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

Withanage Herath Weerasekara,
Thimmagama,
Bamunakotuwa.

**Petitioner**

CA (PHC) 103/2005
HCW/09/2003
(Provincial High Court
North Western)

**VS.**

01. Cooperative Workers Commission
(North-Western)
94 Negombo Road,
Kurunegala.

02. Mawathagama Multi Purpose
Cooperative Society,
Mawathagama.

**Respondents**

**AND NOW BETWEEN**

Withanage Herath Weerasekara,
Thimmagama,
Bamunakotuwa.

**Petitioner-Appellant**

**VS**

01. Cooperative Workers Commission
(North –Western),
94, Negombo Road,
Kurunegala.

02. Mawathagama Multi Purpose
Cooperative Society,
Mawathagama.

**Respondent - Respondent**

| | | |
|---|---|---|
| **BEFORE:** | : | **W.M.M. Malinie Gunaratne, J. and** |
| | | **P.R. Walgama, J** |
| COUNSEL | : | Deeptha Perera<br>for the Petitioner -Appellant |
| | | Suranga Wimalasena, S.S.C.<br>for the 1st Respondent – Respondent |
| | | D.D.P. Dassanayake<br>for 2nd Respondent- Respondent |
| Argued on | : | 12.11.2015 |
| Written submissions<br>filed on | : | 29.01.2016 and 08.02.2016 |
| Decided on | : | 24.05.2016 |

**Malinie Gunaratne, J.**

The Petitioner – Appellant (hereinafter referred to as the Appellant) filed an Application No. 09/2003 dated 02.06.2003 in the High Court of Kurunegala seeking a Writ of Certiorari to quash the Order dated 03.05.2003 ( P 16) issued by the 1st Respondent and a Writ of Mandamus

directing the 1st and 2nd Respondents – Respondents (hereinafter referred to as the 1st Respondent and the 2nd Respondent) to reinstate the Appellant as the General Manager of the 2nd Respondent Society.

After filing objections by the Respondents and having considered the submissions made by both parties, the learned High Court Judge dismissed the Petition, filed by the Appellant.

Aggrieved by the said Judgment dated 31.03.2005, the Appellant has preferred this appeal seeking to set aside the Judgment of the learned High Court Judge.

The facts that have given rise to the instant application are as follows:

The Appellant was the General Manager of the 2nd Respondent. On 28th October 1997, the Appellant was sent on compulsory leave and thereafter his services were suspended. The Appellant was served with a charge sheet and he had been subjected to disciplinary action by the 2nd Respondent. The Appellant was discharged from four of the nine charges and found guilty of the other five charges. Thereafter his services were terminated. The Appellant forwarded an appeal to the 1st Respondent against the said decision of disciplinary action.

The 1st Respondent appointed an inquiring officer, one A.M.P. Atapattu to hold the inquiry. He conducted the inquiry and submitted a report. By that report he had recommended that the Appellant be discharged from five charges that he had been found guilty at the disciplinary inquiry.

Thereafter the 1st Respondent, called the Appellant for a discussion and he was told that the 1st Respondent was going to overrule the report of

the Inquiring Officer. According to the new report the Inquiring Officer has found the Appellant guilty of the five charges.

The Order is marked as 'P 16' and against that Order the Appellant sought the reliefs from High Court of Kurunegala. The learned High Court Judge of Kurunegala dismissed the Petition filed by the Appellant. Being aggrieved by that Judgment the Appellant has preferred this appeal.

When this case was taken up for argument on 12.11.2015, the learned Counsel for the Appellant contended that the Order 'P 16' is *ultra vires,* unreasonable and arbitrary and had been reached in violation of natural justice.

The learned Counsel further contended that, after the Appellant was sent on compulsory leave and thereafter his service suspended, a disciplinary inquiry was held and after he was found guilty of five charges, his service was terminated. When the Appellant forwarded an appeal against the said order, to the 1st Respondent, one A.M.P. Atapattu was appointed to inquire into the appeal. He conducted the inquiry and recommended that the Appellant be discharged from the five charges that he had been found guilty at the disciplinary inquiry. The 1st Respondent has rejected the report of its own inquiring officer and reviewed the same sitting as an appeal board. It has compared the report of the Inquiring Officer with the original disciplinary report and come to some conclusions without holding an inquiry and decided to dismiss the appeal forwarded by the Appellant.

It is the stance of the learned Counsel for the Appellant that the Order (P 16) made by the 1st Respondent rejecting the appeal is *ultra vires,* unreasonable and arbitrary and had been reached in violation of natural

Justice. The learned Counsel contended that, by letter P 13 and P 14, the 1st Respondent had called the Appellant only for a discussion to reach a decision with regard to the appeal forwarded by the Appellant without holding an inquiry. It is the stance of the learned Counsel that, once, the 1st Respondent appointed an inquiring officer to conduct an appeal inquiry he cannot sit as an appeal board over the report of its own appeal inquiring officer.

It is the contention of the learned Counsel for the Petitioner that in the absence of any provision in the Regulations, as to how the commission should act, when they reject the report of their own appeal inquiring officer, it is necessary to hold an inquiry by themselves or through a new appeal inquiring officer. The Counsel further contended that the commission had exceeded its authority when it sat as an appeal board and reviewed the report of the appeal inquiry officer, it had appointed earlier.

The learned State Counsel argued that the so called report of the inquiring officer cannot be considered as a recommendation or a decision. Drawing the attention of the Court to Clause 153 of the Co-operative Service Commission Regulations, the Counsel further argued, that only the Commissioner can take a decision and the report of the inquiring officer does not have any kind of binding power upon the parties and also it cannot be considered as any kind of a decision. Accordingly, it is the contention of the learned State Counsel that, only the Commissioner can make a decision and an inquiring officer is not empowered to make any decision.

The learned State Counsel further contended, therefore that the Appellant's application for two orders in the nature of Writ of Mandamus and Writ of Certiorari is misconceived in law and cannot be maintained.

It is relevant to note that it was the 1st Respondent that had taken the decision (P 16) and not the Inquiring Officer to reject the appellant's appeal on the report of the inquiring officer appointed by the 1st Respondent.

It is the grievance of the Appellant, without holding a fresh inquiry that the 1st Respondent has accepted the 2nd report of the inquiring officer and has taken the impugned decision (P 16). Hence, it is the stance of the learned Counsel for the Appellant that the decision (P 16) is *ultra vires*, unreasonable and arbitrary and had been reached in violation of natural justice.

Professor Wade calls *ultra vires* "acting beyond one's power of authority". The general idea behind the term is that a decision or action of a functionary is said to be *ultra vires* when that functionary acts outside the ambit or scope of his authority. Ultra vires doctrine prevents public authorities from doing anything which the law forbids, or taking any action for which they have no statutory authority.

It is the stance of the learned Counsel for the Appellant that, although it is imperative that the 1st Respondent has to conduct an inquiry either by itself or through an inquiring officer, without holding an inquiry the 1st Respondent had come to some conclusions.

The learned Counsel further contended, that what the 1st Respondent had done is, on its own, compared the report with the original disciplinary inquiry report which had been rejected by the 1st Respondent, without giving

an opportunity to the Appellant to make representations before the 1st Respondent.

At this juncture it is necessary to consider the Clause 150 of the Cooperative Service Commission Regulations enacted by the Provincial Council.

When an appeal is filed by an employee, Section 150 provides the procedure that has to be adopted by the 1st Respondent in determining the appeal and accordingly there are two options available to the 1st Respondent.

(i) An appeal against termination of service or dismissal from service or compulsory retirement can be tried by the Commission and be determined by the Commission.

(ii) If not, can direct an inquiring officer who has been appointed to hold an inquiry and to submit a report.

On a plain reading of the provisions of Clause 150 of the Regulations, it is imperative that the Commission has to conduct an inquiry either by itself or through an inquiring officer. The inquiring officer should submit a report after the inquiry. Clause 153 of the Regulation states that after taking into consideration the inquiring officer's report, using its discretion, the 1st Respondent should make a decision. It is to be noted that although a sort of discretion has been given by the legislative provisions, to the 1st Respondent to take a decision on the report of the inquiring officer, he is bound to exercise his discretion in the best interest of the public.

In the instant case the inquiring officer had recommended that the Appellant be discharged from five charges that he had been found guilty. The 1st Respondent rejected the report of its own inquiring officer and then

went on to review same sitting as an appeal board from the appeal inquiry. It has compared the report of the inquiring officer with the original disciplinary report and has come to some conclusions without holding an inquiry.

In the written submissions filed in this Court by the Respondents, it is contended that, in the determination (P16) of the 1st Respondent, the facts have been widely analysed and well considered and according to the facts and circumstances of the incident, it is apparent that the determination / decision of the Commission is very accurate and in accordance with the facts and circumstances of the incident.

The Cooperative Service Commission Regulations does not provide any provision or has not given any power to the 1st Respondent to compare the report of the inquiring officer with the original disciplinary report and come to a conclusion and determine an appeal. Hence I hold that there is no merit whatsoever in the submissions made by the learned State Counsel.

The Appellant requires an inquiry to make representation as to why the original disciplinary inquiry should be or should not be accepted. Without giving that opportunity the 1st Respondent has compared the report on its own with the original disciplinary report and has come to a decision. Since the Regulations does not allow the 1st Respondent to sit as an appeal board and review a report submitted by an inquiring officer, I am of the view that the 1st Respondent has exceeded its authority and acted *ultra vires.*

Also it is against the Natural Justice. Clause 150 requires the 1st Respondent to have an inquiry before they arrive at a decision. There is a

legal requirement to hear the Appellant before the 1st Respondent arrived at the decision. That has not been done.

An administration body may in a proper case be bound to give a person who is affected by the decision, an opportunity of making representations. The Appellant should have been given an opportunity to present his case before an adverse decision is made against his expectation. There was an obligation on the 1st Respondent to act fairly. It is an admitted fact that no inquiry was held by the 1st Respondent before he arrived at the impugned decision (P 16).

Each party must have the chance to present his version of the facts and to make his submissions on the relevant rule of law. It is said *"qui aliquid statuerit discerit, hand acquum fecerit"* – which means that he who determines any matter without hearing both sides, though he may have decided right, has not done justice.

It is observed by Lord Wright in The General Medical Council vs. Spackman 1943 A.C. 627 "If the principles of natural justice are violated in respect of any decision it is indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision".

It is mentioned in "P 16"

".....ඒ අනුව කොමිෂන් සභාව විසින් අභියාචනා පරීක්ෂණයේ වාර්ථාවත්, විධිමත් විනය පරීක්ෂණ වාර්තාවත්, ඒවායේ ඉදිරිපත් වී ඇති කරුණුත් අධ්‍යයනය කර වෙනම වාර්තාවක් සකස් කර, එම වාර්තා අනුව මෙම කාරණය සම්බන්ධයෙන් තීන්දුවක් දීමට තීරණය කර ඇත. ඒ වාර්තාව අනුව අභියාචක චෝදනා පහටම

වරදකරු වන බව කොමිෂන් සභාවට ඒත්තු ගොස් ඇති නිසා, අභියාචක විසින් ඉදිරිපත් කළ අභියාචනය ප්‍රතික්ෂේප කිරීමට කොමිෂන් සභාව තීරණය කරයි....."

It is relevant to note, that the regulations of Cooperative Service Commission does not empower the 1st Respondent to compare the original disciplinary report with the appeal inquiring officer's report and to arrive at a decision.

Hence I am of the view that the 1st Respondent has not acted within the rules of reason and justice. The Court can interfere where there is manifest unreasonableness in an administrative act.

According to Atkin L.J. in R VS Electricity Commissioner, a Writ of Certiorari will be issued –

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority....."

In Trade Exchange (Ceylon) vs Asian Hotels Corporation Ltd. (1981) 1 S.L.R. 67, it was observed that "an application for prerogative remedy of writ of certiorari is a proceeding calling some public authority to show legal justification for its action and to account for exceeding or abusing the power".

In the above circumstances, I am of the view, that the learned High Court Judge has failed to consider the right question. On perusal of the entirety of the judgment of the learned High Court Judge, it is apparent that the learned High Court Judge has only looked into the question whether the

discretion had been used in a lawful manner by the 1st Respondent when he arrived at the impugned decision (P 16).

Before the High Court, the Appellant had argued that the said decision was *ultra vires*, unreasonable, arbitrary and against the rules of natural justice. But the learned High Court Judge has dismissed the application, without considering the right question, simply based on the fact that the 1st Respondent had a discretion under Section 153 of the regulations. I am of the view that the learned High Court Judge has not looked into the question whether the discretion had been used lawfully or not.

The Appellant had placed sufficient materials to establish that the 1st Respondent had acted unlawfully exceeding his powers.

Hence, I am of the view, that the learned High Court Judge was misdirected in law in refusing to issue a Writ of Certiorari quashing the decision (P 16) of the 1st Respondent.

In the given circumstances, after considering this appeal on its merits, this Court comes to the conclusion that the impugned order (P16) dated 03.05.2003 should be quashed.

Hence I set aside the Judgment of the learned High Court Judge dated 31.03.2005 and the Order made by the 1st Respondent, (marked P 16) dated 03.05.2003 is quashed and the application for Writ of Certiorari is allowed with costs in terms of prayer (b) of the Petition.

This Court has not considered the issuance of a Writ of Mandamus as prayed for in Paragraph (b) of the prayer to the petition, since the 1st Respondent has to follow the correct procedure; and to hold an inquiry

firstly, with the participation of the Appellant, with regard to the appeal forwarded to the 1st Respondent by the Appellant.

Appeal is allowed.

**JUDGE OF THE COURT OF APPEAL**

P.R. Walgama, J.

I agree

**JUDGE OF THE COURT OF APPEAL**

Appeal is allowed.