

1947

Present : Canekeratne J.

SURIYAWANSA, Petitioner, and THE LOCAL GOVERNMENT SERVICE COMMISSION et al., Respondents.

S. C. 283—Application for Writs of Certiorari and Mandamus on the Local Government Service Commission and 3 others

Certiorari—Local Government Service Commission—Inquiry into charge against Medical Officer—Dismissal of officer—Administrative or judicial act—Master and servant—When writ will lie.

Where the Local Government Service Commission after inquiry into allegations concerning the conduct of a Medical Officer decided to dismiss him.—

Held, on a application to quash the proceedings by *certiorari*, that the Commission and the Medical Officer were in the relation of master and servant towards each other and that the act of the Commission was of an administrative and not of a judicial character. A writ of *certiorari* would not therefore lie.

A PPLICATION for writs of *certiorari* and *mandamus* on the Local Government Service Commission and three others.

E. F. N. Gratiaen, K.C. (with him D. W. Fernando), for the first respondent.—The petitioner who was in the service of the Municipal Council of Kandy became a member of the service of the first respondent from April 1, 1946, by virtue of Ordinance No. 43 of 1945. After an inquiry by three out of the four members of the Local Government Service Commission in the presence of the applicant and his lawyers and on the report made by these three members the Commission came to a unanimous decision that the applicant should be dismissed and informed the petitioner of that decision. It is that order and decision that is challenged in these proceedings.

Under the circumstances the preliminary question arises whether *certiorari* or *mandamus* would lie at all in respect of the decision and order of the first respondent.

The decision of the first respondent to dismiss the petitioner their servant is purely an administrative and not a judicial act. No *certiorari* would, therefore, lie to quash such a decision.

Mandamus does not lie, firstly, because the petitioner had no right to the performance of a public as distinct from a private duty by the first respondent and, secondly, because the petitioner has another remedy, i.e., ordinary civil action for wrongful dismissal, if the dismissal is wrongful. See *Perera v. Municipal Council of Colombo*¹. The Local Government Service Commission is an incorporated body and can be sued. Vide section 58A of Ordinance No. 56 of 1946. An action certainly lies against a public incorporated body if such corporation acts dishonestly, corruptly, with improper motives, or acts outside the authority or power given by the Statute which created the corporation. See case reported in (1945) 114 L.J.K.B. 6. See also *Short v. Poole Corporation*², *Fernel and others v. East Ham County Borough*³; *In Re Mirams*⁴; *Brown v. Dagenham Urban Council*⁵.

¹ (1947) 48 N. L. R. 66.

² (1926) 95 L. J., Ch. 110 at 113 and 116.

³ (1929) 98 L. J. K. B. 565.

⁴ (1926) 95 L. J., Ch. 119.

⁵ (1891) 60 L. J., Q.B. 397 at 398.

H. V. Perera, K.C. (with him U. A. Jayasundere and H. W. Jayewardene), for the petitioner.—Mandamus in this case is only asked for as ancillary to the writ of *certiorari* if the decision and order of the first respondent is quashed. *Perera v. Municipal Council of Colombo* (*supra*) does not apply as the facts in that case were totally different. The cases cited dealt with administrative acts only. But, for a dismissal under Ordinance No. 43 of 1945, a finding of a judicial character is necessary. In this connection there are three classes of cases in respect of dismissals of servants by their employers: (1) A private person dismissing his servant is bound solely by the terms of the contract of employment and by nothing else. (2) There are public bodies employing servants to whom an absolute or despotic power of dismissal is given. In this class of cases the power to dismiss must be exercised honestly and *bona fide*. (3) In the third class of cases the power to make an order of dismissal or to make an order affecting the rights of parties is given when certain facts have been found to exist, e.g., misconduct of an employee.

Powers of dismissal given by the Local Government Service Ordinance are not absolute or despotic and they fall into the third class described above. The Ordinance indicates that it is rather a controlled power that is given and not a despotic or absolute power. It is quite clear that this is so if one examine the powers under the Ordinance by the regulations thereunder framed subsequently. After the regulations were enacted misconduct or general inefficiency were the facts to be found by the Commission before dismissing a servant. The finding of such facts is a judicial rather than an administrative act. The fundamental distinction between an executive or administrative discretion and judicial discretion is that in the former there is a real discretion but in the latter there is no discretion at all but only the liberty to come to a conclusion. Once the conclusion is reached in a judicial act no further discretion is given unlike in an administrative or executive act. The absence of regulations during the period when the petitioner was dismissed cannot convert a judicial power to an administrative power.

When a tribunal has the power to find a fact an opportunity of showing cause against such a finding must be given to the person affected. Though there may be no dishonesty or *mala fides* there may be legal malice which may vitiate a decision. See *Frome United Breweries, Limited v. Keepers of the Peace and Justice of the County Borough*¹ and *Rex v. Electricity Commissioner*².

On the scope of the writ of *certiorari* and the application of its principles, see *The King v. The London County Council*³; *Spackman v. Plumstead District Board of Works*⁴; *Board of Education v. Rice and Others*⁵; *The King v. Hendron Rural District Council*⁶; *Rex v. Wandsworth*⁷ *Gratiaen K.C., in reply*.—Mandamus will be ancillary to *certiorari* only in cases where a tribunal which has jurisdiction refuses to exercise

¹ L. R. (1926) 2 A. C. 586.

² L. R. (1924) 1 K. B. 171.

³ L. R. (1931) 2 K. B. 215 at 233.

⁴ L. R. (1885) 10 A. C. 229 at 240.

⁵ L. R. (1911) A. C. 179.

⁶ L. R. (1933) 2 K. B. 696 at 704.

⁷ (1942) 1 A. E. R. 56.

jurisdiction. In such a case the tribunal can be compelled to exercise jurisdiction by a *mandamus*.

“Dismissal” only means determination of the employment. See *Words and Phrases*, Vol. 2, p. 106.

Counsel also cited *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*¹; *Rex v. Drummond*²; *Raymon v. Governing Body of Rugby*³.

Cur. adv. vult.

September 15, 1947. CANEKERATNE J.—

This is an application for an order of *Certiorari* to bring up and quash “the findings and order made by the first respondent”, namely, the document marked P4 whereby the applicant was informed that he was guilty of the charges framed against him and that he was dismissed from its service. The applicant further asks for a writ of *mandamus* on the first respondent.

The applicant started his career as a Medical Officer to the Municipal Council of Kandy and was in the employ of the Council on March 31, 1946; he was then employed as its Maternity and Child Welfare Medical Officer. By Ordinance No. 43 of 1945, which came into operation about November 21, 1945, a Local Government Service Commission was established; this is an incorporated body. By the provisions of this Ordinance the applicant was transferred to and became a member of the service of the first respondent as from April 1, 1946, continuing in the same capacity as before.

The facts which emerged, of which the Court was informed when the case came up for hearing, were these: while the applicant was a member of the service of the first respondent allegations of a serious nature were made against him to the Commissioner of the Municipal Council of Kandy. The complaint was forwarded to the first respondent, and he was interdicted by that body on April 3, 1947; on or about April 12, 1947, he was given an opportunity of showing cause why he should not be dismissed from service or otherwise punished on the ground that he had been guilty of improper conduct in respect of one Mrs. P. N. Gunewardene, of being heard at the inquiry into the allegations and of stating his case and view. He had notice of the date of inquiry which was held in the presence of the applicant and his lawyers by the second, third and fourth respondents who thereafter made a report; and at a meeting of the Commissioners held on May 19, 1947, the members, after considering the report and evidence, unanimously decided that the applicant should be dismissed from the service of the first respondent, and this decision was communicated to him.

The Local Government Service Commission is composed of the Commissioner of Local Government and four other persons nominated by the Minister of Local Government. The second, third and fourth respondents are three of the persons so nominated. At the hearing before me Counsel for the first respondent took the preliminary point that the Court should

¹ *L. R. (1892) 1 Q. B. 431 at 454.*

² *(1903) 88 L. T. 833.*

³ *(1874) 43 L. J., Ch. 834.*

not proceed with this matter because *certiorari* does not lie to the Supreme Court from this order and it was agreed that this preliminary point should be discussed first.

Mr. Gratiaen contends that the decision of the first respondent was an administrative act and cannot be challenged by *certiorari*. Mr. Perera contends that this was a judicial or quasi-judicial act and that the first respondent acted without jurisdiction or in excess of jurisdiction. It is contended on behalf of the applicant that no legally constituted meeting of the first respondent was held inasmuch as the person specified as the Chairman was not present at the inquiry. It is contended further that one member of the Commission conducted himself with regard to the inquiry in such a way that he may reasonably be supposed to have had a bias which would unfit him for deciding the important issue.

The question of the issue of a *mandamus* would only arise if the rule *nisi* for a *certiorari* is made absolute. In its application *mandamus* is confined to cases where no effectual relief can be obtained in the ordinary course of an action. The answer of the applicant to the objection of the respondent being that the remedy by action was useless. It was further urged that the remedy by *mandamus* was ancillary to *certiorari*.

The terms of a contract of employment would be found in the contract, express or implied, between the parties. If there is no question of notice the master could dismiss the servant at any time and without any notice at all. A servant may hold office at the pleasure of the master; it is then important to consider whether the master is a private individual or a statutory body. A statutory body cannot act outside the ambit of the statute which sets it up. Where an authority is constituted under statute to carry out statutory powers with which it is entrusted there are cases which show that if an attempt is made to exercise these powers corruptly—as under the influence of bribery or *mala fide*—for an improper purpose such an attempt must fail. Where the tribunal has exercised discretion, not arbitrarily or illegally, the Courts cannot interfere: *Short v. Poole Corporation*¹. A person may also hold an office or post during good behaviour. Continued good conduct by the servant seems then to be a condition of the contract of service, a breach of this condition would entitle the master to terminate the employment, the servant can be dismissed only for cause.

The applicant was a member of the Local Government Service and was therefore a servant of the first respondent. The remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages; sometimes an action may be brought for a declaration that the notice given of termination of the contract was invalid and the contract is still subsisting. The position of a member in the Local Government Service differs widely from that of a servant in the ordinary sense. Broadly speaking, the former contracts at his appointment that he will serve his employer in accordance with the statute and the regulations from time to time operative. These regulate in great detail the conditions and the terms of his service. Once upon the fixed establishment he retains his position until duly removed or superannuated.

The power generally possessed by a master to dismiss a servant was restricted by the provisions of section 23 (1) and (2) of Ordinance No. 43 of 1945, and the master had no power to dismiss him except upon the grounds which the rules prescribe. The Ordinance and the regulations—those that have been framed which deal with the servant—contain elaborate provisions regarding the removal of members of the service. From which it follows that one can only be removed in accordance with those provisions. The procedure to be followed in matters of discipline and dismissal has been prescribed. Courts of law will not inquire into the merits of the decisions reached by such bodies, but they will give relief in certain cases, as for instance, where the provisions of the statute have not been followed. As there were no regulations in force at the time of the inquiry, section 2 of Ordinance No. 5 of 1946 would be applicable. There was no written law in force at the time in respect of the matter of a dismissal; the Commission was thus empowered by sub-paragraph “b” to determine the matter in its discretion. Mr. Perera contended that the Court should look at the regulations which had been framed although not brought into operation. Mr. Gratiaen objected to this procedure being adopted and I do not think I am justified in doing so. The absolute right which a master might have had, has been cut down by the statute which confers upon the servants of the Municipality transferred to the Local Government Service Commission a certain measure of fixity of tenure. They can only be dismissed in accordance with the procedure laid down by section 23 (1) and (2). If the applicant complains that he was wrongfully or illegally dismissed (*i.e.*, not in accordance with the provisions of the contract of employment or of the Ordinance), there would be nothing to preclude him for bringing an action to obtain such relief as a Court can give for breach of contract. Nothing I say in the course of this order should affect this right.

Originally no doubt the writ of *certiorari* was issued only to inferior Courts. As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. The Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. *Certiorari* lies only in respect of judicial, as distinguished from administrative acts: *Rex v. Woodhouse*¹. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in this writ: *Rex v. Electricity Commissioner*². If the tribunal proceeded to encroach jurisdiction to themselves greater than the statute warrants the Court could send a *certiorari* to them to have their proceedings returned to the Court. Judicial action is an adjudication upon the rights of parties who appear before the tribunal and upon whose claims some decision is rendered. Thus *certiorari* lies to examine the legality of the decision of a tribunal given in a dispute between two or more persons, over and beyond whom the tribunal stands as an arbiter: it lies to a body which is entrusted with power to grant a privilege or licence to a subject and the subject can

¹ (1906) 2 K. B. 501.

² (1924) 1 K. B. p. 205.

make an application to the body. It lies too to a statutory authority on whom far reaching powers affecting individuals as well as property are conferred and rights vested in private persons will be affected by the exercise of the powers. New obligations may be imposed on them or their existing rights may be withdrawn¹.

The question in this case is whether the statutory authority in question (the first respondent) has a duty to act in a manner similar to that in which Courts of Justice act. This is of necessity a differentia which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other. The first respondent was dealing with a person who was its servant, a member of its service, one who had been associated for some years with a local body and whose character up to the time of this complaint was respectable. It received a complaint forwarded by the Municipal Council, it set proceedings in motion against the applicant and after what is called an inquiry into a charge, which the applicant alleges is false, in respect of a married woman who was then seven months with child—an inquiry conducted according to the applicant perfunctorily and by persons who acted as prosecutors and judges—arrived at a decision against the applicant. It was a decision made by a master against its servant. The action although involving the exercise of judgment and discretion is more of an executive or administrative character than judicial. To hold that a writ of *certiorari* would lie when a master made an order of this nature against a servant would lead to consequences of the most manifest inconvenience. The first respondent was not exercising any judicial function in determining whether it should dismiss its servant or not. It may be bound "to act judiciously but not judicially"².

On these grounds I discharge the rule *nisi* for a *certiorari* and *mandamus* but in the circumstances of the case with half costs.

Rule nisi discharged.
