

WICKREMASINGHE
v.
CEYLON ELECTRICITY BOARD AND ANOTHER

COURT OF APPEAL.

L.H. DE ALWIS, J., AND SENEVIRATNE, J.

C.A. 1049/82

SEPTEMBER 10, 1982

*Writ of Certiorari - Electricity Act - Natural Justice - Dispensability of rule
Delegation of authority and resumption - Abdication of statutory authority.*

By Notice dated 6.4.82 the 1st respondent intimated to the petitioner that it intended to survey the petitioner's land, lop off branches and cut down trees, dig trenches, erect posts and fix wires etc. for the purpose of carrying transmission lines from Victoria to Colombo.

Before the petitioner could lodge her objections within the time given the 2nd respondent sent a letter to the 1st respondent with copy to her stating that he had inquired into the petitioner's objections and was of the view that the proposed route was the most suitable. He authorized under s.15(7) the 1st respondent to take all steps necessary to erect lines across the petitioner's land.

The petitioner appealed against this order on the grounds that petitioner was not given an opportunity of being heard, that there was non-compliance with statutory preconditions and that there was an abdication of authority.

Held -

- (1) That the petitioner was given an opportunity of being heard after the commencement of hearing although in the circumstances of the case the audi alteram partem rule could have been dispensed with.
- (2) There was no abdication of authority because responsibility for delegated work remained in the party delegating.
- (3) Authority could be delegated, and resumed, after revocation of delegation.

Cases referred to:

- (1) *Silva v. Attorney-General* (1958) 60 N.L.R. 145
- (2) *Manton v. Brighton Corporation* (1951) 2 K.B. 393

(3) *The Ceylon Co-operative Employees Federation v. The Co-operative Employees Commission* (1976) 78 N.L.R. 518

(4) *De Verteuil v. Knaggs* (1918) A.C. 557 (P.C.)

(5) *Re Pergamon Press Ltd.* (1971) Ch. D. 388

(6) *Ridge v. Baldwin* (1964) A.C. 40

(7) *Ex parte Ostler* (1977) Q.B.D. 122

APPLICATION for writ of certiorari.

Fuiz Mustapha for petitioner.

J.C. Boange for 1st respondent.

P. Tennekoon, S.S.C for 2nd respondent.

Cur. adv. vult.

September 17, 1982

L.H. DE ALWIS, J.

The 1st respondent is a body corporate created and established by the Ceylon Electricity Board Act, No.17 of 1969 and has all the powers conferred on a licensee by the Electricity Act, Chap. 205. The petitioner is the owner of the lands called Nithulgahamula Kumbura and Uadagamayage Kumbura in extent about two acres situated in Medasiyapattuwa in the district of Matale.

By notice dated 6.4.82 (P2) issued under the Electricity Act, Chap. 205, the 1st respondent intimated to the petitioner that it intended to survey the petitioner's land, lop off branches of trees, mark and cut down trees on the land, dig trenches, erect posts and affix wires and perform other acts on the said land.

The petitioner lodged her objections with the 2nd respondent, and was directed to attend an inquiry before an officer authorised by the 2nd respondent, on the 2nd of July 1982. The petitioner was unable to attend the inquiry due to ill health and submitted a medical certificate stating that she was unfit to attend the inquiry for a period of 14 days. The inquiry was then postponed for the 12th of July 1982. On that day her husband appeared on her behalf at the inquiry and wished to be furnished with a detailed statement of the work contemplated to be carried out under section 15(2) of the Electricity Act. He was informed that the next date of the inquiry would be intimated to him.

In the meantime the 2nd respondent inspected the petitioner's land in the absence of the petitioner and on 16.7.82 sent a letter (P3) to the General Manager of the Ceylon Electricity Board (Senior Central Engineer, Kandy) with a copy to the petitioner, stating that he had inquired into the objections of the petitioner to the erection of the proposed power line across her land and after inspection of the land, was of the view that the proposed circuit was the most suitable one for the erection of the electricity transmission line. Under section 15(7) of the Act he authorised the Electricity Board to take all necessary action to erect the said transmission line across the land of Mrs. Wickremasinghe, and for that purpose to perform the acts specified in the notice P2 issued under section 15(2). He also directed that the necessary trees on the land should be cut down and compensation be paid for them.

It is this order of the 2nd respondent, dated 16.7.82 (P3) that the petitioner seeks to quash by the issue of a Writ of Certiorari.

The Senior Central Engineer attached to the Electricity Board in Kandy filed an affidavit stating that the purpose of laying the electricity transmission lines is to supply adequate power to the Victoria Project which is part of the Accelerated Mahaweli Programme, and is of crucial importance to the country. As a result of the lack of electric power the Government has to incur an additional expenditure of several lakhs of rupees on the purchase of diesel oil to operate the generators to supply the additional electricity. The supply of electricity along the proposed line has been held up as a result of the 'stay order' issued by this Court.

On 30.9.82 when the matter came up for hearing before this Court, in view of the urgency of the matter, it was agreed among Counsel for the respective parties that the Government Agent should inspect the petitioner's land again on or before 3.9.82 in the presence of the petitioner and some technical officer of the Ceylon Electricity Board with a view to ascertaining a suitable route for the fixing of the transmission lines causing as little damage as possible to the petitioner's land. The petitioner was permitted to take up any objections at that inspection. The Government Agent has since held a second inspection and has filed his report dated 1.9.82 granting the 1st respondent permission to install the transmission lines across the petitioner's land. The petitioner was given an opportunity of filing a further affidavit after considering the Government Agent's Report, and he has now done so.

Counsel for the petitioner challenged the order of the 2nd respondent dated 16.7.82(P3), on three grounds, as set out in the summary of his written submissions tendered to Court.

They are as follows:-

- (a) violation of natural justice;
- (b) non-compliance with the statutory pre-conditions for the exercise of the power;
- (c) abdication of statutory authority.

P3 is a letter written by the 2nd respondent to the 1st respondent with a copy to the petitioner stating that he inquired into the petitioner's objections and had inspected her land. He stated that he approved of the proposed laying of the electricity transmission line across the petitioner's land as the most suitable route and authorised the 1st respondent to take all necessary action under section 15(7) of the Act, subject to the payment of compensation for the trees cut down in the process.

Dealing with items (a) and (b) together, learned Counsel submitted that there was a non-compliance with the provisions of the Electricity Act which resulted in a violation of natural justice.

Section 15(2) of the Electricity Act requires that before a licensee enters on any land for the purpose specified in sub-section (1), he shall give thirty days notice stating as fully and accurately as possible the nature and extent of the acts intended to be done. Such notice shall be substantially in the prescribed form. The complaint of learned Counsel for the petitioner is that the notice P2 dated 6.4.82 given to the petitioner did not set out the proposed route for the installation of the high tension electric line over the petitioner's land. But as the notice P2 itself discloses and as the petitioner himself admitted in his affidavit, the notice did state that the 2nd respondent intended to survey the petitioner's land, lop off branches of trees on the said land, mark the trees standing thereon, cut down the trees, dig trenches, erect posts, affix wires and perform other acts on the said land. The 1st respondent could not possibly, at that stage, give any indication as to the route along which the transmission lines should be taken over the petitioner's land before he inspected and surveyed the land. In my view the notice P2 was a sufficient compliance with section 15(2) of the Electricity Act and the petitioner has no cause for complaint on that ground.

Section 15(4) provides for the lodging of objections in writing within 14 days, to any of the intended acts of the licensee, by the

person on whom notice under section 15(2) is served. The Government Agent is thereafter required to fix the matter for hearing and to give notice of the date to the person concerned.

Section 15(6) requires the Government Agent to hold the inquiry and to give the party concerned an opportunity to be heard or to direct an officer to hold such inquiry on his behalf and to make recommendations to him.

Section 15(7) provides that upon the conclusion of the inquiry held by the Government Agent or upon receipt of the recommendations made by the officer directed to hold the inquiry, the Government agent may, subject to such terms, conditions and stipulations as he thinks fit, authorize or prohibit any of the acts mentioned in the notice given under sub-section (2).

The inquiry into the petitioner's objections was commenced, on the directions of the 2nd respondent, by the Addl. Government Agent, with notice to the petitioner, but before it was concluded, the Government Agent inspected the land himself and made the order P3 complained of. Since the inquiry was not concluded, it is submitted, that the petitioner was not given a full hearing, in violation of the principles of natural justice. Thereafter, when the 2nd respondent took over the inquiry and inspected the land, the petitioner was not given an opportunity of being present and raising any objections in violation of natural justice.

When the matter came up for hearing before this Court on 30.8.82, in view of the urgency of the matter it was agreed that the Government agent should again visit the land in the presence of the petitioner after giving her notice, and decide upon a convenient route for the laying of the transmission lines causing as little damage as possible to the petitioner's land. The petitioner was permitted to raise any objection at that inspection. It is after the second inspection that the 2nd respondent filed his report dated 1.9.82 in Court. The inspection was carried out on that day by the 2nd respondent in the presence of the petitioner's husband and the Electrical Superintendent of the Ceylon Electricity Board. After taking into consideration the objections raised by the petitioner's husband, the 2nd respondent saw no reason to vary the order he had made earlier and was of the view that the 1st respondent should be granted permission to install the transmission lines across the petitioner's land as pointed out by the 1st respondent and to cut down the necessary trees.

Learned Counsel for the petitioner contended on the authority of *Silva Vs. The Attorney-General*, (1) that once a power is delegated to another officer, it denudes the delegating authority of that power and such power cannot be exercised thereafter unless the delegation is formally revoked by a second order, so that it was not open to the 2nd respondent to inspect the petitioner's land and make his order P3, while the delegation of the power to hold an inquiry to the Additional Government Agent was still in force. The case relied upon is clearly distinguishable from the present case. There, the Public Service Commission which was vested with the appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission under the Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947, delegated its power of dismissal of the accused to the Director of Irrigation. But before the Director of Irrigation could make an order dismissing the appellant, the Public Service Commission decided to dismiss him while the delegation of its power to the Director of Irrigation was still in force.

In the present case, on the other hand, the legislature by section 15(6) of the Electricity Act has empowered the Government Agent to hold the inquiry or to direct an officer to hold such inquiry and make recommendations to him which the Government Agent may or may not adopt. The delegate has no power to decide the matter but only to make recommendations to the delegating authority. It is only the Government Agent who is empowered to make a decision that is final.

In *Manton Vs. Brighton Corporation*, (2) it was held that a statutory power to delegate will normally include a power to revoke the delegation when desired. Slade, J. at page 403 said that the delegating power can at any time resume their authority by saying that in their judgment not only can they resume their own authority with which they have never parted but they can revoke the authority which they have delegated. He further said "one cannot divest oneself of one's statutory duties. One can get another to perform them, and if he perform them properly, well and good; if he does not, one will still have to perform them oneself and therefore one cannot divest oneself of those duties. I was told that, whereas most of the functions of the Standing Committee were to make recommendations to the Council, there was also in some cases entrusted to the Standing Committees the exercise of executive powers. In so far as they merely make recommendations, the remedy of the appointing authority is easy; they may merely refrain from adopting the recommendations

when they do not like them. In so far as the delegation is of executive powers, it seems to me it must be the case that the appointor can determine the authority of the appointee."

In the instant case, probably in view of the slow progress of the inquiry caused by a postponement due to the tendering of a medical certificate by the petitioner and in view of the urgency of the matter the 2nd respondent apparently decided to expedite the inquiry by taking it over himself and inspecting the land. As the delegating authority he had in this case the power to revoke the delegation given to the Additional Government Agent and to take over the inquiry himself. This submission therefore fails.

It was next contended that the order made by the 2nd respondent after his first inspection of the petitioner's land was a nullity in view of the violation of the principles of natural justice and cannot subsequently be validated by a second inspection, after the matter came to Court. But no objection was taken to this procedure by Counsel for the petitioner when it was suggested in Court as the most suitable way of solving the problem in view of the urgency of the situation. It must be said in fairness to learned Counsel for the petitioner, that he willingly agreed to having another inspection held provided his client was given an opportunity of being present and of raising any objections there. Having been a party to such an agreement it does not now lie in his mouth to challenge the validity of the second inspection. It must be noted that certiorari is a discretionary remedy and this Court has the power to withhold it if it thinks fit. This Court will do so in the case of an unmeritorious petitioner, even though there has been a clear violation of natural justice. Wade *ibid* 455. Moreover, as will be pointed out later, not much prejudice and detriment has been caused to the petitioner by the procedure adopted.

The contention of learned Counsel was that sub-sections 4.6 and 7 of section 15 of the Act contemplate an inquiry at which oral evidence and submissions are made and that an inspection of the land is no substitute for it. He relied on the case of *The Ceylon Co-operative Employees Federation Vs. The Co-operative Employees Commission*, (3) where it was held that the words "to hear appeals out of disciplinary orders" *prima facie* appears to bring in the rule of *audi alteram partem* and the right to make oral submissions. *De Smith in Judicial Review of Administrative Action*, 4th Ed. page 192 however states "Doubtless there are also many cases where procedures

involving inspection, testing or examination can be regarded as adequate substitutes for hearings."

In the present case learned Counsel for the petitioner agreed in Court to the adoption of the procedure of an inspection at which he was given an opportunity of being present and of making oral objections. The report of the 2nd respondent dated 1.9.82 tendered to this Court shows that the petitioner's husband was present at the second inspection and did raise objections which are dealt with in the report. The alternative routes suggested by the petitioner's husband for laying the transmission lines, have been carefully examined by the 2nd respondent with the assistance of the technical expert, in the person of the Electrical Superintendent, and have been ruled out as not feasible. Ultimately the route proposed by the 1st respondent was approved as it involved the felling of the least number of trees on the petitioner's land. In my view an on-the-spot inspection of the site affords a far better approach to a solution of this nature than any oral evidence and submissions can provide in an office room. The submission of learned Counsel must fail.

Broadly speaking, however, one can say that the Courts will show special restraint in applying tests of legality where (1) a power is exercisable in "emergency conditions" or (2) the policy content of the power is large and its exercise affects large numbers of people. *De Smith* *ibid* p. 297. That urgency may warrant disregard of the *audi alteram partem* rule in other situations is generally conceded. *De Smith* *ibid* p. 191.

In *De Verteuil Vs. Knaggs*, (4) their Lordships of the Privy Council said "The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated.....It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the persons affected....."

The application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of

the concept of fair play there must be real flexibility. Sometimes urgent action may have to be taken on grounds of public health or safety, for example to seize and destroy bad meat exposed for sale or to order the removal to hospital of a person with an infectious disease. In such cases the normal presumption that a hearing must be given is rebutted by the circumstances of the case. *Wade - Administrative Law*, 4th Ed.p. 451.

In *re Pergamon Press Ltd.*, (5) Sachs, L.J. said at page 403:

"In the application of the concept of fairplay there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasized in a number of authoritative passages in the judgments cited to this Court. [*Russel Vs. Duke of Norfolk* [1949] 1 ACR 109, *Wiseman V Borneman* [1971] A.C. 297. It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet hamper, lengthen and indeed, perhaps even frustrate the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, to the source of its jurisdiction (statutory in the present) the way in which it normally falls to be conducted and its objective."

In *Ridge Vs. Baldwin* (6), Lord Reid said at page 72. that where a Minister was not dealing with a single isolated case, but with something like, say, a scheme for an important new road, his primary concern would not be with the damage to landowners' rights but with the fulfilment of his policy; and that it would be quite wrong to require the Minister to act in the same sort of way as a board of works deciding whether a house should be pulled down. *Wade* *ibid* 471. Although this passage has been subjected to severe criticism by Professor Wade it appears to have been adopted by Lord Denning in *Ex parte Ostler* (7) where he said: "In making a judicial decision, the tribunal considers the rights of parties without regard to the public interest. But in administrative decision (such as a compulsory purchase order) the public interest plays an important part. The question is, to what extent are private rights to be subordinated to the public interest." I am in respectful agreement with these dicta as applicable to the facts of this case.

In the present case the supply of adequate electrical power to the Victoria Project is of the utmost urgency for the implementation of the Accelerated Mahaweli Programme. As the description of this scheme connotes it is a matter of great public urgency. There cannot be any delay. The delay in taking the electricity transmission lines across the petitioner's land not only impedes the progress of this scheme but also involves the Government in very heavy expenditure of lakhs of rupees on the purchase of diesel to operate the generators that are now used to provide the additional power to the Victoria Project. The affidavit of the Senior Central Engineer attached to the Ceylon Electricity Board, which is filed of record, bears this out.

The report of the Government Agent tendered to Court after the second visit to the petitioner's land is that the proposed Ukkuwela-Pangollemada transmission line is a new one and not connected with the 4th circuit referred to.

It is a new transmission line to be separately installed to feed the Victoria Project. The Victoria Project is presently supplied with electricity from the Eriyagama Power Station which also supplies electricity to towns like Katugastota, Akurana etc. The installation of the new transmission line will be for the exclusive use of the Victoria Project which requires more electric power in order that work may proceed according to schedule. It is in these circumstances that the Government Agent after his inspection of the petitioner's land took the view that the installation of the proposed transmission line over the petitioner's land was the most expeditious way in which power could be supplied to the Victoria Project. No lack of bona fides is alleged in this decision and the view of the Government Agent appears to be reasonable in the context of the larger interests of the public.

The petitioner has not suffered any real detriment by the procedure adopted by the Government Agent in this case. The Additional Government Agent who held the first abortive inquiry was empowered only to make recommendations to the Government Agent. It was open to the Government Agent either to accept or reject the recommendations. The final decision was his. He has since with the consent of the petitioner visited the land and made a second inspection. At the second inspection the petitioner's husband has stated his objections to various matters and after a careful consideration of them the Government Agent, with the technical assistance of the Electrical Superintendent, has reached the same conclusion as he had done on the earlier occasion and which has been embodied in P3.

It is finally submitted by learned Counsel for the petitioner that the 2nd respondent has abdicated his statutory authority to the 1st respondent and authorised the latter to do as it pleases. The 2nd respondent is an administrative officer and cannot be expected to have any technical knowledge about laying of Electricity Transmission lines across a land. He has in his report permitted the laying of the transmission lines as pointed out by the technical expert, the Chief Electrical Engineer, in the presence of the petitioner's husband and after paying due regard to the latter's objections. That in no way means that he has abdicated his powers under the Act to the Chief Electrical Engineer. After approving the route, he has authorized the felling of the trees that would be necessary for the installation. Under the Act he has authorised the following acts, viz; the installation of the transmission lines across the petitioner's land, which must obviously have been also pointed out to the petitioner's husband who was present at the inspection and the felling of the trees for this purpose. Not being a technical expert I do not think it was necessary for the 2nd respondent to have detailed every single act the 1st respondent was required to perform once authority was granted to take the transmission wires across the petitioner's land.

For all these reasons, this Court is not disposed to grant the discretionary remedy asked for. The application is dismissed with costs fixed at Rs.525/-

SENEVIRATNE, J. — I agree.

Application dismissed.