hardy M. R., commenting on this stated —

> "That is to say, he would not decide upon the merits, but said that if an applicant does not act with *uberrima fides* and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application".

Rolfe B., added :—

> "I have nothing to add to what Lord Langdale has said upon the general merits of the case ; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurance, matters which are said to require the utmost degree of good faith, '*uberrima fides.*'

[1] *(1917) 1 K. B. 486.*

> In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of facts are so .....
> So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant."

Lord Cozens-Hardy M. R., adds this comment :—

> "That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an *ex-parte* application *uberrima fides* is required and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say, "We will not listen to your application because of what you have done."

Extending this principle to a writ of prohibition, Lord Cozens-Hardy M. R., goes on to observe :—

> "Then it is said that the rule may be true in cases of injunction where there is an immediate order granted, which order can be discharged, but that it has no reference at all to a case like a rule *nisi* for a writ of prohibition, which is nothing more than a notice to the other side that they may attend and explain the matters to the Court. To so hold would, I think, be to narrow the general rule, which is certainly not limited to cases where an injunction has been granted. It has been applied by this Court, and certainly by the Courts below, to an application for leave to serve a writ out of the jurisdiction. If you make a statement which is false or conceal something which is relevant from the Court, the Court will discharge the order and say "You can come again if you like, but we will discharge this order, and we will apply the general rule of the Court to applications like this." There are many cases in which the same principle would apply. Then it is said "That is so unfair ; you are depriving us of our right to a prohibition on the ground of concealment or misstatement in the affidavit." The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the Court."

Carrington L. J., in the same case stated his view on the matter thus :—

> "Now the rule *nisi* or the order which was discharged is an essential preliminary to the issue of the writ of prohibition. If there is a defect in that essential preliminary step such as that it ought to be treated as if it had not been taken, then the writ of prohibition cannot be granted, because the essential preliminary to its issue does not exist..... ..... It is perfectly well settled that a person who makes an *ex-parte* application to the Court—that is to say, in the absence of the person who will be affected by that which the Court is asked to do—is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

Scrutton L. J., who was also associated on the same Bench cited the words of Wigram V. C. in the case of *Castelli v. Cook*— (1849) 7 Hare, 89, 94 :—

> "A plaintiff applying *ex-parte* comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

Scrutton L. J., next cited the Judgment of Kay J., in the case of *Republic of Peru v. Dreyfus Brothers & Co.,* 55 L. T., 802,803 :

> "I have always maintained, and I think it most important to maintain most strictly, the rule that, in *ex-parte* applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when *ex-parte* applications are made."

He also cited a similar statement made by Farwell L. J. in the case of *The Hagen* :—

> "Inasmuch as the application is made *ex-parte* full and fair disclosure is necessary, as in all *ex-parte* applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application."

Scrutton L. J., was however, inclined to take the view that where the excess of jurisdiction was patent on the face of the record, this principle will not apply, on the ground that a public excess of jurisdiction might grow into a precedent if not checked. For this reason he distinguished the case of patent excess from the cases which can only be found by going into the evidence.

In this application, the Petitioner had not only obtained notice, but had succeeded in staying further action in the matter until the final disposal of the application. Had not Mr. Jayewardene, who appeared for the 1st respondent, impressed upon this Court the extreme urgency of this matter to be taken up and disposed of on the 23rd of December, 1972, the men, women and children of the town of Chilaw and its outskirts would have found themselves without fish, and as the connected application No. 780/72 deals with the Chilaw Vegetable Market, without vegetables when the New Year 1973 dawned.

The application before us was one in which the principles set out in the case of *Rex v. Kensington Income Tax Commissioners*, could have been followed and the application dismissed *in limine*.

We, however, dealt with this matter on its merits and dismissed the application with taxed costs payable to the 1st and 2nd respondents.

RAJARATNAM, J.—

I agree.

Learned Counsel for the petitioner submits that the 1st respondent is under a public and statutory duty to issue the lease to the petitioner.

He has referred us to the relevant by-laws and far from satisfying us that a Writ of this nature lies in the totality of the by-laws and regulations, he almost conceded that he cannot maintain this application without referring us to s. 18 of the Constitution Act. He submitted that he strongly relies on s. 18 (1) (*a*) of the Constitution Act which states that "all persons are equal before the law and are entitled to equal

protection of the law ". In my view this is not relevant to the issue before us ; if it is, it is only after the petitioner establishes that he has acquired a right to be protected. This section cannot mean that every person who is the highest tenderer for a lease must of right by virtue of s. 18 (1) (*a*) of the Constitution Act be given the lease. The grant of a lease according to the by-laws is left to the discretion of the Special Commissioner to any approved person by private treaty or by calling for tenders and in this case the Commissioner has acted with a commendable sense of responsibility in approving as lessee the 2nd respondent, a Co-operative Society, which had the lease of the fish market for the previous year. The 2nd respondent is a Co-operative Society and the 1st respondent has acted in the highest interest of the Local Authority and the citizens by granting the lease to the Chilaw Multipurpose Co-operative Society at the highest bid. This was a step he could have taken and it goes to his credit and he has acted also in the highest interest of the public perhaps unconsciously or consciously in conformity with the principles of the State Policy as laid down in s. 16 (2) (*e*) of the Constitution Act—" the development of co-operative property in the distribution and exchange as a means of ending exploitation of man by man ".

I fail to understand how the petitioner if he had no right to the lease under the by-laws and regulations could by reason of s. 18 (1) (a) claim a right which he never had under the by-laws and regulations of the Urban Council.

If the petitioner acquired a legal right and the 1st respondent had a legal duty to grant the lease to the petitioner then a Writ of Mandamus was available in any case before and after the Constitution Act of Sri Lanka. Section 18 (1) (*a*) enshrines in our Constitution the concept and guarantee of the equality of all persons before the law and their rights to equal protection of the law. This provision in the Constitution cannot be stretched to persuade us to force the grant of a right of lease to the petitioner, when he has no such right to a lease under any laws of the country nor does this provision nullify the right of the special Commissioner to grant the lease to a person he approves when he had a right to grant the lease even by private treaty. At the worst the petitioner has suffered the fate of every unsuccessful tenderer, although he made the highest bid. But the fact of making the highest bid does not in law entitle by that reason alone a person to a lease nor does it take away the discretion of the Commissioner to grant the lease to whomsoever he approves.

In this case, even the terms of the tender notice held out no guarantee that the highest will be the successful tenderer.

The 1st respondent has in my view shown no *mala fides* in selecting the 2nd respondent as a lessee. The two circumstances that the 2nd respondent was a co-operative Society and also the previous lessee are sufficient to counter any allegation of *mala fides* whatsoever.

I find it impossible to be convinced that where the petitioner who had no right to the lease, on the bare fact that he had made the highest tender obtained that right under s. 18 (1) (a) of the Constitution Act. This provision does not protect non-existent rights—to put it briefly and bluntly.

Learned Counsel for the petitioner has totally failed to relate the equal protection of the law as guaranteed by the Constitution to the right of the lease which he demands. I was unable to understand during the whole course of his argument how he can avail himself of this constitutional guarantee when he has failed to establish his right to the lease. The Constitutional guarantee has by no means changed the laws to give a right to every highest tenderer to have his tender accepted.

With regard to the other matters in my brother's judgment while agreeing with the principles he has enunciated, I repeat what he has stated " I do not go to the extent of saying that the petitioner has deliberately misled or deceived this Court ".

Application dismissed.