1961 *Present :* **Tambiah, J.**

J. C. W. MUNASINGHE, Petitioner, *and* THE AUDITOR-GENERAL and another, Respondents

S. C. 31—Application for a Writ of Certiorari and/or a Writ of Prohibition under Section 42 of the Courts Ordinance

Certiorari—*Executive officer entrusted with quasi-judicial functions—Procedure to be followed by him when it is not specified by statute—Natural justice*—Audi alteram partem *rule—Town Council Chairman—Surcharge by Auditor-General—Appeal therefrom—Procedure—Town Councils Ordinance, No. 3 of 1946, ss. 195 (1), 196 (1) (2) (3).*

By section 196 (3) of the Town Councils Ordinance (as amended by *Gazette* No. 9,773 of 24th September 1947) :—

" . . . any person aggrieved may . . . appeal to the Minister, and it shall be lawful for the Minister, upon such appeal, to decide the question at issue according to the *merits of the case,* and if the Minister finds that any disallowance or surcharge has been lawfully made, but that the subject matter thereof was incurred under such circumstances as to make it *fair and equitable* that the disallowance or surcharge should be remitted, the Minister may direct that such disallowance or surcharge shall be remitted . . ."

Held, that, when a person who has been surcharged by the Auditor-General under the provisions of section 195 (1) of the Town Councils Ordinance appeals to the Minister under section 196 (3), the Minister has a duty to act judicially and to observe the rules of natural justice, particularly the rule *audi alteram partem.* Accordingly, if the Minister does not give the appellant an opportunity to be heard, writ of *certiorari* will lie.

APPLICATION for a Writ of Certiorari and/or a Writ of Prohibition against the Auditor-General and the Minister of Local Government and Housing.

A. C. Nadarajah, with *C. V. Munasinghe* and *Miss Suriya Wickramasinghe,* for the petitioner.

Mervyn Fernando, Crown Counsel, for the respondents.

Cur. adv. vult.

May 15, 1961. TAMBIAH, J.—

This is an application for a writ of certiorari to quash the order of the Auditor-General, surcharging the petitioner sums of money amounting to Rs. 28,962/48 cts. and the order of the Minister of Local Government and Housing confirming the said sum.

The petitioner, in his affidavit, set out the facts of the case. The petitioner was the Chairman of the Madampe Town Council from 1947 to the end of 1958, except for a few months in 1953. In 1950, the late Mr. S. W. R. D. Bandaranaike, the then Minister of Health and Local Government, requested the Madampe Town Council to start a Housing Scheme and agreed to reimburse 75% of the expenditure out of the Slum Clearance Vote for 1950-1951.

In pursuance of this agreement, a sum of Rs. 87,862 was given as Government grant for the scheme and the Town Council was requested to get the balance as a loan from the Local Loans and Developments Fund. Although the original scheme was to have the Housing Scheme on the land owned by the Council, another site was purchased for this purpose for Rs. 18,000, on the advice of the Town Planner, with the approval of the Commissioner of Local Government.

Tenders were called for by the Council and the contract was given to the Globe Agency Ltd., Colombo, to complete this scheme at a cost of Rs. 138,914/23 cts. By a resolution dated 30.4.51, the Council vested the petitioner with the necessary authority and powers for the successful construction work of the scheme. The Commissioner of Local Government offered to pay Rs. 70,000 and made an initial payment of Rs. 10,000, undertaking to pay the balance during the following year. According to the petitioner, however, as the sums promised were paid in small instalments, and as there was delay in the payment of such instalments, he was compelled on some occasions to authorise the advances for materials supplied and the work already done, in terms of Rule 97, framed under Section 206 of the Town Councils Ordinance No. 3 of 1946. The monies so advanced were paid out of the funds of the Council as a temporary measure till the Government made good its promise.

The Auditor-General, the 1st respondent, by his letter dated 8.12.58, marked A, called upon the petitioner to show cause why he should not be surcharged the sum of Rs. 28,962/48 cts., given by way of advances in connection with the Housing Scheme. The reason given by the Auditor-General, in his letter marked A, was that there was no provision in the Town Councils Ordinance No. 3 of 1946, under which the advances could have been properly made. It was not suggested that there had been any misappropriation of the funds. The petitioner, in his affidavit, has stated that the Council had not suffered any loss and that the 1st respondent has surcharged the said sum as the petitioner had failed to give the necessary explanation within the required time.

The petitioner filed an appeal to the Minister of Local Government and Housing in 1959, and the Permanent Secretary to the Minister of Local Government and Housing sent a letter dated 10.12.60, marked D, stating that the Minister, the 2nd respondent, had disallowed the petitioner's appeal and has upheld the surcharge of the sum of Rs. 28,962/48 cts. made by the Auditor-General.

The petitioner's averments, in his affidavit, that the 2nd respondent has made this order without any inquiry at which he could have supported his appeal, is not traversed by the second respondent. The first intimation the petitioner had about his appeal was the letter, marked D1, refusing his prayer. It was urged on behalf of the petitioner that the second respondent did not give any notice to the petitioner in respect of the petitioner's appeal.

The Crown Counsel, who appeared for the respondent, did not contest the facts set out in the petition and affidavit. However, he contended that the writ of certiorari did not lie in the present case as there was no procedure envisaged by section 196 (3) of the Town Councils Ordinance, No. 3 of 1946, requiring the Minister to notify the petitioner the date on which he would hear the appeal or even prescribing the manner in which such appeal should be heard. The counsel for the respondent also submitted that section 196 (3) of the Town Councils Ordinance vests the Minister with an absolute discretion to deal with such matters and hence no Certiorari would lie in the present case.

Section 195 (1) of the Town Councils Ordinance empowers the Auditor-General to surcharge any person who makes or authorises an illegal payment of money of the Town Council. Section 196 (1) of the Act gives any person aggrieved by such surcharge the right to appeal against such a decision to the Supreme Court on a point of law and the Supreme Court is given the power to confirm or disallow such surcharge. Under Section 196 (2) of the Ordinance, every appeal to the Supreme Court has to be presented in the same manner as an appeal from an interlocutory order of a District Court.

Section 196 (3) of the Town Councils Ordinance (as amended by *Gazette* No. 9,773 of 24th September 1947) reads as follows :—

> " In lieu of an appeal under sub-section (1) any person aggrieved may, within thirty days of the date of the decision of the auditor duly communicated to him, appeal to the Minister, and it shall be lawful for the Minister, upon such appeal, to decide the question at issue according to the *merits of the case*, and if the Minister finds that any disallowance or surcharge has been lawfully made, but that the subject matter thereof was incurred under such circumstances as to make it *fair and equitable* that the disallowance or surcharge should be remitted; the Minister may direct that such disallowance or surcharge shall be remitted on payment of the costs, if any, which may have been incurred by the auditor in the enforcing of such disallowance or surcharge. Any amount directed to be recovered from any such person under any

order made by the Minister may forthwith be recovered by the Commissioner or any person authorised in writing in that behalf by the Commissioner in the same manner as any sum certified to be due by an auditor is recoverable under the provisions of this section. "

It is not denied by the Crown Counsel that the Auditor-General, acting under section 195 of the Town Councils Ordinance, has a duty to act judicially. Section 196 (3) gives a right of appeal from the decision of the Auditor-General to the Minister and the Minister, upon such appeal, is empowered to decide the question at issue according to the merits of the case. This provision empowers the Minister to decide both questions of law and fact and there can be no doubt that when the Minister hears such an appeal, he has a duty to act judicially and to observe rules of natural justice and, in particular, the *audi alteram partem* rule.

Section 196 (3) of the Ordinance further empowers the Minister to exercise his discretion and to remit any surcharge or to disallow it if the Minister finds that the subject-matter thereof was incurred under such circumstances as to make it "fair and equitable" that the disallowance or surcharge should be remitted. The conferment of this power on the Minister does not dispense with his duty to act judicially, according to the " merits of the case ", and does not convert the power given to him into one of unfettered and absolute discretion, as submitted by the Crown Counsel.

The Crown Counsel further stressed on the differences in the legal terminology used in sections 196 (2) and 196 (3). He contended that whereas special procedure is provided by section 196 (2) to hear appeals, no such procedure is provided by section 196 (3) and, therefore, he contended that the Minister need not have given any notice to the petitioner informing him that his appeal would be heard on a particular day. Such a contention, however, is untenable.

The point which arises is an important one in view of the modern trend of legislation to entrust executive officers with quasi-judicial functions. The Legislature often sets out the procedure to be followed by such officers in hearing appeals or provides for rules to be made by such officers, which are to have the force of law. Where such procedure is set out, the dictates of natural justice are observed by the executive officer adhering to such procedure. Where, however, no such procedure is set out, the principles to be followed, and the powers of the High Court to issue writs of certiorari, are set out in the opinion of Lord Parmoor in the House of Lords in the case of *Local Government Board v. Arlidge* [1] in the following terms :—

" The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected

[1] *(1915) 84 L. J. K. B. 72 at 86 and 87.*

parties. Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in accordance with the principles of substantial justice."

"In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal . . . ."

In *Arlidge's case* (supra) the writ of certiorari was refused because special procedure for hearing appeals were enacted and the Local Government Board against whom the writ was asked, gave the parties a fair opportunity of being heard before them and stating their case and views. In this case, the earlier case of *Spackman v. Plumstead District Board of Works* [1] was cited with approval by Lord Parmoor. In *Spackman's case* (supra), Lord Selborne, in the course of his opinion, stated: "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a Judge in the proper sense of the word: but he must give the parties an opportunity of being heard before him and stating their case and their view."

In the instant case, however, although no procedure for hearing appeals by the Minister is set out, no opportunity was afforded to the petitioner to be heard and one of the fundamental rules of natural justice, namely, that a person must be heard before he is condemned has not been observed.

The Crown Counsel contende that when the petitioner addressed his appeal to the Minister, he waived all rights to be heard. As section 196 (3) of the Town Councils Ordinance No. 3 of 1946 does not prescribe any particular form of appeal, the petitioner was at liberty to adopt this particular form of appeal. The letter to the Minister, a copy of which was given by the Crown Counsel, at the request of the Court, sets out the facts and the relevant provisions of law, and contains a prayer in the following terms:—

"Under these circumstances, I appeal to you in terms of Section 196 (3) of Town Councils Ordinance No. 3 of 1946 that the decision of the Auditor, Town Council, Madampe, to disallow the expenditure of Rs. 28,962/48 and surcharge such sum from me be set aside."

Nowhere in the letter has the petitioner stated that the appeal can be decided by the Minister, in the petitioner's absence. As observed by Charles J. in *Stafford v. Minister of Health* [2],

". . . . The mere giving of the notice of objection, in accordance with the statutory requirement, and setting out the grounds of objection is not an adequate presentation of the appellant's case."

[1] *54 L. J. M. C. 81; 10 A. C. 229.* [2] *(1946) 1 K. B. 621 at 625.*

In the instant case, the Minister of Local Government and Housing, in not giving an opportunity to the petitioner to be heard in appeal, has violated principles of natural justice and has exceeded his jurisdiction. Accordingly, I quash the order of the Minister disallowing the appeal of the petitioner, dated 1.9.59 and upholding the surcharge of Rs. 28,962/48.

I do not propose to quash the order of the Auditor-General, the 1st respondent, as the petitioner has chosen to appeal from the Auditor-General's order to the Minister. The writ of certiorari does not lie in cases where there is another effective remedy open to the petitioner. The resulting position in this case is that the appeal by the petitioner is still pending before the Minister and I have no doubts that the Minister will give an opportunity for both the petitioner and the 1st respondent to be heard. The failure to notice the petitioner is perhaps due to a misapprehension of legal principles.

The application against the 2nd respondent is allowed but the application against the 1st respondent is dismissed. I award no costs in this appeal.

Application against 2nd respondent allowed.

Application against 1st respondent dismissed.