1961 *Present :* **H. N. G. Fernando, J.**

VADAMARADCHY HINDU EDUCATIONAL SOCIETY LTD., Petitioner, *and* THE MINISTER OF EDUCATION and another, Respondents

S. C. No. 34 and No. 407 of 1960—Application for a mandate in the nature of a Writ of Certiorari

Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960—Sections 5, 6 (b), 11, 15—Unaided School—Failure of proprietor to maintain due facilities—Order of Minister appointing the Director of Education as manager—Duty of Minister to hold a proper inquiry before making such Order—Natural justice—Certiorari.

Section 11 (*b*) of the Assisted Schools and Training Colleges (Special Provisions) *Act, No. 5 of 1960*, provides that :—

" Where the Minister is satisfied—

(*b*) after consultation with the Director, that any School which, by virtue of the provisions of this Act, is being administered as an unaided school, is being so administered in contravention of any of the provisions of this Act or any Regulations or Orders made thereunder or of any other written law applicable in the case of such school,

the Minister may, by Order published in the Gazette, declare that, with effect from such date as shall be specified in the Order—

(i) such school shall cease to be an unaided school ;

(ii) such school shall be deemed for all purposes to be an assisted school, and

(iii) the Director shall be the manager of such school."

On 30th December 1960 a party made certain complaints by letter to the Director of Education stating that the petitioner, which was an Educational Society and the proprietor of an unaided school, had, in breach of section 5 of the *Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960*, ceased to maintain certain facilities and services that were maintained by the School immediately prior to 21st July 1960. The complaints were that (1) the School Hostel had been closed down, (2) the Post-Primary School latrines had been demolished, (3) the School Playground had been converted into a timber depot, (4) a section of the Primary School which housed the Handicraft Laboratory had been fenced off. The Director then wrote to the petitioner on 11th January 1961 requesting him to show cause on or before 25th January why an Order under section 11 (*b*) should not be published. The petitioner replied on 23rd January explaining that the complaints were fabricated with an evil motive and requesting an inquiry at the spot if the Director was not satisfied with the explanations. By letter dated 26th January the Director informed the Principal of the School that the Minister of Education had ordered that the School should be taken over for Director Management with effect from 1st February 1961.

It was admitted that an Order under section 11 is " quasi-judicial ".

Held, that the power to make an Order under section 11 does not depend on any consideration of public policy, nor upon the existence of facts on account of which such considerations may render a decision necessary or desirable. On the contrary, the power depends on the Minister's satisfaction that facts exist which establish a contravention of the Act or its Regulations, which contravention (by section 15) would itself be a punishable offence. The question, therefore, in the present case was whether there was an " inquiry conducted with due regard to the rights accorded by the principles of natural justice to the petitioner against whom it was directed ". (See *The University of Ceylon v. Fernando*, 61 N. L. R. 505 (P.C.)).

The denial of a " fair opportunity " to the petitioner " to correct or contradict any relevant statement to his prejudice " and the failure of the Director to inspect the School and hold an inquiry on the spot through an officer of his Department entitled the petitioner to a writ of certiorari quashing the Order of the Minister.

APPLICATION for a writ of certiorari on the Minister of Education and the Director of Education.

S. Sharvananda, with *Bala Nadarajah*, for the petitioner.

B. C. F. Jayaratne, Crown Counsel, for the respondents.

Cur. adv. vult.

November 10, 1961. H. N. G. FERNANDO, J.—

The petitioner, an Educational Society, was the proprietor of a School which was, under the Education Ordinances of 1939 and 1951, an "Assisted School" in receipt of grants from State Funds. On 29th November 1960, in terms of *section 5* of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, the petitioner elected to administer the School as an un-aided school.

Section 6 (*b*) of the Act provides that :—

> "The proprietor of any school which, ... is an un-aided school—
>
> (*b*) shall continue to maintain all such facilities and services as were maintained by such school on the day immediately preceding the twenty first day of July, 1960 ;"

Section 11 (*b*) of the Act provides that :—

> "Where the Minister is satisfied—
>
> (*b*) after consultation with the Director, that any school which, by virtue of the provisions of this Act, is being administered as an un-aided school, is being so administered in contravention of any of the provisions of this Act or any Regulations or Orders made thereunder or of any other written law applicable in the case of such school,
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> the Minister may, by Order published in the Gazette, declare that with effect from such date as shall be specified in the Order—
>
> (i) such school shall cease to be an unaided school ;
>
> (ii) such school shall be deemed for all purposes to be an unaided school, and
>
> (iii) the Director shall be the manager of such school."

On 28th December 1960, the petitioner discontinued the services of the Principal and all the other teachers of the School with effect from 31st December, informing them at the same time of the decision of the

Executive Committee of the Society to advertise for new teachers, and stating that the former assistant teachers could be re-employed on basic salaries if the Manager was satisfied that they will co-operate with the Management.

By a letter dated 30th December 1960 the President of the Northern Province Teachers' Association informed the Director of Education of these discontinuances, adding that neither December salaries nor salaries in lieu of notice had been paid. Further the letter stated that :—

(1) the School Hostel had been closed down ;

(2) the Post-Primary School latrines had been demolished ;

(3) the School Playground had been converted into a timber depot ;

(4) a section of the Primary School which houses the Handicraft Laboratory had been fenced off.

The Director then wrote to the Society his letter of 11th January 1961, stating that adequate notice had not been given to the teachers and requesting that at least one month's notice be given. Referring to the conditions in *section 6* (*b*) of the Act, he asked for a list of the entire staff proposed to be employed in their place, in order "to ascertain whether you fulfil the conditions". He asked also for the date when the School will re-open after the Vacation.

The Director then stated that the four matters mentioned above had "been brought to his notice", and enumerated them in terms which are identical with those used by the President of the Teachers' Association. There follows this statement :—"You have thus failed to continue and maintain all facilities and services as were maintained on the day immediately preceding 21st July 1960. You are hereby requested to show cause on or before 25th January 1961 why an Order under *section 11* of the Act should not be published declaring that (the school) should cease to be an unaided school and deemed for all purposes to be an assisted school".

To that letter the President of the Society replied on 23rd January 1961 by letter which was received at the Director's office on the 24th. This letter began with a statement that the complaints were fabricated with an evil motive and requesting an inquiry on the spot.

In regard to the unpaid salaries for December, the President stated that the Director was liable to pay them ; and in regard to the matter of notice, that the teachers had preferred to take their legal remedy in the courts. A list of the 32 members of the new staff was sent with the letter, the President stating that more appointments are being made and that a complete list would be sent shortly. (Apparently the number of teachers discontinued in December had been 43). He added that the School had re-opened on 18th January 1961.

The President thereafter dealt in great detail with the 4 allegations made about the Hostel, the latrines, the playground and the Handicraft Laboratory, his explanations being briefly as follows :—

1. *The Hostel* had been meant originally for teachers, but there being only six resident teachers some pupils had also been admitted in order to run it economically. It was closed with the discontinuance of the teachers, but " with the appointment of new teachers the Hostel has now been re-opened ".

2. *The Latrines* had been built on adjacent private land with the leave of its owner. He had demolished them in order to put up a house on his land. The students had not been inconvenienced because other latrines were available for their use. New latrines were being provided and would be ready in about a week's time.

3. *The former Playground* had been situated on some leased land for many years, but the Society had purchased its own land for a playground and used it as such since about 1955 and held the Sports Meet there in that year. The leased land had also been continued in use until its owner claimed back the land on the expiration of the lease in September 1960.

4. *The Handicraft Laboratory* had been housed since 1957 in a building erected by the President at his personal cost ; although it was intended as the Meeting Hall of the Society it was used for the Handicraft Laboratory until December 1960, when the Laboratory was shifted to a new building erected for the purpose.

The President concluded by stating that all facilities were being duly provided at the School and by repeating his request for an inquiry at the spot if the Director was not satisfied with the explanations.

By letter dated 26th January 1961 the Director of Education informed the Principal of the School that the Minister of Education had ordered that the School should be taken over for Director Management with effect from 1st February 1961. The Government Gazette of 27th February 1961 contains the Order (undated) in which the Minister makes the declaration under *section 11* of the Act in respect of the School.

In the Petition to this court dated 30th January 1961, the petitioner applied for a Mandate in the nature of a Writ of Certiorari setting aside the Order of the Minister. The petitioner also prayed for a direction from the court that the respondents, the Minister of Education and the Director of Education, do desist from carrying the impugned Order into execution ; a direction to that effect (pending the disposal of the main application) was given by the court (T. S. Fernando, J.), on 31st January 1961.

Upon this Petition (No. 34 of 1961), the principal point argued before me has been that the respondents failed to hold a proper inquiry before taking action under *section 11* of the Act. It was common ground

that the Order of the Minister was referable to paragraph (*b*) of *section 11* and was made in pursuance of the power to make declarations under that section if the Minister is satisfied that there has been a contravention of the provisions of the Act or of any Regulation made thereunder. It was also common ground that the contravention, if any, had been against *section 6* (*b*) of the Act, namely the failure to maintain facilities and services as at 20th July 1960.

One minor point can be disposed of without difficulty. Crown Counsel argued for the respondents that Certiorari will not lie against an Order under *section 11*, because the Minister thereby only makes a " declaration " of the matters stated therein with respect to a school, and does not in law make an effective *Order*. This argument would be of some force if it is further contended that such a " declaration " is merely an expression of a wish or intention and has no legal force or effect. No such contention was, or indeed could have been, maintained, for the legal effect of such an Order is quite clearly that a school to which it relates thereby ceases to be un-aided and becomes an assisted school subject to the Management of the Director. In fact the Director's letter of 26th January above referred to correctly interprets the effect of the Order, namely that the school becomes thereby subject to Director Management.

That matter apart, Crown Counsel did not contend that an Order under *section 11* is anything but " quasi-judicial ". The power to make the order does not depend on any consideration of public policy, nor upon the existence of facts on account of which such considerations may render a decision necessary or desirable. On the contrary, the power depends on the Minister's satisfaction that facts exist which establish a contravention of the Act or its Regulations, which contravention (by *section 15*) would itself be an offence punishable by fine and imprisonment. It is not often that a decision antecedent to the exercise of power to make an administrative Order so closely resembles the decisions on matters of pure fact antecedent to the exercise of judicial power. Manifestly therefore, the question for me, in the language of the recent judgment of the Privy Council in the *University of Ceylon case*[1] is whether there was an "inquiry conducted with due regard to the rights accorded by the principles of natural justice to the petitioner against whom it was directed ".

A preliminary consideration which seems to me not one to be ignored, is that, in the *University of Ceylon case* [1] and the one before me, the authority whose Order is challenged made a decision of first instance and was not as in the *Arlidge case* [2] merely reviewing a decision in appeal.

[1] *The University of Ceylon v. Fernando, 61 N. L. R. 505 (P.C.).*

[2] *L. C. B. v. Arlidge, (1915) A.C. 120.*

Before passing to a consideration of the main question, it is necessary to take account of the affidavits filed on behalf of the respondents. I do not quite understand the statement in paragraph 3 of the Director's affidavit which, in reply to paragraphs 5, 6 and 7 of the Petition, admits only the receipt of notice of a " purported election " under *section 5* of the Act No. 5 of 1960. If the election was merely " purported " and not legally effective, the petitioner's School did not become an un-aided school and surely could not have been the subject of an Order made under *section 11* of the Act " after consultation with the Director ". But fortunately the implied denial of the validity of the election under *section 5* is of no consequence.

The Director in paragraph 8 of his affidavit states that his letter of 11th January 1961 was written " on representations made to me ", and he refers immediately thereafter and in the same paragraph to the letter which he had received from the President of the Teachers' Association, the contents of which I have already summarised. The Director does not give any other reason for his decision to call upon the petitioner to " show cause ", and it would therefore appear that this was his sole reason. Of course the Director rightly took some action upon the complaint made to him, particularly in seeking an explanation in regard to the four specific matters which appeared to fall within the scope of *section 6 (b)* of the Act. But did the letter from the President of the Teachers' Association justify the Director's statement in his ultimatum dated 11th January to the petitioner Society that " *You have thus failed* to continue and maintain all facilities and services, etc." ?

For present purposes the most important averment in the Director's affidavit is made in paragraph 9, where the Director states that " on the material furnished in the letter of 23rd January 1961 (that is the petitioner's explanation in regard to the charges made by the President of the Teachers' Association), and on information received by me from the officers of my Department in the Northern Province, the Honourable Minister after consulting me made the Order ", which the petitioner now challenges.

The "facts" having been now stated, the judgment of Their Lordships of the Privy Council in the *University of Ceylon case* [1] happily make it otiose for me to refer to earlier English cases which have been acted upon by the courts in Ceylon. For present purposes, I can mention usefully only the decision in *Spackman's case* [2]. There Spackman had been the co-respondent in a Divorce case, in which a civil court had held that he was guilty of adultery with the defendant wife in the case. When in a subsequent proceeding before the British Medical Council, the object of which was to strike Spackman off the Register of Medical Practitioners on the ground of infamous conduct, an attempt was made

[1] *The University of Ceylon v. Fernando, 61 N. L. R. 505 (P.C.).*

[2] *General Medical Council v. Spackman, (1943) A.C. 627.*

to lead evidence that the finding of the court might have been wrong, the Council declined to entertain such evidence, it was held that the Council should not have declined to hear the further evidence. Which means of course that upon the new evidence the Council might have reached an opinion different from that formed by the Divorce court on the evidence which was available to it. What is striking in the decision is that the tribunal was held not to have made " due inquiry " before deciding a question of fact, despite the existence of a judgment of a civil court holding that the fact had been proved. The consideration that the tribunal in that case was expressly directed by the relevant statute to hold due inquiry does not in my opinion distinguish that case from the present one, for an inquiry sufficient in the circumstances was one of the rights accorded by the principles of natural justice to a person against whom an Order under *section 11* of the Ceylon Act No. 5 of 1960 was proposed to be made. In accordance with the Privy Council's recent decision, the Minister can follow what procedure he thinks best, but " subject to the obvious implication that some form of inquiry must be made, such as will fairly enable him to determine whether he should hold himself satisfied that the charge in question had been made out ". If the pre-existence, in the *Spackman case*[1], of a decree of a competent court as to the *facta probanda* did not obviate the necessity for an inquiry into those facts, there would surely be a need for inquiry if all that the Director had before him was a series of allegations made by the President of the Teachers' Association.

Crown Counsel did not argue before me that either the matter of the dismissal by the petitioner in December 1960 of the former Satff of the School, or the matter of the sufficiency or competence of the new Staff employed in January 1961, could in any way have constituted a failure on the petitioner's part to comply with the provisions in *section 6* (*b*) of the Act. The "charges " against the petitioner related to the closure of the Hostel, the Playground and the Handicraft Laboratory, and to the demolition of the Latrines, and the petitioner was by the Director's letter of 11th January 1961 duly informed of the " charges " and offered the opportunity to meet them. But was a " fair opportunity " given to the petitioner " to correct or contradict any relevant statement to his prejudice " ?

The prejudicial statements must be taken to have been made against the petitioner by the President of the Northern Province Teachers' Association ; for in paragraph 8 of the Director's affidavit it is stated that the letter of 11th January 1961 was written on representations made to the Director, and in support of that statement a copy of the President's letter is attached. In these circumstances, it would not be reasonable to suppose that there had been at that stage any adverse *official* report to the Director from any official of his Department. Had

[1] *General Medical Council v, Spackman, (1943) A.C. 627.*

such been the case, one would have expected some mention of such a report either in the letter of 11th January itself or in the affidavit, or in both. I feel bound to deal with the matter on the footing that the Director does not claim to have received any such official report at that stage.

When, therefore, the Director received the Society's letter of 23rd January 1961, the position would seem to have been that the Department had before it the original " complaint " of 30th December 1960 from the President of the Teachers' Association on the one side, and the Society's explanations on the other. In regard to each one of the four matters complained of, the Society in a sense admitted the correctness of the bare facts stated in the complaint, but proceeded to state further facts which, if true, would establish that the facts complained of did not constitute a contravention of *section 6* (*b*) of the Act :—the Hostel had been closed in December, but had re-opened when the new term commenced in January ; some latrines had been demolished by the owner of the land on which they had stood, but new latrines were being provided and would be ready very soon ; the former Playground on leased land had been taken back by its owner, but a new Playground had been provided in anticipation some years before ; the former Handicraft Laboratory was being put to a different purpose, but the Laboratory was now housed in a new building. Indeed, even if (as was not argued) the matter of the dismissal of the former Staff could at first sight have been considered to have been a breach of *section 6*, there was the explanation that the School had re-opened in January with a new Staff.

In the circumstances just stated, a mere preference for the written word of the President of the Teachers' Association and a decision based thereon would have been unreasonable, for the President's statements, even if true, did not establish the falsity of the Society's explanations. In regard to three at least of the four matters, the Society's explanation was that action had been taken recently (after 30th December when the ' complaint ' had been made) to remedy what might otherwise have been a short-coming. This is another reason why action based upon such a preference would have been unreasonable. It is clear to me therefore that, if the Order under *section 11* was made *solely* after consideration of the two letters of 30th December and 23rd January, there was no inquiry " such as would enable the Minister *fairly* to determine whether he should hold himself satisfied that the charges had been made out ". It remains to see whether, on the matters disclosed to the court in these proceedings, it is shown that other relevant information was utilised by the Minister in an inquiry of the nature required by law.

The Society had in its letter of 23rd January twice requested the Director to hold an inquiry on the spot into the matters complained of. Such a request was most reasonable in the circumstances, for visual inspection would easily demonstrate whether or not the Society's explanations were correct. The fact mentioned in the Director's affidavit that, there are officers of his Department in the Northern Province, shows

that such an inspection by one of those officers was possible, and there is no reason to suppose that an inspection would not have been feasible and convenient; as was pointed out in the *Arlidge case* [1] the Minister's duty could have been duly discharged if " his materials were vicariously obtained through his officials ".

In this connection the Director does not expressly controvert the averment in paragraph 23 of the Petition that " the respondents failed to hold a proper inquiry ". What the Director does state in paragraph 9 of the affidavit is that " information was received by him from officers in the Northern Province ". He does not specify what that information was or from whom and when he received it, nor does he state whether and upon what matters those officers were called upon to furnish information. In the *Arlidge case*[1] it is clear that an Inspector did in fact hold an inquiry and made two reports to the Board on dates which are specified in the judgments. The appellants in that case had made no request to see those reports, but claimed in the courts that the failure to disclose them was contrary to the principles of natural justice. Upon this aspect of the matter the rejection of that claim in the *Arlidge case*[2] does not assist the present respondents; for here the question is whether there was in fact any inspection at all by any officer of the Department of Education.

I do not of course reject the Director's averment of fact that some information was furnished to him by his officers, but the absence from the affidavit of any reference to any inspection of the School, and even more important, the lack of any affidavit from any such officer, is to my mind of much significance and compels me to the conclusion that the respondents have failed to prove that there was in fact any inspection which could have served to test the correctness of the explanations given by the Society in its letter of 23rd January 1961.

In seeking to arrive at a decision, it is helpful to consider the *University of Ceylon case*[2] on the supposition that its facts were different, being altered to be analogous to those now arising before me. Let me suppose that the Vice-Chancellor had before him only two letters: one from the girl student to the Vice-Chancellor alleging that the " accused " male student had prior to the examination written some words in German in the girl's note book; the second a letter from the " accused " (after being informed of the accusation) stating that the accusation was false and inviting the Vice-Chancellor to inspect the girl's note book and see

[1] *L. C. B. V. Arlidge, (1915) A.C. 120.*
[2] *The University of Ceylon v. Fernando, 61 N. L. R. 505 (P.C.).*

for himself whether it actually contained the words in German. If then the Vice-Chancellor did not himself inspect the note book or cause it to be inspected by some responsible delegate, but instead chose to rely on the girl student's allegation without further inquiry, can it be held by a court that by means merely of reading the two letters the Vice-Chancellor afforded to the " accused " student " a fair opportunity to correct or contradict the relevant statement to his prejudice "? When the petitioner in the present case explained to the Director, as he virtually did, " these buildings and facilities are in fact existing and available, come and see for yourself or send someone to see " , would not an inspection on the spot have been the only just means of affording a " fair opportunity " to the petitioner ? Even if other means may have been sufficiently just, there is no indication that any other means were in fact utilised.

If again, on the supposed facts of the *University of Ceylon case* [1] which I have hypothetically assumed, the Vice-Chancellor had in addition merely stated to the court " I had the two letters before me and in addition I had some other information from a University official ; but I do not disclose who it was or what he said or when ", would that additional item of evidence have justified a conclusion by a court that some honest and reliable official had in fact inspected the girl's note book, and had seen the words in German in the note book and reported accordingly to the Vice-Chancellor, and further that the Vice-Chancellor had thereby been satisfied that the entry in the note book was genuine and not fabricated ? I do not imagine that a court may properly presume the existence of such weighty and important facts from such vague and slender evidence. In the same way, I am unable to assume from paragraph 9 of the Director's affidavit that, before the Order under *section 11* of the Act was made, (1) there had been an inspection of the School by some officer, and (2) the officer thereafter furnished to the Director a Report contradicting any or all of the explanations set out in the Society's letter of 23rd January 1961, and (3) the Minister took the Report into consideration and decided to accept it in preference to the Society's explanation.

The possibility that some officer had made an inspection of the school *before* the letter of the 23rd was written by the Society is rendered at least unlikely in the face of the requests in that letter for an inquiry on the spot. The possibility that such an inspection was held *after* the receipt on 24th January of the Society's letter, is very nearly ruled out by the time element, for the decision to take over the School is recorded in the Director's letter dated 26th January. In these circumstances the only inference which validly arises from the absence in the Director's

[1] *The University of Ceylon v. Fernando, 61 N. L. R. 505 (P.C.).*

affidavit of any reference to an inspection of the School and/or any official report, is that there had in fact been no such inspection or report. At the lowest, the position is that the Director made no attempt to satisfy this court that an inspection had taken place. The court has necessarily to hold that the respondents failed to prove that a fair opportunity was afforded to the petitioner to meet the " charges " made against it.

Crown Counsel invited me to assume that, because the Minister must be taken to have acted honestly, there must have been some official inspection followed by a Report, which has remained undisclosed probably because of considerations of secrecy. That such an assumption would be unjust in the circumstances is easily made manifest. Had the Director averred in his affidavit that some specified officer had in fact made an inspection and furnished a Report, this court could not have denied to the petitioner an opportunity (if he requested it) to disprove the fact of such an inspection. To assume that there had been an inspection despite the lack of an averment to that effect would be to hold that a fact has been proved as against the petitioner in circumstances in which no occasion has even arisen for the petitioner to deny the existence of that fact.

In view of the Order which has to be made in Application No. 34, it is not necessary to deal with the point taken in the subsequent Application No. 407. In this instance the petitioner has contended that the amendment of the Schedule to Act No. 5 of 1960, which amendment was effected by Act No. 8 of 1961 (2nd Schedule paragraph 1 (4)) has the effect that the petitioner's School is not one to which the Act of 1960 applies for the reason that this School was conducted " mainly for persons over 14 years of age ". Having regard to the particulars available to the court concerning the ages of the pupils in the School, the petitioner has not established to my satisfaction that the School was conducted mainly for such persons. The Application No. 407 has therefore to be dismissed.

In the Application No. 34 I make order that a Mandate in the nature of a Writ of Certiorari do issue quashing the Order under *section 11* of Act No. 5 of 1960 in so far as it contains a declaration under that section in respect of the J/Vadamaradchy Hindu Girls' College, Point Pedro.

The respondents will pay to the petitioner the costs of the application fixed at Rs. 315.

Application No. 34 allowed.

Application No. 407 dismissed.