1960 *Present :* **H. N. G. Fernando, J.**

S. G. DE ZOYSA, Petitioner, *and* THE PUBLIC SERVICE COMMISSION *et al.*, Respondents

S. C. 250—Application for the grant and issue of Mandates in the nature of Writs of Certiorari and Mandamus

Public officer—Compulsory retirement of public officers—Procedure—" Retirement Rules "—Legal effect of Rules—Public and Judicial Officers (Retirement) Ordinance (Cap. 253), s. 2—Rules made thereunder and published in the Gazettes of 29th April 1949 and 29th April 1955—Public Service Commission Rules issued by direction of the Public Service Commission on 21st August 1956, Rules 60-62—Public Service Commission Rules published in the Gazette of 22nd September 1947, Rules 62, 63—Ceylon (Constitution) Order-in-Council, 1946, Articles 57, 60, 61, 72, 87, 88—State Council Order-in-Council, 1931, Articles 86, 89—Public Services Regulations published in Gazette of 30th June 1931, Regulations 82, 87—Certiorari—Mandamus.

The petitioner was a member of the Police Force since 1931. Prior to the date of the present application he held the appointment of Deputy Inspector-General of Police and, in terms of section 57 of the Ceylon (Constitution) Order-in-Council, 1946, held office under the Crown " during Her Majesty's pleasure ". He was born in 1909 and was fifty years of age on 15th January 1959. He was liable, under the " Retirement Rules " made under the Public and Judicial Officers (Retirement) Ordinance, to be required by the Public Service Commission to retire upon his completing the age of fifty years or at any time thereafter. On 6th November 1958 he was granted by the Permanent Secretary to the Ministry of Defence and External Affairs an extension of service for one year with effect from 15th January 1959 ; but this extension was stated to be subject to the Retirement Rules. He received a further letter of extension on 20th October 1959 and expected that he would not be called upon to retire before 16th January 1961. Nevertheless, on 27th November 1959 the Public Service Commission made order requiring the petitioner to retire from service on 1st March 1960. No opportunity was given to the petitioner to show cause against the action proposed to be taken. Admittedly the order of retirement was not preceded by the procedure prescribed by Rules 60-62 of the Public Service Commission Rules of 21st August 1956 or by Rules 62 and 63 of the Rules published in the *Gazette* of 22nd September 1947.

Held, that the Public Service Commission Rules relating to the procedure to be followed prior to the retirement of a public officer did not have the same legal effect as a statutory provision and could not, therefore, be enforced by *Certiorari* and *Mandamus*.

APPLICATION for Writs of Certiorari and Mandamus.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *S. J. Kadirgamar*, *W. T. P. Goonetilleke* and *H. L. E. Cooray*, for Petitioner.

V. Tennekoon, Deputy Solicitor-General, with *B. C. F. Jayaratne*, Senior Crown Counsel, and *R. S. Wanasundera*, Crown Counsel, for 2nd and 3rd Respondents and 4th substituted Respondent.

Cur. adv. vult.

November 15, 1960. H. N. G. FERNANDO, J.—

The petitioner has been a member of the Police Force since 1931, and at the time of the occurrence of the events which led to the making of this Application, held the appointment of Deputy Inspector-General of Police. In terms of section 57 of our Constitution he held office " during pleasure ". Having been born in 1909, he was fifty years of age on January 15th 1959.

Rules made under the Public and Judicial Officers (Retirement) Ordinance (Cap. 253) and published in the *Gazette* of April 29, 1949, as subsequently amended by a Rule published in the *Gazette* of April 29, 1955, (to which I will for convenience refer as the " Retirement Rules ") provide *inter alia* that the " competent authority " may require an officer of the Police Department to retire upon his completing the age of fifty years or at any time thereafter. It is beyond dispute that the authority competent in the case of the petitioner to require him to retire under the Retirement Rules was the Public Service Commission.

There has apparently been a practice, the source of which (if I recollect rightly) was not referred to in the argument, in pursuance of which the Permanent Secretary to the Ministry of Defence and External Affairs, by the document dated 6th November 1958 granted to the petitioner an extension of service for one year with effect from 15th January 1959; but this extension was stated to be subject to the " Gazette Notification regarding retirement of Police Officers in Gazette No. 10,790 of 29th April 1955 ", which was the Notification of the amending Rule to which I have already referred. In view of the terms of this letter of extension it is unnecessary for me to state reasons for the opinion that the extension thus allowed by the Permanent Secretary could not fetter the power of the Public Service Commission to make an order of retirement under the Retirement Rules. I need only note for present purposes that the petitioner must rightly have expected that he would not be called upon to

retire prior to 15th January 1960. Indeed, having regard to a further letter of extension dated 20th October 1959 issued by the Permanent Secretary to the Ministry of Justice his rightful expectation must have been that he would not be called upon to retire before 16th January 1961.

Nevertheless on 27th November 1959 the Public Service Commission made order requiring the petitioner to retire from service on 1st March 1960, advising him that he should avail himself prior to that date of leave preparatory to retirement. It has not been argued that there is anything in the Retirement Rules themselves which vitiates this order.

In the affidavit attached to his petition, the petitioner states his belief that the Public Service Commission in making the order of retirement acceded to the requests or wishes of politicians including the then Minister of Justice, and sets out a history of events which according to him prompted the desire for his removal from service. It is fortunately unnecessary to enter into a consideration of these allegations of fact, for eminent counsel appearing for the petitioner has conceded that the allegations are not relevant to the decision of the questions of law arising upon the petition. On 31st May 1960 the petitioner applied to this Court (1) for a Writ of Certiorari quashing the order of retirement made by the Public Service Commission and (2) for a Writ of Mandamus requiring the Commission *inter alia* to recognise that the petitioner was and is an officer of Police. It is clear that a Writ of Mandamus could issue, if at all, only if the order of retirement is first quashed by way of Certiorari.

The principal grounds of the application to quash the order of retirement, as they were stated in the arguments of the petitioner's counsel, are I trust adequately summarised thus :

(*a*) A body empowered to make an order, even though the order be administrative and not judicial or quasi-judicial, is bound to comply with any enactment, having the force of law, which regulates the procedure to be followed in the making of that order. In the event of non-compliance with such an enactment this Court is entitled in appropriate circumstances to quash the order by Writ of Certiorari. Where such an enactment provides that a person likely to be affected or prejudiced by a proposed order will have an opportunity to make his representations, the failure to afford him such an opportunity is an appropriate ground for quashing the order.

(*b*) The Public Service Commission Rules, issued by direction of the Commission on August 21, 1956 prescribed the procedure to be followed before the Commission will make an order of retirement under the Retirement Rules. The relevant procedural provisions are set out in Rules 60-62 of the Public Service Commission Rules. These Rules have the force of law. If they do not, then alternatively, Rules 62 and 63 of a set of Rules published in the Gazette of September 22nd 1947 which are to a similar

effect are still in operation, having the force of law in that they were made by the Governor by virtue of powers conferred by section 87 of the Ceylon Constitution Order-in-Council, 1946. Admittedly, the impugned order of retirement was not preceded by the steps envisaged in these Rules, and the principle stated at (*a*) above therefore applies.

The Rules thus relied on provide that where a Head of a Department considers that an officer should be required to retire under the Retirement Rules he will make a recommendation to the Permanent Secretary and inform the officer concerned of the proposal to retire him. It is further provided that the Permanent Secretary will make his recommendation to the Public Service Commission forwarding the statement of the officer, if any. It is conceded that in the present instance no appropriate recommendations were made by the Head of the Department or the Permanent Secretary and also that the petitioner was not informed of the proposal to make the order of retirement. The substantial argument for the petitioner has been that the making of these recommendations and the affording to the petitioner of an opportunity to make his representations regarding his proposed retirement were conditions precedent to the exercise by the Commission of its power to make an order of retirement, and that, since the conditions were not fulfilled, the Commission in making the order acted in excess of its statutory powers.

The principal question for determination is whether the Commission is bound by the Rules, or to put the matter differently, whether the Rules have the force of law. In considering this question it is convenient first to examine the origin and what I might call the " legal status " of the Rules published in the Gazette of September 22nd 1947, for the argument that the existing Public Service Commission Rules have the force of law depends upon the prior contention that the 1947 Rules have that force.

The State Council Order-in-Council, 1931 provided that the appointment, dismissal, etc., of public officers shall be vested in the Governor subject to instructions given to him through the Secretary of State ; and Article 89 of that Order established a Public Services Commission to " advise the Governor " in the exercise of his powers, and also empowered the Governor " by regulation subject to the approval of the Secretary of State to prescribe the duties of and the procedure to be followed by the Commission in the exercise of their duties ". In pursuance of this power the Governor made the Public Services Regulations which were published in the Gazette of June 30th 1931. Regulations 82 and 87 of those Rules provided as follows :—

" 82. The age for retirement of pensionable officers from the Public Service is fifty-five years. Every such public officer may be required to retire from the Public Service on or after attaining the age of retirement. If a Head of a Department considers it to be in the public

interest that an officer in his Department should be so required to retire, he should make a recommendation to the Public Services Commission accordingly.

" 87. If a Head of a Department recommends that a public officer whose emoluments exceed Rs. 15,000 per annum should be required to retire in terms of Public Services Regulation 82, and if the officer is unwilling to retire, the Head of the Department shall inform the officer that such a recommendation is being made and call upon the officer to submit a statement of his reasons for wishing to remain in service for submission to the Public Services Commission along with the Head of the Department's recommendation. "

These Regulations remained in force until 1946. In that year the Ceylon Constitution Order-in-Council, 1946, (which ultimately replaced the 1931 Order) provided in Article 60. that the appointment, dismissal, disciplinary control, etc. of public officers is vested in the Governor acting on the recommendation of the Public Services Commission, and Article 61 of this Order-in-Council provided as follows :—

" (1) The Governor, acting on the recommendation of the Public Services Commission, may make regulations for all or any of the following matters :—

(*a*) the exercise by the Commission of any of their functions ;

(*b*) the delegation to the Commission, or to any public officer acting with or without the recommendation of the Commission, subject to such conditions as may be prescribed by the regulations, of any of the powers vested in the Governor by subsection (1) of section 60 of this Order. "

Under the heading of " Transitional Provisions ", the same Order-in-Council had an Article 87 which empowered the Governor to modify, add to or adapt " the provisions of any general order, financial regulation, public service regulation or other administrative regulation or order, or otherwise for bringing the provisions of any such administrative regulation or order into accord with the the provisions of this Order or for giving effect thereto ". Article 87 (2) read as follows :—

" Every regulation made under subsection (1) of this section shall have effect until it is amended, revoked or replaced by the appropriate Minister or authority under this Order. "

By virtue of the powers vested in the Governor by Article 87 the following notification was published in the Gazette of 22nd September 1947 :—

" . . . . the Administrative Regulations of the Government of Ceylon are by this Regulation modified, added to and adapted with effect from the date of the first meeting of the House of Representatives, to read as set out in the Schedule. "

In the Schedule to this Notification are set out the earlier Regulations as modified. added to and adapted in four sections : I. The Public Service Commission, II. Appointments and Transfers, III. Discipline and IV. Retirements. The Regulations 62 and 63 now relied on by the petitioner are in Section IV of the Schedule ; the gist of them I have noted above.

In support of his contention that these regulations had the force of law, counsel had first to establish that the corresponding regulations previously in force under the State Council Order-in-Council had themselves the force of law. It will be seen that Article 87 of the 1946 Order-in-Council which provided for the adaptation and modification of general orders, regulations, etc., does not expressly declare, as does for example Article 72 or Article 88 of the same Order-in-Council, that the regulations as modified and adapted " shall have effect as if enacted in this Order " or " shall have the force of law ". Counsel had therefore necessarily to concede that in the case of Financial Regulations modified and adapted under Article 87 they would not have the force of law because, not having the force of law before, they could not acquire the force of law by reason of adaptation or modification under Article 87. Similarly it had also to be conceded that the Public Service Commission Regulations so adapted and modified in 1947 would only have the same " legal status " as they previously had. But in their case it was argued that they did have the force of law in 1931 and retained that force when adapted and modified under Article 87.

Let me first state my opinion that the 1931 Regulations were not law and were only directions and instructions which public officers were bound to follow, not because they were an " enactment ", but because non-compliance would expose them to the peril of disciplinary action. The rules as to retirement in the 1931 Regulations as also in the 1947 Regulations and in the current Rules constituted but a small and unimportant section of the set of regulations. Far more important were those dealing with appointments, discipline and dismissals. The 1931 Regulations relating to appointments provided that certain appointments were subject to the approval of the Secretary of State, while the disciplinary regulations provided that in some instances the final confirming authority was the Secretary of State. The Regulations were, I feel sure, substantially in conformity with similar regulations obtaining in colonial and semi-colonial dependencies of the British Empire, as also with similar regulations obtaining at the time in India. When Article 86 of the 1931 Order-in-Council vested control of the Public Service Commission in the Governor subject to instructions from the Secretary of State, no legal rights were in my opinion thereby conferred on public officers. If for instance the procedure prescribed for the appointment to a particular public office requiring the approval of the Secretary of State was not followed, nevertheless if the appointment was in fact approved by the Secretary of State, it surely could not have been contended in a Court of law that the appointment was invalid. Similarly if an order of dismissal

made by an officer in Ceylon competent under the regulations to make it was in fact confirmed by the Secretary of State, could it have been contended that the order was invalid for failure to comply with the requisite procedure ?

A similar question arose in India in three cases which cast light on the legal effect of regulations such as these. Section 96 (B) of the Government of India Act 1919, provided as follows :—

> " (1) Subject to the provisions of this Act and of the rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.
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> " (2) The Secretary of State in Council may make rules for regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. "

Rule 14 of the rules referred to in subsection (2) provided *inter alia* that an order of dismissal should be preceded by a properly recorded departmental inquiry at which charges must be framed and explained to the accused, evidence in support and evidence in defence must be recorded, and a finding recorded on each charge after discussion of the evidence.

In the case of *Vankata Rao v. Secretary of State* [1] two Courts in India and thereafter the Privy Council held that " the procedure prescribed by the rule was not followed at all " prior to the dismissal of the officer concerned. In an action by the dismissed officer in which he had claimed damages for wrongful dismissal, their Lordships of the Privy Council examined the effect of the rules. Referring to the words in the section 96 (B) " subject to the rules made thereunder " they regarded the terms of the section as containing a " statutory and solemn assurance that the tenure of office, though at pleasure, would not be subject to capricious and arbitrary action but will be regulated by rule ". They held that section 96 (B) in express terms stated that office is held during pleasure; and that this was an express term of the contract of employment ; and they rejected the argument that the rules constituted an added contractual term that the rules are to be observed. One reason for this view was that " the rules are manifold in number and most minute in particularity and are all capable of change ". If indeed the rule in question did have the force of law in the same way as did section 96 (B)

[1] *1937 A. I. R. (P.C.) 31.*

itself, there appears to me to be no reason why the rule should not, equally with section 96 (B), have been regarded as an additional term of the contract of employment.

In *Rangachari v. Secretary of State*[1], decided by the same Board, a sub-inspector of Police who had been dismissed sued apparently for a declaration that he was entitled to a pension despite an order of dismissal from the Public Service. One of the grounds for questioning the validity of the order of dismissal was that the order had been made by an official lower in rank than the person who had appointed the sub-inspector. The Privy Council held *inter alia* that the dismissal was by reason of its origin, bad and inoperative. Referring to the express provision in section 96 (B) (1) that " no person may be dismissed by an authority subordinate to that by which he was appointed ", their Lordships stated " It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. It is plainly necessary that this statutory safeguard should be observed with the utmost care and that a deprivation of pension based upon a dismissal purporting to be made by an official who is prohibited by statute from making it rests upon an illegal and improper foundation." While the dismissal was held to be unlawful, it was only because of the peculiar circumstances of the case that their Lordships decided not to exercise their discretionary power to make the declaration sought for by the dismissed officer.

The decision in *Rangachari's* case establishes that their Lordships drew a distinction between the legal effect of the statutory provision which had been breached in that case and a mere rule, the breach of which was relied on in the first mentioned case. The distinction is well emphasized in the *High Commissioner for India v. Lall*[2]. The relevant statute in this case was the Government of India Act 1935, section 240. Subsections (1) and (2) correspond to the provisions reproduced above from the 1919 Act, but subsection (3) provided that " no person shall be dismissed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him ". The Privy Council (in an action by the dismissed officer for a declaration that the order of dismissal was *ultra vires* and that he was still a member of the Indian Civil Service) was satisfied that subsection (3) of section 240 had not been complied with. Citing with approval the passage from the judgment in *Rangachari's* case which I have cited above, their Lordships had no difficulty in holding that " *the provisions as to a reasonable opportunity of showing cause against the action proposed* (i.e. subsection (3)) *is now put on the same footing as the provision now in subsection* (2), and that it is no longer resting on rules alterable from time to time but is mandatory and *necessarily qualifies the right of the Crown recognised in subsection* (1) ". They regarded subsections (2) and (3) of section 240 as prohibitory in form and not merely permissive. It is to be noted that

[1] *1937 A. I. R. (P. C.) 27.* [2] *1948 A. I. R. (P. C.) 121.*

rules providing for an inquiry similar to the rules to that effect earlier in force, still existed at this time ; but the approval of the two earlier decisions of 1937 satisfies me that, if section 240 had not contained the express statutory provision for showing cause which subsection (3) did contain, their Lordships would not have held as they actually did that the order of dismissal was void and inoperative. The mere rule itself would not have entitled the officer in that case to the declaration to that effect which was granted by the Privy Council, and that simply for the reason that the rule had not the force of law.

Counsel for the petitioner has sought to distinguish the three Indian cases on the ground, in that of *Vankata Rao*, that the action was for breach of contract, and in the other two cases on the ground that the actions were for declarations that the orders of dismissal were void, whereas the present application is for a quashing by Writ of Certiorari. I think I have impliedly stated my reasons for declining to recognise such a distinction as valid. In *Lall's* case the Privy Council granted the declaration on the basis that there had been a breach of a statutory provision, and in *Rangachari's* case the declaration was not accorded on a similar basis only for the reason that their Lordships considered the grant of a declaration unnecessary or inappropriate in the circumstances. What *Venkata Rao's* case decided was that *the rule did not have the same legal effect as a statutory provision.* Indeed the Privy Council in *Lall's* case (at page 152, paragraph 17) found it interesting to contrast the two earlier decisions in one of which a statute was relied on and in the other of which only a mere rule. Each of these decisions turned on the answer to the same question as arises for me to decide : " Is the right to dismiss a person who holds office during pleasure qualified by a provision in a mandatory enactment ? ". If this question cannot be answered in the affirmative, no Court can hold for any purpose that an order of dismissal is illegal on the ground of a breach of the provision.

Where a statute confers power on some competent authority to make rules for a particular purpose and the rule is not inconsistent with the statute itself, then if the intention of the Legislature is that the authority should be a subordinate law-making body the rule has the same force of law as the statute itself. If the Secretary of State who made the rule invoked in *Venkata Rao's* case was a subordinate law-making body in this sense, then in my opinion his rules had the force of law and by virtue thereof constituted a term of the contract of employment just as much as subsection (1) of section 96 (B) did. The decision in that case to the effect that the rule did not form a term of the contract can only be construed as meaning that its maker the Secretary of State was not empowered to make law. The Regulations made for Ceylon in 1931 were not a mandatory enactment, and their modification and adaptation by the Governor in 1947 did not convert them into such an enactment. For the same reasons, I must hold that the present Rules issued by the Public Service Commission are not a mandatory enactment qualifying the right of dismissal involved in section 57 of the Constitution.

Having reached this conclusion, it is scarcely necessary to consider the more general proposition that, if an officer holding office during pleasure is compulsorily retired without regard to the principle of natural justice that he be first heard on his own behalf, this Court is entitled to quash the order of retirement. I do not agree that natural justice would require such a hearing before an officer is retired under the Retirement Rules. But even if I did so agree, the decision in *Venkata Rao's* case, where there had been a flagrant breach of a rule which ideally embodied the same principle, confirms me in the opinion that the proposition is untenable. Nor is it necessary for me to rely on the decision of Gratiaen, J. in *Wijesundera v. Public Service Commission* [1].

Having regard to certain of the allegations made by the petitioner, some relevant and some not clearly irrelevant, which have not been contradicted, the petitioner appears to have good ground for his belief that the Retirement Rules were utilized in his case for a purpose which they were not intended to serve and in a manner not contemplated by the Public Service Commission Rules. While I refuse the application, I am not disposed to make an order for costs in favour of the respondents.

Application refused.