[IN THE PRIVY COUNCIL]

1963 *Present :* **Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-y-Gest, Lord Devlin, and Sir Kenneth Gresson**

A. K. DAVID, Appellant, *and* M. A. M. M. ABDUL CADER, Respondent

PRIVY COUNCIL APPEAL NO. 43 OF 1962

S. C. 234 of 1960—D. C. Puttalam, 6327

Urban Council—Chairman—Malicious refusal by him to issue statutory licence to proprietor of a cinema—Liability to be sued in his personal capacity—Delict—Malicious misuse of statutory power by a public authority—Actionability—Public Performances Ordinance (Cap. 134)—Urban Councils Ordinance (Cap. 255).

Under the Urban Councils Ordinance the Chairman is himself the local authority in connection with the granting of licences for cinema performances. The granting or withholding of such licences is his personal responsibility, and his acts are not those of the Council which is a corporation, nor is he a corporation for the purpose of these duties. It follows that, if the law does recognise a right of action against him in any circumstances arising out of a breach of those duties, whether or not a breach accompanied by bad faith or malice, the only way in which he can be sued is as an individual person, and there is no relevant distinction in his status as a party between his official capacity and his personal capacity.

An applicant for a statutory licence is entitled to damages if there has been a malicious misuse of the statutory power to grant the licence.

Accordingly, an action claiming damages for a delict is available against the Chairman of an Urban Council in his personal capacity if he maliciously refuses, as a public authority, to exercise his statutory power to issue to the proprietor of a cinema a licence under the Rules made under the Public Performances Ordinance. In such a case it cannot be contended that the only remedy of the proprietor of the cinema is to apply for a *mandamus* to have his application for a licence properly heard and determined.

APPEAL from a judgment of the Supreme Court dated 24th March, 1961.

The plaintiff, who was the proprietor of a cinema, had applied to the defendant, who was the Chairman of the Urban Council of Puttalam, for a licence for his cinema under the Rules made under the Public Performances Ordinance. He instituted the present action against the defendant, as an individual person, to recover damages on the ground that the defendant had wrongfully and maliciously refused and neglected to issue the required licence.

The action was dismissed by the District Court on the preliminary issue that the defendant could not be sued " in his private capacity for something he has done in his capacity as the Chief Executive officer of the Urban Council ". On appeal to the Supreme Court the action was

dismissed on a different preliminary issue, namely, that no right of the plaintiff could be said to have been infringed and that his proper and only remedy was to apply for the issue of the prerogative writ of *mandamus* to ensure that his application was duly heard and determined. The plaintiff then preferred the present appeal to the Privy Council.

E. F. N. Gratiaen, Q.C., with *Dick Taverne*, for the plaintiff-appellant.

No appearance for the defendant-respondent.

Cur. adv. vult.

July 2, 1963. [*Delivered by* VISCOUNT RADCLIFFE]—

This is an appeal from a judgment of the Supreme Court of Ceylon dated 24th March, 1961, which rejected an appeal of the appellant against a judgment of the District Court of Puttalam dated 17th March, 1960. By that judgment the District Court had dismissed an action instituted by him against the respondent claiming damages for an alleged delict.

The decision in favour of the respondent was given on the basis of two issues which, by agreement of counsel at the trial, were determined as preliminary issues before the full hearing of the case. The learned Judge in the District Court answered both issues against the appellant, and the Supreme Court upheld his decision, though on quite a different point. The respondent has not been represented before the Board. For the reasons which will appear later they have come to the opinion that the action is not one which can properly be disposed of on preliminary points of law in advance of evidence, and they will advise Her Majesty accordingly. Since therefore the action must go back to the District Court for trial, it is desirable that only the minimum necessary to deal with the matter should be said at this stage.

The issues between the appellant and the respondent are set out in their respective pleadings. By his plaint the appellant sets out (paragraph 2) that he was at all material times the proprietor of a cinema at Puttalam; that (paragraph 3) the respondent was at all material times the Chairman of the Urban Council of Puttalam and as such the local authority responsible for the issue of licences under the Rules made under the Public Performances Ordinance (Cap. 134); that (paragraph 4) the appellant duly applied to the respondent for a licence for his cinema under the Rules; that (paragraph 5) the cinema was in all respects a fit and proper building suitable for public performances, and the appellant had paid the necessary fee for the licence and had fulfilled all necessary and/or reasonable conditions entitling him to the issue of a licence; that (paragraph 6) the respondent had nevertheless wrongfully and maliciously refused and neglected to issue the required licence. The appellant concluded by claiming Rs. 35,000 as damages and a further sum for continuing damage

The respondent's answer contained the specific plea *in limine* that the plaint disclosed no cause of action against him. Subject and without prejudice to that plea, he admitted that he was at all material times the Chairman of the Puttalam Urban Council and that the Chairman, *ex officio*, as the executive officer of the Council was the local authority to whom application had to be made for the issue of the licence. Apart from this admission, the answer in effect denied the rest of the averments of the plaint and stated (paragraph 7) that a licence was issued to the appellant but that he refused to accept it by reason of conditions that were lawfully and properly inserted therein.

When the action was opened in the District Court the appellant's counsel proposed the following issues :—

1. Is and was the plaintiff at all material times the proprietor of the cinema (the Gardiner Theatre, Puttalam) ?
2. Did the plaintiff by two letters referred to in his plaint duly apply for a public performance licence for his cinema ?
3. Did the defendant wrongfully and maliciously refuse and neglect to issue the licence ?
4. If issues 1, 2 and 3 are answered in the affirmative, what damages is the plaintiff entitled to ?

The respondent's counsel then proposed to add two further issues :—

5. Does the plaint disclose a cause of action against the defendant?
6. If not, can the plaintiff maintain this action ?

He further moved that these two issues should be argued first as they affected the entire action. The appellant's advocate made no objection to this and the District Judge proceeded to hear arguments on them alone and to give judgment on them as preliminary issues.

The effect of his judgment, which was delivered on the 17th March, 1960, was to reject the respondent's argument that the local authority had an absolute discretion to grant or withhold licences and its decision could not be challenged in a Court of law, but to uphold an argument that, as the respondent was acting as Chairman of the Urban Council in the matter of the licence, he could not be sued " in his private capacity for something he has done in his capacity as the Chief Executive Officer of the Urban Council, Puttalam ".

The respondent was named in the plaint as " M. A. M. M. Abdul Cader, ' Haniffa Villa ', Puttalam ", Haniffa Villa being presumably his private residence. The Judge held that as the plaint did not disclose a cause of action against him in his private capacity, he must answer No to both issues 5 and 6, and dismiss the action with costs.

The judgment of the Supreme Court (De Silva and Tambiah JJ.) proceeded on different lines. It did not express any view as to the validity of the point that had succeeded with the trial Judge, but accepted the proposition that a plaintiff could not maintain any right of action for damages in respect of a refusal or failure to grant a licence of the kind involved in this case, even though the licensing authority had acted maliciously in

withholding the licence. In the opinion of the Court no right of the plaintiff could be said to have been infringed in such circumstances and his proper and only remedy was to apply for the issue of the prerogative writ of mandamus to ensure that his application was duly heard and determined. The Court's decision was expressly based upon the English authority, *Davis v. Mayor, etc. of the Borough of Bromley* [1], a case the facts of which were very similar to those pleaded in the present proceedings.

Before their Lordships the appellant challenged both judgments delivered in Ceylon as unsupportable in law. It is convenient to say at once that in their opinion the point upon which the District Judge dismissed the action is misconceived. Under the Urban Councils Ordinance (C.255) the Chairman is himself, as the pleadings have recognised, the local authority in connection with the granting of licences for cinema performances. The granting or withholding of such licences is his personal responsibility, and his acts are not those of the Council, which is a corporation, nor is he a corporation for the purpose of these duties. It follows that, if the law does recognise a right of action against him in any circumstances arising out of a breach of those duties, whether or not a breach accompanied by bad faith or malice, the only way in which he can be sued is as an individual person, and there is no relevant distinction in his status as a party between his official capacity and his personal capacity. In their Lordships' opinion the appellant's action cannot be treated as defective on such a ground.

The argument accepted by the Supreme Court raises a different issue. The judgment adopts the view that for an action in delict to succeed and afford a right to damages there must have been an infringement of an antecedent legal right of the person injured. The appellant, it appeared to the Court, had no such right, since under the governing statute he was not entitled to exhibit cinematographs in his building without the licence of the local authority, and it had been left to the discretion of the Chairman of the local Council to decide whether to grant or to withhold the necessary licence.

If they were to regard this as a proposition equally valid for the English law of tort as for the Roman-Dutch law of delict (and the Supreme Court judgment relies exclusively on the authority of decisions in the English Courts) their Lordships would have great difficulty in upholding it in so general a form. It does not appear to them that a right to damages is excluded by the mere circumstance that the appellant could not lawfully operate his cinema without a licence. Plainly the law forbade his doing so. But the question to be determined is not what rights he had without a licence but rather what rights were created between these two parties by the relationship under which one wished to operate a cinema and had applied for a licence to do so and the other had the statutory responsibility for deciding how to deal with that application. Whatever the limits of the range of the latter's discretion in carrying out that responsibility, a separate question which would need careful consideration if the action

[1] *[1908] 1 K. B. 170.*

came to be tried, the appellant has at any rate pleaded that he had done everything required to qualify him for the grant of a licence and that he was entitled to have one issued. Given that relationship and the assumption of that state of facts, it seems to their Lordships impossible to say that the respondent did not owe some duty to the appellant with regard to the execution of his statutory power ; and if, as pleaded, he had been malicious in refusing or neglecting to grant the licence, it is equally impossible to say without investigation of the facts that there cannot have been a breach of duty giving rise to a claim for damages.

The Supreme Court's opinion was based on the decision of the English Court of Appeal in *Davis v. Bromley* supra, a decision which they presumably regarded as satisfactorily illustrative of the principles of the Roman-Dutch law of delict. The facts indeed of the *Davis* case were closely similar to those pleaded here. There too a licence or statutory approval had been sought from and refused by a local authority, and the applicant issued a writ alleging that the authority had not acted bona fide in rejecting his plans but from motives of spite and claiming a declaration that he was entitled to carry out his proposed works and damages for the refusal. The judgment of the Court, which is shortly expressed, is to the effect that no action would lie in these circumstances ; that the possible indirect motives attributed to the defendants could not render the exercise of their statutory discretion the more susceptible to judicial review than it would be otherwise ; and that the plaintiff's only remedy, if the defendants had really made no true or bona fide exercise of their authority, was to apply for a mandamus to have his application properly heard and determined.

Davis's case was decided in the year 1907. Since then the English Courts have had to give much consideration to the general question of the rights of the individual dependent upon the exercise of statutory powers by a public authority, and the decision of that case would now have to be seen in the context of a very great number of later decisions that have dealt with the question at more length and with more elaboration. In their Lordships' opinion it would not be correct to-day to treat it as establishing any wide general principle in this field : certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence. Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a " malicious " misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their Lordships' view it is only after the facts of malice relied upon by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty.

These reasons have forced their Lordships to conclude that this action is not appropriately disposed of by argument upon the two preliminary issues by which it has so far been judged. The position, as they see it, is this. It has been dismissed in the District Court upon a ground which is not maintainable in law. It has been dismissed in the Supreme Court in reliance upon a general principle derived from certain English authorities which their Lordships regard as too widely stated to afford a satisfactory conclusion of the pleadings as they stand. The issue remains what it has been from the beginning, a question of liability dependent directly upon the Roman-Dutch law of delict and only indirectly and by way of analogy and illustration upon the English law of torts. Such consultation as their Lordships have thought it wise to make of the institutional writers on Roman-Dutch Law, Voet, Lee and Wille, has not led them to think that the conceptions of that law would regard as necessarily inadmissible a right of compensation to a plaintiff for a malicious invasion of his statutory "rights" to have his claim to a licence subjected to bona fide determination by a public authority. In view of the order that they propose to advise and the fact that this aspect of the parties' rights and liabilities under the Roman-Dutch law has not been accorded any express treatment in the judgments of the Courts in Ceylon, their Lordships think that it would be inappropriate for them to say anything more about the merits in law of this appeal than that they could not dismiss it with any confidence that the appellant's case, as pleaded, has as yet received the full consideration that is required for a final determination of the case.

In their opinion, for the reasons stated above, this action is not one that can justly be disposed of on preliminary issues argued in advance of the hearing of evidence. Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they rise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedure. Otherwise the hoped-for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases.

Their Lordships will humbly advise Her Majesty that the appeal be allowed and the Order of the District Court dated 17th March, 1960, and the Order of the Supreme Court dated 24th March, 1961, be reversed. In lieu thereof they advise that the action should be remitted to the District Court with a direction that it should proceed to trial and that the six issues raised by the parties should be answered by the Judge at the conclusion of the hearing. Since the appellant agreed to the procedure of treating issues 5 and 6 as preliminary points and made no objection to it on the appeal to the Supreme Court he should pay the respondent's costs of the hearings in both those Courts in any event.

Their Lordships make nc order as to the costs of the appeal to the Board.

Appeal allowed.