

HUSSAIN v. BAKER.

[Civil Jurisdiction (Seton, C.J.) August 22, 1946.]

Licence Ordinance (Cap. 154)—s. 4—(5)—Order of Governor in Council of 20th March, 1931—Licensing Officers authorised to exercise discretion—whether ultra vires.

Rishad Hussain had been granted a retail store licence in respect of a store in the Nadroga District. The licence lapsed at the end of 1945 and the Licensing Officer for the District refused a renewal. The store was in fact erected on a Crown Lease one clause of which provided that the only buildings to be erected on the property were residences for the lessee and his employees and buildings connected with the agriculture of the property. The lessee had not obtained any variation of this clause or any consent of the Crown to the erection of the store building. In refusing the renewal of the retail store licence the Licensing Officer stated in a letter to Hussain's solicitors "the Director of Lands is not prepared, under any circumstances to vary the conditions of this lease and it will therefore not be possible to operate a store on the land".

On June 26, 1946 Hussain made an *ex parte* application for a rule *nisi* and on this application judgment was given as follows:—

(SETON, C.J.).—"The applicant states that he has a Crown Lease of land at Kabesi, Maro, on which he has erected a store although such a proceeding is prohibited by the terms of the lease, which, however, is not in his own name. For such store he obtained a licence under the Licences Ordinance (Cap. 154) in respect of the year 1945. When, however, he applied to the respondent for the renewal of the licence for the first half of the current year, his application was refused on the ground that he was not permitted by the terms of his lease to have a store on the premises and that the lessor was not willing either to amend the conditions of the lease or to waive the prohibition in regard to the store.

"In these circumstances, the applicant comes to this Court asking for a rule *nisi* directed to the respondent requiring him to show cause why an order should not be made commanding him to issue the licence in question.

"At first sight no one would be inclined to say that the reasons which the respondent has given for not issuing the licence are eminently reasonable but Mr. Stuart for the applicant says that this is quite beside the point. He contends that by virtue of the provisions of sub-s. (3) of s. 4, the respondent has no choice in the matter unless he has been authorized by the Governor in Council to exercise his discretion in regard to the issue of licences as provided by sub-s. (5) of the same section.

"Sub-s. (3) says that every Licensing Officer shall have 'power' to issue licences but sub-s. (5) reads as follows:—

" 'The Governor in Council may by order under his hand from time authorize any Licensing Officer to exercise direction in the issue of any licences under this Ordinance, but any person who feels aggrieved at a decision of any Licensing

“ ‘ Officer in the exercise of his discretion as aforesaid may
 “ ‘ appeal to the Governor in Council who may alter, modify or
 “ ‘ revoke any such decision.’
 “ Mr. Stuart argues that since the respondent has no authority
 “ under sub-s. (5) to exercise his discretion, he is not empowered to
 “ do so and, on application being made for a licence, he is bound to
 “ issue the same whatever the circumstances may be.
 “ Perhaps he is right ; the provisions of sub-s. (5) certainly seem
 “ somewhat unusual having regard to those of sub-s. (3) and I do
 “ not feel inclined to say, without hearing argument on the subject,
 “ just what the position is. That being the case, I think a rule
 “ should issue.”

HELD.—The Order in Council published on March 20, 1931 authorising all Licensing Officers to exercise discretion in the issue of licences under the Licence Ordinance will not be held *ultra vires* the Governor in Council.

[**EDITORIAL NOTE.**—See *Oddaiyan v. Pennefather* [1936] 3 Fiji L.R.— for a case in which a rule *nisi* for a mandamus directed to a Licensing Officer was refused on the ground that the Court has no jurisdiction].

Cases referred to :—

(1) *Akerele v. The King* [1934] A.C. 523.

RETURN TO A RULE NISI for mandamus. The facts referred to above were set out in an affidavit of the appellant. The argument fully appears from the judgment.

K. A. Stuart for the appellant.

The Attorney-General, *J. H. Vaughan*, for the respondent.

SETON, C.J.—The respondent appears to show cause why a rule made by this Court on 26th June, 1946, commanding him to issue a licence to the applicant under the Licence Ordinance (Cap. 154) in respect of a certain store at Kabesi, Maro, should not be made absolute.

On the application for the rule, it was stated that the respondent had not been authorized to exercise discretion in the issue of licences under the Ordinance as he might have been under the provisions of sub-s. (5) of s. 4 of the Ordinance. This now turns out to be a mistake and Mr. Stuart, who appeared for the applicant, very frankly stated that had he been aware of the Order published in the *Fiji Royal Gazette* dated 20th March, 1931, at p. 101, he would have hesitated before launching these proceedings.

Nevertheless, Mr. Stuart has not thrown up the sponge ; on the contrary he has attacked the validity of the Order just mentioned and the Court has been favoured with an interesting and well prepared argument on the subject.

Sub-s. (5) of s. 4 of the Licence Ordinance reads as follows :—

“ The Governor in Council may by order under his hand from
 “ time to time authorize any Licensing Officer to exercise discretion
 “ in the issue of any licences under this Ordinance, but any person
 “ who feels aggrieved at a decision of any Licensing Officer in the
 “ exercise of his discretion as aforesaid may appeal to the Governor
 “ in Council who may alter, modify or revoke any such decision.”

In exercise of the power conferred by this sub-section, the Governor in Council made an Order dated 5th March, 1931, authorizing all licensing officers to exercise discretion in the issue of any licences under the Licences Ordinance.

Mr. Stuart contends that this Order is invalid because it conflicts with the intention of the Ordinance which is that the Governor in Council shall have power from time to time to authorize one or more Licensing Officers to exercise discretion in the issue of licences but does not permit a general Order of the nature quoted above, embracing as it does all Licensing Officers, present and future, without any consideration of the circumstances affecting each, and he cites the case of *Akerele v. The King* [1934] A.C., 523, in support of his contention.

In that case the Chief Justice of Nigeria, being authorized "by special order" to increase the jurisdiction to be exercised "by a Commissioner", made a general order increasing the jurisdiction of all Commissioners and the Judicial Committee of the Privy Council advised that he had no power to do so because, in the opinion of the Committee, the wording of the section of the Ordinance which conferred the authority upon the Chief Justice made it clear that the special Order was intended to be applicable to an individual and not to a class.

There is, however, a marked difference between the wording of s. 4 (5) of the Licences Ordinance and that used in the Nigerian Ordinance; it is not "a Licensing Officer" but "any Licensing Officer" and "any" may extend to "all" or "every". So while it may be possibly arguable whether the Legislature intended that the subject should be dealt with by what Mr. Stuart has described as an "omnibus" Order, the wording of s. 4 (5) does not put the question beyond doubt as it did in the case of *Akerele v. The King*.

For this reason, I am not prepared to find that the Order of 5th March, 1931, was *ultra vires* of the Governor in Council, and accordingly the rule will be discharged.

SHANTILAL *ats.* LAUTOKA TOWN BOARD.

[Appellate Jurisdiction (Seton, C.J.) August 22, 1946.]

Jewellery, Old Metal and Marine Stores Ordinance (Cap. 188)—Licence Ordinance (Cap. 154) ss. 3, 7—dealer in jewellery taking out Hawker's Licence in lieu of Store Licence—whether required to take out a Store Licence.

Shantilal occupied a dwelling house in Lautoka town where he and his employees manufactured jewellery on an enclosed verandah. There was a notice "Licensed Jeweller" or "Shantilal Jeweller" displayed over the front door when the premises were visited by the Town Clerk on 22nd March 1946. At that time Shantilal held a licence issued under the Old Metal and Marine Stores Ordinance in January, 1946 and a hawker's licence but had not held a store licence of any description since December 1945 when his retail store licence expired. In evidence he