

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF  
SRI LANKA**

In the matter of an application for Writs of Certiorari  
under Article 140 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

Sri Lanka Telecom Ltd,  
Head Office,  
Lotus Road,  
Colombo 1.

Petitioners

C.A/WRIT/App/No.519/2008

vs

1. Human Rights Commission of Sri Lanka,  
No, 36, Kynsey Road,  
Colombo 8.  
  
And Seven (07) others.

Respondents

BEFORE : **S.SRISKANDARAJAH, J (P/CA).**

COUNSEL : Dr. Jayampathy Wickramaratne PC with Uditha Egalahewa and Pubudini  
Wickramaratne  
  
for the Petitioner.

A.Gnanathan, ASG with Maithiri Amarasinghe Jayatillaka SC,  
for the 1<sup>st</sup> to 7<sup>th</sup> Respondent

W.Dayaratne, PC with R.Jayawardena,  
for 8<sup>th</sup> Respondent

Argued on : 29.09.2010 & 24.11.2010

Decided on : 30.01.2012

**S.Sriskandarajah.J**

The Petitioner Company was originally a Department of the Sri Lanka Government, namely, Sri Lanka Telecommunication Department. This Department was converted into a Corporation under the provision of Section 2 of the State Industrial Corporation Act No.49 of 1957. On or about 25.09.1996 the said Corporation was converted into a public limited liability company called 'Sri Lanka Telecom Limited' in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. On or about 05.08.1987, the Secretary to the Treasury sold 35% of the share in the Petitioner - Company to Nippon Telephone and Telegraph Corporation (NTTC) of Japan and 3.5 % of the shares of the Petitioner Company were issued to the employees free of charge. On or about 15.11.2002 by an internal public offering a further 12% of the shares were sold to the General public and the Petitioner became a Public Listed Company, and the Government of Sri Lanka owns 49.05% shares of the Petitioner Company.

The Petitioner submitted that the 8<sup>th</sup> Respondent was an employee of the Department of Telecommunications and was absorbed to the Petitioner Company in 1997 as a Clerk in Class IIA. In 1998, a Marketing Division was created in the Petitioner Company and several posts of Assistant Sales Managers were created in the said division. The 8<sup>th</sup> Respondent was one of the persons selected for the said post and was transferred to the

Marketing Division as Assistant Sales Manager on 26.02.1996. In August 1999 the Petitioner Company received a complaint from one Mr. S.H.M. Rahim that the 8<sup>th</sup> Respondent had solicited a bribe from him to provide 5 telephone lines and IDD facilities, a business established under the premium package. The Petitioner further submitted that a preliminary investigation was held in respect of the said complaint and the investigating officer recorded the statement from the 8<sup>th</sup> Respondent. The investigating officer in his report stated that the 8<sup>th</sup> Respondent is not fit to hold the post of Assistant Sales Manager and allowing him to continue in his post would bring disrepute to the Petitioner Company, and recommended that the 8<sup>th</sup> Respondent be transferred out of the Marketing Division. In the aforesaid circumstances and in view of the recommendation of the investigating officer, the 8<sup>th</sup> Respondent was transferred to the commercial section with immediate effect by letter dated 4.11.1999, pending formal disciplinary action. The 8<sup>th</sup> Respondent refused to report at the commercial section, and after one month, on 3.12.1999, protested against the transfer. The 8<sup>th</sup> Respondent was requested to comply with the transfer order and thereafter make his representation at a formal inquiry. However, he refused to do so. The Petitioner submitted that a formal inquiry into the complaint against the 8<sup>th</sup> Respondent was held on 17/01.2000, and was again re-fixed for the 21.02.2000, and on 1.3.2000, the 8<sup>th</sup> Respondent failed to attend on these days for the said inquiry. The 8<sup>th</sup> Respondent, without attending the said inquiry, has filed an application bearing No.15/2000 in the Human Rights Commission (1<sup>st</sup> Respondent) alleging, inter alia, that his fundamental rights under 12(1) of the Constitution had been violated by the Petitioner Company by arbitrarily transferring him from the marketing division to the commercial division. When this matter came up for hearing on 19.06.2001, the Counsel for the Petitioner raised a preliminary objection that the Commission did not have jurisdiction in respect of the application for the reason that the act complained of does not constitute executive or administrative action. The Investigating Officer of the Human Rights Commission requested both parties to submit their written submissions on this question. By letter dated 3.4.2000, the 7<sup>th</sup> Respondent informed the Petitioner Company that the Commission has rejected the

preliminary objections raised by the Petitioner Company. The Human Rights Commission based on the report prepared by the retired Judge of the Court of Appeal, G.W. Edirisuriya, in relation to the above Application, came to the conclusion there is a violation of Article 12(1) of the Constitution. It has recommended -

(1) to amend the salary scale on A6 from 22.06.1999 and place on appointment, with all allowances and other payments, which are not less than that of his colleagues V.Niles, Netenuman and PM.W. Kumar;

(2) to pay a reasonable compensation for the full loss of career.

The Petitioner Company was asked to report back to the Commission on or before 16.6.2006.

The Petitioner Company filed a writ application in the Court of Appeal bearing No.CA Writ 1373/2006 and, in the said Writ application, the Petitioner has stated that the Human Rights Commission has no jurisdiction to inquire into the complaint made by the 8<sup>th</sup> Respondent, and the Commissioner has merely adopted the report of Justice G.W. Edirisuriya, and has failed to give due consideration to the matter in question as requested by letter, among other matters. When the said Writ Application was taken up for hearing, it was submitted to Court that the Human Rights Commission is willing to hold a fresh inquiry. In view of the submissions, the Petitioner Company informed Court that it did not wish to proceed with the Application and withdrew the same.

The Petitioner was informed by the Human Rights Commission that an inquiry into the said Application bearing No.HRC/15/2000 would be held before the 6<sup>th</sup> Respondent on 20<sup>th</sup> March 2007. On that day the 6<sup>th</sup> Respondent requested the parties to file written submissions, and extensive written submissions were filed by both parties. In the written submission, the Petitioner once again raised the same preliminary objection that the Human Rights Commissioner has no jurisdiction to hear this complaint.

The 8<sup>th</sup> Respondent has also sought relief in the Labour Tribunal, and the Labour Tribunal has decided that the 8<sup>th</sup> Respondent's service has not been constructively terminated by the Petitioner Company, and that at his own conduct, the 8<sup>th</sup> Respondent has in fact vacated his post, the 8<sup>th</sup> Respondent has not appealed against the said decision of the Labour Tribunal.

Judicial Review Application is a remedy to challenge the legality of a decision. The Petitioner, after obtaining order from the Human Rights Commission has filed a Writ Application bearing No.1373/2006 challenging the said decision on the basis that the Human Rights Commission has no jurisdiction to hear the said complaint, as the Petitioner's action does not fall within the ambit of executive or administrative action, but when the said Writ Application was taken up for argument, the Petitioner, without pursuing his objection, has agreed to go before the Human Rights Commission and sought a fresh inquiry before the Human Rights Commission. By the conduct of the Petitioner, the Petitioner has in fact waived its rights to object to the jurisdiction of the Human Rights Commission.

Even in the 2<sup>nd</sup> inquiry, the Human Rights Commission has decided that it has jurisdiction to hear and determine this Application the Human Rights Commission after considering the five member bench judgment of the Supreme Court in *P.V.D. Leo Samson Vs. Sri Lanka Air Lines Limited (2001) 1 Sri L R 94.*, relied in *Jayakody Vs. Sri Lanka Insurance and Robinson Hotel Company Limited (2001) 1 Sri L R 365* where the Supreme Court had taken a different view to that in Leo Samson's case. In this case the Agency test had been applied. The substance of this case is that when the Government owns the majority of shares in a company that Company is a State Agency.

The Human Rights Commission by its Recommendation dated 03.03.2008 marked 'G' has recommended to grant the salary scale of A6 from 22.06.1999 and place at appointment with all allowances and other payments which are not less than of his

colleagues V. Niles, Netunuman and P.M.W. Kumar, and to pay a reasonable compensation for the full loss of career.

The Petitioner is challenging this decision in this Application and has raised an objection that the government of Sri Lanka has no major control with the Petitioner Company, especially with regard to the procurement of personnel. In the circumstances the Petitioner Company cannot be treated as an organ of the State and consequently its actions do not set out executive or administrative action as contemplated by Articles 17 and 126 of the Constitution, and in view of that, the 1<sup>st</sup> Respondent Commission's recommendation marked 'G' is illegal and null and void and, therefore, the Petitioner seeks a writ of certiorari to quash the said decision marked 'G'.

The letter of complaint by the 8<sup>th</sup> Respondent is dated 4.11.1999, which is the material time of consideration and at which time the Government of Sri Lanka owned more than 50% of the shares of the Petitioner Company. The shares owned by the Government of Sri Lanka at the relevant time were 61.05% of the Petitioner Company. In *Hemasiri Fernando Vs. Mangala Samaraweera, Minister of Post & Telecommunication and Media* which was decided on the 29<sup>th</sup> April 1999 and reported in 99 1 SLR 415 the court held that if the Government had the majority shares in a Company at the relevant time the act complaint of during that time could be considered as an executive or administrative act. Section 14(a) of the Human Rights Commission Act No.21 of 1996 provides for the Human Rights Commission to investigate an allegation of infringement of fundamental rights by executive or administrative action. Further, Section 15(3)(c) of the Human Rights Commission Act provides for the making of recommendations as it may think is appropriate to prevent such infringement.

The term 'institution' is defined in Section 33 of the Interpretation section of the Human Rights Commission Act No.21 of 1996, and that includes a Company whose majority shares are held by the government. The learned Inquiring Officer in the Human Rights Commission had taken into consideration the shares held by the Government in the

Petitioner Company during the relevant period and had come to the conclusion that the Government had the majority shares in the Petitioner Company during the relevant period and, therefore, the Petitioner Company falls within the definition of 'institution' in the Human Rights Commission Act No.21 of 1996.

The Human Rights Commission has the power to inquire into any violation of Human Rights committed by the 'institution' defined in the said Act. The question whether the Government has the majority shares in the Petitioner Company at the relevant time was considered by the Inquirer, and has decided that the said Petitioner Company falls within the definition of the term 'institution' in the Human Rights Commission Act. In the above circumstances, the Petitioner's submission that the Human Rights Commission has no jurisdiction to inquire into this matter has no merit.

The Respondents contended that the Human Rights Commission has made only a recommendation and it is not a decision or determination and, therefore, a writ will not lie to quash the recommendation. The Counsel for the Petitioner contended that the said recommendation is in effect a decision and that will affect the reputation of the Petitioner Company and, therefore, the said recommendation could be quashed by a writ of certiorari by this Court.

Arkin L.J in *R v Electricity Commissioners exp. London Electricity Joint Commission Co Ltd* [1920] 1 KB 171 held that the writ of certiorari will be issued;

"Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority".

Following the above legal principle the Supreme Court held in *Jayawardene v Silva* 72 NLR 25; that a writ of certiorari does not lie to quash an election made by the collector under Section 130 of the Customs Ordinance. Certiorari does not lie against a person

unless he has legal authority to determine a question affecting the rights of a subject and at the same time, has the duty to act judicially when he determine such question.

The Petitioners in this application is seeking a writ of certiorari to quash the recommendation of the Human Rights Commission marked 'G' dated 03.03.2008.

Section 14 of the Human Rights Commission of Sri Lanka Act No 21 of 1996 provides that; The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused- (a) by executive or administrative action; or(b) as a result of an act which constitutes an offence under the Prevention of terrorism Act, No. 48 of 1979, committed by any person.

Section 15 (3) of the said Act provides Where an investigation conducted by the Commission under section 14 discloses the infringement or imminent Infringement of a fundamental right by executive or administrative action, or by any person referred to in paragraph (b) of section 14, the Commission may make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement or the continuation of such infringement. The recommendation marked G was made under the above provisions.

In *G.P.A. Silva and Others v Sadique and Others* [1978-79-80] 1 Sri LR 166 at 172,177 the full bench of the Supreme Court comprising Justices Samarawickrame J., Thamotheram J. Ismail J. Weeraratne J. and Sharvananda J came to the conclusion that the report of a commission does not take effect *proprio vigore*, accordingly, Certiorari will not issue to quash the report of the commission. The Court held:

“It appears to be clear that certiorari will also lie where there is some decision, as opposed to a recommendation, which is a prescribed step in a statutory process and leads to an ultimate decision affecting rights even though that decision itself



does not immediately affect rights. From the citations which I have set out, it would appear that a Writ of Certiorari would lie in respect of an order or decision where such order or decision is binding on a person and it either imposes an obligation or involves civil consequences to him or in some way alters his legal position to his disadvantage or where such order or decision is a step in a statutory process which would have such effect. “

The recommendation of the Human Rights Commission contained in document marked ‘G’ does not take effect *proprio vigore*. There is no provision in the said Act to enforce the recommendation of the said Commission. If the Commission’s recommendations are not complied with, the Commission can only report to the President and in turn it can be placed in Parliament. In view of this the recommendation of the Human Rights Commission cannot be quashed by a writ of Certiorari.

President of the Court of Appeal