Privy Council Appeal No. 17 *of* 1949

Nakkuda Ali - - - - - - - - - - *Appellant*

v.

M. F. De S. Jayaratne - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JUNE, 1950

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD RADCLIFFE
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* LORD RADCLIFFE]

This is an appeal from an Order of the Supreme Court of Ceylon dated the 8th October, 1947. On the 21st March in the same year the appellant had obtained a rule nisi calling on the respondent to show cause why a mandate in the nature of a Writ of Certiorari (to use the language of S. 42 of the Courts Ordinance) should not issue to him with a view to quashing an Order which he had made on the 10th March, 1947, cancelling the appellant's licence to act as a dealer in textiles. By the Order of the Supreme Court, which is the subject of this appeal, the rule nisi was discharged.

The material facts of the case, though few in number, are somewhat obscure, and it is difficult by a study of them to arrive at any certain conclusion as to what really happened. But, apart from the merits of the individual case, the respondent's Counsel raised several important questions during the argument of the appeal which relate to the jurisdiction conferred upon the Supreme Court by S. 42 and to the power of that Court to issue any Writ of Certiorari to him in respect of his cancellation of a textile licence under the relevant section of the Defence (Control of Textiles) Regulations, 1945. It is desirable to deal with these questions, which are general, before coming to the individual merits of the present appellant's application for the Court's mandate: and in view of the opinion which their Lordships entertain as to the respondent's immunity it will not be necessary to consider at any great length the details of the incident that led to the cancellation. But a short statement of the facts will serve to explain the issue as to the Court's jurisdiction.

Since 1943 a scheme for the rationing of textiles had been in force in Ceylon. Introduced originally by Regulations made by the Governor under the appropriate Defence powers it was operated at the dates material to this appeal in accordance with the Defence (Control of Textiles) Regulations, 1945. One of the features of the scheme was that it restricted

dealings in regulated textiles to such persons as held textile licences, the responsibility for granting which lay with an officer appointed by the Governor to be Controller of Textiles. In effect therefore a dealer who could not get or who lost a textile licence was out of the textile business so long as the scheme continued in operation. The appellant had secured a licence on his original application in July, 1943, the licence authorising him to carry on business in textiles at Nos. 109 and 111, Keyzer Street, Pettah, Colombo. From that time until the revocation of his licence in March, 1947, he had carried on business at that address in partnership with Shabandri Mohamed Hussain under the style "S. Mohamed Hussain & Co.".

On the 10th March, 1947, the respondent, the then Controller of Textiles, sent a letter to the appellant's firm which contained the words: "I find you are a person unfit to hold a textile licence. I therefore order the revocation of your licence under Regulation 62 with effect from 10th March, 1947." The Regulation thus invoked by the respondent is the last of a fascicule of regulations headed "Offences and Punishments" and runs as follows:—

> "62. 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."

Upon this the appellant started the present proceedings. On the 21st March, 1947, he obtained from the Supreme Court a rule nisi directed to the respondent requiring him to show cause why a Writ of Certiorari should not be issued to him for the purpose of quashing his Order of cancellation. The Petition upon which the rule nisi was obtained showed that the respondent's decision to cancel the licence had been preceded by certain exchanges between the parties which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office that was known as the Textile Coupon Bank.

The Textile Coupon Bank was an agency for collecting from dealers the coupons which they themselves had collected from their customers on the sale of textiles. Coupons paid into the bank by a dealer were credited to him in its books and, no doubt, the account so kept with him governed the volume of his future permitted textile imports. The system that was instituted for checking the record of coupons so paid in was an elaborate one. It is not necessary for the purposes of this appeal, nor are their Lordships sufficiently informed as to the whole machinery of the scheme of control, to say how many persons might stand to gain by such a falsification of the books as would credit to a dealer a larger number of coupons than he had in fact paid in. It was a falsification of this kind that the respondent claimed to have discovered with regard to the appellant's account with the bank, and on the 22nd February, 1947, he sent to the appellant's firm a letter which in effect amounted to a charge that on two separate occasions, the 30th November, 1946, and the 21st December, 1946, they had paid in 669 and 992 points respectively but had got their paying-in slips altered so as to show the larger amounts of 5,669 and 2,992 points respectively, with a view to obtaining in their ledger account at the bank credit for a larger amount than the coupons actually surrendered entitled them to. The letter invited the appellant to send any explanation that he might wish to offer in respect of these matters to the respondent in writing by the 25th of the same month and stated that any relevant documents might be seen at the Control of Textile Office. It is fairly plain that this letter was not the first intimation which the appellant had received to the effect that irregularities affecting his account were being investigated in the respondent's office. On the 25th February, 1947, his proctors addressed to the respondent a letter of explanation, the substance of which was to maintain that on the two impugned occasions the appellant had in fact surrendered coupons covering the larger amounts of 5,669 and 2,992 points, and to assert that both the foil and counterfoil of his paying-in book, which showed these numbers in words and figures, though with obvious interpolations in respect of the

thousand numeral, were documents substituted by some other person in the place of the firm's genuine foil and counterfoil. After considering this explanation in the light of the other information that was before him the respondent formed the view that he had reasonable grounds to believe that the appellant was unfit to be allowed to continue as a dealer in textiles and accordingly exercised his powers under Regulation 62 and cancelled the licence.

In due course the respondent appeared before the Supreme Court to show cause why the rule nisi for the writ of certiorari should not be made absolute, and on the 8th October, 1947, Mr. Justice Canekeratne delivered judgment to the effect that the rule nisi must be discharged with costs. The ground of his decision was that on the facts of the case as they appeared in the evidence before him the appellant had not shown himself entitled to the mandate that he sought, because the respondent, though exercising a quasi-judicial function in deciding to cancel a licence under Regulation 62, had not departed in any way from the rules of natural justice in the procedure by which he arrived at his decision. The learned Judge therefore applied to this case the principle of a familiar line of English authorities of which *Board of Education* v. *Rice* [1911] A.C. 179 and *Local Government Board* v. *Arlidge* [1915] A.C. 120 are the leading examples. Having regard to the decision of a Bench of five judges (Howard, C.J., Keuneman, Wijeyewardene,. Canekeratne, J.J., and Nagalingam, A.J.) in *Abdul Thassim* v. *Edmund Rodrigo* (*Controller of Textiles*) 48 N.L.R. 121, it was not open to the learned judge in the Supreme Court to consider either the question whether S. 42 of the Courts Ordinance gave the Court power to direct the prerogative writs to a person such as the Controller of Textiles or the question whether a Controller of Textiles acting under the powers of Regulation 62 is acting in a capacity that would make him amenable to certiorari, even supposing that he is a person or tribunal within the meaning of S. 42. Both these questions were, however, fully argued before their Lordships and they must therefore consider them. In effect this means that they must review the Supreme Court's decision in the *Abdul Thassim* case.

There is nothing in the Roman-Dutch law or the law of Ceylon that corresponds to the "writs of mandamus, quo warranto, certiorari, procedendo and prohibition". It seems obvious, therefore, that the jurisdiction of the Supreme Court to grant and issue mandates in the nature of such writs is derived exclusively from s. 42 and was conferred originally upon that Court by the legislative predecessor of that section. The range of the jurisdiction must be found within the words of the statutory grant. Those words describe the permissible subjects of the Court's mandates as being "any District Judge, Commissioner, Magistrate, or other person or tribunal". The respondent contends that he is not an "other person or tribunal" within the meaning of those words, since their collocation with the words "District Judge, Commissioner, Magistrate" indicates that they extend only to tribunals (or persons acting as tribunals) which are in the ordinary sense established judicial bodies: and he reinforces his argument by pointing out that s. 42 confers a number of powers in series, the power in question being preceded by a power to inspect and examine the records of any Courts and being succeeded by a power to transfer cases from one Court to another. Hence, he argues, the range of persons or tribunals that are subject to the Court's mandate under s. 42 is more limited than that which is encompassed by the common law of England and is confined to persons who are ejusdem generis with District Courts, Magistrates or Commissioners.

Their Lordships agree with the decision of the Full Bench on this point. It is not necessary to add to their reasons. The reference to the writs of mandamus and quo warranto certainly makes it difficult to suppose that only Courts of Justice as ordinarily understood are to be subject to these mandates. Moreover there can be no alternative to the view that when s. 42 gives power to issue these mandates "according to law" it is the relevant rules of English common law that must be resorted to in

order to ascertain in what circumstances and under what conditions the Court may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon. But even in the cases of certiorari and prohibition the English law does not recognise any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a judge in respect of certain of their duties. The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the Court's jurisdiction. In truth the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted. If these rules are borne in mind with respect to the phrase " according to law ", the limited construction of s. 42 for which the respondent contends is not only one which it is very difficult to express in precise words but one which is based on an altogether different conception from that which has guided the development of the English practice.

If then the Controller of Textiles is not excluded from the ambit of s. 42 upon the proper construction of the words " other person or tribunal ", would it be " according to law " that he should be amenable to certiorari when he purports to act under Regulation 62 ; assuming, of course, for this purpose that in acting he has made a decision that is liable to be quashed on its merits? The Supreme Court held in the *Abdul Thassim* case that he was so amenable, and that decision has been given effect to in three other cases the facts of which bear a substantial similarity to the facts of that now under appeal. One of them, *Jayaratne* v. *Bapu Miya Mohamed Miya*, is also the subject of appeal to this Board. The foundation of the Supreme Court's reasoning on this point is to be found in one sentence of the judgment of Howard, C.J., in the *Abdul Thassim* case: " 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 would be impossible to consider the significance of such words as " Where the Controller has reasonable grounds to believe . . ." without taking account of the decision of the House of Lords in *Liversidge* v. *Anderson* [1942] A.C. 206. That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, Regulation 18B, of the United Kingdom. It was not a case that had any direct bearing upon the Court's power to issue a writ of certiorari to the Home Secretary in respect of action taken under that Regulation : but it did directly involve a question as to the meaning of the words " If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . ." which appeared at the opening of the Regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.

Their Lordships do not adopt a similar construction of the words in Regulation 62 which are now before them. Indeed it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words " if A.B. has reasonable cause to believe " are capable of meaning " if A.B. honestly thinks that he has reasonable cause to believe " and that in the context and surrounding circumstances of Defence Regulation 18B they did in fact mean just that. But the

elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning "if there is in fact reasonable cause for A.B. so to believe". After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships therefore treat the words in Regulation 62 "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation.

But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this Regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.

Their Lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immense range of reported cases in which certiorari has been granted by the English Courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established Courts of Justice, and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably true to say that the Courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial even in respect of acts that approximate to what is purely administrative than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial. But the basis of the jurisdiction of the Courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Lord Justice Atkin (as he then was) in *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 204. " . . . the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, Courts of Justice. Wherever 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 these writs". As was said by Lord Hewart, C.J., in *R.* v. *Legislative Committee of the Church Assembly* [1928] 1 K.B. 411 at 415, when quoting this passage, "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine

questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

It is that characteristic that the Controller lacks in acting under Regulation 62. In truth when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes and has reasonable grounds to believe that the holder is unfit to retain it. But, that apart, no procedure is laid down by the Regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred upon the Controller by Regulation 62 stands by itself upon the bare words of the Regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

For these reasons their Lordships are of opinion that the case of *Abdul Thassim* was wrongly decided on this point, and that the respondent's argument that he is not amenable to a mandate in the nature of certiorari in respect of action under Regulation 62 must prevail. That in itself is sufficient to dispose of the appeal. But since the merits of the appellant's case have been fully argued before them and a question of costs might arise if the appeal were to be dismissed merely on this point of jurisdiction that could not have been argued in Ceylon, their Lordships will indicate the view that they would have taken had certiorari been an available remedy in this case.

They have no doubt that Mr. Justice Canekeratne was right in discharging the rule nisi. The situation that was revealed to the Court by the respondent's evidence was this. Dealers who wished to pay in textile coupons into the Coupon Bank were provided by the Bank with a paying-in book, the slips of which consisted of foil and counterfoil. The dealer entered on foil and counterfoil the number of coupons to be surrendered and took or sent the book and coupons to the Bank. They were there handed to a receiving clerk who counted the coupons, checked the number so counted against the numbers entered in the foil and counterfoil of the paying-in slip and recorded that number in a scroll-book which the dealer or his representative thereupon signed. That was the first check. The respondent produced affidavits from the two receiving clerks who had been on duty on the 30th November and 21st December, 1946, respectively, to the effect that they had entered in the scroll-book the numbers of 669 and 992 in respect of the coupons surrendered on behalf of the appellant on those days, and that the appellant's servant, M. O. Aliyar, had initialled the scroll-book bearing those numbers. They also identified their initials on the counterfoils of the paying-in slips. The second check was that the receiving clerk handed the dealer's paying-in book and the coupons to an assistant Shroff, who recounted the coupons, compared their number with the numbers entered in the foil and counterfoil and initialled both. The respondent produced an affidavit from this official stating that he had counted the coupons surrendered and identifying his initials on the foil and counterfoil of the paying-in slips. The assistant Shroff then passed the paying-in book to the Shroff. The Shroff compared the particulars on the foil with those on the counterfoil to see that they tallied and, if satisfied, entered the particulars in a register kept by him. He then affixed serial numbers to foil and counterfoil, initialled the counterfoil, signed the foil and passed on both these documents to the chief clerk. This was the third check. The respondent produced affidavits from the Shroff (for the 30th November, 1946), and the official who had acted as Shroff (for the 21st December, 1946), identifying their respective signatures and initials on the relevant foils and counterfoils and confirming that they had entered in the Shroff's register the respective

numbers of 669 and 992 in respect of the coupons surrendered by the appellant. Up to this point, therefore, there was a complete chain of evidence to the effect that the appellant had only surrendered these numbers of 669 and 992 coupons on those days. Now, as has been said, the next step in the Coupon Bank system was that the Shroff passed on the paying-in book to the chief clerk. His duty was to countersign foil and counterfoil and to record in a register kept by him, called the Credit Control Book, the number of coupons appearing in those documents. He then retained the foil of the paying-in slip but returned to the dealer the paying-in book with the counterfoil. The foil was in turn passed on to a ledger clerk who entered up the number of coupons shown on it to the credit of the dealer. No evidence was forthcoming on the part of any chief clerk or ledger clerk, but the respondent's own affidavit showed that, whereas the chief clerk's register recorded 669 and 992 coupons as surrendered by the appellant on the relevant dates, the ledger account credited him with the larger numbers of 5,669 and 2,992 respectively.

Plainly, therefore, the respondent had before him serious discrepancies in the books of his own office, the final result of which was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify. Moreover the two foils in the possession of the Department showed, if they showed nothing more, that the words and figures denoting five thousand and two thousand respectively had been inserted at a different time from that at which the words and figures denoting the rest of the total had been written. It is not possible to tell exactly from the evidence before the Court what was the sequence of the respondent's actions. An inspector of his Department obtained the counterfoils from the appellant's possession: these showed the same interpolations as the foils had shown. The counterfoils were submitted to the Government analyst who reported that the slip dated the 30th November, 1946, bore signs of an erasure upon which the words "Five thousand" had been written and that in the total the first figure "5" in fact overlay the figure "6" that followed. He found no definite indications on the other counterfoil. On the 22nd February the respondent wrote the appellant the letter already referred to in which he informed him precisely what were the discrepancies in his account that were being investigated, stated that the foils and counterfoils of the paying-in slips showed interpolations covering the bigger amounts, and told him that he (the respondent) had reason to believe that the appellant had got the interpolations made with a view to securing for himself a larger credit than he was properly entitled to. An explanation in writing was invited and the appellant was told that he could inspect any relevant documents.

On the 25th February the appellant's proctors sent a written explanation. The gist of it was that he had in fact surrendered the larger number of coupons on both the challenged dates. The paying-in slips had been entered up in the handwriting of the appellant and there were no interpolations on them when he sent them with the coupons to the Bank. They had been taken to the Bank by the servant, M. O. Aliyar, whose regular practice it was to put his own signature on paying-in slips. The letter then put forward the suggestion that the true paying-in slips had been destroyed by someone and that those now existing and bearing interpolations (the counterfoils of which had in fact been recovered from the appellant's possession) had been substituted in a handwriting which was not that of the appellant or any of his employees. No direct allusion was made to the fact that Aliyar's signature was, presumably, in the scroll-book acknowledging the lower amounts as paid in; but the letter stated that in the past Aliyar sometimes put his signature in the book without verifying the entry, and that on other occasions he put his signature to a blank space that was later filled in. Either of these things, it was suggested, might have happened on the two challenged occasions.

Apart from sending this letter the appellant seems to have procured an interview for his Counsel with the respondent, at which submissions were made. What they were the evidence did not reveal. Finally the respondent's affidavit speaks of an enquiry which he deputed an Assistant Controller to hold and of statements recorded at that enquiry or directly by himself on the part of the appellant, his partner S. Mohammed Hussain, and the employee Aliyar. Again the evidence fails to explain at what stage these statements were made or what their content was, and it is significant that the appellant's evidence makes no reference to them either by way of affirmation or denial. When all this procedure had been completed the respondent cancelled the appellant's licence.

It is impossible to see in this any departure from natural justice. The respondent had before him ample material that would warrant a belief that the appellant had been instrumental in getting the interpolations made and securing for himself a larger credit at the Bank than he was entitled to. Nor did the procedure adopted fail to give the appellant the essentials that justice would require, assuming the respondent to have been under a duty to act judicially. The appellant was informed in precise terms what it was that he was suspected of: and he was given a proper opportunity of dissipating the suspicion and having such representations as might aid him put forward by Counsel on his behalf. In fact, the explanation that he did offer was hardly calculated to allay the respondent's suspicions: probably it confirmed them. It left unanswered so many questions to which the appellant could have supplied some solution if he had really been innocent of any complicity in the falsifications. If he had surrendered the number of coupons credited to him in his ledger account, as he maintained, he must have had books or records of his own which verified his possession of those numbers on the relevant dates. He never produced such books or records. If he had somehow become possessed of substituted counterfoils, not, as they should have been, in his handwriting, he must have been able to offer some explanation as to how this came about and how the difference was not detected. He gave no explanation. If Aliyar's signature was in the scroll book against the smaller numbers of coupons surrendered, it was no good suggesting that Aliyar might not have verified the numbers on those occasions or might have signed in blank. Either the appellant should have found out and explained what Aliyar's account of these matters was or else, if Aliyar was no longer in his employ and available to be questioned, he should have stated unequivocally that this was so. But, failing explanations from him on points such as these, a heavy cloud of suspicion remained; and, if the respondent felt bound to act upon this suspicion, it was not because he had come to entertain it through any denial of natural justice or without reasonable cause but because the appellant himself either could not or would not produce the explanation that would have dissolved it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

(9089) Wt. 8148—56 100 7/50 D.L. G. 338

In the Privy Council

NAKKUDA ALI

v.

M. F. De S. JAYARATNE

DELIVERED BY LORD RADCLIFFE

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