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

C.A. (PHC) 189/04

HC Anuradhapura No. 55/2002

H.B. Kirimudiyanse,
Jaffna Road
Kabithgollawa Junction,
Madawachchi.

Petitioner

Vs

1) Cooperative Employees Commission of the North Central Province.

2) Multi Purpose Cooperative society Madawachchi.

Respondents

And now between

Multi Purpose Cooperative society Madawachchi.

2nd Respondent appellant

H.B. Kirimudiyanse,
Jaffna Road
Kabithgollawa Junction,
Madawachchi.

Petitioner

Before : W.L.Ranjith Silva, J. and D.S.C. Lecamwasam, J.

Counsel : Pubudu Alwis fo the 2nd Respondent Appellant

P.K.Prince perera for the Petitioner Respondent

Argued : 04-11-2010

W/subm: 10-12-2010

Decided : 27-01-2011

W.L.Ranjith Silva, J.

The Petitioner Respondent hereinafter referred to as the Petitioner filed a writ application in the Provincial High Court of Anuradhapura seeking mandates in the nature of a Writ of Certiorari and a Writ of Mandamus to quash the disciplinary findings of the 1st Respondent and 2nd Respondent Appellant, who shall hereinafter be referred to as the Appellant and to compel the Appellant to pay his entitlements including areas of salary.

After arguments the Learned High Court Judge by his Judgment dated 24th of March 2004 granted relief to the Petitioner as prayed for in the petition. Being aggrieved by the said judgment the Appellant has preferred this appeal to this Court.

At the stage of arguments and in their written submissions as well, the Appellant relied on several grounds of appeal. Some of them are;

1) that there was no valid writ application before the Provincial High Court of Anuradhapura,

2) that there was undue delay in filing the writ application in the High Court,

3) that there was suppression of facts,

4) that the Petitioner had not acted with *uberima fides,*

5) that the Petitioner had no capacity to invoke writ jurisdiction.

No valid writ application before the Provincial High Court

This objection was not urged in the High Court when the matter was argued in that court. For the first time the Appellant has put forward this argument in this court. In their written submissions as well as oral submission the Appellant contended that that the Petitioner Respondent did not comply with rule 3 (1) of the Court of Appeal (Appellate Procedure) Rules of 1990 made by the Supreme Court and published in the government gazette number 645/4 dated 15th January 1991 wherein it is laid down that in order to invoke the writ jurisdiction of the Court of Appeal granted to it under article 140 and 141 of the Constitution the application shall be by way of petition supported by an affidavit.

Respondent contended that filing of an affidavit was mandatory but the affidavit filed by the Respondent is defective and therefore there was no valid affidavit in the eye of the law and thus there was no valid application for writ in the High Court. The contention of the Appellant is that the Respondent being a Buddhist has not affirmed to, either in the head / recital of the affidavit or in the jurat, in other words the affidavit filed of record has not been properly affirmed to by the deponent (Petitioner) as required in terms of section 5 of the Oaths and Affirmations Ordinance No.09 of 1895 according to which a Buddhist has to affirm to the contents of an affidavit. In support of his contention the Appellant has cited the following authorities.

In **Chandrawathie Vs Dharmaratne and Others 2001 BLR** the Supreme Court held that if the affirmation is not in the head of the affidavit or the jurat clause it is defective and is fatal.

In Clifford **Ratwatte Vs Thilanga Sumathipala and Others 2001 2 SLR 55** it was held that if the deponent states that he is a Christian and affirms the affidavit instead of swearing , the affidavit is defective.

In **Inaya Vs Orix Leasing Co. ltd 1999 3 SLR 197** in the affidavit before court the defendant being a Muslim had failed to solemnly and sincerely and truly declare an affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed. It was held that although technicalities should not be allowed to stand in the way of justice the basic requirements of the law must be fulfilled.

It appears that the Counsel for the petitioner has either been oblivious to this argument of the Appellant or had conveniently avoided responding to the same. Of all the grounds of appeal taken by the Appellant I am of the view that this is the only substantial argument that has been taken by the Appellant which deserves the attention

of this court. The rest of the grounds of appeal urged by the Appellant pose no problem as they could be disposed of comfortably as I find no merit in any of them. Yet I would be dealing with every one of them succinctly in chapters to follow.

In Gamage Palitha Wickramasiri Vs Pathrannahelage Nandawathie and another C.A. No.312/91 (F) Weerasuriya, J. having referred to and discussed fully the relevant sections of the Civil Procedure Code namely SS 168, 181, 182, 437 and 438 with regard to the reception of evidence of witnesses professing different religions held that the same shall apply to evidence on affidavits as well. Further having referred to several authorities including **De Silva vs L.B.Finance Ltd (1993 1 SLR 371)** held that there was a failure on the part of the deponent to comply with the requirement in terms of section 168 of the Civil Procedure Code as the deponent, being a Christian, had affirmed to the matters in the affidavit.It is to be observed that, in **De Silva vs L.B.Finance Ltd (supra)**, referred to above, the affidavit was somewhat in line with the impugned affidavit in the instant matter before us. With great respect to those eminent judges I'm reluctantly compelled to disagree with them for the following reasons.

In **De Silva and others Vs L.B.finance Ltd (supra)** the impugned affidavit at the commencement or in the recital contained the following words " being a Buddhist do hereby solemnly sincerely and truly declare and affirm." .The jurat of the said affidavit contained the words " within named affirment" instead of the transitive verb 'affirmed'. Thus the word affirms was wanting only in the jurat but was present in the recital. In that case his Lordship Justice G.P.S. De Silva held that the fair meaning that could be given to those words is that the deponent had affirmed to the contents of the affidavit, before the Justice of the peace.

In other words his Lordship held that it was not necessary to mention the word affirms in the jurat if that word was found in the body of the affidavit such as the recital to the affidavit. His Lordship endeavoured in that case to give a constructive meaning to the words contained in the affidavit even in the absence of the precise word affirm in the jurat. It is true that in that case the word affirms was at least found in the recital of the affidavit. In the instant case the word affirm is found nowhere neither in the recital not in the jurat.

I find that there is no magic in the word affirm. It means according to the Oxford Advanced Learner's *Dictionary "to state firmly or publicly that sth is true or that you*

support sth strongly." The impugned affidavit at the commencement and in its recital states බෞද්ධාගමිකයකු වශයෙන් අවංකවත් , සත්‍ය ලෙසත් , ගාම්භීරත පූර්වකවත් - ප්‍රතිඥා දී ප්‍රකාශ කර සිටින වගතම්

Translated into English it means "being a Buddhist I solemnly sincerely and truly declare and state. Neither the Jurat no the body of the affidavit contains the word affirm. The Jurat of the impugned affidavit contained the date and the place of attestation and the fact that the deponent is signing the same having read and understood the contents of the affidavit. What is wanting in the affidavit is the precise word 'affirm'.

On a consideration of the impugned affidavit I find that the provisions of section 438 of the Civil Procedure Code have been complied with. The jurat expressly sets out the place and the date on which the affidavit was signed. The affidavit has been signed before a Justice of the Peace. There is specific reference in the jurat that the affidavit was duly signed by the deponent after having read and understood the contents. The contention that the affidavit is invalid is based on the absence of the word affirm in the jurat or in the body of the affidavit.

On the other hand if a Catholic does not swear an affidavit that might be a different kettle of fish altogether because swearing becomes very important and most

significant to a Catholic who believes in Almighty God. I.e. I swear by the Almighty God that I will tell the truth. A mere assertion statement or affirmation may not suffice for the purpose of executing a valid affidavit as far as a Catholic, Christian or a Jew is concerned. **(Edussuriya, J. in Clifford Ratwatte V Thilanga Sumathipala and Others CA./LA.121/90)** But in the case of a deponent being a Buddhist this question does not arise.

I cannot understand why a Buddhist cannot believe in God or Gods. **Perera, J. in Rustomjee Vs Khan (1914 18 NLR 120 at 123** held that the use of the word " may" in the Oaths Ordinance of 1895, instead of " shall", must be regarded as deliberate; with the consequences, non-Christians who believe in God would have the option to swear or to affirm.

Buddhism is a philosophy and a religion. In any case where a deponent solemnly sincerely and truly state something in his affidavit with responsibility, a particular word should not be allowed to play tricks or stand in the way of justice and fair play. A particular word should not be allowed to vitiate or invalidate an affidavit which is otherwise regular on the face of it. The words solemnly sincerely and truly connotes that the deponent is publicly admitting the truth of the contents in the most responsible manner. The absence of a particular word namely the word 'affirm' referred to in the

statute cannot and should not be allowed to stand in the way of justice. The words must be given a purposive and meaningful construction instead of trying to split hairs on technicalities. **(Mohamed Vs Jayaratne and Others 2002 3 SLR 181)**

The rationale in the above quoted judgments is that the fundamental obligation of a deponent is to tell the truth and the purpose of an oath or affirmation is to enforce that obligation. Therefore the substitution of an oath for an affirmation or *vice versa* will not invalidate an affidavit or on the other hand by reading the affidavit as a whole if a fair meaning could be given to the words used in the affidavit that the deponent has affirmed to the contents of the affidavit before the Justice of the Peace then it could be construed that there is sufficient compliance with the requirement of an affidavit. **(H/L Hon. S. Sriskandarajah, J. in Kulutanthrige Don John Patric Vs Kuluthantrige Dona Mercy CALA application No. 280/ 2002 D.C.colombo Case No. 19481/L)**

For the reasons stated I hold that there is no merit in the first ground of Appeal taken by the 2nd Respondent Appellant, namely that there was no valid Writ application before the Provincial High Court, accordingly the first ground of appeal is hereby rejected.

With regard to the third and fourth grounds of appeal I find that there is no substance or merit in those arguments. In addition the submissions did not sound convincing and those two grounds were not prosecuted with much conviction or vehemence.

Second ground of appeal- undue delay

The counsel for the appellant contended that there was undue delay in presenting the writ application to the High Court. He cited the following authorities in support of his case. **(Issadeen V the commissioner of National Housing and others2003 2 SLR 10, Lanka Diamond (Pvt) Ltd V Wilfred Vanells and Two Others 1997 1 SLR 360).**

In order to decide whether there was undue delay in presenting the application for writ in becomes necessary to deal with the facts pertaining to the case. The Petitioner Respondent joined the first Respondent society on 04 of February 1971 as a general manager. The Petitioner was appointed as a curator of the stores on 26 of June 1973. Due to a leakage of goods to the value of Rs. 8146.76, the Petitioner was dismissed from service without any enquiry whatsoever. The Petitioner states that by letter dated 13 of August 1976; he was dismissed from service with immediate effect without following any procedure. The Petitioner further states that the dismissal was

totally and completely against the principles of natural justice, that thereafter the Petitioner submitted several appeals to the Respondents including the Respondent Appellant and after four years that is on 8 of August 1979 a charge sheet was issued on the Petitioner containing three charges but a disciplinary inquiry was not held to go into the charges framed against him based on that charge sheet. Thereafter nearly 21 years later another charge sheet was issued against the Petitioner. The second charge sheet was issued on 15th of November 1997. At the time of issuing the second charge sheet the dismissal made on 13th of August 1976, prior to the issuance of the two charge sheets, was not cancelled and was in existence.

The inquiry that followed the second charge sheet commenced on 25th of February 1998 and was completed on the sixth of April 1998. It is alleged by the Petitioner that the discipline inquiry was concluded without granting the Petitioner the opportunity to meet his case properly and effectively. I

It was submitted on behalf of the petitioner that the 1st Respondent informed the petitioner that he had been convicted of all the charges leveled against him and that he appealed to the 1st Respondent but was informed that the 1st Respondent cannot intervene in the matter. The Petitioner had thereafter submitted a second appeal dated 15th of July 1999, to the, 1st Respondent by stating his grievance but once again, by the letter dated 30th of August 1999 the 1st Respondent informed the Petitioner that

there was no reason to interfere with the decision. Thereafter the Petitioner had submitted two more appeals to the 1st Respondent but was informed that his request cannot be considered. On 5th of January 2001 the Petitioner submitted a further appeal to the1st Respondent. As a result of that appeal the Petitioner was asked to appear before the 1st Respondent but was informed that there was no reason to change the decision and it was thereafter that the Petitioner filed the writ application in the High Court of Anuradhapura on 18 December 2002.

On the facts it is crystal clear that there had been untoward and inexcusable delay on the part of the Appellant in holding a proper disciplinary inquiry against the Petitioner. He had been dismissed summarily without holding any inquiry or even serving a charge sheet on him. Thereafter it took several years to frame charges against the Petitioner and there too the authorities failed to prosecute or to hold an inquiry on the charge sheet issued against him and subsequently after 21 years a second charge sheet was served on him. It is only thereafter a purported inquiry was held and even at that inquiry, on the evidence it is clear that the Petitioner was not afforded a fair inquiry. He was not permitted to lead evidence at the inquiry held and thus was deprived of a fair inquiry. Delay / laches of a party does not bestow a right or privilege on the other to indulge in delay / laches but is it ethical, proper, just or fair to allow the Appellant to rely on the delay on the part of the Petitioner in filing the writ application, when

they themselves delayed long years, for more than 21 years, in framing charges and proceeding against the Petitioner. On the other hand in view of the brazen facts I am of the opinion that even if there was a delay in filing the application for writ that delay is certainly excusable and pardonable in the light of and in the face of the glaring injustice, the glaring prejudice that has been caused to the Petitioner by the conduct of the first 1st Respondent and the 2nd Respondent Appellant.

Tenability of the Learned High Court Judges order

The Appellant has questioned the capacity of the Petitioner to maintain or invoke the writ jurisdiction of the High Court. The Appellant was a statutory body vested with statutory rights and obligations created by statute. The Petitioner was an employee but it was not a simple and pure master and servant contract there was a lot of rights and obligations governed by and emanating from statutes, especially so when it comes to disciplinary matters, dismissal, inquiry, appeals etc.

The remedy of judicial review is available where an issue of public law is involved. The expression public law and private law whilst convenient for descriptive purposes must be used with caution. It is not correct to assume that there is no public law element in an ordinary relationship of master and servant and that accordingly in such a case judicial review would not be available. Even in a master and servant

relationship where conditions of employment or disciplinary matters are regulated to some degree by statutory provisions or a statutory scheme, such actions attract public law remedies.

Employment by public authorities does not per se inject any elements of public law nor does the fact that the employees in the higher grade or is an officer. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. It is this underpinning and not the seniority which injects any element of public law. The ordinary employer is free to act in breach of its contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee public law rights and at least making him a potential candidate for administrative law remedies. **(Vide. Malloch V Aberdeen Corporation [1971] 1 WLR 1578, Per Sriskandarajah, J. in CA. Application No 1807/ 2006).**

With regard to the dismissal of the Petitioner I find that it had been done haphazardly without serving a charge sheet or without holding a proper inquiry. A charge sheet had been served on the Petitioner after a couple of years and thereafter a second

charge sheet was filed after 21 years and it is only thereafter that any form of an investigation has been held. On top of this brazen violation of fundamental norms and the rights of the Petitioner, even at the investigations held on the second charge sheet the Petitioner had not been afforded a fair hearing. The Appellant has not observed the principles of natural justice. In fact P 13 reveals that the Petitioner was not allowed to place his case properly, effectively and to the best of his ability. The investigating team determined that it was not necessary for the Petitioner to lead evidence and thereafter had prevented him from leading any evidence, in fact has ruled that they really would not permit the Petitioner to lead evidence. This is a blatant violation of the Petitioner's right to a fair hearing. The Appellant has not followed a fair procedure in keeping with the rule *audi alteram partem* in conducting their investigations against the Petitioner.**(vide. Koralagamage Vs the commander of the army 2003 3 SLR 169, Ratnayake Vs Ekanayake commissioner general of exercise and others 2002 2 SLR 299, Lanka Loha Holdings (Pvt) Ltd Vs the Attorney General 2002 3 SLR29)**

For the reasons adumbrated on the facts and the law I am of the view that there is no merit in this appeal and accordingly I dismiss this appeal with costs fixed at Rs.5000/= to be paid to the petitioner Respondent by the 2nd Respondent appellant.

JUDGE OF THE COURT OF APPEAL

D.S.C.Lecamwasam, J.
I agree

JUDGE OF THE COURT OF APPEAL