1978 *Present :* **Udalagama, J., Ismail, J. and Tittawella, J.**

C. I. GUNASEKERA, Petitioner

and

W. P. L. DE MEL, COMMISSIONER OF LABOUR and TWO OTHERS, Respondents

S. C. Application 530 of 1976

Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, sections 2, 5—Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1974, regulation 38 (1)—Letter by workman to employer that he would not take action to implement certain instructions—Whether such letter a termination or vacation of employment within the meaning of regulation 38 (1)—Need for a finding that such workman failed or refused to perform such work as he may be directed—Failure by Tribunal to address its mind to relevant question—Employer held to have terminated services on disciplinary grounds—Can such finding be sustained—Mode of interpretation of regulation—Writ of Certiorari quashing order.

The petitioner was at the relevant time Manager, Motor Department, Walker Sons & Co. Ltd. (3rd respondent). It was common ground that he was a "workman" within the meaning of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, and that his was a "scheduled employment" as set out therein. In a letter to the employer dated 18th April, 1974, the petitioner stated, *inter alia*, as follows :—"It is with regret, therefore, I have to inform you that ..... I will not take action to implement these instructions." He gave as the reason that the said instructions, which pertained to the manner of disposal of motor spares, were abhorrent to his conscience and principle.

The petitioner was informed by letter dated 26th April, 1974, that he had by his conduct contravened certain emergency regulations and was deemed "to have terminated or vacated" his employment from 18th April, 1974. The petitioner accordingly ceased to be in the employment of the 3rd respondent thereafter.

The petitioner then addressed the Commissioner of Labour (1st respondent) and thereafter the 2nd respondent was directed to hold an inquiry under the said Act No. 45 of 1971. On 31st May, 1976, the 2nd respondent made order that he was satisfied that the termination of the petitioner's services was on disciplinary grounds and accordingly he recommended that the position taken up by the 3rd respondent must be upheld. This order was in the form of a recommendation and was submitted to the 1st respondent who by letter dated 21st June, 1976, informed the petitioner that his complaint was not covered by the provisions of the said Act No. 45 of 1971, as his employment had been terminated on disciplinary grounds. The petitioner applied for a Writ of Certiorari to quash this order

Although in its letter of 26th April, 1974, the 3rd respondent had referred to regulation 13 (1) of the Emergency Regulations, it was agreed that the relevant provision was regulation 38 (1) which read, *inter alia*, as follows :—

> "Where any services is declared by any order made by the President to be an essential service, any person who on or after April 1, 1974, was engaged or employed on any work in connection with that service.... *who fails or refuses*, after

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the lapse of one day from the date of such order to perform such work as he may be directed, by the employer.... he shall,

(a) be deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or the terms or conditions of any contract governing his employment; and

(b) in addition, be guilty of an offence."

Held: (1) That the evidence available at the inquiry did not disclose a failure or refusal by the petitioner to perform such work as he might have been directed to. Whilst there had been a declaration by the petitioner, no reasonable person could on the material available reach the conclusion that there has, in fact, been any failure or refusal to perform any assigned tasks.

(2) The regulation in question pertained to certain circumstances that follow when persons in the specified category "failed or refused to perform such work as may be directed". It does not deal with insubordination or with disciplinary action. The 2nd respondent who held the inquiry and made the order complained of had singularly failed to address his mind to the crucial question, namely, whether there had been a refusal to follow any direction or order, by a consideration and an analysis of the facts and circumstances in the case in the light of material placed before him by the petitioner.

(3) That accordingly a Writ of Certiorari should be issued quashing the proceedings held by the 2nd respondent and the order made by the 1st respondent.

Per TITTAWELLA, J.: "It is plain that the essence of the regulation is the *failure* or *refusal* to perform such work as may be directed. There must first be a direction followed by a failure or refusal. On any analysis of the elements of the regulation bearing in mind that it was one made under the Public Security Ordinance for an emergency situation in respect of a service declared to be an essential service (it being agreed that the petitioner falls into this category) carrying with it heavy penalties, it is unthinkable that a mere declaration of a refusal to perform work in the future was ever intended to be brought within its ambit. The words of the regulation construed in the spirit of it do not lend themselves to such a wide interpretation. There must in fact be a failure or refusal with respect to any work that has been directed to be performed. It is a well accepted rule of construction that where a section imposes a penalty—and such is the case in the present case—if there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the lenient one. A Court will not hold that a penalty has been incurred unless the language of the section which is said to impose it is so clear that the case must necessarily be within it. (*Tuck & Sons v. Priester*, 19, Q.B.D. 629 at 638 and at 645), (*Dyke v. Elliott*, Appeal Cases 1871-73, 4 P. C. 184 at 191)."

Cases referred to:

Wijerama v. Paul, (1973) 76, *N.L.R. 241.*

Tuck & Sons v. Priester, (1887) 19 *Q.B.D. 629; 3 T.L.R. 326. C.A; 56 L.J. Q.B. 553; 36 W.R. 93.*

Dyke v, Elliott, The Gauntlet, (1872) *L. R. 4 P.C. 184; 26 L.T. 45; 20 W.R. 497.*

R. v. Electricity Commissioners, (1924) *1 K.B. 171.*

Virakesari Ltd. v. P. O. Fernando & Others, (1963) *66 N.L.R. 145.*

APPLICATION for Writs of Certiorari, Procedendo and Mandamus.

H. W. Jayewardene, Q.C., with *H. L. de Silva* and *Miss P. Navaratnarajah*, for the petitioner.

S. W. B. Wadugodapitiya, Deputy Solicitor-General, with *S. Ratnapala*, State Counsel, for the 1st and 2nd respondents.

C. Ranganathan, Q.C., with *P. Navaratnarajah, Q.C.* and *P. Mandaleswaran*, for the 3rd respondent.

Cur. adv. vult

August 4, 1978. TITTAWELLA, J.

This is an application under section 12 of the Administration of Justice Law, No. 44 of 1973, for writs in the nature of *certiorari*, *procedendo* and *mandamus*. Almost at the outset the petitioner's Counsel restricted himself to the application for a writ of certiorari to quash the order dated 21st June, 1976, of the Commissioner of Labour, and the connected proceedings.

The petitioner at the relevant times was the Manager, Motor Department of Walker, Sons & Co. Ltd., the third respondent. He had commenced employment under this Company as an executive in 1949. In 1951 he was promoted to the Senior Executive Grade, and from 1971 held the post of Manager, Motor Department. The first respondent is the Commissioner of Labour and the second respondent, J. C. Mohan, is a Labour Officer of the Department of Labour to whom was delegated by the first respondent under section 11(2) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (hereinafter referred to as the Act) the duty of holding an inquiry.

In March 1974 Walker, Sons & Co. Ltd., had received from the Government an allocation of money for the importation of motor spares. The manner in which this allocation was to be distributed between the Motor Department, Motor Repairs Department and the Dealers had been the subject of discussion as the existing arrangements were not considered to be satisfactory. Certain decisions were made by the Management and draft instructions were accordingly prepared and embodied in a circular letter to all the departments including the Motor Department and the Motor Repairs Department. This circular letter issued under the hand of A. L. Perera, the Co-ordinating Secretary, bore the date 1st April, 1974, and it also summoned the

heads of departments including the petitioner for a conference the next day i.e., the 2nd April, 1974. This document which was marked "A" in these proceedings is reproduced below :

"A"

1st April, 1974.

Our Ref. ALP : YM.

The Manager, M.D.—Two extra copies are enclosed herewith.

The Manager, M.R.

1974 Allocation for Motor Spares

At a meeting with the Company's Agents held recently, the following decisions were made :—

(1) The recent allocation of 1.3 million for motor spares is to be apportioned in the following manner :—

(*a*) 33 1/3 per cent to dealers,

(*b*) 40 per cent to M.R. and Branches, and

(*c*) 26 2/3 per cent to M.D.

(2) *Dealers' Allocation.*—Dealers are to be requested to place orders for the spares they require and our indent to the manufacturers is to be based on this.

(3) *M.R.'s Allocations.*—M.R. is to decide on what spares are to be ordered. A circular letter is to be sent to Branches by CS/ALP requesting them to state their requirements of spares. Copies of their replies to be sent to M.R. The final form of the M.R. indent will be decided on by CS/ALP in consultation with M.D. and M.R.

(4) M.D. will order such spares as they consider they require and this list will also be submitted to CS/ALP before it is sent to the manufacturers.

These spares will be sold over the counter as at present.

The present system of registering customers is to be abandoned, except so far as they relate to Government Departments and corporations. *All sales will be on a cash basis.* Where M.R. makes a requisition for spares in excess of 40% allocation referred to above, these will be supplied on a cash basis at M.D's selling price. Such purchases by M.R. will not be taken into M.R. stock. M.D. will not in future refuse to release any spares to M.R. if spares are available.

The Agents desire to be kept informed of the progress of the indents placed and the action being taken at every stage.

A conference to discuss the manner in which these decisions are to be implemented will be held in my office at 8.30 a.m. on 2.4.74. Will the following please be present :—

MD/CIG	MD/Mr. Balasubramaniam.
MD/Mr. de Mel	MR/CS.
cc./GS/P.	Sgd. CS/ALP.

At the conference the petitioner had stated that he did not agree with the policy laid down in the letter "A" as it had far reaching implications but was always ready to take note of the Co-ordinating Secretary's instructions. The Co-ordinating Secretary had then inquired from the petitioner whether this meant that he (the petitioner) was not prepared to assist in implementing these decisions and the petitioner had stated that he had no comments to make.

On the 18th April, 1974, the petitioner despatched the following letter to Messrs. Walker, Sons & Co. Ltd., the third respondent—

"B"

REGISTERED POST

Motor Department,
Walker Sons & Co. Ltd.,
Colombo 1.
18th April, 1974.

Our Ref : MD : CIG : VJ.

Mr. B. T. B. Pulle,
Director,
George Steuart & Co. Ltd.,
Managing Agents,
Walker Sons & Co. Ltd.,
Main Street,
Colombo 1.

Dear Sir,

1974 Allocation for Motor Spares

I refer to the instructions dated 1st April, 1974, under the above heading and issued to me under the signature of Mr. A. L. Perera. It is stated therein that these instructions are decisions made by the Company's Agents and I have now had an opportunity to give the subject matter my fullest consideration. I find that, with the exception of Para. 1 Clause (*a*) which is mandatory, the instructions are abhorrent to my conscience and principles.

It is with regret, therefore, I have to inform you that as Manager, Motor Department, I will not take action to implement these instructions.

Yours faithfully,
C. I. GUNASEKERA,
Manager, Motor Department.

Copy to :
Mr. T. A. Moy,
Chairman,
George Steuart & Co. Ltd.,
Colombo 1.

Shortly thereafter the petitioner received the following letter from the third respondent—

"C"

WALKER SONS & CO. LTD

P. O. Box 166
Colombo
26th April, 1974

OUR REF : TAM : DP.
Mr. C. I. Gunasekera,
Motor Department

Dear Sir,

We have to acknowledge receipt of your letter dated 18.4.74 and have taken note of your refusal to carry out the orders given in the letter dated 1st April, 1974, sent to you by Mr. A. L. Perera, Co-ordinating Secretary.

In these circumstances, we hereby inform you that you have by your conduct contravened Regulation 13 (1) made under Section 5 of the Public Security Ordinance published in *Gazette* No. 14,949/7—1971 of 16.3.1971 read with the Order under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 2 of 1971 published in the *Gazette Extraordinary* No. 14,953/26 of 15th April, 1971, and consequently you are deemed for all purposes to have terminated or vacated your employment as from 18th April, 1974.

You will accordingly hand over all files, documents, papers, Car No. 4 Sri 3336, its switch key, other accessories to the said car and other articles of the Company's property in your possession to Mr. A. L. Perera, on receipt of this letter.

Yours faithfully,
for Walker Sons & Co. Ltd.
Sgd :
T. A. Moy
Chairman,
Managing Agents—George
Steuart & Co. Ltd.

The petitioner accordingly ceased to be in the employment of the third respondent thereafter. He sent a letter on the 29th April, 1974, protesting against the conduct of the third respondent stating *inter alia*—

> I hereby place on record that I cannot by my conduct be deemed for all purposes to have terminated or vacated my employment as stated in your letter.

On the 15th August, 1974, the petitioner addressed the Commissioner of Labour (Termination of Employment Unit) and thereafter as stated earlier the second respondent was directed by the first to hold an inquiry under the Act. This commenced on the 5th of September, 1974. There were nine dates of inquiry terminating on the 12th June, 1975. Written submissions were submitted on a number of occasions by Counsel for the petitioner as well as the Counsel for the third respondent after which the second respondent made his order on the 31st May, 1976 in the form of a recommendation to the Deputy Commissioner of Labour. The order embodied findings and reasons for the conclusion reached which was as follows :—

> I am quite satisfied that the termination of the applicant's (i.e., the petitioner's) services is on disciplinary grounds and therefore I recommend that the Company's position must be upheld.

The reasons and conclusions of the second respondent were submitted to the Acting Commissioner of Labour who in a letter dated 21st June, 1976, informed the petitioner as follows :—

Sir,

Termination of Employment

Re your letter of 15. 8. 74.

> As your employment has been terminated on disciplinary grounds the complaint is not covered by Act 45 of 1971 Termination of Employment (Special Provisions).

This is the order that is now sought to be quashed by the petitioner in these proceedings.

At the outset there was some argument before us as to what constituted the record in this matter. The following documents were before us—

(a) the petition and affidavit of the petitioner dated the 22nd July, 1976, together with the documents that accompanied them.

(b) the further affidavit of the petitioner filed on the 13th December, 1977, together with additional documents.

The respondents had filed no affidavits or other papers but the following documents had been called for by this Court and were before us :—

(c) the proceedings before the second respondent at the inquiry held under the Termination of Employment of Workmen (Special Provisions) Act together with all the documents produced by both parties.

(d) the File of the Commissioner of Labour relating to this matter.

It was agreed that all these documents were available for scrutiny by us and this would be in accordance with the view expressed by T. S. Fernando, J. in the Court of Appeal in *Wijerama v. Paul*, 76, N.L.R. 241 at 255.

The main matter that calls for examination is the statement of reasons given by the second respondent for the conclusion he reached on the 31st May, 1976, that the termination of the petitioner's services was on disciplinary grounds and therefore not covered by the provisions of the Act in view of section 2 (3) of the said Act. Section 2 (1) of the Act is in the following terms—

"2 (1) No employer shall terminate the scheduled employment of any workman without—

(*a*) the prior consent in writing of the workman, or

(*b*) the prior written approval of the Commissioner."

Section 2 (3) of the Act is as follows :—

"2 (3) For the purposes of this Act the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever otherwise than *by reason of a punishment imposed by way of disciplinary action.*"

Secion 5 of the Act states—

"Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act such termination shall be illegal, null and void and accordingly shall be of no effect whatsoever."

There has been no dispute in this case that the petitioner was a "workman" and that his was a "scheduled employment" as defined in the Act.

At the very commencement of the inquiry before the second respondent Counsel for the petitioner and the third respondent stated their respective positions. On behalf of the petitioner it was submitted that at no time did he refuse to perform any duties or carry out any orders and therefore the third respondent had no right to act in terms of Regulation 38 (1) of the Emergency Regulations. The petitioner it was submitted did no act that warranted him being brought under this Regulation. If the third respondent desired to terminate the services of the petitioner this should have been done under the Act after obtaining his consent or the prior approval of the Commissioner of Labour. This not having been done it was submitted that the termination of employment of the petitioner was null and void and of no consequence whatsoever. The position of the third respondent Company as stated by their Counsel was—

> Broadly our position is that termination as such does not arise here for the reason that Mr. Gunasekera (i.e. the petitioner) by his conduct as evinced by his letter of the 18th April, 1974, has brought himself within the Emergency Regulations and thereby consequently vacated his post.

The issues before the second respondent were therefore very clear. He had to determine whether the petitioner ceased to be in the employment of the third respondent—

(*a*) by the third respondent terminating his employment, or

(*b*) by the petitioner vacating his post by bringing himself within Regulation 38 (1) of the Emergency Regulations.

If the third respondent terminated the petitioner's employment it was only done by resorting to the Emergency Regulations. If the petitioner vacated his post as was contended for by the third respondent it was also because of the application of the Emergency Regulations. In either event a duty was cast on the second respondent to match the contents of this emergency regulation with the actions and conduct of the petitioner and determine whether he fell within the liability imposed by the said regulation.

The letter of the 26th April, 1974, by the third respondent informed the petitioner that he has terminated or vacated his employment by the contravention of "Regulation 13 (1) made under section 5 of the Public Security Ordinance published in *Gazette* No. 14,949/7—1971 of 16.3.71." Under section 2 (2) of the Public Security Ordinance a Proclamation declaring that Part II of the Ordinance shall come into operation shall be in operation only for a month and the Proclamation and the regulations made

under Part II of the Ordinance cease to have any force or validity thereafter. Accordingly on the date of this letter, i.e. the 26th April, 1974, the regulation regarding which there had been an alleged contravention had long ceased to exist and was of no value or significance. This was a deplorable lapse on the part of the third respondent Company in such a grave matter but it was agreed by all concerned that the operative regulation was Regution 38 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1974 published in *Gazette Extraordinary* No. 105/5 of the 1st April, 1974. It is as follows :—

> 38. (1) Where any service is declared by order made by the President, under regulation 2 to be an essential service, any person, who on or after April 1, 1974, was engaged or employed, on any work in connection with that service, fails or refuses, after the lapse of one day from the date of such order, to attend at his place of work or employment or such other place as may from time to time be designated by his employer, or a person acting under the authority of his employer, or who fails or refuses, after the lapse of one day from the date of such order, to perform such work as he may be directed, by his employer or a person acting under the authority of his employer to perform, he shall, notwithstanding that he has failed or refused to so attend or to so work in furtherance of a strike—
>
> (*a*) be deemed for all purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or the terms or conditions of any contract governing his employment ; and
>
> (*b*) in addition be guilty of an offence.

Regulation 45 of these regulations prescribes the punishment for the contravention of any regulation to be rigorous imprisonment for a term not less than three months and not exceeding five years in addition to a fine not exceeding five thousand rupees on conviction after trial before a Magistrate. Regulation 58 prescribes that no prosecution for an offence under the Emergency Regulations shall be instituted except by or with the written sanction of the Attorney-General.

The relevant and operative portion of regulation 38 (1) could be set down as follows :—

(*a*) Any person in an essential service who

(*b*) fails or refuses to

(*c*) perform such work as he may be directed

(*d*) shall be deemed to have terminated or vacated his employment *and* in addition

(*e*) be guilty of an offence.

it is plain that the essence of the regulation is the *failure* or *refusal* to perform such work as may be directed. There must first be a direction followed by a failure or refusal. On any analysis of the elements of the regulation bearing in mind that it was one made under the Public Security Ordinance for an emergency situation in respect of a service declared to be an essential service (it being agreed that the petitioner falls into this category) carrying with it heavy penalties, it is unthinkable that a mere declaration of a refusal to perform work in the future was ever intended to be brought within its ambit. The words of the regulation construed in the spirit of it do not lend themselves to such a wide interpretation. There must in fact be a failure or refusal with respect to any work that has been directed to be performed. It is a well accepted rule of construction that where a section imposes a penalty—and such is the case in the present one—if there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the lenient one. A Court will not hold that a penalty has been incurred unless the language of the section which is said to impose it is so clear that the case must necessarily be within it. (*Tuck & Sons v. Priester*, 19, Q.B.D. 629 at 638 and at 645) (*Dyke v. Elliott*, Appeal Cases 1871-73, 4 P.C. 184 at 191).

With these considerations in mind it becomes necessary to examine the material available to ascertain whether the petitioner's conduct falls within the ambit of this regulation. Neither at the inquiry before the Labour authorities nor at the argument in appeal was there any clear and unambiguous demonstration of the work that the petitioner either failed or refused to perform after being so directed. No prosecution of the petitioner for an offence under the Emergency Regulations was launched or possibly ever contemplated. It would be fair to state that the chances of success in such a prosecution were extremely slender.

At the inquiry before the second respondent the sole witness for the third respondent was A. L. Perera, the Co-ordinating Secretary. His evidence in chief consisted solely in referring to the affidavit sworn to by him on the 6th November, 1974, and produced in evidence. In paragraph 10 therein he has categorised the "refusals" of the petitioner and it becomes necessary to deal with them in some measure of detail.

According to paragraph 10 (*b*) of this affidavit the petitioner was directed by A. L. Perera's letter of 1st April 1974 to write or request dealers to place orders for the spares they require on the basis of which the indent to the manufacturers was to be made. This paragraph further states that at the conference held on the 2nd April, 1974, for the discussion of the implementation of the instructions Mr. Gunasekera (the petitioner) had declined to draft the letter to the dealers in that he said that he was not willing to do so. A. L. Perera states that this was a refusal of the directions or instructions in paragraph (2) of the letter of 1st April, 1974.

Firstly the letter of 1st April, 1974, which was addressed to the petitioner amongst others is one informing him of the decisions and not one containing directions made at a meeting of the company's agents. The relevant paragraph relating to dealers allocations reads thus :

> *Dealers allocations*—Dealers are to be requested to place orders for the spares they require and our indent to the manufacturers is to be based on this.

It does give a direction that the petitioner should draft a letter to the dealers. What transpired at the conference of the 2nd April has been set down by A. L. Perera in the notes of that meeting which have been produced marked "B" at the inquiry. Relating to dealers allocations the following note had been made by A. L. Perera on the 2nd of April itself.

> The petitioner stated that they were prepared to listen to any instructions on the matter and did not think it desirable to draft any letter on their own. The memo of 1.4.74 was quite clear and both the petitioner and MD/MB suggested that the form of letter be drafted and sent to them. CS/ALP (i.e. A. L. Perera) then agreed to send them a draft of the letter to be sent to dealers.

These notes prepared by A. L. Perera himself and dated the 2nd April, 1974, do not indicate that the petitioner "refused" to draft a letter to the dealers. The position is made clear further on a perusal of A. L. Perera's evidence at the inquiry. At page 12 of the proceedings of the 7th November, 1974, the following question and answer appear—

> Q. But the circular itself of 1st April does not give a specific instruction or direction to anybody to draft a letter ?
>
> A. Well, I suppose so.

In this connection it is of relevance to consider what the petitioner did or failed to do regarding the dealers' allocations. Some instructions had been given to the petitioner by A. L. Perera in this regard and the latter in a communication dated the 17th April, 1974, addressed to the petitioner on the subject of this circular letter to dealers had this to say :—

Circular letter to dealers

> I acknowledge receipt of your memo dated 17.4.74 on the above subject with thanks and appreciate the promptness in dealing with this matter.

In this state of facts which have not been seriously contested it is difficult if not impossible to say that there has been on the part of the petitioner " a refusal of the directions or instructions in paragraph (2) of the letter of the 1st April, 1974 ".

According to paragraph 10 (*d*) of A. L. Perera's affidavit the letter of the 1st April, 1974, directed the petitioner to—

> submit his own order for spares to A. L. Perera before it was sent to the manufactur. Mr. Gunasekera by his letter of the 13th April, 1974 " refused " to carry out this direction contained in paragraph (4) of the letter of 1.4.74.

Paragraph (4) referred to herein is as follows :—

> M. D. will order such spares as they consider they require and this list will also be submitted to CS/AL. P., (i.e. A. L. Perera) before it is sent to the manufacturers.

A. L. Perera in his evidence at the inquiry has been cross-examined on this matter. The proceedings of the 7th November, 1974, show that he has admitted the fact that on the 18th April, 1974, which is the date of the petitioner's letter the time to submit M. D.'s requirement for spares had not yet come—(vide page 15 of the proceedings of this date)—

> Q. Are you categorically stating that Mr. Gunasekera himself in fact did not submit his requirements for spares—you have said so in the affidavit ?
>
> A. The time for that has not come.

Further on, in the proceedings of that date—

> Q. But in fact he did not refuse to carry out these instructions ?
>
> A. But in fact as far as I know I believe that his assistants were continuing with the preparation of the indents and allocations.

Q. As to whether they were being done on the instructions given by Mr. Gunasekera prior to his leaving or not you do not know ?

A. I do not know.

It will thus be seen that A. L. Perera's own evidence is to the effect that in this matter the time had not yet arrived for the petitioner to carry out any directions and the question of a refusal by the petitioner cannot therefore arise.

Paragraph 10(b) of the affidavit of A. L. Perera is to the following effect :—

> The petitioner was directed to abandon—
>
> the system of registering customers for the purchase of motor spares (with certain exceptions). By his said letter the petitioner had refused to carry out this direction.

In this connection the first matter is that the registering of customers was not done by the petitioner. A. L. Perera at page 25 of the proceedings of the 7th November, 1974, admits that the actual registering of the customers was done by Balasubramaniam and de Mel and that the petitioner was only their superior. The following appear in the transcript of evidence of that date :—

> *Q.* You cannot say as to whether in fact he (the petitioner) refused to abandon the registering of customers ?
>
> *A.* Certainly apart from that letter he did not say that he is refusing to carry out instructions.
>
> *Q.* The direction was—do not register customers ?
>
> *A.* Yes.
>
> *Chairman :* Did he register customers despite his being asked not to register ?
>
> *A.* Not to my knowledge.

On a consideration of the totality of A. L. Perera's testimony at the inquiry it is abundantly clear that he is not able to give any direct evidence of any occasion where the petitioner refused to carry out any instructions or orders. He has only inferred as such from the letter of the petitioner dated the 18th April, 1974. At page 7 of the proceedings of the 11th November, 1974, the following appears—

> *Q.* In your affidavit that you have sworn to you state that he (the petitioner) has refused to carry out your instructions ?
>
> *A.* Yes.

Q. Why do you say that ?

A. I have done so in the context of the letter of the 18th of April and his behaviour on the 2nd April.

Q. You have only inferred from his conduct and his letter that he has not carried out the instructions ?

A. Yes, I certainly have.

Q. After he wrote his letter of the 18th of April you did not try to find out whether in fact he refused to carry out the instructions or not ?

A. No. I did not.

At page 10 of the same day's proceedings—

Q. Up to date you are not aware of a single instruction which Mr. Gunasekera in fact refused to carry out ?

A. Except that having behaved in the manner in which he behaved on the 2nd April the whole thing culminated in his letter of the 18th April.

At the inquiry the petitioner called as his witness de Mel and Balasubramaniam, two officers in the Motor Department working under the petitioner. They were both quite sure that the petitioner at no stage asked them not to carry out any instructions or orders and that until the petitioner"s services were terminated he carried out his normal duties and functions.

The available evidence is clearly in one direction and it is therefore not, as stated before, without significance that neither before the labour authorities nor at the argument in appeal was there a clear demonstration of the directions given to the petitioner or of the work (if any) he failed or refused to perform. Whilst there has been a declaration by the petitioner no reasonable person can on the material available reach the conclusion that there has *in fact* been any failure or refusal to perform any assigned tasks. Futhermore no one has even remotely suggested that the conduct of the petitioner by writing the letter dated 18th April, 1974, has caused the slightest detriment to the third respondent firm or to the interests of public security, preservation of public order or for the maintenance of supplies and services essential to the life of the community. His conduct did not indicate in any way that he was repudiating the contract of service he had with the third respondent. The eventual punishment meted out to him was therefore in any event altogether excessive and wholly out of proportion to the occasion. Be that as it may the task before this Court is to determine whether certiorari lies in the present case.

To repeat the oft quoted dictum of Atkin, L. J. in *Rex v. Electricity Commissioner*, (1924) 1 K.B. 171 :—

> Wherever a body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division.

In the case of *Virakesari Ltd. v. P. O. Fernando and others*, 66 N. L. R. 145, Weerasooriya, S. P. J. said thus :—

> It is well settled that the order of an inferior tribunal having a duty to act judicially in determining the rights of parties is liable to be quashed by writ of certiorari for an error of law appearing on the face of the record. In this connection " the record " includes not only the formal order, but also all the documents which form the basis of decision.

There is no question that the order of the second respondent is reviewable by a writ of certiorari if the petitioner could establish that there is an " error of law on the face of the record ". For this purpose it becomes necessary to examine the reasons of the second respondent of the 31st May, 1976, which formed the basis of the order dated the 21st June, 1976, which is sought to be quashed now.

The second respondent more or less commences his order by stating—" In my opinion this is a pure and simple case of termination on disciplinary grounds ". After stating the positions of the petitioner and the management he states—" There is no doubt that by R5 (i.e. the Circular letter of 1st April, 1974) the applicant (i.e. the petitioner) was directed by the management to do certain items of work ". At no stage in his order has the second respondent posed to himself the questions at issue or addressed his mind to the various items of evidence placed before him at the inquiry. In short he gives no reasons for arriving at these far reaching conclusions. He then goes on to state :—

> .. In my view it is within the discretion of the employer to determine what work shall be done and the manner in which it shall be done. It is not within the province of an employee to dictate to the employer the manner in which he shall be permitted to perform the work. In this case the employee expects the management to make decisions to suit his conscience and principles.

These observations may have relevance in another context but can hardly contribute to the determination whether the petitioner had contravened Regulation 38 (1) of the Emergency Regulations. In fact at no place in the order has he ever set down what in

his opinion would be the elements that constitute a violation of the regulation in question.

The second respondent appears to have been greatly influenced by the state of feeling that existed between the petitioner and A. L. Perera. The order states :—

> It should also be noted that prior to his writing the letter on 18.4.74 the applicant (i.e. the petitioner) had expressed his resentment and bitterness towards A. L. Perera by addressing him in insulting language as clearly shown in R15 by adjectives such as "inept" and "bloomer". In my view to address a superior in this fashion and apply to him these adjectives without any necessity is undisputably subversive of discipline. The use of such offensive words exhibit a lack of respect for the position of the person to whom it is addressed.

However appropriate these generalisations of the second respondent may be they do not have any bearing on the question he had to determine, it is clear from the order that these matters have greatly influenced the second respondent in reaching his conclusions.

The following comments also appear in the order of the second respondent :—

> I would say that an announcement of a refusal to obey an order or instruction already given to perform certain functions is not merely insubordination but a complete and final disobedience.

The crucial matter in the inquiry before the second respondent was to find out whether there was any order given. The petitioner had been at great pains to demonstrate that there was no order and there was no refusal on his part. The order at any point does not indicate that the material led in evidence on behalf of the petitioner received any consideration or that it was subject to any analysis before the conclusions of the second respondent were reached.

Finally the second respondent concludes his reasons in the following manner :—

> It appears that the applicant's (i.e. the petitioner's) action failing to follow instructions was deliberate and letter R9 (letter dated 18.4.74) was written by the applicant after due deliberation. He was guilty of insubordination and the company had the right to take disciplinary action against him. This the Company had done by invoking the provisions of regulation 38 (1) of the Emergency Regulations.

Suffice it to state that this Emergency Regulation does not deal with insubordination or with disciplinary action. It pertains

to certain consequences that follow by persons in a specified category when they "fail or refuse to perform such work as they may be directed". The second respondent has singularly failed to address his mind to this question by consideration and an analysis of the facts and circumstances in the present case in the light of the material placed before him by the petitioner.

Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made. The above is a summary of some of the grounds for awarding certiorari as set down in S. A. de Smith's work—Judicial Review of Administrative Action (Third Edition).

On an application of these principles to the present case it seems to me that this is an instance where this Court is entitled to interfere by way of certiorari. I am also satisfied that it would be right and just to do so. Accordingly a mandate in the nature of a Writ of Certiorari is issued quashing the proceedings held by the second respondent. The order made by the Commissioner of Labour dated the 21st June, 1976, marked "H" in these proceedings is also quashed.

The petitioner's application is allowed with costs payable by the third respondent.

UDALAGAMA, J.—I agree.

ISMAIL, J.—I agree.

Application allowed.