

1949 Present : Wijeyewardene C.J., Windham J. and Gratiaen J.

DE MEL, Petitioner, and M. W. H. DE SILVA, Respondent

S. C. 564—IN THE MATTER OF AN APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF PROHIBITION UNDER SECTION 42 OF THE COURTS ORDINANCE

*Writ of Prohibition—Appointment of Bribery Commissioner—Authority to determine legal rights of citizens—Duty to act judicially—Writ lies when Commissioner acts in excess of jurisdiction—Commissions of Inquiry Act, No. 17 of 1948, section 2—Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, section 5.*

A Writ of Prohibition may, in appropriate circumstances, issue against a person having authority to determine a question affecting the legal rights of a citizen and having the duty to act judicially.

**T**HIS was a question reserved by Gratiaen J. for the decision of a Divisional Bench in the following terms :—

“ One of the preliminary questions arising for consideration in this matter is of such importance as to require, in my opinion, an authoritative decision of the Supreme Court before I proceed to deal with the application on its merits.

“ The petitioner is a member of the Municipal Council of Colombo and was elected to the office of Mayor for the years 1945, 1947, 1948 and 1949. On 24th May, 1949, the Governor-General of Ceylon, acting under the authority of the powers vested in him by the Commissions of Inquiry Act, No. 17 of 1948, appointed the respondent, Mr. M. W. H. de Silva, K.C., to be a Commissioner for the purpose of inquiring into and reporting to His Excellency on certain specified questions connected with the alleged prevalence of bribery and corruption among the members of the Colombo Municipal Council. The respondent was authorised and empowered by the terms of his appointment ‘ to hold all such inquiries and make all such investigations as might appear to him to be necessary for the purpose’. He was also required to transmit his report to the Governor-General ‘ as early as possible’.

“ As far as I can judge, the Governor-General's power to appoint the respondent a Commissioner for the purposes which I have indicated is derived from the Act of 1948; on the other hand, the respondent's duty to investigate and to report on the matters submitted to him is not imposed on him by any Act of Parliament. It directly emanates from and is regulated by the terms of his particular appointment as Commissioner, although the Act does clothe him with certain powers to assist him in the performance of his duty. Learned Counsel for the petitioner concedes, I think, that if matters had stood in this way the functions with which the respondent was charged could not properly have been described as judicial or quasi-judicial functions over which this Court could exercise any controlling jurisdiction. Whatever other remedy may or may not have been available to a person who claims to be dissatisfied with the procedure adopted by the respondent in executing his commission, an application for a writ in the nature of *prohibition*

or *certiorari* would not have been appropriate for the purpose of challenging that procedure.

“ Learned Counsel submits, however, that although this is the legal position in cases where a person normally acts as a Commissioner appointed by the Governor-General, supervening legislation which has come into operation since the date of the respondent's appointment has altered the scope of his status and functions. Before the respondent entered upon his investigation of the matters on which he was required to submit his report to the Governor-General, Parliament passed the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949. Section 5 of the Act provides as follows :—

5. (1) Where the Commissioner finds at the inquiry and reports to the Governor-General—

- (a) that any Councillor did, at any time after December 2, 1943, corruptly solicit or receive or agree to receive, for himself or for any other person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council ; or
- (b) that any Councillor did, at any time after December 2, 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of that other Councillor, or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council,

the Governor-General shall cause the finding to be published as soon as may be in the *Gazette*, and the Councillor against whom the finding was made—

- (i) shall, for a period of five years reckoned from the date of the publication of the finding in the *Gazette*, be disqualified from being registered as a voter or from voting at any election of members of any public body or from being elected, or from sitting or voting, as a member of any public body ; and
- (ii) shall, if he is a member of the Council at the date of the publication of the finding in the *Gazette*, vacate his seat as such member with effect from that date.

(2) Where any member of the Council, by reason of the operation of the preceding provisions of this section, vacates his seat as such member the provisions of the Municipal Councils Ordinance, No. 29 of 1947, read with the Local Authorities Elections Ordinance, No. 53 of 1946, shall apply for the purpose of filling the vacancy so occurring in like manner as those provisions would have applied if such member had resigned his seat.

(3) Every finding of the Commissioner referred to in, and published as required by, the preceding provisions of this section shall have effect as therein provided, notwithstanding anything in any other law, and shall not be called in question in any Court.

Here again one finds that the Act of 1949 does not directly vest the respondent with additional statutory powers; the Legislature has however thought fit, in its wisdom, to declare that any Municipal Councillor found by the respondent to have committed a corrupt act as specified in section 5 shall automatically be deprived of certain civic rights as soon as the relevant findings in the respondent's report have been caused by the Governor-General to be published in the *Government Gazette*. Indeed, the Act seems to give the Governor-General no discretion to decide whether or not such findings shall be made public.

"It is argued for the petitioner that by reason of this subsequent legislation the respondent's functions, in so far as they are directed towards the investigation of the question whether any particular Municipal Councillor has acted corruptly in a manner contemplated by section 5 of the Act of 1949, have in truth become judicial or quasi-judicial functions in view of the statutory consequences which would inevitably arise from the publication of a finding adverse to the Councillor concerned. Learned Counsel contends that in this state of things the respondent has 'legal authority'—directly or indirectly—'to determine questions affecting the rights of subjects' (*per* Atkin L.J. in *R. v. Electricity Commissioners*<sup>1</sup>), and that a writ of *certiorari* or a writ of prohibition may therefore issue from this Court should it be established that the respondent has either exceeded his so-called 'jurisdiction' or, in exercising that 'jurisdiction', violated in some way the fundamental principles of natural justice.

"In the present case the respondent has given the petitioner formal notice of his intention to hold an inquiry in public on 6th December, 1949, into twenty-seven separate allegations to the effect that the petitioner, being a Member of the Colombo Municipal Council, had on various dates corruptly given gifts of money, amounting in the aggregate to over Rs. 60,000, to other Councillors for the purpose of inducing them to exercise their respective votes in his favour at Mayoral Elections. The petitioner complains that for certain reasons deposed to in his affidavit 'it would be contrary to all principles of natural justice for the respondent to sit in judgment over him and the respondent has divested himself of jurisdiction to inquire into the allegations against the petitioner'. In other words, as learned Counsel summarised his client's contention, the inquiry proposed to be held on 6th December would be 'a mock trial with the verdict pre-determined'. In these circumstances the petitioner asks this Court to issue a mandate in the nature of a writ of prohibition prohibiting the respondent from inquiring into the allegations against the petitioner.

"The general principle involved with regard to the jurisdiction of this Court in a matter of this nature is one of public importance and I consider it desirable that the question should be decided by a fuller Bench. I accordingly make order under section 48 of the Courts Ordinance referring the following question for the decision of a Bench of three judges:—

Whether, having regard to the provisions of the Commissions of Inquiry Act, No. 17 of 1948, the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, or any other

<sup>1</sup>(1924) 1 K. B. 171.

relevant legislation, it is competent for the Supreme Court to issue a mandate in the nature of a writ of prohibition to prohibit a Commissioner appointed by the Governor-General from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section 5 (1) of the Act of 1949.

"For the purpose of deciding on the number of Judges to whom this question should be referred, I have thought it my duty to consult my Lord the Chief Justice, and this part of my order has been made with his concurrence.

"If the answer to this general question which I have formulated be answered in the negative, the petitioner's application will stand refused. If the answer be in the affirmative, I shall proceed to consider the application on its merits for the purpose of deciding whether or not a *rele nisi* should issue from this Court as prayed for by the petitioner.

"Let a copy of this order be forwarded to the Attorney-General with a request that he be good enough to arrange for an officer of his Department to assist the Court as *amicus curiae* when the question referred by me to a Bench of three judges comes up for consideration."

*H. V. Perera, K.C., with S. Nadesan, D. S. Jayawickrama, C. S. Barr-Kumarakulasinghe and K. C. Nadarajah*, for petitioner.—The respondent was appointed a Commissioner under the provisions of the Commissions of Inquiry Act, No. 17 of 1948, which repealed the Commissions of Inquiry Ordinance (Cap. 276). The power given to the Governor-General includes power to choose persons who are to form the Commission, and is subject to limitation as to the selection of the matter regarding which an inquiry is desired. The function to be performed by the Commission is also laid down in the Act, viz., to inquire into and report on such matter. That is to say, the Commission has legal authority to inquire and report. Section 7 sets out the powers of the Commission. These powers, it is submitted, are the powers which judicial bodies normally have. The Act does not, it is true, provide that the report of the Commissioner is to have any legal consequences. To that extent, the Commission is a fact-finding one. But a fact-finding Commission would be a judicial body if some other person is empowered to act on its findings. The Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, came into operation on August 5, 1949, after the issue of the Commission to respondent. Effect was given by this Act to the Commissioner's finding which is not subject to judicial review—section 5. There is no way of avoiding the consequences of a finding. The respondent therefore is a person having legal authority to determine questions affecting the rights of persons and having the duty to act judicially (*The King v. Electricity Commissioners (supra)*). *Certiorari* would therefore lie to quash proceedings held by him. For principles regarding *certiorari* see *Dankotuwa Estates Co., Ltd., v. Tea Controller*<sup>1</sup>. Where *certiorari* lies to quash proceedings, prohibition is available to prevent from holding proceedings. Where a decision is sufficiently near a judicial decision, it may be the subject of a writ of *certiorari*. *King v. Hendon Rural District Council*<sup>2</sup>. Courts should not be chary of exercising the power of prohibition. *Reg. v. Local Government Board*<sup>3</sup>. See also *Estate and Trust Agencies (1927)*,

<sup>1</sup> (1941) 42 N. L. R. 197, 205.

<sup>2</sup> (1933) 2 K. B. 696.

<sup>3</sup> (1882) 10 Q. B. D. 309 at 321.

*Ltd. v. Singapore Improvement Trust*<sup>1</sup>. The Commissioner is a statutory tribunal. *Barrat v. Kearns*<sup>2</sup>.

*A. E. P. Rose, K.C., Attorney-General, with T. S. Fernando, Crown Counsel, and M. Tiruchelvam, Crown Counsel, as amicus curiae.*—A writ of prohibition does not lie in this case. The writ is a very special remedy, and issued, at first, to Courts if they exceeded their jurisdiction. Later it was extended to tribunals, when the forms of justice were not observed. Courts are anxious to limit the class of cases in which they will intervene by prohibition. They will so intervene only if the tribunal has a jurisdiction given by Act of Parliament. Jurisdiction must be distinguished from authority. Jurisdiction connotes duties judicial, authority connotes administrative duties. Bribery Commission has no jurisdiction, because it was not created by Act of Parliament. The Commission is purely fact-finding. See *re The Grosvenor and West End Railway Terminus Hotel Co., Ltd.*<sup>3</sup> and *Shell Company of Australia, Ltd. v. Federal Commissioner of Taxation*.<sup>4</sup>

*Cur. adv. vult.*

December 8, 1949. WIJEWARDENE C.J.—

On May 24, 1949, His Excellency the Governor-General acting in pursuance of the provisions of section 2 of the Commissions of Inquiry Act, No. 17 of 1948, appointed a Commissioner to inquire into and report on the questions—

- (a) whether any member of the Colombo Municipal Council did at any time after December 2, 1943, corruptly solicit or receive or agree to receive, for himself or for another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council,
- (b) whether any member of the Colombo Municipal Council did at any time after December 2, 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of such other Councillor or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council.

Shortly after the appointment of the Commissioner but before the commencement of the inquiry the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, came into operation on August 5, 1949.

The petitioner is a member of the Colombo Municipal Council and was elected Mayor for 1945, 1947, 1948, and 1949. The respondent gave the petitioner formal notice on November 8, 1949, stating that he would hold an inquiry in public on December 6, 1949, into certain allegations that the petitioner had on various dates after December 2, 1943, corruptly given gifts of money to other members of the Colombo Municipal Council for the purpose of inducing them to exercise their respective votes in his favour at the Mayoral elections. That notice set out in

<sup>1</sup> (1937) 3 A. E. R. 324.

<sup>2</sup> L. T. R. Vol. 76, 337.

<sup>3</sup> (1905) 1 K. B. 504.

<sup>4</sup> (1931) A. C. 275.

detail the various charges against the petitioner, gave the names of the witnesses summoned to prove the charges and specified the documents relied upon to support those charges.

The petitioner moved this Court on November 19, 1949, for the issue of a mandate in the nature of a writ of prohibition prohibiting the respondent from inquiring into the allegations referred to in that notice. When the matter came up for hearing before my brother Gratiaen the following question was reserved by him for the decision of a Divisional Bench :—

“ Whether, having regard to the provisions of the Commissions of Inquiry Act, No. 17 of 1948, the Colombo Municipal Bribery Commission (Special Provisions) Act, No. 32 of 1949, or any other relevant legislation, it is competent for the Supreme Court to issue a mandate in the nature of a Writ of Prohibition to prohibit a Commissioner appointed by the Governor-General from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section 5 (1) of the Act of 1949 ”.

For the purpose of deciding this question it is desirable to set out in some detail the provisions of the two Acts mentioned above.

By the Commissions of Inquiry Act, No. 17 of 1948, the Governor-General is empowered, whenever it appears necessary to him, to issue a warrant appointing a Commission of Inquiry consisting of one or more members to inquire into and report upon “ any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare ” [section 2 (1) (c)]. A Commissioner so appointed is deemed to be a public servant and every inquiry before him is deemed to be a judicial proceeding within the meaning of the Penal Code (section 8). The Commissioner has *inter alia* the power—

- (a) to summon any person to give evidence or to produce documents ;
- (b) to examine witnesses on oath or affirmation ;
- (c) to decide whether the public should be excluded from the whole or any part of the inquiry ; and
- (d) to make certain recommendations as to the costs of any person implicated or concerned in the matter under inquiry (section 7).

Any person failing without good reason to give evidence or produce a document as required by the summons is deemed to have committed an offence of contempt against or in disrespect of the authority of the Commissioner (section 11). Every such offence is punishable by a Judge of the Supreme Court “ as though it were an offence of contempt committed against or in disrespect of the authority of that Court ” (section 9). Every person whose conduct is the subject of inquiry or who is concerned in the matter under inquiry has a right to be represented by a lawyer (section 14). The presumptions arising under section 80 of the Evidence Ordinance are made applicable to the record of the evidence or any part of the evidence given before the Commissioner (section 13).

The Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, gives the legal consequences of a report made

by the respondent as such Commissioner at the close of his inquiry. Section 5 of that Act enacts as follows :—

*Section 5 (1)*—Where the Commissioner finds at the inquiry and reports to the Governor-General—

- (a) that any Councillor did at any time after December 2, 1943, corruptly solicit or receive or agree to receive, for himself or for any other person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council ; or
- (b) that any Councillor did at any time after December 2, 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of that other Councillor, or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council,

the Governor-General shall cause the finding to be published as soon as may be in the *Gazette*, and the Councillor against whom the finding was made—

- (i) shall, for a period of five years reckoned from the date of the publication of the findings in the *Gazette*, be disqualified from being registered as a voter or from voting at any election of members of any public body or from being elected, or from sitting or voting, as a member of any public body ; and
- (ii) shall, if he is a member of the Council at the date of the publication of the findings in the *Gazette*, vacate his seat as such member with effect from that date.

*Section 5 (2)* . . . . .

*Section 5 (3)*—Every finding of the Commissioner referred to in, and published as required by, the preceding provisions of this section shall have effect as therein provided, notwithstanding anything in any other law, and shall not be called in question in any Court.

It will thus be seen that a Commission of Inquiry as the present Commission is one created by the Commissions of Inquiry Act, No. 17 of 1948, and the members of that Commission are appointed by the Governor-General by virtue of the powers vested in him under that Act. If that Act were not on the Statute Book the present Commission of Inquiry could not have come into existence. The respondent, as Commissioner, has to inquire into various allegations of bribery and for that purpose he has to examine witnesses on oath or affirmation and reach a decision on such evidence with regard to the allegations made against the petitioner. The petitioner is entitled to be represented by a lawyer at the inquiry. At the close of the inquiry the respondent has to report his finding to the Governor-General. It is true that the respondent is not expected to make any order in his report affecting the legal rights of the petitioner. It is, in fact, rendered unnecessary in view of section 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, which states in clear terms that the Governor-General “ shall ”

cause the finding to be published "as soon as may be" in the *Gazette*, if the finding is adverse to the petitioner, and that on such publication the petitioner should be subject to the disqualifications set out in that section. An adverse finding of the Commissioner, therefore, results necessarily in affecting the legal rights of the petitioner. For the above reasons, I am of opinion that the respondent is a person having legal authority to determine a question affecting the rights of the petitioner and having the duty to act judicially. Following the decision in *The King v. The Electricity Commissioners*<sup>1</sup> I would answer in the affirmative the question reserved for our decision.

WINDHAM J.—I agree and have nothing to add.

GRANTEN J.—I agree.

1949 Present: Wijewardene C.J. and Gunasekara J.

VADIVELU, Appellant, and INSPECTOR OF POLICE,  
BADULLA, Respondent

*S. C. 1,236—M. C. Badulla, 6,043*

*Criminal Procedure Code—Charge of housebreaking and theft—Whether triable summarily—Section 152 (3)—Penal Code, sections 440, 443, 369.*

A charge of housebreaking and theft may be tried summarily by a Magistrate under the powers conferred on him by section 152 (3) of the Criminal Procedure Code; but the Magistrate should, of course, decide whether it is "proper" for him to exercise that jurisdiction in the particular case before him.

**A**PPPEAL from a judgment of the Magistrate, Badulla.

This appeal was referred to a Bench of two Judges by Dias J.

*S. Nadesan*, for accused appellant.

*H. A. Wijemanne*, Crown Counsel, with *S. Wijesinha*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

June 16, 1949. WIJYEWARDENE C.J.—

The accused appeals from a conviction under section 443 of the Penal Code and a sentence of two months' rigorous imprisonment.

This appeal comes before a Bench of two Judges on a reference made by my brother Dias in the following terms:—

1. "I think this case should be decided by a Bench of two Judges".
2. "The question is whether a charge of house breaking and theft, namely sections 443 and 369 or under sections 440 and 369 may summarily be tried by a Magistrate under the powers conferred on him by section 152 (3) of the Criminal Procedure Code".
3. "In this case the Magistrate assumed jurisdiction before any evidence was led and the case therefore falls within the principle

<sup>1</sup>(1924) 1 K. B. 171.