1947 *Present:* **Dias J.**

ADBUL THASSIM, Petitioner, *and* EDMUND RODRIGO (Controller of Textiles), Respondent.

167—Application for a Writ of *Certiorari* against the Controller of Textiles.

Defence (Control of Textiles) Regulations, 1945—Proceedings under Regulation 62—Judicial in nature—Bias of Controller against dealer—Vitiates proceedings—Dealer's right to be informed of the accusations against him—Writ of certiorari.

Regulation 62 of the Defence (Control of Textiles) Regulations provides: "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to that dealer."

Held, that proceedings under the Regulation are judicial, and not administrative in nature, and that bias in the Controller would vitiate the proceedings.

Held, further, that before a person is penalised under the Regulation he is entitled to be told of the accusations against him and should be afforded a reasonable opportunity for showing cause. If, however, he fails to appear and dispute the truth of the accusations, it is open to the Controller to act on the uncontested facts which are before him.

APPLICATION for a writ of *certiorari* against the Controller of Textiles.

H. V. Perera, K.C. (with him *C. Suntheralingam*), for the petitioner.

Walter Jayawardene, C.C., for the respondent.

Cur. adv. vult.

June 3, 1947. DIAS J.—

This is an application under section 42 of the Courts Ordinance for a writ of *certiorari* to quash the order dated April 10, 1946, made by the respondent, Mr. Edmund Rodrigo, the Controller of Textiles, declaring the petitioner to be unfit to continue to hold a textile licence and cancelling his licence as from April 10, 1946, under section 62 of *The Defence (Control of Textiles) Regulations, 1945* [1].

[1] *Published in the Defence Regulations in force on October 1, 1946, page 108.*

Mr. Edmund Rodrigo was the Controller of Textiles at the date this application was filed. Since then, however, he has ceased to function and has been succeeded by another officer. It was agreed between Counsel on both sides that the decision of the questions raised need not be delayed while steps were being taken to add or substitute the present holder of the office as a respondent, and that the Court should proceed to adjudicate as between the petitioner and the respondent before the Court.

Under the Textile Regulations the holder of a textile licence can be punished for a breach of its provisions in three ways :

(*a*) He can with the written sanction of the Controller be charged in a Magistrate's Court—section 59 read with section 57. On his conviction, the licensee can appeal in the ordinary way to the Supreme Court. When the conviction stands the Controller can cancel the licence—section 60.

(*b*) Where the Controller is satisfied that a dealer has contravened the regulations other than certain specified regulations, the Controller may, without prosecuting him or sanctioning his prosecution, make what is called a "punitive order" under section 58 (1). A person against whom such an order is made, has the right to appeal to "the Tribunal of Appeal" constituted under section 58A. The order of the "Tribunal of Appeal" is final and conclusive—section 58A (6). Under a punitive order the Controller has the power to suspend or cancel the licence granted to the offender.

(c) Section 62 of the Regulations provides :

> "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to that dealer."

There is no appeal from an order made under this regulation.

Regulation 62 came up for elucidation and construction in this very case before a Bench of five Judges[1] when it was laid down that the Controller of Textiles when he exercises functions under Regulation 62 of these Regulations is a "person or tribunal" within the meaning of section 42 of the Courts Ordinance. It was also laid down that the fact that he can only act when he has "reasonable grounds" indicates that he is acting judicially and not exercising merely administrative functions. It was, therefore, held that the Controller when acting under section 62 was amenable to a mandate in the nature of a writ of *certiorari*. Until this decision was given the Controller and those advising him had been acting under the belief that a proceeding under section 62 was in the nature of a purely *departmental* or *administrative* action and could not, therefore, be reviewed by the courts of law[2]. That fallacy has now been exploded.

In order to appreciate the questions which arise for decision, and in view of the order I propose to make, it is necessary to consider the matter from its inception.

[1] *(1947) 48 N. L. R. 121.* [2] *See In re a Sworn Translator (1932) 12 C. L. Rec. xciv.*

On January 5, 1945, in the course of an inquiry at the shop of Messrs. Hamid & Company (a stranger to these proceedings), the respondent inspected certain bill books of that firm and came to the conclusion that this petitioner "appeared to have purchased textiles from the said firm approximately of the value of Rs. 20,000 for his business at Ambalangoda." The respondent, thereupon, instructed two officers of his department to investigate whether these textiles were taken to the petitioner's business at Ambalangoda, and whether they were disposed of in accordance with the Regulations.

These two officers made their investigations, and their reports are appended as exhibits D and E to the respondent's affidavit. A third officer furnished the report marked F.

The respondent says in paragraph 6 of his affidavit: "From the investigations made by me and by the three officers . . . . it appeared to me that the petitioner had contravened the said Regulations and was carrying on business in a manner prejudicial to the effective control of textiles and was, therefore, liable to be dealt with on the ground that he was unfit to hold any textile licence."

On January 10, 1945, therefore, the respondent wrote the letter marked H to the petitioner stating that he had been informed that the petitioner had committed various (specified) breaches of the Regulations, and he was called upon to show cause in writing before January 20, 1945, why his licence should not be cancelled for these breaches of the Regulations. This action was taken by the respondent under section 58 (1) (2) of the Regulations. It is to be noted that the time given for showing cause was ten days, and no objection was taken then that the time given was insufficient.

The petitioner showed cause, but on his application the inquiry, which had been fixed for February 2, was put off until February 5. On this date petitioner's counsel applied for another postponement which the respondent, in my view, rightly refused. Counsel then retired from the proceedings and the respondent proceeded to hear the evidence and made order cancelling the petitioner's licence. This order was communicated to the petitioner on February 7, 1945. This was clearly a "punitive order" made under section 58 (1) of the Regulations.

The petitioner appealed to the Tribunal of Appeal under section 58 (3). On March 19, 1945, when the appeal was taken up for hearing, the tribunal sent the case back to the respondent after making the following order:

> "After examining some copies of letters produced on behalf of this appellant, the Controller states that his order has not been conveyed in full to the appellant and wishes to rectify the position. We have also considered the suggestion made in the petition of appeal that the appellant be given an opportunity of producing evidence in support of his written explanation. This suggestion seems to us to deserve consideration by the Controller. We, therefore, adjourn further consideration of the appeal."

The matter then came up before the respondent on April 26, 1945. On that day counsel for the petitioner took up the position that the respondent was too closely connected with the facts of the case to take an

impartial view of the matter, and suggested that the inquiry be passed on to someone else—Exhibit I. The respondent was not prepared to do this. It seems to me that both counsel for the petitioner and the respondent were wrong in the attitudes they adopted. Counsel for the petitioner had no right to ask that the matter should be passed on to someone else in the light of the definite order made by the Tribunal of Appeal. The matter was to go back *to the respondent* so that some mistakes should be rectified and that the petitioner's evidence should be led. If the petitioner did not want this respondent to continue to deal with the matter, he ought to have obtained a direction from the Tribunal of Appeal to that effect. Not having done so, his attitude was unreasonable and obstructive. How could the matter be dealt with by a new officer unless the whole proceedings were started *de novo* ? The Tribunal of Appeal did not order that the proceedings should be held afresh.

Instead of so ruling, the respondent recorded " I am not prepared to do this. These are not judicial proceedings, and in departmental administrative matters, the head of the department is necessarily aware of the facts ; and what is more, is officially interested in the matter ". Counsel for the petitioner then asked for another date which the respondent gave him and refixed the matter for May 10, 1945.

On May 10, 1945, after certain submissions were made by counsel for the petitioner, the respondent made the long minute which is appended to exhibit J. Counsel having heard the respondent dictate this minute then stated that his clients were not prepared to participate in the inquiry. He again submitted that the respondent was too intimately connected with the facts of the case to hold an impartial inquiry, and wanted it held by some other person. The respondent then went on to record.

> " I cannot understand Mr. Suntheralingam's position. After my last explanation that this is *not an impartial judicial inquiry*, but the exercise of definite *administrative powers* vested in me, and which I can exercise on facts that come under my direct notice, facts which I hear from others, and facts that emerge from perusal of documents and from facts which may be elicited in the course of an inquiry. It is left to me to hold an inquiry or not as the case may be at my entire discretion, and there is certainly no provision for an inquiry by anybody else. The only other authority having any part or share in the eventual disposal of the matter is the Appeal Tribunal which, I presume, will not concern itself in the correct observance of any procedure on the lines of a lawsuit, but will only look into the question whether in all the circumstances of the case, I have exercised my discretion in a reasonable and appropriate manner. I think all these attempts to pretend that the shop is the unit and not the licensee is an attempt at gaining time . . . and he only wants to take time because he knows that when there is an appeal pending, he can continue his trade, and he wants to make that continue as long as possible. I shall return the papers to the Appeal Tribunal as soon as it is reconstituted ".

On September 30, 1945, the matter went back to the Tribunal of Appeal—exhibit K. Counsel for the petitioner then addressed a long argument to the tribunal and asked that the matter be not proceeded with until

effect was given to the order of March 19, 1945. The application was refused. Nothing deterred, counsel then asked the tribunal to suspend proceedings to enable the petitioner to move the Supreme Court for a writ of *certiorari*. This application was also refused by the tribunal. On September 24, 1945, the tribunal recorded that it had been served with a notice from the Supreme Court, and therefore, the appeal proceedings were suspended *sine die* until the decision and disposal of the application to the Supreme Court.

On September 24, 1945, the petitioner making the Tribunal of Appeal the respondent had moved the Supreme Court for writs of *certiorari*, *prohibition*, and *mandamus*. The matter came up before Cannon J. on March 15, 1946, when a compromise was effected. Cannon J. said "The object of the petitioner is to prevent the Tribunal of Appeal considering what they submit is a matter alien to the decisions appealed from. Having regard to the Controller's letter and the present position which has resulted from unforeseen circumstances, it seems that an order of the Court in the matter as it now presents itself is unnecessary, and a *consent order* has, therefore, been drafted with the assistance of Mr. H. V. Perera and the Solicitor-General who appears as *amicus curiae*. The order is as follows: The Controller of Textiles revokes the two orders appealed from, and the petitioner withdraws his application. The position of the petitioner and the Controller of Textiles will be as it was on February 7, 1945."

Two facts emerge: In the first place the Controller of Textiles was no party to those proceedings. No relief had been asked for as against the Textile Controller, and I find it difficult to see how this order binds the present respondent. This question has not been raised or argued, and I shall say no more about it, except that the respondent apparently acquiesces in the order drafted by the Solicitor-General who represents the administration. In the second place what was reversed by the Supreme Court in the consent order were not only the proceedings before the Tribunal of Appeal, *but also the two orders of the Textiles Controller which were appealed against.* In fact the resulting position was as it existed before the Textile Controller wrote the letter H dated January 10, 1945, calling upon the petitioner to show cause why a punitive order should not be made against him.

It is at this point that the present matter of complaint emerges. The order of the Supreme Court is dated March 15, 1946. On March 25, 1946, the respondent wrote the letter marked C to the petitioner stating "I believe you to be unfit to continue to hold a licence to deal in textiles . . . . You are, therefore, requested to show cause in writing before April 5, 1946, why I should not revoke all outstanding licences issued to you to deal in textiles." In the reasons given by the respondent in the letter marked C for his belief that the petitioner was unfit to hold a licence appears this; "When you were questioned why you did not take them (the textiles) to your shop, you produced a bill book containing bills on which *the name of D. V. Mendis as purchaser had been forged and in which you had altered their date.*" It is to be noted that the time given for showing cause was eleven days.

To this letter the petitioner's proctor on April 3, 1946, that is to say two days before cause had to be shown, replied by letter marked D 1 stating that they were consulting counsel and in view of the Easter holidays a date in May was asked for in order to show cause.

No reply was sent to this communication, but on April 10, 1946, the respondent by his letter E acting under section 62 of the Regulations revoked all the petitioner's licences with effect from that date. The question for the decision is whether the respondent acted without jurisdiction or in excess of his jurisdiction in making the order.

It having been clearly declared to be the law that the respondent in acting under section 62 of the Regulations was acting in a judicial and not in an administrative capacity, it is urged that in cancelling the petitioner's licence he acted without jurisdiction because the time given for showing cause was inadequate in that a fair opportunity for meeting the accusation was not afforded to the petitioner. It is further contended that the act of the respondent in proceeding to make his order without replying to the petitioner's letter D 1 dated April 3, 1945, has prejudiced the petitioner. It is further argued that even if the petitioner was in default, it was the duty of the respondent to have held an inquiry on April 5, 1945, before making up his mind to cancel the licences. Considering the fact that one of the accusations made against the petitioner is that he had either forged a document or caused somebody to forge it, it is contended that the petitioner should have been first prosecuted in a court of law for that offence, before the drastic provisions of section 62 were invoked against him. Finally it is urged that the respondent was biassed, that he had already made up his mind against the petitioner, that he did not have that open mind which is a cardinal characteristic of a judge, and that, therefore, he was incompetent to deal with this matter under section 62.

I cannot agree that the time given by the respondent for showing cause was insufficient or inadequate. It will be recalled that when the petitioner was first asked to show cause on January 10, 1945, at a time when he was probably quite ignorant of the action contemplated against him, he was satisfied with ten days. By April, 1946, both the petitioner and those advising him must have been fully aware of what the facts were and the legal principles involved. They were given eleven days in which to show cause. The petitioner waited until two days before the date fixed for showing cause, and wrote a vague letter stating that they were consulting counsel and, in view of the approaching Easter Vacation asked for a date in May. I consider this to be an unsatisfactory letter, and the application should have been disallowed out of hand. It would have been more satisfactory had the respondent replied to the letter D 1, but even if it did reach his office on April 4, it may not have reached a busy man like the respondent until April 5 when it was too late to reply to it. I find that the first point taken fails.

Before a person is penalised under section 62 he is entitled to be told of the accusations against him, and he should be afforded a reasonable opportunity for showing cause. That has been done in this case, but the petitioner did not avail himself of the opportunity afforded him. He was in default and the respondent could

not be expected to go on postponing the inquiry until it suited the convenience of the petitioner to attend. The decision of the House of Lords in *Board of Education v. Rice*[1] was cited. It was there held that the officer must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But he was not bound to treat such a question as though it were a trial. He had no power to administer an oath and need not examine witnesses. He can obtain information in any way he thinks best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

I do not think any prejudice has been caused to the petitioner by reason of the fact that no reply was sent to his letter D1. It was the lateness of the despatch of the petitioner's letter which prevented the respondent from sending him a reply.

Under section 62 when a party is in default, there is no inquiry which the Controller can hold, for the section presupposes that before the petitioner is called upon to show cause, the Controller is already in possession of certain facts which make him form the view that a person should be called upon to show cause. If that person appeared and disputed the truth of the accusations, or demanded an inquiry, the Controller was bound to hold that investigation before he can have "reasonable grounds to believe" that the dealer is unfit to continue as a dealer. But when the petitioner is in default, it is open to the Controller to form that belief on the uncontested facts which are before him. Undoubtedly there is a presumption of innocence in favour of the petitioner. That presumption could be displaced either after an inquiry at which the petitioner was present, or when the petitioner is in default, as was the case here, on the information already before the Controller.

Counsel for the petitioner admits that it is not a condition precedent for the taking of action under section 62 that there should have been a prosecution of the petitioner in a criminal court. He has cited authorities, mostly in cases where members of the legal profession have been disbarred for professional misconduct in matters showing that they had committed some criminal offence. The Privy Council has expressed the view in *A pleader v. Judges of the High Court of Allahabad*[2] that in such cases, it is desirable that the offender should be first tried for the alleged offence, before disciplinary action is taken against him. That does not, however, prevent such action being taken against a person without first setting the criminal law in motion. To lay down such a principle would be inexpedient, for there are many cases where there is a moral certainty that a person may have committed a crime, which cannot be supported by evidence in a court of law, and yet that person may be guilty of conduct which makes him amenable to disciplinary action. The fact is that every case must be decided on the peculiar facts applicable to it.

The substantial point urged to show that the respondent acted without jurisdiction is that he was biassed and did not possess that "open mind"

[1] (1911) *App. Cas.* 179 *at p.* 182. [2] *A. I. R.* (1931) *P. C.* 112.

which is an attribute of the judicial mind, and that, therefore, he had no jurisdiction to deal with the petitioner under section 62. Curiously enough, this point has not been taken in the petition. The explanation is that until the respondent filed his counter-affidavit and the exhibits annexed thereto, the petitioner was unable to formulate this as a ground of objection. This is strange, because counsel who appeared for the petitioner in the earlier proceedings, time after time protested that Mr. Edmund Rodrigo was so intimately connected with the matter, that it was not expedient that he should continue to function both as prosecutor and judge. In fact, the whole of the previous proceedings show that one of the main objections, if not the main objection, urged by Mr. Suntheralingam was this question of bias. The evidence also proves that Mr. Rodrigo appears to have conceded this; but his point of view—subsequently declared by a Bench of five Judges to be erroneous—was that as this was a departmental and not a judicial inquiry, he was entitled to be biassed. In passing I may be permitted to observe that it is by no means clear whether in an administrative or departmental inquiry against a person which may entail penal consequences, the head of a department who knows the facts can be both prosecutor and judge. I believe in such cases His Excellency the Governor has been known to quash the proceedings. Now that the law has been judicially declared that a proceeding under section 62 is a judicial inquiry and not merely an administrative proceeding, the evidence clearly shows that when the respondent called upon the petitioner to show cause under section 62, he had already made up his mind that the petitioner was unfit to continue as a delear in textiles.

A judge who is biassed has no jurisdiction to hear that case. Our Courts have even gone to the length of holding that even if there is the semblance of bias in the judge, he must not try that case. I was informed that there is a Deputy Controller of Textiles. Section 53 of the Regulations provides that, subject to the general direction of the Controller, (*a*) any power or function conferred upon or assigned to the Controller by any of the provisions of these Regulations may be exercised or discharged by any Deputy Controller of Textiles, and (*b*) any such power or function, *other than power or function under Regulation 57 or Regulation 58*, may be exercised or discharged by an Assistant Controller of Textiles or by any other officer authorized in writing in that behalf by the Controller. Section 57 refers to the granting of sanction to prosecute. Section 58 deals with the power to make a "punitive order". It is to be noted that section 62 is not excepted under section 53 (*b*). Therefore, the power to hold an inquiry and to make an order under section 62 can be lawfully delegated to a subordinate by the Controller.

In the circumstances of this case, what the respondent should have done was to have called upon the petitioner to show cause under section 62, and then hand over all the evidence to his subordinate with the direction that he should hold the inquiry *without any interference from the Controller*, and report his findings to him. If the findings were adverse to the petitioner and were to the effect that he was unfit to continue as a dealer, action could be taken under section 62, and no objection whatever could be taken to the legality of the procedure adopted, for in such

a case the Controller would clearly have "reasonable grounds to believe" that the dealer was unfit to continue as such. I have no doubt that had the respondent been aware that proceedings under section 62 were judicial and not administrative, he would have taken the proper course. However as things are, an erroneous course of procedure was followed owing to a misapprehension of the nature of the proceedings under section 62. In doing so, the respondent was clearly biassed against the petitioner, and he had, therefore, no jurisdiction to deal with the matter under section 62. The proceedings culminating in the cancellation of the petitioner's licences cannot therefore stand.

The rule *nisi* will, therefore, be made absolute. In all the circumstances of the case I think each party should be ordered to bear his own costs.

Rule made absolute.