1972 *Present :* **Walgampaya, J., and Wimalaratne, J.**

W. D. SIMON and 3 others, Appellants, *and* THE COMMISSIONER OF NATIONAL HOUSING and 3 others, Respondents

S. C. 629/71—Application for a Writ of Certiorari under Section 42 of the Courts Ordinance

Protection of Tenants (Special Provisions) Act No. 28 of 1970—Section 5 (2)—Ejectment of a tenant other than by order of Court—Tenant's complaint to Commissioner—Inquiry held by Commissioner—Procedure—Natural justice—Inquiry of a quasi-judicial nature—Bias of the inquiring officer—Proof—Difference between "real likelihood" test and 'reasonable suspicion" test—Certiorari.

On 9th July 1971 a tenant of certain premises complained to the Commissioner of National Housing that she had been ejected from the premises by her landlord in contravention of the provisions of section 5 (1) of the Protection of Tenants (Special Provisions) Act. Thereupon an Assistant Commissioner commenced an inquiry in terms of section 5 (2) of the Act. On 15th October 1971, which was the sixth date of the inquiry, Counsel for the landlord objected to the Assistant Commissioner continuing with the inquiry on the ground of bias on the part of that officer. It was alleged that on 9th October the tenant, and on 10th October the tenant's Counsel, had been having private talks with the inquiring officer in his room concerning the pending inquiry.

Held, that, when conducting an inquiry of a quasi-judicial nature, the inquiring officer, such as a Commissioner holding an inquiry under section 5 (2) (*a*) of the Protection of Tenants (Special Provisions) Act No. 28 of 1970, must comply with the well known rules of natural justice. One of these rules is that he must be disinterested and unbiased. But a decision of the inquiring officer is not liable to be quashed by the Supreme Court on the ground merely of the reasonable suspicion of the party aggrieved unless it is proved that there was a real likelihood that the inquiring officer was biased against the party aggrieved.

Held further, (i) that, when an Assistant Commissioner decides at an inquiry held by him under section 5 (2) (*a*) of the Protection of Tenants (Special Provisions) Act that a tenant has been deprived of his right to use the premises, the decision may be communicated to the landlord in the form of an Order by another Assistant Commissioner.

(ii) that the Commissioner is not bound by the rules of evidence and procedure applicable to a trial before a Court.

APPLICATION for a Writ of Certiorari.

E. R. S. R. Coomaraswamy, with *N. Satyendra*, *S. C. B. Walgampaya* and *Miss P. de Alwis*, for the petitioners.

F. Musthapha, State Counsel, for the 1st, 2nd and 3rd respondents.

H. W. Jayewardene, with *Gamini Dissanayake*, for the 4th respondent.

Cur. adv. vult.

July 19, 1972. WIMALARATNE, J.—

The petitioners seek in these proceedings a Mandate in the nature of a Writ of Certiorari to quash certain proceedings held by the 2nd respondent, M. J. Silva, Asst. Commissioner of National Housing, and an Order dated 16.10.71 made by the 3rd respondent S. Chelliah, Asst. Commissioner of National Housing, under Section 5 (2) of the Protection of Tenants (Special Provisions) Act No. 28 of 1970, directing them to hand over possession of premises No. 244, Jubilee Post Junction, Mirihana, to the 4th respondent, Rita Ratnayake.

The 4th respondent complained to the Commissioner of National Housing on 9.7.71 that she, the tenant of these premises, was forcibly ejected by the landlord and some others in contravention of Section 5 (1) of the Act. When such a complaint is made the Commissioner is empowered, by section 5 (2) (*a*) of the Act, to hold an inquiry for the purpose of deciding the question whether or not such tenant has been ejected from such premises. After entertaining the 4th respondent's complaint R1, the 3rd respondent visited and inspected the premises on 10.7.71 in the presence of the 4th respondent, the 1st petitioner (the landlord), his son the 2nd petitioner, intended son-in-law the 3rd petitioner and the 4th petitioner, brother of the 3rd petitioner. The 3rd respondent informed the parties that a proper inquiry would be held later.

Section 5 (2) (*b*) provides that the landlord and the person ejected shall be given an opportunity of being heard at such inquiry. The Commissioner's decision on the question "shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ, Order, Mandate or otherwise".

The Petitioners were, by letter P1, summoned for an inquiry. The inquiry commenced on 12.8.71 before the 3rd respondent. The petitioners were represented by Advocate Miss Maureen Seneviratne, and the 4th respondent by Advocate Mr. S. Parameswaran. At the outset Counsel for the petitioners objected to the 3rd respondent holding the inquiry on the ground that he had inspected the premises on 10.7.71. The inquiry was thereupon held before the 2nd respondent, commencing on 20.8.71, on which date certain issues were formulated, after which the 4th respondent gave evidence. The resumed dates of inquiry, namely 11th September, 18th September, 25th September and 9th October were devoted mainly to the cross-examination of 4th respondent by Counsel for the petitioners, and to legal arguments on the admissibility of certain items of evidence which Counsel sought to elicit in cross-examination.

On the next date of inquiry, namely 15th October, Counsel for the petitioners objected to the 2nd respondent continuing with the inquiry and formulated her objections in the following terms :—

> " (*a*) that on 9th October, after the inquiry was adjourned, my clients have received information that approximately 15 minutes after I left the inquiry hall, you came out of the inquiry hall with Mrs. Rita Ratnayake and told her on the corridor " Don't worry. I shall not allow her to go on indefinitely ". Saying this you walked towards your room with Mrs. Rita Ratnayake.
>
> (*b*) that on 10th October, Advocate Mr. S. Parameswaran, Counsel for Mrs. Rita Ratnayake, had entered your room and was engaged in conversation with you for approximately two and half hours.
>
> I shall support the aforementioned statements with evidence before the proper authority.
>
> It is a fundamental rule that justice should not only be done but manifestly and undoubtedly be seen to be done.
>
> My clients in the circumstances are convinced that they will not have a fair hearing before you. "

The record Z (at page 43) shows that Counsel also stated " I withdraw from the inquiry with my clients ". The 2nd respondent ruled that the inquiry would proceed. Thereupon Counsel walked out with her clients, the petitioners. After a short adjournment the inquiry was resumed. The 4th respondent was re-examined and the 3rd respondent Chelliah also gave evidence regarding his inspection of 10th July, before Counsel closed his case for the 4th respondent. The inquiring officer thereupon recorded the evidence of two other Asst. Commissioners Samaranayake and Kapugeekiyana, and after answering the issues earlier formulated, made order that 4th respondent shall be entitled to have the use and occupation of the premises restored to her and that 1st petitioner and every other person holding under him of the said premises shall vacate and deliver vacant possession to the 4th respondent.

This order was communicated by the 3rd respondent Chelliah to the petitioners by document P7 dated 16.10.71. It is this order and the proceedings held before the 2nd respondent M. J. Silva from 20.8.71 to 15.10.71 that the petitioners seek to have declared null and void. In their petition the petitioners plead that the order contained in P7 is illegal and made contrary to the principles of natural justice in that—

(*a*) the order has been made by the 3rd respondent, who did not hold the inquiry;

(*b*) the 2nd respondent should not have conducted the inquiry in view of the objections taken by Counsel and referred to earlier;

(c) the petitioners have not been informed of the findings made against them by the 2nd respondent; and

(d) the order P7 impliedly directs them to do an illegal act, namely to eject all persons in occupation of the premises because the petitioners are neither the landlords of those persons, nor the owners of the premises.

Ground (b) above is the main ground on which arguments have been adduced before us. It is conceded for the respondents that the Commissioner holding an inquiry under Section 5 (2) (a) of the Protection of Tenants (Special Provisions) Act performs functions quasi-judicial in nature. It is a rule of law that in conducting such an inquiry he must comply with the well known rules of natural justice. One of those rules is that he must be disinterested and unbiased. In order to establish the charge of bias against M. J. Silva the petitioners rely upon an affidavit of one Daya Weerasekera, dated 15.10.71, which is the document P4. In that document Weerasekera refers to two incidents—

(1) On 9.10.71 he was present at the Housing Department from 9 a.m. to 3.30 p.m. waiting to be called for an inquiry to which he had been summoned. Approximately 15 minutes after Counsel Miss Seneviratne had left the inquiry room he saw M. J. Silva coming out of the same room in the company of Rita Ratnayake *and her lawyer*. Whilst passing him he overheard M. J. Silva say " Don't worry. I shall not allow her to go on indefinitely ".

(2) On 10.10.71 (Sunday) he was again in the same Department from 9.30 a.m. to 3 p.m. waiting till he was called to give evidence. He saw Advocate Parameswaran entering M. J. Silva's room and engaging in a conversation which lasted approximately 2½ hours. He himself had occasion to enter that room in order to take a telephone call; just then the conversation stopped.

This is the only evidence relied upon by the petitioners in proof of the allegation of bias against the 2nd respondent. As against this there are the affidavits of Advocate Parameswaran, of the 2nd respondent and of the 4th respondent. In his affidavit marked " X ", Advocate Parameswaran denies the incident of the 9th; he says that he, the 4th respondent and her husband left the inquiry hall together, and 2nd respondent did not on that occasion speak to them. That statement is supported by the affidavits of the 2nd and 4th respondents. With regard to the incident of the 10th Advocate Parameswaran's version is that he went to the Housing Department for the purpose of inspecting the proceedings of the previous day. A little after 11 a.m. when he was passing M. J. Silva's office the latter called him in and asked him why he was there. Just then a cup of tea was brought in by a peon and M. J. Silva offered him this cup of tea and ordered another for himself. They were engaged in a casual conversation for about 10 minutes and he left thereafter. He emphatically denies that he

discussed with M. J. Silva anything pertaining to the inquiry. M. J. Silva's affidavit regarding the incident of the 10th is substantially the same. Advocate Parameswaran was accompanied on that date by a Police Constable Ramapillai who has also made an affidavit, marked Y. He corroborates Parameswaran regarding the duration of their stay in the Housing Department.

Learned Counsel for the petitioners invites us to act upon the affidavit of Daya Weerasekera, a person said to be disinterested in the result of this inquiry. If he is believed, Counsel contends it would mean that the inquiring officer by reason of his words, deeds and association with a party to the proceedings made himself suspected of partisanship. On a careful consideration of the affidavit, in the light of the surrounding circumstances, I have come to the conclusion that it is unsafe to quash the proceedings on that affidavit alone.

Weerasekera made his affidavit five days after the incident of the 10th. Weerasekera must have met Mr. Hilton Seneviratne, Proctor, on the 10th or soon thereafter, because on his own affidavit, he stepped into M. J. Silva's room to convey an urgent telephone message on behalf of Mr. Hilton Seneviratne. The delay of five days in making his affidavit appears to me to be inordinate, under the circumstances.

When Miss Seneviratne stated her objections before M. J. Silva on the 10th it would appear that she did not have with her Weerasekera's affidavit. There are at least two discrepancies between what she told M. J. Silva and what Weerasekera has put down in the affidavit P4. According to P4-M. J. Silva came out of the inquiry room with Rita Ratnayake and *her Counsel*, but from what Miss Seneviratne stated the impression one gets is that M. J. Silva and Rita Ratnayake came out of the room alone. Again, according to P4 Weerasekera was in the Housing Department on the 10th from 9.30 a.m. but Miss Seneviratne's statement was that Advocate Parameswaran had entered M. J. Silva's room at about 9 a.m. It is therefore a safe inference that Weerasekera made the affidavit P4 only after Miss Seneviratne stated her objections on the 10th and after she walked out of the inquiry room with the petitioners.

Weerasekera has not been seen or heard by us. He is said to be disinterested, but the opposite party has not had an opportunity of cross-examining him and if possible establishing his interest. Not a single statement in P4 is corroborated by other evidence. On the other hand the counter affidavits filed on behalf of the respondents contradicted Weerasekera on many material particulars. One of the counter affidavits is from an Advocate of this Court, against whom nothing has been urged, except that he has been counsel for the 4th respondent.

For all these reasons I have come to the conclusion that the petitioners have not proved the incident of the 9th. With regard to the incident of the 10th, what has been established is that Advocate Parameswaran

met M. J. Silva quite by chance when he went to the Housing Department at about 11 a.m. He had a conversation with M. J. Silva for about 20 minutes, in the course of which he was offered and drank a cup of tea. There was no discussion about the pending inquiry.

Do these facts accepted by us as established constitute " bias " on the part of M. J. Silva? As stated earlier in this judgment M. J. Silva was a person holding an inquiry of a quasi judicial nature. The main principles evolved with regard to the conduct of Judges and Magistrates have been applied with appropriate modifications, to the exercise of judicial and quasi-judicial functions by bodies other than Courts and in this case we prefer to apply the same standard as we would to a Judge performing judicial functions. " Even where the evidence adduced has pointed strongly to the inference that an adjudicator was in fact biased, the Courts have confined themselves to determining whether a real likelihood of bias has been established. And this question is to be answered by inferences drawn from the circumstances ". S. A. de Smith in *Judicial Review of Administrative Action* (2nd Edition) p. 243.

It is however contended on behalf of the petitioners that Courts have often quashed decisions on the strength of the reasonable suspicion of the party aggrieved, without having made any finding that a real likelihood of bias in fact existed. This " suspicion " test derived support from the well known judgment of Lord Hewart C.J., in *R v. Sussex Justices. Ex. p. Mc.Carthy* [1] (1924) 1 K.B. 259 " A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice ".

However, in *R v. Camborne Justices, Ex. p. Pearce* [2] (1954) 2 A.E.R 850 Slade J. had this observation to make (at p. 853) " While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done ". The Court applied the " real likelihood " of bias test and held that where a member of a County Council sat as Clerk to Justices in cases where the prosecution was conducted on behalf of the Council of which he was a member, there was no real likelihood of bias.

In *Regina v. Barnsley Licensing Justices* [3] (1960) 2 Q. B. 167 an application for a spirit licence at a drug store was granted to a Co-operative Society by seven Licensing Justices, six of whom were

[1] *(1924) 1 K. B. 259.* [2] *(1954) 2 A. E. R. 850.*

[3] *(1960) 2 Q. B. 167.*

members of the Co-operative Society. An Order was sought to quash the decision of the justices, and Devlin L. J. said " I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, . . . But, in my judgment, it is not the test. We have not to inquire what impression might be left in the minds of the present applicants or in the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias . . . . " Real likelihood " depends on the impression which the Court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices were biased ? " at p. 187.

Two other decisions have been referred to in the course of the argument. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*[1] (1968) 3 Weekly Law Reports 694, the Chairman of a Rent Assessment Committee was also a Solicitor who advised in disputes with landlords. Although the Court of Appeal held that the fact relating to the Chairman's connection with tenants was such as to give the reasonable impression that he was biased, even though there was no actual bias on his part, Lord Denning M.R. observed " The Court does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people . . . . The Court will not inquire whether he did, in fact, favour one side unfairly, suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence : and confidence is destroyed when right-minded people go away thinking : ' The Judge was biased ' " at p. 707.

In *Hannam v. Bradford City Council*[2] (1970) 2 A.E.R. 690 the " suspicion " test was applied again in a case where three governors of a school sat on a Sub-Committee appointed to inquire into the dismissal of a teacher. The decision of the Sub-Committee was later approved by the full Council of the governors. Sachs L. J. took the view that no materially different results were produced by the application of the real likelihood of bias test urged by Counsel for the Council and the test applied by the County Court Judge whether a reasonable man would say that a real danger of bias existed, and he said " If there is such a difference I uphold the latter and respectfully adhere to the school of thought adopted in *Lannon's case*, for the reasons there given by Lord Denning M.R. " at p. 694.

" In so far as the ' real likelihood ' and the ' reasonable suspicion ' tests are inconsistent with each other " submits de Smith (at p. 246) " the former is normally to be preferred ; the reviewing Court should make an objective determination, on the basis of the whole evidence before it, whether there was a real likelihood that the inferior tribunal would be biased ". It is the same view that T. S. Fernando, J. took in

[1] *(1968) W. L. R. 694.* [2] *(1970) 2 A. E. R. 690.*

In re Ratnagopal[1] (1968) 70 New Law Reports 409 when he said " The proper test to be applied is, in my opinion, an objective one and I would formulate it somewhat on the following lines: Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him ? I agree with the respondents' Counsel that the burden on a person seeking to show reasonable cause is to satisfy this objective test on a balance of probability " at p. 436. No doubt that was a case where the person complaining of bias was a person who had been called upon to show cause for his refusal to be sworn as a witness under section 12 (1) of the Commissions of Inquiry Act (Cap. 393), but the principle enunciated would, in our view, also apply to persons complaining of bias on the part of a person acting in a quasi-judicial capacity.

In order to demonstrate that under all the circumstances of this case there was no real likelihood of bias on the part of M. J. Silva the record of the proceedings from 20.8.71 to 15.10.71 were subjected to careful analysis by learned Counsel for the 4th respondent. He submits that far from being biased against the petitioners, M. J. Silva had given wide latitude to Counsel for the petitioners, latitude to the extent that he could be criticised for allowing the course of the inquiry to be diverted from the issues that were involved to an inquiry into a number of irrelevant matters. A reading of the proceedings shows that Counsel for the petitioners had been given a very wide latitude when she cross-examined the 4th respondent for nearly three days, and when the only substantial issue the 2nd respondent had to decide was the question as to whether the 4th respondent had been ejected from the premises. Most of the objections taken by Counsel for the 4th respondent were overruled and Counsel for the petitioners succeeded in asking from the 4th respondent almost all the questions that were objected to. The proceedings considered as a whole leave no room whatsoever for the view that there was a real likelihood of bias on the part of M. J. Silva against the petitioners.

The complaint that Advocate Mr. Parameswaran saw M. J. Silva alone in the latter's office room is to be viewed in the light of M. J. Silva's affidavit that Advocate Miss Seneviratne had also occasion to see him alone in his office room on 7.9.71 to seek a postponement of the inquiry on the ground that she was engaged elsewhere on that day. I do not think that Advocate Mr. Parameswaran went to M. J. Silva's office room on the 10th in order to influence him. For the reasons stated above I take the view that the petitioners have not established ground (*b*).

Another ground (*c*) relied upon is that the petitioners have not been informed upto date of the findings made against them by the 2nd respondent. This ground may conveniently be taken up with ground (*a*) that the order has been made by the 3rd respondent who

[1] *(1968) 70 N. L. R. 409.*

did not himself conduct the inquiry. What the law contemplates is a decision by the Commissioner that a tenant or person in occupation of premises has been ejected and a written communication by the Commissioner to every person in occupation of the premises in the form of an order that they shall vacate the premises on a specified date and deliver possession thereof to the person ejected. By virtue of Section 14, "Commissioner" includes an "Assistant Commissioner". One Assistant Commissioner, namely the 2nd respondent, has decided that the 4th respondent has been ejected, meaning thereby that she has been deprived, by using direct or indirect methods, of her right to use the premises. That decision has been communicated in the form of an Order P7 by another Assistant Commissioner, namely the 3rd respondent, who is the officer in charge of all matters relating to the implementation of the provisions of the Act. The 3rd respondent has only performed the administrative act of communicating the order, and we see nothing irregular in that procedure.

It has also been pointed out that whereas M. J. Silva's Order was that the 1st petitioner and every other person holding under him shall vacate the premises and deliver possession to the 4th respondent, the order communicated in P7 is that every person who is presently in occupation shall vacate the premises and that 4th respondent who has been forcibly ejected be restored to the occupation of the premises. The 3rd respondent's Order seems to me to be in conformity with Section 5 (2) (c) (ii) of the Act, and with the answers to the issues formulated at the inquiry. Grounds (a) and (c) also fail.

Yet another objection formulated as ground (d) is that the 3rd respondent has by the said order impliedly directed the petitioners to do an illegal act, namely to eject all persons now in occupation. They complain that they are unable to implement this order since presently there are persons who are in lawful occupation of the premises who were not parties to the inquiry and the petitioners are not the landlords of such persons. The simple answer to this argument is that the petitioners are not called upon to eject the persons presently in occupation. The Commissioner has, by virtue of the powers vested in him under Section 5 (2) (a) (ii) ordered them to be ejected. On failure to comply with such order the Commissioner seeks to enforce the order by instituting proceedings in the Magistrate's Court under Section 6. There is therefore no illegal act which the petitioners have been called upon to perform.

Although the ground was not taken in their petition, learned Counsel for the petitioners has complained that the inquiring officer has not complied with the rules of procedure and evidence. He has attacked the procedure adopted by M. J. Silva after petitioners' Counsel withdrew from the inquiry. M. J. Silva had called as witnesses two Assistant Commissioners Samaranayake and Kapugeekiyana to give evidence of what they discovered on a perusal of the information book of the

Mirihana Police Station, a procedure in complete violation of the provisions of the Evidence Ordinance. It has been argued that proceedings before the Commissioner are judicial proceedings before a "Court" within the meaning of Section 2 (1) of the Evidence Ordinance and that the Evidence Ordinance applies to such proceedings.

Before the enactment of this statute, a tenant illegally dispossessed of property had to resort to his common law remedy enforceable in the ordinary Courts. It is common knowledge that that procedure is cumbersome, and does not provide speedy relief. It is in order to provide a less cumbersome procedure and a speedy remedy that Parliament enacted this law "to prevent landlords from ejecting tenants by resort to threats, violence and harassment . . . . and to provide for matters incidental thereto or connected therewith". The jurisdiction to decide the question as to whether a tenant had been forcibly ejected was vested in an administrative officer and his powers were defined in Sections 5, 6 and 7. Where a statute is silent as to the procedure to be followed by him in determining the truth or falsity of a given allegation, it is for him to determine the procedure to be followed as he thought best, but with due regard to the principles of natural justice—*The University of Ceylon v. Fernando*[1] (1960) 61 New Law Reports 505. As was stated by Lord Loveburn in *Board of Education v. Rice*[2] (1911) A.C. 179 the Commissioner was not bound to treat the matter as if it were a trial; it was only lawful for him to examine any witnesses if he thought fit to do so, but he could obtain information in anyway he thought best. If it was the intention of Parliament that the Commissioner was to be bound by the rules of evidence and procedure applicable in a trial before a Court, then Parliament need not have removed the jurisdiction of the Courts and vested in an administrative officer the question of deciding whether a tenant had been unlawfully ejected. To equate an inquiry before the Commissioner to a trial before a Court would be to pull the language of Parliament to pieces and to defeat the very purpose for which the legislation was enacted.

The application of the Petitioners is refused with costs payable to the four respondents as follows:—Rs. 105 to 1-3 Respondents and Rs. 105 to 4th Respondent.

WALGAMPAYA, J.—I agree.

Application refused.

[1] *(1960) 61 N. L. R. 505.*

[2] *(1911) A. C. 179.*