1963 *Present :* Herat, J.

BOARD OF TRUSTEES OF MARADANA MOSQUE, Petitioner, *and* MINISTER OF EDUCATION and another, Respondents

S. C. 573/61—Application for a Mandate in the nature of Certiorari on the Hon. Badi-ud-din Mohamed, Minister of Education, and Mr. S. F. de Silva, Director of Education

Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, as amended by Act No. 8 of 1961—Sections 4 (1), 6 (1), 11—Declaratory order under Section 11—Can it be questioned by Certiorari *?—Difference between a " judicial act " and an " executive act".*

Certiorari does not lie to question or quash a ministerial or executive act even if done illegally.

Section 11 of the Assisted Schools and Training Colleges (Special Provisions) Act provides that " where the Minister is satisfied .... after consultation with the Director, that any unaided school is being so administered in contravention of any of the provisions of this Act .... the Minister may by order published in the Gazette declare that, with effect from such date as shall be specified in the order, (1) such school shall cease to be an unaided school, (2) such school shall be deemed for all purposes to be an assisted school, and (3) the Director shall be the Manager of such school."

Held, that a declaratory order made under Section 11 of the Assisted Schools and Training Colleges (Special Provisions) Act and the consequential vesting order under Section 4 are ministerial and not judicial acts. They cannot therefore be questioned by way of *certiorari*.

Where 52 teachers out of a total of 64 teachers in an unaided school (Zahira College, Colombo) were not paid their salaries by the Manager of the School—

Held, that an order under Section 11 of the Assisted Schools and Training Colleges (Special Provisions) Act was legally valid.

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

H. V. Perera, Q.C., with *S. Sharvananda, Izadeen Mohamed* and *Bala Nadarajah*, for the Petitioner.

A. C. Alles, Deputy Solicitor-General, and *V. Tennakoon*, Deputy Solicitor-General, with *H. L. de Silva* and *R. I. Obeyesekera*, Crown Counsel, for the 1st and 2nd respondents.

Cur. adv. vult.

September 3, 1963. HERAT, J.—

Section 6 (1) of Act No. 5 of 1960 as amended by Act No. 8 of 1961 (the Assisted Schools and Training Colleges Special Provisions Acts) provides that in the case of all unaided schools the salaries of teachers should be paid on or before the 10th day of every succeeding month. A breach of that provision is a breach of a provision of the Act.

Section 11 of the said Act No. 5 as amended by Act No. 8 aforesaid provides that " where the Minister is satisfied .... after consultation with the Director, that any unaided school is being so administered in contravention of any of the provisions of this Act ... the Minister may by order published in the Gazette declare that with effect from such date as shall be specified in the order (1) such school shall cease to be an unaided school, (2) such school shall be deemed for all purposes to be an assisted school, and (3) the Director shall be the Manager of such school."

At all relevant times Zahira College, Maradana, was an unaided school within the meaning of the said Act No. 5 of 1960 as amended by Act No. 8 of 1961. The Petitioner which is the Board of Trustees of the Maradana Mosque is an incorporated body under section 7 of the Maradana Mosque Ordinance, No. 22 of 1924. The Petitioner at all relevant times was the Manager of the said Zahira College. It is an admitted fact and established on the affidavits filed in these proceedings that the salary for July 1961 of 52 teachers out of a total of 64 teachers belonging to the staff of Zahira College was not paid to them by or before the 10th of August 1961, which date according to the provisions of section 6 of Act No. 5 of 1960 as amended by Act No. 8 of 1961 was the latest date for the payment of their salaries. There was clearly a contravention of section 6 of the Act and if the Minister was satisfied in consultation with the Director of Education that the school in question was being administered in contravention of the provisions of the Act, the Minister was entitled to make an order under section 11 declaring that the school was now an assisted school and that the Director was the Manager. And after this was done a vesting order vesting the school premises in the Crown could be made under section 4 (1) of Act No. 8 of 1961. This was also done.

The Minister in consultation with the Director acted under section 11 and published an order in the Government Gazette declaring that he was satisfied in consultation with the Director that there had been a contravention of the provisions of section 6, and declaring Zahira College an assisted school and that it was Director-managed. Subsequently a vesting order vesting the school premises in the Crown was duly made and published in the Government Gazette.

The Petitioner in this application seeks a writ of certiorari to quash these orders.

In my opinion this application must fail for two reasons. The first reason is that a writ of certiorari does not lie in the circumstances of this case. It is trite law that remedy by way of certiorari only lies to question and quash a judicial act. It does not lie to question or quash a ministerial or executive act, even if done illegally. Such an act, even if illegal or *ultra vires*, must be canvassed by a different procedure. Are the acts of the Minister in making the declaratory order under section 11 and the consequential vesting order under section 4 "judicial" acts or "executive"—"administrative" acts ? One must look at the relevant provisions of the statute before one answers this question. Section 11 requires the Minister to be satisfied in consultation with the Director that the Act is being contravened. Giving these words their plain grammatical meanings, all that the statute requires the Minister to do is to consult the Director and satisfy himself of contravention. There is no requirement for an inquiry of any sort, far less for a judicial inquiry. I am not in the habit of burdening my judgments by copious quotations from other men's minds, but I am humble enough to spend much time in reading and meditating upon the opinions of other judges and legal writers on the difference between a "judicial" act and an "executive" act. The result of what I have read makes me come to the conclusion that the essence of a "judicial act" is where the law predicates an inquiry by the judicial process before the reaching of the conclusion which results in the act. On the other hand an executive act is done by a process where the law predicates no prior judicial process before the arrival of a mental decision preceding the act. The exercise of judgment is not the test. For instance an administrator has to decide on which of two plots of land, A or B, a housing scheme is to be erected. Before he decides to build on plot A rather than on plot B, he will consider many factors and undoubtedly exercise his powers of judgment—but his decision in favour of plot A and not in favour of plot B is not a judicial act. The law does not require him to go through the judicial process. The essence of the judicial process is inquiry, the taking and consideration of evidence, and the hearing of both sides interested in the matter. Very often, even where purely ministerial or executive acts are concerned, the value of the judicial process is such that the person called upon to decide adopts the judicial process by holding some sort of inquiry and hearing both sides, but the act still remains a ministerial act. In the case of the statute under consideration, there is no requirement of any inquiry. The Minister can consult the Director and can satisfy himself

by perusing the file forwarded by the Director. If the Minister is then personally satisfied that there has been a contravention of a provision of the Act, it is open for him to act under section 11. It may be that the act of the Minister is unjustified but as his act is a purely ministerial one it cannot be questioned by way of certiorari but has to be tested in our Courts in other ways. The great writ of Certiorari must be jealously guarded and upheld no doubt, but it must be confined to its proper scope and not allowed to hamper the administration in its legitimate sphere.

The second reason why in my opinion the present application fails is the following. The act of the Minister was *intra vires* and not *ultra vires.* The words of section 11 are "being administered in contravention of the provisions." In my view one flagrant act of contravention satisfies the condition of "being administered in contravention". As stated earlier, 52 teachers out of a total of 64 were not paid their salaries for July 1961 by 10th August 1961, and they had brought their grievances to the notice of the Director. The Director and the Minister acted in consultation with each other and the order under section 11 was legally valid. I uphold the validity of the Minister's act and I hold that in the circumstances of the case it was a perfectly honourable and legal action for the Minister to do.

I also hold that the vesting order under section 4 of Act 8 of 1961 was a ministerial act and cannot be questioned by way of certiorari. In fact it is a purely consequential order flowing from the order made under section 11. I also hold that this order was *intra vires.*

In the result, I hold that the application of the Petitioner fails and is dismissed with costs payable to both the Respondents.

Application dismissed.