1955 *Present :* Gratiaen, J., and Fernando, J.

N. T. MENDIS *et al.*, Appellants, *and* COMMISSIONER OF LOCAL GOVERNMENT, Respondent

S. C. 181 (Inty.)—U. C. Appeal L—1/29/9

Urban Councils Ordinance, No. 61 of 1939—Sections 193, 194 (1), 195—Recovery of surcharges—"Any person accounting"—"Negligence or misconduct"—Local Government Service Ordinance, No. 43 of 1945, s. 51, as amended by Act No. 8 of 1949, s. 19.

The two appellants, who were members of an Urban Council, were opposed to a decision of the Local Government Service Commission that full pension should be paid to a retired officer of the Council. In an application made by the Commission for a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension, the Supreme Court decided that the Council must pay the costs which were taxed at Rs. 3,899. Thereafter the Auditor-General sought to charge against the appellants, as members of the Council, the loss which the Council incurred by payment of the costs.

Held, that under section 194 (1) of the Urban Councils Ordinance it was necessary to prove negligence or misconduct on the part of the appellants before the Auditor-General could call upon them to make good any deficiency or loss which was not tainted by illegality.

APPEAL under section 195 of the Urban Councils Ordinance against an order made by the Auditor-General.

S. P. C. Fernando, with *Stanley Perera*, for the 1st and 2nd appellants.

A. C. Alles, Crown Counsel, for the respondent.

E. R. S. R. Coomaraswamy, with *B. A. R. Candappa*, for the Urban Council (party noticed).

Cur. adv. vult.

October 6, 1955. GRATIAEN, J.—

This is an appeal under section 195 of the Urban Councils Ordinance No. 61 of 1939 against an order made by the Auditor-General on 13th July 1954 charging against the 1st and 2nd appellants, as members of the Panadura Urban Council, a sum of Rs. 3,899 representing a loss to the Council alleged to have been incurred in consequence of their "misconduct". A similar order has been made against other members of the Council who are not parties to the present appeal.

The 1st appellant had been the Chairman, and the 2nd appellant a member, of the Council from 1st January 1950 until 24th April 1953. The Superintendent of Works of the Council, who had retired from office on 15th March 1950 had requested the Local Government Service Commission (hereafter called "the Commission") to fix the amount

payable to him as retiring pension under the Council's by-laws. He had originally been employed directly by the Council, but was transferred by operation of law to the service of the Commission under the provisions of the Local Government Service Ordinance No. 43 of 1945. Accordingly, the power and discretion to grant him a pension on retirement, though previously vested in the Council, now vested in the Commission. Nevertheless under section 51 of the Ordinance as amended by section 19 of the Act No. 8 of 1949 the ultimate financial responsibility for the pension payable to him by the Commission continued to be imposed on the Council.

Some members of the Council, including the appellants, took the view that the retiring officer had not qualified himself for the maximum pension payable under the by-laws. On 9th October 1950 the Council also resolved by a majority vote that the payment of his pension should in any event be withheld "until this officer hands over all documents that were in his charge". The terms of this resolution were communicated to the Commission which later decided, however, that the officer should be granted the maximum pension payable to him under the Council's by-laws with effect from the date of his retirement.

The appellants and certain other members of the Council were dissatisfied with the Commission's decision, and a sub-committee was appointed to make counter proposals in the matter. In due course, the Council passed a resolution on 9th July 1951 recommending to the Commission that, as the work and conduct of the officer concerned had not been "altogether satisfactory", his pension should be fixed at a reduced rate representing two-thirds of the maximum pension. This recommendation was duly considered by the Commission but was rejected. The question was again brought up for discussion at a meeting of the Council on 24th August 1951. The 1st appellant, as Chairman, proposed "that eminent counsel should be consulted and that a further appeal be made to the Local Government Service Commission". The majority of the members resolved, however, that representations by way of protest should be made to the (then) Prime Minister. In the meantime, the Council acknowledged its liability to make payments to the Commission in respect of the officer's pension at the reduced rate, and a cheque was tendered on this basis on the 19th September 1951. Three days later, the Commission returned the cheque and at the same time applied to this Court for a mandate in the nature of a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension as fixed by the Commission.

The appellants and other members who shared their views now gave up the unequal struggle. They had not succeeded in obtaining an interview with the Prime Minister in time to achieve any practical results, and they abandoned all hope of persuading the Commission, with whom the final decision in the matter of pensions obviously rested, to alter its earlier ruling. Accordingly, the Council unconditionally acknowledged its liability to make good the full amount of the pension payable. Payment on this basis was made before the *mandamus* proceedings came up

for hearing. There remained only the question as to who should pay the costs incurred by the Commission in making the application to the Supreme Court. On that issue this Court decided that the Council must pay the costs which were taxed at Rs. 3,899. This amount was accordingly paid out of the Council's funds.

We are now in a position to examine the propriety of the Auditor-General's order which is under appeal. Having audited the accounts of the Council for the relevant period as required by section 193 of the Urban Councils Ordinance, he decided, after hearing the appellants, that the expenditure incurred by the Council in paying the Commission's costs in terms of the order of the Supreme Court ought to be charged against the appellants and the other members of the Council who had opposed the payment of the full pension fixed for the retired officer. He purported to make this surcharge in pursuance of section 194 (1) of the Ordinance which provides as follows :—

> "Every auditor acting in pursuance of this Part shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person and any sum which ought to have been, but is not, brought into account by that person, and shall in every case certify the amount due from such person".

The relevant words of the section which the Auditor-General purported to apply to this particular case are—" . . . . and *shall* charge *against any person accounting* the amount of any deficiency or loss incurred by the *negligence or misconduct* of that person . . . . . "

Section 194 (1) corresponds to section 247 (7) of the Public Health Act, 1875, of England, and the words "any person accounting" have been construed to be wide enough to include any member of the local authority whose accounts are before the auditor [1]. In order to remove doubts as to whether a narrower interpretation ought to be preferred, the words "any person" were substituted for "any person accounting" in the corresponding section of the later Statute (section 228 of the Local Government Act, 1933)—see *re Dickson* [2]. It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is "contrary to law", but also to make good "any loss suffered by the Council owing to his negligence or misconduct as such member". If the payment authorised is contrary to law, the liability to be surcharged is absolute ; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability.

The Council has doubtless incurred a loss because the majority of its members (including the appellants) persisted for too long in their attempt

[1] *R. v. Roberts (1905) 1 K. B. 247 C. A.*

[2] *(1948) 2 K. B. 95.*

to persuade the Commission to reconsider its decision to fix the retiring officer's pension at a level which they considered too high. But the question is whether such conduct amounted to " misconduct ".

The Auditor-General presumably had in mind the decision of the Court of Appeal of England in *Davies v. Cowperthwaite* [1] which bears some resemblance to the facts now under consideration. The members of an Urban District Council had there resolved to make a contribution out of the rate fund in support of a march of unemployed persons to London to protest against the unemployment assistance regulations. The proposed expenditure was manifestly *ultra vires*, and the Council was restrained by an order of the High Court from making the illegal payment. It was held that the costs incurred by the Council in the injunction proceedings should be surcharged upon those members who had passed the resolution. They had been guilty of " misconduct " within the meaning of section 228 (1) (*d*) of the Local Government Act, 1933—which substantially corresponds to the relevant words of section 194 (1) of the local Ordinance—because " notwithstanding a warning that the conduct which was proposed was unlawful, *and without in any way combating the correctness of the advice*, they took part in passing a resolution which they had been told was an illegal resolution ". For these reasons, their behaviour constituted " misconduct " and went far beyond " mere imprudence or want of judgment which cannot be called misconduct ". In sanctioning an illegal expenditure of the rate-payers' money, they had " acted in a way in which no reasonable men, acting reasonably, and desirous of doing their duty to the rate payers according to law, would have acted ".

The facts of the present case are clearly distinguishable. The Auditor-General has not suggested that the appellants were actuated by improper motives ; indeed there is no evidence on the record to support such an imputation. It is neither illegal nor improper for the elected members of a local authority to make recommendations to the Local Government Service Commission on the subject of pensions which must ultimately be paid out of the rate payers' money. Let it be assumed that, in seeking to protect the rate payers, the appellants acted with too much tenacity and with insufficient tact. As things turned out, their over-enthusiasm during the later stages of the discussions resulted in a loss to the Council, but their behaviour cannot be said to contain that element of bad faith which is necessarily involved in the term " misconduct ".

I would allow the appeal and quash the order of surcharge by the Auditor-General upon the appellants. As this is the first occasion on which the provisions of section 194 of the Ordinance have arisen for clarification in this Court, I think that each party should bear his own costs in these proceedings.

FERNANDO, J.—I agree.

Appeal allowed.

[1] *(1935) 2 A. E. R. 685.*