APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Sharpe.

1937

July 8.

CHWAN SENG CHAN

v.

THE COMMISSIONER OF POLICE, RANGOON.*

Hackney Carriages and Rickshaws—Licenses to ply—Powers of the Commissioner of Police, Rangoon—Discretion to grant or refuse licences—Power to limit the number of vehicles—Rangoon Hackney Carriages Act, ss. 4, 23—Rule 1, intra vires—*Mandamus—Specific Relief Act, s. 45, proviso* b.

S. 4 of the Rangoon Hackney Carriages Act gives the Commissioner of Police an unfettered discretion to grant or refuse a license in respect of hackney carriages and rickshaws. There is no provision in the Act which makes it incumbent upon the Commissioner to issue licenses in respect of all hackney carriages and rickshaws which as to their condition and description comply with the provisions of the Act and the rules made thereunder.

Held, therefore, that no mandamus could be issued under s. 45 of the Specific Relief Act against the Commissioner of Police for the City of Rangoon requiring him not to restrict the number of rickshaws which may ply for hire, and to consider the application of the appellant for the issue of licenses to him for plying rickshaws.

Per ROBERTS, C.J.—Rule 1, made in pursuance of s. 23 of the Hackney Carriages Act, empowering the Commissioner of Police to fix at his discretion the maximum number of hackney carriages and rickshaws which may ply for hire is not *ultra vires*. Its terms are implicit in the wording of s. 4 of the Act.

Haji Ismail v. *The Municipal Commissioner of Bombay*, I.L.R. 28 Bom. 253 ; *S. R. Varma* v. *Corporation of Calcutta*, I.L.R. 60 Cal. 689, followed.

Queen-Empress v. *Marian Chetti*, I.L.R. 17 Mad. 118 ; *Rustom Irani* v. *Kennedy*, I.L.R. 26 Bom. 396, distinguished.

Foucar for the appellant. Rule 1 of the Rules made under the Rangoon Hackney Carriages Act, which allows the Commissioner of Police to fix the maximum number of rickshaws that may ply for hire in Rangoon, is *ultra vires* for two reasons. Firstly, no such rule can be made under s. 23, or under any other provision of the Act. Nor can it be said to be a rule to carry out the objects of the Act. See the preamble and s. 4. Secondly, the rule delegates certain rule-making powers

* Civil First Appeal No. of 68 1937 from the order of this Court on the Original Side in Civil Misc. Case No. 172 of 1936.

vested in the Local Government to the Commissioner of Police for which there is no authority in the Act.

The rule is also *ultra vires* for an additional reason, namely that it is unreasonable. It unduly restricts the number of people who can earn a livelihood by plying rickshaws in the streets of Rangoon. So long as the vehicles complied with the rules as to their condition and description, the Commissioner of Police must issue the licenses.

Queen-Empress v. *Marian Chetti* (1) ; *Rustom Jamshed Irani* v. *Hartley Kennedy* (2) ; *Gell* v. *Taja Noora* (3).

A. Eggar (Advocate-General) for the respondent. There is no question of delegation in this case at all because the power to make rules is nowhere delegated. All that the Commissioner of Police is empowered to do is to fix the maximum number of rickshaws, and this he could do otherwise also. Section 4 of the Act itself would empower him to fix the maximum as a condition precedent to the licensing of rickshaws.

The ruling in *Rustom Irani*'s case was considered in *Haji Ismail* v. *The Municipal Commissioner of Bombay* (4) and distinguished. This case is more apposite, and in matters of this nature the Commissioner of Police exercises a discretion.

Mandamus is a high prerogative writ and is not issued lightly. The High Court will not put itself in the position of an appellate Court and see whether the officer exercising a discretion acts properly or not. Unless the order complained of is manifestly unreasonable or unjust the High Court will not interfere. Further, an application for mandamus is not the proper remedy to obtain a decision on whether a certain rule is *ultra vires*.

(1) I.L.R. 17 Mad. 118.
(2) I.L.R. 26 Bom. 396.
(3) I.L.R. 27 Bom. 307.
(4) I.L.R. 28 Bom. 253.

1937

CHWAN SENG CHAN v. THE COMMISSIONER OF POLICE, RANGOON.

ROBERTS, C.J.—This is an appeal from a judgment of Mr. Justice Sen who dismissed with costs the petition of Messrs. Chwan Seng Chan of 15th Street, Rangoon, under section 45 of the Specific Relief Act, 1877, praying for a finding that the respondent, who is the Commissioner of Police for the City of Rangoon, is not authorized to restrict the number of licenses issued or to fix the maximum number of hackney carriages and rickshaws which might ply for hire, under the provisions of the Rangoon Hackney Carriages Act, or to give a preference to certain classes of rickshaws already licensed, and further to direct the respondent to consider the appellants' application for the issue of 100 licenses in respect of the said rickshaws and to grant the said licenses to the appellants, provided that the said rickshaws, as to their condition and description, complied with the provisions of the said Act and valid rules made thereunder.

Now, by section 4 of the Rangoon Hackney Carriages Act (Burma Act No. IV of 1917)

"No vehicle shall be let to hire, or taken to ply, or offered for hire, except under a license duly granted to the owner thereof in that behalf by the Commissioner of Police";

and by section 45 of the Specific Relief Act the High Court may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office

"provided that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person in his public character."

The petitioners in this case have therefore to show that the Commissioner of Police was obliged to grant the

license at the time at which it was applied for, provided the rickshaws as to their condition and description complied with the provisions of the Act and the rules made thereunder.

The case of *Rustom Jamshed Irani* v. *Hartley Kennedy* (1) shows that in a case in which an Act of the Legislature says that

"the Commissioner of Police shall from time to time grant licenses * * * and the said licenses may be granted by the said Commissioner for any term not exceeding one year"

the word "shall" must be construed in a mandatory sense ; and where the word "shall", therefore, is found in a Statute of this character the Commissioner would have no option but to comply with the requirement that a license should be granted, provided that the necessary formalities were carried out and the conditions under which the license should be granted were fulfilled.

But the present is not a case in which there is any such mandatory direction. It is not, for instance, like a case under the Burma Motor Vehicles Rules where Section II, Rule 9, says

"The Commissioner of Police, Rangoon, shall register every motor-vehicle in respect of which registration is applied for under Rule 8 if he is satisfied * * *."

Rule 10 says

"The Commissioner of Police shall, upon registering any motor-vehicle, issue to the owner thereof a certificate * * *",

and Rule 11 says that upon registering the Commissioner of Police shall record the particulars relating to the motor-vehicle in a register to be maintained by him in a certain form. It is therefore, to say the least, probable that if the Legislature had desired to make it

(1) (1901) I.L.R. 26 Bom. 396.

1937

CHWAN SENG CHAN v. THE COMMISSIONER OF POLICE, RANGOON.

ROBERTS, C.J.

incumbent upon the Commissioner of Police to grant a license in every case, similar words would have been used in the Hackney Carriages Act. But in the Act, as I have already pointed out, there is neither the word "shall" nor "may".

In *S. R. Varma* v. *Corporation of Calcutta* (1) it was held that a discretion to refuse a license was implied in a case to which section 391 of the Calcutta Municipal Act (Bengal Act III of 1923) applied. That section runs as follows :

> "No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, keep open any theatre, circus or other similar place of public resort, recreation or amusement :
>
> Provided that this section shall not apply to private performances in any such place."

It was held in that case that there was a discretion to refuse a license, although the discretion must be exercised in a reasonable manner and in a judicial spirit.

In the case we are considering it is not contended for a moment that the exercise of the discretion by the Commissioner of Police was animated by any wrong motive or was not *bona fide* : and I am clearly of opinion, looking at the authorities, that the petitioners have failed to prove that it was ever incumbent upon the Commissioner of Police to grant the license at the time it was applied for. I would add, speaking for myself alone, that when one looks at the objects of the Act, "for the regulation and control of hackney carriages and rickshaws in Rangoon", and when one sees that by section 23 of the Hackney Carriages Act the Local Government may make rules from time to time for carrying these

(1) (1932) I.L.R. 60 Cal. 689.

objects into effect, there is, to my mind, nothing *ultra vires* in Rule 1 so made by them which says

"The Commissioner of Police may fix the maximum number of hackney carriages and rickshaws which may ply for hire."

In my view this Rule does not give the Commissioner of Police power to make rules, still less to make general orders, the breach of which is to be treated as though they were breaches of a penal enactment as in the case of *Queen-Empress* v. *Marian Chetti* (1) which was cited to us. All it does is to say that the maximum number of vehicles plying for hire may be fixed by the Commissioner of Police. But I think that the rule is unnecessary since its terms are implicit in the wording of section 4 of the Act, and holding the view that I do of section 4 of the Act the matter is conclusive upon that point alone. It follows that this appeal must be dismissed. No order as to costs.

SHARPE, J.—This is an appeal from a refusal of Mr. Justice Sen to make an order under section 45 of the Specific Relief Act, 1877, requiring the respondent to grant 100 rickshaw licenses to the appellants, provided that the rickshaws in respect of which the licenses are sought comply as to their condition and description with the provisions of the Rangoon Hackney Carriages Act, 1917, and the rules made thereunder.

It is to be observed in the first place that the power to make the order prayed is discretionary, and secondly that it may only be made provided that the doing of a specific act, which is in this case the granting of rickshaw licenses, is clearly incumbent upon the particular public officer against whom the order is sought.

Mr. Foucar for the appellant admits that nowhere in the Rangoon Hackney Carriages Act is to be found any

(1) (1893) I.L.R. 17 Mad. 118.

1937

CHWAN SENG CHAN v. THE COMMISSIONER OF POLICE, RANGOON.

SHARPE, J.

express provision that these licenses must be granted, and he is therefore forced to rely upon the argument that as under section 4 of the Act, no vehicle shall be offered for hire except under a license granted by the Commissioner of Police, therefore the Commissioner of Police must license all rickshaws which comply with the provisions of the rules laid down. That argument cannot, to my mind, be accepted. To my judgment section 4 gives the Commissioner of Police an unfettered discretion to grant or refuse a license. If it had been intended by the Legislature that it was to be obligatory upon the Commissioner of Police to grant license in every case there would have been a section in the Act to say so, just as section 12 was inserted in Act XLVIII of 1860 : there the words were clear "The Commissioner of Police *shall* from time to time grant licenses etc." In the absence of any such mandatory provision in the present Act it is impossible to say that the Commissioner of Police was bound to grant these rickshaw licenses.

I am supported in the view which I take by the decision in the case of *Haji Ismail Haji Essac* v. *The Municipal Commissioner of Bombay* (1) where it was held that

"the power of the Municipal Commissioner of Bombay to grant a license under section 394 of the City of Bombay Municipal Act includes the power to refuse it."

In my judgment, therefore, the appellants have failed to bring themselves within proviso (*b*) to section 45 of the Specific Relief Act, 1877. Consequently the application fails, and this appeal must be dismissed.

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(1) (1903) I.L.R. 28 Bom. 253.

G.B.C.P.O.—No. 35, H.C.R., 29-10-37—2,250.