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

G. H. P. N. Shelton Silva
159-B-1, Hewagama,
Kaduwela.

PETITIONER

C.A 795/2009 (Writ)

Vs.

Dr. H. L. Obeysekera
Director General
Department of Technical Education
and Training, P.O. Box 557,
Olcott Mawatha, Colombo 10.

And 8 others

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: P. Radhakrishnan for the Petitioner

Chaya Sri Nammuni S.C for the Respondent

ARGUED ON: 09.10.2012

DECIDED ON; 15.10.2012

GOONERATNE J.

The Petitioner to this Writ Application was a Director of the Department of Technical Education. He has sought mandates in the nature of writs of certiorari and mandamus to quash document marked P15, by which his right to import a vehicle on duty free concessionary basis was denied. Document P15 had been issued by an Assistant Director on behalf of the Director General of the Department of Trade, Tariff and Investment Policy of the Ministry of Finance and Planning. According to same it is stated that since the application to import vehicles on a duty free basis was not received before 31.3.2008 there is no legal basis to take any steps in this regard. A Writ of Mandamus is sought to get the 1st – 5th Respondents to issue a duty free concessionary vehicle permit.

It was the position of the learned counsel for the Petitioner that the Petitioner being a public servant holding the designated post as described above is qualified and entitled to a duty free vehicle permit as pleaded in his petition and affidavit. There was no contest on the eligibility of the Petitioner for a duty free permit. The learned State Counsel did not contest this aspect. It was the position of the Petitioner that by document marked P10, his application for a duty free permit had been forwarded and

confirmed by his head of the department, Director General, Department of Technical Education and Training. Document P12 refer to forwarding the application with proof of delivering. Having drawn the attention of this court to the above document the Petitioner allege that document P11 and P14, indicates that those responsible have misplaced the Petitioner's application. Even this aspect of the case that the application had been misplaced was not denied by learned State Counsel. The learned counsel for the Petitioner supported his case with circular marked P3 & P1, and submit his client is entitled to a duty free concession to import a vehicle and that he cannot be denied such a right although the persons or authorities concerned had misplaced the application due to no fault of the Petitioner. Further P15, cannot be issued by the writer of same unless powers are delegated by Secretary, Finance and Planning.

Learned counsel for the Petitioner argued the case of the Petitioner on the footing of legitimate expectation and emphasized that documents P1 & P3, are still in operation and Petitioner cannot be denied of his right to import a vehicle and invited this court to consider the point that P1 & P3 should be read together with article 12(1) of the Constitution. He cited the case of Perera Vs. Prof. Edirisinghe 1995 (1) SLR 148. Learned counsel also argued that there is a legal duty on the part of the Respondents

to issue the permit in terms of circular P1 & P3. In the course of the argument the learned counsel for Petitioner very correctly and in the true spirit of a counsel disclosed to this court that his client who has retired from service, and has at present got the benefit of importing a duty free vehicle but the concessionary rate has varied and informed court that on his application for same earlier by P10/P12 he had a better concession than the one from which Petitioner got a benefit. As such he would pursue the application for relief as prayed for in the prayer to the petition.

The learned State Counsel argued this case on the basis that the duty free permit offered to Government is a privilege and that a public servant would not have an absolute right for such a permit. Learned State Counsel also submitted that circular 'P3'and '5R3' had been issued by the same Department. Attention of this court was drawn to Clause 3 and 5 of circular P3 to demonstrate that there is a procedure to be adopted and approved by P3 circular which indicates that there is no absolute right. Learned State Counsel also cited the case of Wannigama Vs. The Incorporated Council of Legal Educations 2007 B.L.R Pg. 54.

It is very unfortunate that the Petitioner had been deprive ed of this privilege due to no fault of his, acts. This court observes that due to poor administration within the public service, has made a very senior public

servant to be denied the right to import a vehicle on a duty free basis. However due to all this it is evident by document P15, that applications received after 31.3.2008 cannot be entertained. This is indicative of the fact of a terminal date and beyond such date an application cannot be entertained, may be for the reason that such concessions are granted to public servants for a particular period until it is renewed thereafter. All this would depend on Government Policy prevalent at a particular period of time. This court cannot by way of a writ disturb such policy decisions unless one could establish an absolute right.

I am inclined to agree with learned State Counsel that the Petitioner has no absolute right for a permit of this nature and as such the petitioner cannot have a legitimate expectation for a permit, even if the authorities are responsible for a very grave lapse. I am firmly of the view that such a permit to a public servant is more a privilege and not a right, which is not available to an employee in the private sector. I had the benefit of perusing the case of Wannigama Vs. The Incorporated Council of Legal Education and 16 Others 2007 B.L.R. 54 ...

Held:

(a) the applicant for writ of mandamus must establish that he has a legal right of performance of a legal duty by the party against whom the writ is sought

(b) the applicant cannot rely upon a legitimate expectation unless such expectation is founded upon either a promise or an established practice;

(c) Writ of Mandamus will not be issued when it appears that there is an impossibility of performance by reason of circumstances and the writ will be normally refused if the party against whom it is prayed for does not, for some other reason, possess the power to obey.

I have also considered the case of W.K.C. Perera Vs. Prof. Daya Edirisinghe and Others. The dicta in that case is very important and relevant. But I do not think I could look at the case in hand with the same yard stick. The authorities concerned cannot act on a lapsed circular or a privilege extended to public servants for a limited period. Above all when it concerns concessions to be granted financially for limited period of time policy decisions should not be altered. The case of W. K. C. Perera Vs. Prof. Edirisinghe, no doubt demonstrate a violation of a fundamental right and the case in hand emerge from a privilege on issue of duty free permit.

The court cannot issue a Mandamus to correct an erroneous decision as to the fact 2 CLW 14; 10 Times 65; 12 Law Rec. 176. The grant of Mandamus is a matter for discretion of the court. It is not a writ of right and is not issued as a matter of course 1 CLW 306.

The court before issuing a Writ of Mandamus is entitled to take into consideration the consequences which the issue of the writ will entail 34 NLR 33. A Mandamus will not be issued when it would be futile and could not be obeyed. 33 N.L.R 257; 1 CLW 109. A party applying for a

Mandamus must make out a legal right and a legal obligation 1 N.L.R at 35. Further I cannot find a valid legal basis to quash document P15 as it merely conveys that after a particular date application cannot been entertained which is a general statement.

I also refer to the case of P. S. Bus Co. Ltd. Vs. Members and Secretary of the Ceylon Transport Board 61 NLR 491 per Sinnatamby J., refusing the application, observed:

"The prerogative writs are not issued as a matter of course, and it is in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ, for instance, will not issue where it would be vexatious of futile. It was not suggested that the passage of the Motor Transport Act through the House of Representatives was effected by a bare majority of one vote and that, if there were ninety-five members, the result would have been different. It is appreciated that the petitioner asked for a writ on different grounds of a more fundamental character, viz, that there was no valid and lawful House of Representative in existence, but this circumstance is one of the matters a Court will take into consideration in exercising its discretion. The Court will also consider the probable consequences of granting the writ. In the present case the consequences of granting the writ can only be described as disastrous. It would result in all the legislation passed by Parliament since it came into existence and all its actions liable to be regarded as illegal and of no effect. I would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it would disturb the peace and quiet

of the country; and above all, it will bring the government of the country to a standstill. I take the view that in these circumstances, even if the grounds on which the application is made are valid. No Court would exercise its discretion in favour of the petitioner.

In all the circumstances of this case I am reluctantly compelled to refuse this application for Writ of Certiorari/Mandamus. No doubt this court is mindful of the lapse that has taken place due to no fault of the Petitioner. I cannot grant relief by way of a prerogative writ, being discretionary remedies of court.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL