

1961

Present : Tambiah J.

CITY MOTOR TRANSIT CO., LTD., Petitioner, and C. WIJESINGHE
(Minister of Nationalised Services) and others, Respondents

S. C. 9—Application for a Writ in the nature of Mandamus under section 42 of the Courts Ordinance (Cap. 6)

Mandamus—Writ claimed against Minister of Crown—Liability of Minister to perform a duty prescribed by statute—Letter to public officer requesting performance of duty—Direct reply withheld—Inference of refusal to perform duty—Motor Transport Act, No. 48 of 1957, ss. 2, 6, 28 (2), 29 (1), 53, 55, 65—Award of Compensation Tribunal—Duty of Minister to determine mode of payment.

The rule that a mandamus cannot lie against a servant or agent of the Crown is not applicable to a case where a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant or *persona designata*, and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as a mere agent for the Crown. In such a case a writ of mandamus would lie at the instance of a person who has a direct and substantial interest in securing the performance of the duty.

By section 53 of the Motor Transport Act, No. 48 of 1957 :—

“ The mode of payment of compensation under this Act shall be determined by the Minister in consultation with the Minister of Finance.”

Held, that section 53 imposes a duty on the Minister (of Nationalised Services), not as an agent of the Crown but as a person designated by office, to perform a public duty for the benefit of persons to whom compensation has been awarded, and therefore a writ of mandamus would lie if the Minister refused to perform the duty.

“ It must be noted that there is no liability on the part of the Crown to pay the compensation. The liability is cast on an incorporated body, namely, the Ceylon Transport Board. Therefore, it cannot be said that in acting under s. 53 the Minister acts purely as an agent of the Crown. He has a statutory duty to perform for the benefit of those to whom compensation has already been granted.”

Held further, that a public officer may legitimately be regarded as having refused to do his duty if he withholds a direct answer to a letter requesting him to perform the duty.

APPPLICATION for a writ of mandamus to compel the Minister of Nationalised Services to determine the mode of payment of compensation to the petitioner some of whose omnibuses were compulsorily acquired and requisitioned by the Ceylon Transport Board under the Motor Transport Act, No. 48 of 1957.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy, E. B. Vannitamby* and *H. Ismail*, for the Petitioner.

V. Tennekoon, Senior Crown Counsel, with *H. L. de Silva*, Crown Counsel, for the 1st and 6th Respondents.

S. Sharvananda, with *M. T. M. Sivardeen*, for the 3rd Respondent.

Cur. adv. vult.

March 10, 1961. TAMBIAH, J.—

This is an application for a Writ of Mandamus to compel the Minister of Nationalised Services to determine the mode of payment of compensation under the Motor Transport Act, No. 48 of 1957, in consultation with the Minister of Finance, in terms of section 53 of the Act.

Some buses owned by the Petitioner in 1957 were compulsorily acquired and requisitioned by the Ceylon Transport Board under the above Act, which also set up a Compensation Tribunal.

By an award of the Compensation Tribunal, dated 2.4.59, the Petitioner was awarded the sum of Rs. 47,736.17 as compensation payable by the Ceylon Transport Board in respect of the acquisition of three buses.

On 25.11.59 the Petitioner by letter requested the Minister of Nationalised Services, the first Respondent, to make order determining the mode of payment, as required by section 53 of the Act. On 24.12.59 the Petitioner sent another letter to the Minister pointing out the long delay in the matter and warning him that unless a suitable reply was received he would be compelled to move this Court by way of a Writ of Mandamus compelling the Minister to perform the statutory duty cast by section 53. The Acting Permanent Secretary to the Minister of Nationalised Services, at the first Respondent's direction, replied to the Petitioner's proctors by letter dated 30.12.59, in the following terms :—

“ My No. A.52/34,
Ministry of Nationalised
Services and Shipping,
Colombo,
December 30, 1959.

Dear Sirs,

Compensation

In reply to your letter of December 24, 1959, addressed to the Hon. Minister of Nationalised Services and Shipping I am directed to state that a decision regarding the mode of payment of compensation must await the formation of the new Government after the General Election.

Yours faithfully,

Sgd.....SILVA,
Acting Permanent Secretary.

Messrs. Moonesinghe and Jayamaha,
Proctors and Notaries,
167, Mihindu Mawatha,
Colombo 2.”

The Petitioner filed this application on 13.1.60.

The main contention of learned Crown Counsel is that the duty cast on the Minister by section 53 is not enforceable by a Writ of Mandamus since the act contemplated by that section is in the nature of a legislative

Act delegated by Parliament, in the performance of which the Minister acts as an agent of the Crown. Mr. H. V. Perera submitted on behalf of the Petitioner that section 53 imposes a duty on the first Respondent for the benefit of the Petitioner, and therefore the first Respondent could be compelled by a Writ of Mandamus to perform the statutory duty cast on him by section 53.

The question, how far servants of the Crown can be compelled to perform a duty by Mandamus, is lucidly discussed in *Queen v. The Secretary of State for War*¹. In this case Charles J. said at pp. 334–335 :

“ Now there are no doubt cases where servants of the Crown have been constituted by statute agents to do particular acts, and in those cases a mandamus would lie against them as individuals designated to do those acts. But it is also beyond question that a mandamus cannot be directed to the Crown or to any servant of the Crown simply acting in his capacity of servant. ‘ With reference to that jurisdiction ’ says Cockburn, C.J., in *Reg. v. Lords of the Treasury* (Law Rep. 7 Q.B. 387, at p. 394), ‘ we must start with this unquestionable principle—that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown. The thing is out of the question. In like manner where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction. ’

“ In the present case the Secretary of State is a servant of the Crown, and the duty we are asked to compel him to perform is not imposed by statute.”

Mandamus against the Secretary of State for War for compelling him to carry out the terms of a royal warrant regulating the pay and retiring allowances of the officers and soldiers of the army was refused, since it was not a duty imposed on the Secretary of State either by statute or common law.

Lord Esher, M.R., dismissing the appeal in the above case said at p. 338 :

“ Assuming that the Crown were under any obligation to make this allowance to the claimant, a mandamus would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not : he has no legal duty as such agent towards any individual. ”

In *The King v. The Lords Commissioners of His Majesty's Treasury*², a Writ in the nature of a mandamus issued against the Lords Commissioners of His Majesty's Treasury compelling them to determine the mode of calculating the pension of police officers. As the case bears some analogy to the instant case, the relevant terms of the English Act that enforced the duty must be examined.

¹ (1891) 2 Q. B. 326.

² (1909) 2 K. B. D. 183.

By section 14 of the Police Act, 1890, "where a person has served in two or all of the following capacities:—(i) as a civil servant within the meaning of the Superannuation Act, 1887; (ii) in a police force with a salary paid out of money provided by Parliament; he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension Provided as follows . . . (2) The pension shall be payable from money provided by Parliament and from the police pension fund in *such proportions as the Treasury may determine*, regard being had to the period of service and the salary received in each capacity." By section 33: "In this Act, unless the context otherwise requires . . . the expression 'police force' means a force maintained by one of the police authorities mentioned in the " 3rd Schedule to the Act.

In delivering his judgment Lord Alverstone, C.J. said (1909, 2 K. B. D. at p. 189), "The question which has arisen is whether the Treasury can be called upon to determine what proportion of the total pension is to be paid from money provided by Parliament and from the police pension fund respectively, and the answer to that question depends upon s. 14 of the Act."

The Police Act, 1890, sections 1 and 3 gave every constable in a police force a right to a pension upon his retirement after having completed a specified number of years' approved service. This had to be determined in a particular way, as set out in section 4 (4) of the Act. The proviso (2) to s. 14 has been set out above.

It was contended that the Writ did not lie against the Lords of the Treasury, in view of the rule that a mandamus cannot lie against the Crown or its servants. This contention was, however, rejected. Jelf, J., said at p. 192, "With regard to the question of mandamus I am entirely of the same opinion as my Lord, that a mandamus will lie to direct this public authority to perform a statutory duty without which the statute is meaningless and unworkable."

Crown Counsel cited *Merricks v. Heathcoat-Amory and another*¹ as authority for the proposition that when a Minister acts as an agent of the Crown, no mandamus lies against him. The Petitioner's Counsel did not contest this broad proposition. In the above case, pursuant to the powers conferred by the Agricultural Marketing Act, 1931, s.1, a draft scheme for the marketing of potatoes was approved by the Minister of Agriculture and Fisheries in July, 1954. The Minister in accordance with the provisions of section 1 (8) laid the draft scheme before each House of the British Parliament for its approval. In an action against the Minister to restrain him from seeking approval of a scheme by either House of Parliament on the ground that it was in parts *ultra vires*, it was held that in carrying out his function under the Agricultural Marketing Act, s. 1, the Minister was acting as an officer representing the Crown, and by virtue of the provisions of the Crown Proceedings Act,

¹(1955) 2 A. E. R. 453.

1947, s. 21, the Court could not grant an injunction against the Crown. Upjohn, J. said in the course of his judgment, at pp. 456–457 :

“ I have heard full arguments from counsel for the plaintiff and from the Attorney-General, and I think in those circumstances I can properly express my own views as to the capacity in which the Minister acts in carrying out or proposing to carry out the relevant functions under s. 1 of the Agricultural Marketing Act, 1931. It seems to me clear that in carrying out his functions under that section he is acting as representative or as an officer of the Crown. He is the Minister of Agriculture who is responsible for the conduct of agricultural matters in this country. As part of his general responsibility, he is the person who would naturally be designated in the Agricultural Marketing Act as the person to carry out the functions, purposes and policy of that Act. It was no doubt for that reason that it was the Minister who was to approve any scheme under section 1 (1). It was his duty, not, as I venture to think, merely as a delegated person, but acting in his capacity as Minister of Agriculture, that he had to consider the scheme, that he had to hear objections and representations, and hold inquiries, and he had the power and duty of making such modifications as he thought fit. It was his duty in his capacity as Minister of Agriculture and not merely as a delegated person that, if he was satisfied—with the satisfaction he felt in his capacity as Minister of Agriculture and an official of the Crown—that the scheme would conduce to the more efficient production and marketing of the regulated product, to lay before the Houses of Parliament a draft scheme, and so ultimately in the same capacity to make an order bringing the scheme into effect. It seems to me that *from start to finish he was acting in his capacity as an officer representing the Crown*. That being so, it is conceded that no injunction can be obtained against him, and therefore the motion fails *in limine*. ”

“ I am not at all satisfied that it is possible to have the three capacities which were suggested. Of course there can be an official representing the Crown and that is plainly this case. But if he were not, it was said that he was a person designated in an official capacity but not representing the Crown. The third alternative was that his capacity was purely that of an individual. I understand the conception of the first and third categories, but I confess I find it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity ; but in the ordinary case where the relevant or appropriate Minister is directed to carry out the function or policy or some Act, it seems to me that he is either acting in his capacity as Minister of the Crown representing the Crown, or he is acting in his personal capacity, usually the former. ”

Crown Counsel also relied on the ruling of this Court in *Munasinha v. Devarajan*¹. In this case it was held that the Writ of Mandamus did not lie against the Assistant Government Agent to pay a particular person a sum of money awarded as compensation for land acquired under the Land Acquisition Act. Sansoni, J. in the course of his judgment said at p. 287:

“ It seems to me that this application must fail for the reason that the Writ of Mandamus does not lie against the Crown nor against the servant of the Crown where the duty sought to be enforced is not one which is imposed on the servant himself but is imposed on him only in the capacity of agent for the Crown. The principle on which the rule is based is stated in *9 Hailsham p. 761* :—‘ No court can compel the Sovereign to perform any duty, no Writ will lie to the Crown. Where it is sought to establish a right against the Crown the appropriate procedure is by a petition of right. Nor will a Writ lie against a Secretary of State in his capacity as agent of the Crown; for in that capacity he is responsible to the Crown alone, and is under no legal duty towards the subject.’ The same rule applies as regards other persons acting as servants of the crown.”

Since the duty of paying this money is in the Crown the Assistant Government Agent was merely acting as an agent of the Crown and therefore it was rightly held that the writ did not lie.

Dr. De Smith in his book, “*Judicial Review of Administrative Action*” (Steven and Sons) states as follows at p. 445 :—

“ In other cases also applications for mandamus against Crown servants to compel the payment of moneys by the Crown or of moneys that were in the hands of the Crown have been refused. Where, however, a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant or *persona designata*, and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty.”

The relevant provisions of the Motor Transport Act may now be examined. The Ceylon Transport Board is incorporated by section 2 of the Act. It is given the power to acquire and hold both movable and immovable property for the purposes set out in section 6 of the Act. The Act gives the Board the right to borrow money, with the consent of the Minister of Nationalised Services given with the concurrence of the Minister of Finance, for the purposes set out in s. 28 (2). Under this provision the Board has the right to borrow money in order to make payment of any compensation payable under the Act. The Minister of Finance has to guarantee the repayment of the principal and the payment of interest on any Ceylon transport stock created and issued under

¹ (1955) 57 N. L. R. 286.

s. 29 (1) (b), and also may with the concurrence of the Minister of Nationalised Services guarantee the payment of interest on any Ceylon transport stock created and issued under section 29 (1) (a). Where property has been acquired by the Board, compensation becomes payable to the owners of such property. For the purpose of assessing the compensation, a tribunal designated as the Compensation Tribunal is set out under s. 55 of the Act. The Tribunal is given the power to consider all references for award as to compensation. It is also empowered to hear evidence and to award such compensation as it may think fit (s.65). In the instant case, as stated earlier, the Tribunal has already awarded the sum of Rs. 47,736·17, to be paid to the Petitioner. S. 53 states as follows :—

“The mode of payment of compensation under this Act shall be determined by the Minister in consultation with the Minister of Finance.” The Minister referred to is, of course, that of Nationalised Services. If the question is posed as to whether the section imposes a duty on a public officer for the benefit of an individual, the answer is irresistible. The Petitioner is given the right to get compensation. It does impose a duty on the Minister of Nationalised Services to do an act in consultation with the Minister of Finance for the benefit of those to whom compensation has been granted. The persons to whom compensation has been granted obtain satisfaction only after compensation is actually paid, and this cannot be done unless and until the mode of payment of the compensation is determined by the Minister. It must be noted that there is no liability on the part of the Crown to pay the compensation. The liability is cast on an incorporated body, namely, the Ceylon Transport Board. Therefore, it cannot be said that in acting under s. 53 the Minister acts purely as an agent of the Crown. He has a statutory duty to perform for the benefit of those to whom compensation has already been granted. It seems to me to be a monstrous proposition to state that the Legislature, after having stated that compensation is payable to persons whose property has been taken over by the Board and having set up a tribunal to award the compensation, did not by s. 53 impose a duty on the Minister to do an act for the benefit of those persons to whom compensation has been granted.

It was argued by Crown Counsel that s. 53, read along with some of the earlier sections that have been referred to, confers a legislative power on the Minister, and that the Minister while acting under these provisions was doing so purely as an agent of the Crown. I am unable to accept this argument. If it is upheld, the working of the Act would be rendered nugatory, and the statutory provisions whereby compensation became ultimately payable to persons whose property has been acquired would be utterly futile.

In the affidavit filed by the Minister of Nationalised Services, he states that large sums of money become payable by the State, and that as Parliament had not met, the Minister of Finance was unable to obtain

funds. It seems to me that by a Writ of mandamus the Crown itself cannot be ordered to pay any money. As stated earlier the liability to pay the money is cast on the Board and not on the Crown as such.

In my view s. 53 imposes a duty on the Minister, not as an agent of the Crown but as a person designated by office, to perform a public duty for the benefit of persons to whom compensation has been awarded, and therefore a Writ of mandamus lies if the Minister refuses to perform the duty.

At the end of the argument Crown Counsel stated that there had been no refusal on the part of the Minister to perform the duty under s. 53. Although the Minister in his affidavit formally denies that he refused to perform the duty, the correspondence between the Petitioner and the Minister, taken with the latter's subsequent conduct, leaves no doubt in my mind that there was a request by the Petitioner to the Minister to perform the duty and there had been what amounts to a refusal by the Minister. Lord Denman C.J. said:—"It is not indeed necessary that the word 'refuse' or any equivalent to it, should be used; but there should be enough to show that the party *withholds compliance*, and distinctly determines not to do what is required." *The King v. Brennock and Abergavenny Canal Navigation*¹. In interpreting this passage, Gratiaen, J., said as follow in *Wijeyesekera & Co. v. The Principal Collector of Customs, Colombo*² :—

"Lord Denman there pointed out that if, in effect, a party said to a public officer, 'I desire a direct answer, and your not giving it will be considered a refusal', the public officer may legitimately be regarded as having refused to do his duty if he withholds a direct answer to the question."

For these reasons I direct the Minister of Nationalised Services to act under s. 53 of the Motor Transport Act and to determine the mode of payment of compensation in consultation with the Minister of Finance. It may be that the Minister of Nationalised Services has difficulties in acting under s. 53, but so long as he performs his part of the obligation he cannot be said to be in default.

The Ceylon Transport Board and the Minister of Finance have been made parties to this application, but no relief has been prayed for against them. Counsel appearing on behalf of the Board asked for costs. As the Board has had to incur the expenses of retaining counsel, I order the Petitioner to pay a sum of Rs. 105 as costs to the Board. The Petitioner is entitled to a sum of Rs. 105 as costs from the first Respondent.

Application allowed.

¹ 3 *Ad. and El.* 217 (111 *E.R.* 295).

² (1951) 53 *N. L. R.* 329 at 333; 45 *C. L. W.* 81 at p. 84.