

1952

Present : Pulle J.

THABREW, Petitioner, and S. B. YATAWARA (Acting Registrar,
Co-operative Societies), Respondent

S. C. 649—Application for a Writ of Certiorari

Co-operative Societies (Amendment) Act, No. 21 of 1949—Section 50A —An officer's liability to repay money—His right to oral hearing.

By the last part of sub-section 1 of section 50A of the Co-operative Societies (Amendment) Act: "Before making any such order against any person, the Registrar shall give that person an opportunity of being heard and of showing cause why such order should not be made."

Held, that the person against whom the order is made is entitled to an oral hearing. Where the Registrar fails to grant such oral hearing, he acts in excess of his jurisdiction and becomes liable to a writ of *certiorari*.

APPPLICATION for a writ of *certiorari*.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundere, Q.C.*, and *H. W. Jayewardene*, for the petitioner.

D. Jansze, Crown Counsel, for the 1st respondent.

E. R. S. R. Coomaraswamy, for the 2nd respondent.

Cur. adv. vult.

July 17, 1952. PULLE J.—

The petitioner who was during the period 3rd April, 1948, to 7th August, 1951, the President of a Co-operative Society called the Alut-gama Korales Co-operative Stores Union, Ltd., asks for a writ of *certiorari* to quash an order dated the 7th December, 1951, made under section 50A of the Co-operative Societies (Amendment) Act, No. 21 of 1949. This order requires the petitioner to pay to the Society referred to above the sum of Rs. 25,740·88 with interest. The grounds urged by the petitioner are that he was not given an opportunity of being heard before the order was made and that the circumstances in which it was made amounted to a violation of natural justice.

The arguments adduced on behalf of the petitioner centre round the provisions of section 50A which came into operation with the amending Act of 1949. Under sub-section 1 of section 50A the Registrar of Co-operative Societies is empowered to examine into the conduct of any present or past officer of a society and to make order requiring him to repay such sum of money as it appears to be due from such officer to the Society. There is apparently no limit to the sum which an officer may be ordered to repay. The last part of the sub-section provides,

"Before making any such order against any person, the Registrar shall give that person an opportunity of being heard and of showing cause why such order should not be made."

Upon an order being made it is competent for the society under the provisions of sub-section 2 to have the amount recovered as though it were a fine imposed by a sentence of a Magistrate. Failure to pay or produce the money alleged to be due after an audit under section 17 or after an inquiry under section 35 exposes the officer to a prosecution for criminal breach of trust in the same way as a public servant who commits a breach of section 392A of the Penal Code—*vide* section 50B.

It is, therefore, manifest that having regard to the drastic consequences of an order made under section 50A the procedural steps leading to the making of the order must be strictly complied with.

The history of this case commences with a notice dated 31st January, 1951, under the hand of the Registrar, Co-operative Societies, addressed to the petitioner informing him that according to the books of accounts of the Society a sum of Rs. 25,740·88 was due from him to the Society. The petitioner was required to shew cause, if any, why an order should not be made under section 50A for the payment of the said sum. A protracted correspondence then ensued between the petitioner and the Registrar of the Co-operative Societies which terminated in the order dated 7th December, 1951, made under section 50A which required the petitioner to pay on or before the 15th January, 1952, the sum of Rs. 25,740·88.

From the outset the petitioner requested the Registrar to state the grounds on which he sought to be made liable. If the position taken up was that the petitioner had from time to time dishonestly converted to his use monies which came into his hands, it ought to have been comparatively easy to prepare a statement of the various sums aggregating to Rs. 25,740·88 showing against each sum the date on which it reached the hands of the petitioner. On the 26th April, 1951, the Registrar sent to the petitioner the balance sheet of the Society according to which there was a shortage of cash amounting to Rs. 30,212·30. It is obvious that this single item in the balance sheet could not assist the petitioner in the slightest degree to formulate a defence to the order which was proposed to be made against him. Undoubtedly there were offers to the petitioner that facilities would be provided for an examination of the accounts, but they were almost valueless, as he was informed that at the examination he could not have the assistance of even an accountant. Up to July, 1951, the Registrar could not formulate anything more definite than that, "according to the information available" the petitioner was "responsible for certain monies". In the same month the petitioner's Proctor wrote to the Registrar, "Further to the correspondence on the above subject and my client's interview with your Additional Assistant Registrar on 12.7.51 at Ruanwella Resthouse, I am instructed to state that the basis of your claim against my client remains as obscure as before". The obscurity persisted, in spite of further correspondence, and was partially lifted when by his letter of the 6th November, 1951, the Registrar informed the petitioner that the amount claimed was the difference between the cash received by him and the amount counted for by him. It ended with the words, "If you have anything further to state you will have to do so by the

15th instant the date given in my last letter". To this a prompt reply was sent in which the petitioner stated that he had cause to show against the proposed order and asked for "an opportunity of being heard in terms of section 50A". The Registrar did not reply but proceeded to make the order the validity of which is now attacked.

In my opinion when the petitioner made the request to be heard he was entitled to a hearing before the order was made against him. The section makes it clear that it is not sufficient that the officer of a Society is given an opportunity of showing cause. In the context under discussion "hearing", in my opinion, must be an oral hearing by the Registrar. The officer may waive his right or he may not avail himself of the opportunity, in which event he could not be heard to complain that he was not heard but, if he insists on a hearing, it must be granted. The view I have taken is supported by the judgment of Cozens-Hardy, M.R., in *James v. Institute of Chartered Accountants*¹ where the words "the member having first had an opportunity of being heard" had to be interpreted. The Master of Rolls said, "Those words undoubtedly mean this—that if the member is, as I see some members are, at Johannesburg, a meeting dealing with the contemplated exclusion of the member must be held at such a date as would give the member a reasonable opportunity of being present there after the receipt of the notice by him". In the case of *The King v. Tribunal of Appeal under the Housing Act, 1919*,² the words that fell to be construed were contained in a rule of procedure made by the Minister of Health under the Housing (Additional Powers) Act, 1919. That rule reads as follows:

"If, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may have been furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily."

"Subject as aforesaid the Appeal Tribunal shall fix a date for the hearing of the appeal."

The Court held that the meaning of the rule was that the Tribunal of Appeal might dispense with an oral hearing, not that they might dispense with a hearing of any kind.

In holding that the petitioner was under section 50A entitled to an oral hearing I do not feel that I am placing a strained construction on the section. The failure of the Registrar to grant a hearing vitiated the order he made. It was in excess of his jurisdiction. The rule nisi for *certiorari* is made absolute with costs.

Rule made absolute.

¹ (1908) 98 *Law Times Reports* 225.

² (1920) 3 *K. B.* 334.