Privy Council Appeal No. 29 of 1966

A. T. Durayappah of Chundikuly, Mayor of Jaffna – *Appellant*

v.

W. J. Fernando and others – – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1966.

Present at the Hearing:
VISCOUNT DILHORNE
LORD GUEST
LORD DEVLIN
LORD UPJOHN
LORD PEARSON

[*Delivered by* LORD UPJOHN]

The first and principal question in this appeal is whether the fourth respondent who is the Minister of Local Government (who will be referred to as the Minister) was justified in exercising his powers under section 277 of the Municipal Councils Ordinance (chapter 252) as amended by Act No. 12 of 1959 (this Ordinance as amended will be referred to as the Municipal Ordinance) to dissolve the Jaffna Municipal Council (hereafter referred to as the Council) without giving it the right to be heard in its own defence. In other words was the Minister before exercising his powers under section 277 bound to observe that rule of natural justice, which is neatly and briefly stated in the recently resuscitated Latin expression "*audi alteram partem*". While it was an issue in the lower courts, it is now no longer disputed that the Minister acted in complete good faith and that in fact he would have given the Council the opportunity of being heard but for the urgency of the case as he or his advisers regarded it and it is not in doubt that if he was bound to observe the principle *audi alteram partem* he failed to do so. Their Lordships will only state that while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable.

The Council was constituted under the Municipal Ordinance as the municipal authority for the district of Jaffna, a very large and important town, and there was thereby conferred upon it all the usual powers and duties of a local authority in their area. Only a brief review of the provisions of the Municipal Ordinance constituting these particular local authorities is necessary. By Part I the Minister was empowered to declare any area to be a municipality, to define the limits of any municipality so declared and to assign a name and designation to the Municipal Council to be constituted for the municipality so declared (sections 2 and 3). The Municipal Council constituted for each municipality was (subject to reserved powers irrelevant to this judgment) to be the local authority within the administrative limits of the municipality charged with the regulation, control and administration of all matters relating to the public health, public utility services, public thoroughfares and generally with the protection and promotion of the comfort, convenience and welfare of the people and amenities of the municipality (section 4).

By Part II elaborate provisions were made for the election of Councillors, their terms of office and for the election by the Councillors of the Mayor and Deputy Mayor, from time to time.

Section 34 is important:

> "(1) Every Municipal Council shall be a corporation with perpetual succession and a common seal and shall have power, subject to this Ordinance, to acquire, hold and sell property, and may sue and be sued by such name and designation as may be assigned to it under this Ordinance.
>
> (2) The common seal of the Council shall remain in the custody of the Commissioner, and shall not be affixed to any contract or other instrument on behalf of the Council, except in the presence of the Mayor or Deputy Mayor and the Commissioner who shall sign their names to such contract or other instrument in token of their presence."

Sections 35 and 37 provided for the vesting in the Council of much immovable property, waste lands, quarries, lakes and waterworks, Crown Lands (made over with sanction of the Governor-General), public parks, gardens and open spaces, all streets, public markets and public buildings.

The following Parts of the Municipal Ordinance expanded in great detail these all important general powers and duties conferred upon Municipal Councils to which detailed reference is unnecessary. By Part IX (section 185 onwards) every Municipal Council was bound to establish a Municipal Fund and its powers and duties in relation thereto were elaborated. Then by Part XII (section 230 onwards) every Municipal Council was empowered to levy rates (with the sanction of the Minister) on property within the municipality.

By Part XIV headed "Central Control" section 277 (1) enacted:

> "(1) If at any time, upon representation made or otherwise, it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded, and thereupon such Council shall, without prejudice to anything already done by it, be dissolved, and cease to have, exercise, perform and discharge any of the rights, privileges, powers, duties, and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law."

There was a general local election for Councillors to the Council in December of 1963 and 18 members were by the constitution of the Council elected to it for the term of three years expiring at the end of 1966.

There is no doubt that this Council went through troublous times; within the period of 2½ years of its election four Mayors were successively elected, the appellant having been elected as recently as ~~the~~ 31st March 1966. Although their Lordships are not directly concerned with such matters it may be stated as a matter of history that a number of complaints, whether justifiable or not, as to the conduct of the Council and the councillors were made to the Minister. He therefore sent the Commissioner of Local Government to inquire into these matters with instructions to report immediately. The Commissioner of Local Government visited Jaffna on 27th and 28th May 1966 and it is fair to say that the appellant, who had been informed by the Minister of his impending visit gave to him every facility that he required for this purpose. He had full access to all the minutes of the Council but he did not ask anyone any questions or give any member of the Council any opportunity of expressing their views on any matter. His report, first orally and then in writing, was received by the Minister on 29th May who on the same day made an Order stating that it appeared to him that the Jaffna Municipal Council was not competent to perform the duties imposed upon it and that pursuant to the powers conferred upon him by section 277 as amended he directed that the Council should be dissolved and

superseded on 29th May 1966. On 30th May 1966 the Governor-General appointed the first, second and third respondents to be special commissioners to exercise perform and discharge the rights privileges powers duties and functions conferred upon the Council or the Mayor by the Municipal Ordinance. This Order dissolving the Council is challenged by the appellant and indeed by another councillor but your Lordships are not concerned with that second challenge.

Upon the question of *audi alteram partem* the Supreme Court followed and agreed with the earlier decision of *Sugathadasa v. Jayasinghe* (1958) 59 N.L.R. 457, a decision of three judges of the Supreme Court upon the same section and upon the same issue namely whether a Council was not competent to perform its duties. That decision at p. 471 laid down " as a general rule that words such as ' where it appears to ' or ' if it appears to the satisfaction of ' or ' if the . . . considers it expedient that ' or ' if the . . . is satisfied that ' standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially ".

Their Lordships disagree with this approach. These various formulae are introductory of the matter to be considered and are given little guidance upon the question of *audi alteram partem*. The statute can make itself clear upon this point and if it does *cadit quaestio*. If it does not then the principle stated by Byles J. in *Cooper v. The Board of Works for the Wandsworth District* 14 C.B.N.S. 180 at 194 must be applied. He said this:

> " A long course of decisions, beginning with *Dr. Bentley's* case, and ending with some very recent cases, establish, that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

If the law were otherwise then such cases as *Capel v. Child* (Crompton and Jarvis 558), where the words are in fact very similar to the words of section 277, must have been differently decided. That case is in fact an important landmark in the history of the development of the principle *audi alteram partem*. The solution to this case is not to be found merely upon a consideration of the opening words of section 277. A deeper investigation is necessary. Their Lordships were of course referred to the recent case of *Ridge v. Baldwin* [1964] Appeal Cases page 40 where this principle was very closely and carefully examined. In that case no attempt was made to give an exhaustive classification of the cases where the principle *audi alteram partem* should be applied. In their Lordships' opinion it would be wrong to do so. Outside well-known cases such as dismissal from office, deprivation of property and expulsion from clubs, there is a vast area where the principle can only be applied upon most general considerations. For example, as Lord Reid when examining the case of *Rex v. Electricity Commissioners* at page 76 of 1964 Appeal Cases pointed out, Bankes L. J. inferred the judicial element from the nature of the power and Atkin L. J. did the same. Pausing there however, it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of the *Nakkuda* case. Outside the well-known classes of cases, no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: First what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined. Their Lordships therefore proceed to examine the facts of this case upon these considerations.

As to the first matter it cannot be doubted that the Council of Jaffna was by statute a public Corporation entrusted like all other Municipal Councils with the administration of a large area and the discharge of important duties. No one would consider that its activities should be lightly interfered with. Their Lordships may notice here an argument addressed to them that as this was a local authority subject to the superior power of the Minister under section 277, the exercise of this power was a matter properly left to him as the one responsible to the Legislature to whom he was answerable for his actions and he could not be responsible to the Courts under the principle *audi alteram partem*. Their Lordships dissent from this argument. The Legislature has enacted a statute setting up municipal authorities with a considerable measure of independence from the central government within defined local areas and fields of government. No Minister should have the right to dissolve such an authority without allowing it the right to be heard upon that matter unless the statute is so clear that it is plain it has no right of self-defence. However this consideration is perhaps one of approach only. The second and third matters are decisive. Upon the second matter it is clear that the Minister can dissolve the Council on one of three grounds: that it (*a*) is not competent to perform any duty or duties imposed upon it (for brevity their Lordships will refer to this head as incompetence); or (*b*) persistently makes default in the performance of any duty or duties imposed upon it; or (*c*) persistently refuses or neglects to comply with any provision of law.

A preliminary argument was addressed to their Lordships on the footing that incompetence was the equivalent of inability to perform its duties. This argument was based on certain observations in the *Sugathadasa* case at page 475 where the judges expressed the opinion that the Council became not competent to perform the duties imposed upon it when circumstances arose that rendered it incapable of performing them. It was argued that the words in the statute " not competent " were equivalent to " not able to undertake " and it was said that in the circumstances of this case it had not been shown that the Council were not able to undertake their duties and so could not be found to be incompetent. Their Lordships do not agree with this argument and do not think that the judges in the *Sugathadasa* case intended to go as far. It may be that a Council is so incompetent that it is not able to undertake anything, but inability to undertake its duties (which may arise from circumstances outside anyone's control) is not the test as to incompetence.

While their Lordships are only concerned with the question of incompetence, the true construction of the section must be considered as a whole and its necessary intendment in the light of the common law principles already stated. It seems clear to their Lordships that it is a most serious charge to allege that the Council, entrusted with these very important duties, persistently makes default in the performance of any duty or duties imposed upon it. No authority is required to support the view that in such circumstances it is plain and obvious that the principle *audi alteram partem* must apply.

Equally it is clear that if a Council is alleged persistently to refuse or neglect to comply with a provision of law it must be entitled (as a matter of the most elementary justice) to be heard in its defence. Again this proposition requires no authority to support it. If, therefore, it is clear that in two of the three cases, the Minister must act judicially, then it seems to their Lordships, looking at the section as a whole, that it is not possible to single out for different treatment the third case namely incompetence. Grammatically too any differentiation is impossible. The Section confers upon the Minister a single power to act in the event of one or more closely allied failures and he can only do so after observing the principle *audi alteram partem*. Had the Minister been empowered to dissolve the Council only for incompetence and on no other ground it might have been argued that as " incompetence " is very vague and difficult to define Parliament did not intend the principle *audi alteram partem* to apply, in the circumstances, but their Lordships would point out that charges of

inefficiency or failing to be diligent or to set a good example have been held subject to the principle see *Fisher v. Jackson* [1891] 2 Ch. 84. The third matter can be dealt with quite shortly. The sanction which the Minister can impose and indeed, if he is satisfied of the necessary premise, must impose upon the erring Council is as complete as could be imagined; it involves the dissolution of the Council and therefore the confiscation of all its properties. It was at one moment faintly argued that the Council was a trustee and that it was not therefore being deprived of any of its property but this argument (soon abandoned) depended upon a complete misconception of the law of corporations. A statutory corporation such as a Municipal Corporation, like, every trading corporation owns its property and the corporators have no proprietary interest in it but like them it can deal with its property only in accordance with its constitution. In the case of a trading company that is laid down in its memorandum and articles of association. In the case of a statutory corporation it is laid down in the Statute, or Municipal Ordinance, by virtue of which it is incorporated but it is important to remember throughout that it owns its property (it may hold property as a trustee see section 37 of the Municipal Ordinance but that is quite a different matter). The Council owned large areas of land, had a Municipal Fund and was empowered to levy rates from its inhabitants though it was bound to apply them in accordance with its constitution. In their Lordships' opinion this case falls within the principle of *Cooper v. Wandsworth Board of Works* (supra) where it was held that no man is to be deprived of his property without having an opportunity of being heard. For the purposes of the application of the principle it seems to their Lordships that this must apply equally to a statutory body having statutory powers, authorities and duties just as it does to an individual. Accordingly on this ground too the Minister should have observed the principle.

For these reasons their Lordships have no doubt that in the circumstances of this case the Minister should have observed the principle *audi alteram partem*. The case of *Sugathadasa v. Jayasinghe* (supra) was wrongly decided.

Had the matter remained there their Lordships would have allowed the appeal and held the Order of 29th May 1966 to have been inoperative. However during the hearing of the appeal, their Lordships raised the question, not taken in the Court below, whether the appellant was entitled to maintain this action and appeal. This question is of some general importance. The answer must depend essentially upon whether the Order of the Minister was a complete nullity or whether it was an Order voidable only at the election of the Council. If the former, it must follow that the Council is still in office and that, if any councillor, ratepayer or other person having a legitimate interest in the conduct of the Council likes to take the point, they are entitled to ask the court to declare that the Council is still the duly elected Council with all the powers and duties conferred upon it by the Municipal Ordinance.

Apart altogether from authority their Lordships would be of opinion that this was a case where the Minister's Order was voidable and not a nullity. Though the Council should have been given the opportunity of being heard in its defence, if it deliberately chooses not to complain and takes no step to protest against its dissolution, there seems no reason why any other person should have the right to interfere. To take a simple example to which their Lordships will have to advert in some detail presently, if in the case of *Ridge v. Baldwin* (supra) the appellant Ridge who had been wrongly dismissed because he was not given the opportunity of presenting his defence, had preferred to abandon the point and accept the view that he had been properly dismissed, their Lordships can see no reason why any other person, such, for example, as a ratepayer of Brighton should have any right to contend that Mr. Ridge was still the Chief Constable of Brighton. As a matter of ordinary common sense, with all respect to other opinions that have been expressed, if a person in the position of Mr. Ridge had not felt sufficiently aggrieved to take any

action by reason of the failure to afford him his strict right to put forward a defence, the Order of the Watch Committee should stand and no one else should have any right to complain. The matter is not free of authority, for it was much discussed in that case. Lord Reid at page 80 reached the conclusion that the Committee's decision was void and not merely voidable and he relied upon the decision in *Wood v. Woad* L.R. 9 Exchequer 190. Their Lordships deprecate the use of the word void in distinction to the word voidable in the field of law with which their Lordships are concerned because, as Lord Evershed pointed out in *Ridge v. Baldwin* at page 92, quoting from Sir Frederick Pollock, the words void and voidable are imprecise and apt to mislead. These words have well understood meanings when dealing with questions of proprietary or contractual rights. It is better, in the field where the subject matter of the discussion is whether some Order which has been made or whether some step in some litigation or quasi litigation is effective or not, to employ the verbal distinction between whether it is truly a " nullity ", that is to all intents and purposes, of which any person having a legitimate interest in the matter can take advantage or whether it is " voidable " only at the instance of the party affected. On the other hand the word " nullity " would be quite inappropriate in questions of proprietary or contractual rights; such transactions may frequently be void but the result can seldom be described as a nullity. In the field now under consideration there are many cases illustrating the difference, see for example *Macfoy v. United Africa Company Limited* [1961] 3 W.L.R. at page 1405 where it was held that a failure to comply with certain rules of the Supreme Court rendered the proceedings voidable and not a nullity. On the other side, is the very recent decision of their Lordships Board in *C. Devan Nair v. Yong Kuan Teik* where a failure to comply with a rule was held to make purported subsequent proceedings a nullity. Their Lordships understand Lord Reid to have used the word " void " in the sense of being a nullity. In the same case Lord Hodson at page 135 took the view that the decision of the Watch Committee in *Ridge v. Baldwin* was a nullity. On the other hand Lord Evershed, though he differed on the main question as to whether the principle *audi alteram partem* applied, devoted a considerable part of his judgment to the question whether the decision was voidable or a nullity and with this part of his judgment Lord Devlin expressly stated his agreement. Lord Evershed at page 88 onwards examined the case of *Wood v. Woad* in some detail and he reached the conclusion (page 90) that in *Wood v. Woad* the question whether the purported exclusion from the association by the Committee was void or voidable was not essential or indeed material to the claim made in the action by the plaintiffs for damages against the members of the Committee. He continued, speaking of that case " Certainly in my judgment it cannot be asserted that the judgments in the case cited or indeed any of them support or involve the proposition that where a body such as the Watch Committee in the present case, is invested by the express terms of a statute with a power of expulsion of any member of the police force and purports in good faith to exercise such power, a failure on their part to observe the principle of natural justice, *audi alteram partem,* has the result that the decision is not merely voidable by the Court but is wholly void and a nullity ".

Lord Morris of Borth-y-Gest also considered this question and reached the conclusion that the Order of the Watch Committee was voidable and not a nullity. He examined the question as to the nature of the relief that the party aggrieved (Ridge) would apply for, which would be that the decision was invalid and of no effect and null and void. Their Lordships entirely agree with that and with the conclusions which he drew from it, namely that if the decision is challenged by the person aggrieved on the grounds that the principle has not been obeyed, he is entitled to claim that as against him it is void *ab initio* and has never been of any effect. But it cannot possibly be right in the type of case which their Lordships are considering to suppose that if challenged successfully by the person entitled to avoid the Order yet nevertheless it has some limited

effect even against him until set aside by a court of competent jurisdiction. While in this case their Lordships have no doubt that in an action by the Council the Court should have held that the Order was void *ab initio* and never had any effect, that is quite a different matter from saying that the Order was a nullity of which advantage could be taken by any other person having a legitimate interest in the matter.

Their Lordships therefore are clearly of opinion that the Order of the Minister on 29th May 1966 was voidable and not a nullity. Being voidable it was voidable only at the instance of the person against whom the Order was made, that is the Council. But the Council have not complained. The appellant was no doubt Mayor at the time of its dissolution but that does not give him any right to complain independently of the Council. He must show that he is representing the Council or suing on its behalf or that by reason of certain circumstances such for example as that the Council could not use its seal because it is in the possession of the Municipal Commissioner or for other reasons it has been impracticable for the members of the Council to meet to pass the necessary resolutions, the Council cannot be the plaintiff. Had that been shown then there are well known procedures whereby the plaintiff can sue on behalf of himself and the other corporators making the Council a defendant and on pleading and proving the necessary facts may be able to establish in the action that he is entitled to assert the rights of the Council. That however is not suggested in this case. The appellant sets up the case that as Mayor he is entitled to complain but as such he plainly is not. If the Council is dissolved, the office of Mayor is dissolved with it and he has no independent right of complaint, because he holds no office that is independent of the Council. If the Mayor were to be heard individually he could only deal with complaints against the Council with which *ex hypothesi* the Council itself did not wish to deal. So accordingly, it seems to their Lordships that on this short ground the appellant cannot maintain this action.

For these reasons which differ entirely from those in the Court below their Lordships have therefore humbly advised Her Majesty that the appeal should be dismissed. In the circumstances however there will be no Order as to the costs of this appeal.

In the Privy Council

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