

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

**In the matter of an Application for mandates in the
nature of Writ of *Certiorari and Mandamus* under and
in terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka**

Kurugama Gunathilaka,
No.48, Mahanawiya Road,
Walliwela, Weligama.

Petitioner

CA/ WRIT/78/2013

Vs,

1. Southern Development Authority,
No. 15, Matotagama, Walgama North,
Matara.
 2. S.P.S. Ranjith Gunasekara,
Chairman, Sothern Development Authority,
No. 15, Matotagama, Walgama North,
Matara.
- 2A. H. Sumanapala,
Director General,
Divineguma Development Department,
4th floor, Sri Jayewardenepura Kotte,
Battaramulla.
- 2B. Chandra Wickremasinhe,
Director General,
Divineguma Development Department,
4th floor, Sri Jayewardenepura Kotte,
Battaramulla.

3. Sarath Amaraweera,
'lakshani' Hakmana Road, Galwewa,
Beliatta.
4. H. Chandana Priyalal Pathirana,
219, Wellawaya Road,
Moaragala.
5. Sunil Sooriyabandara Dissanayake,
Jalasampadana Mawatha,
Kalugalahena,
Deniyana.
6. A.K.A.Y. Tharanga,
Assistant Director,
Legal Department, Ministry of Finance and Planning
General Treasury,
Colombo 01.
7. K.P. Dahanayake,
Area Manager,
Regional Development Bank,
382A, Anagarika Darmapala Mw,
Paburana, Matara.
8. W.K.K. Athukorala,
District Secretary,
District Secretariat,
Matara.
9. J.K. Padmasiri,
Director (Finance and Administration),
Southern Development Authority,
No. 15, Matotagama, Walgama North,
Matara.
10. P.N. Wijerathna,
Acting Director (Policy Planning),
Southern Development Authority,
No. 15, Matotagama, Walgama North,
Matara.

11. Sumith Wanigathunga,
Internal Auditor,
Southern Development Authority,
No. 15, Matotagama, Walgama North,
Matara.
12. P.B. Jayasundara,
Secretary to the Ministry of Economic Development,
2th floor, Sri Jayewardenepura Kotte,
Battaramulla.
- 12A. P.H.L. Wimalasiri Perera,
Ministry of Housing and Samurdhi,
2th floor, Sri Jayewardenepura Kotte,
Battaramulla.
- 12B.M.Senevirathne,
Ministry of Social Empowerment and Welfare,
2th floor, Sri Jayewardenepura Kotte,
Battaramulla.

Respondents

Before : **Vijith K. Malalgoda PC J (P/CA)**

Counsel : Asthika Devendra with Lilan Warusavitana for the Petitioner
Manohara Jayasinghe SC for the Attorney General

Argued On: 04.03.2016

Written Submissions On: 16.05.2016

Order On: **23.09.2016**

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to the present application Kurugama Gunathilake has come before this court seeking inter alia,

- h) Grant a mandate in the nature of *Writ of Certiorari* quashing the decision embodied in P-5 to conduct a disciplinary inquiry against the Petitioner
- i) Grant a mandate in the nature of *Writ of Certiorari* quashing the decision embodied/ reflected in P-6, P-7C, P-7E and P-8B to defer two salary increments of the Petitioner
- j) Grant a mandate in the nature of *Writ of Certiorari* quashing the decision embodied in P-3 to remove the Petitioner from the post of Acting District Director of Hambantota of the 1st Respondent Authority or its successor
- k) Grant a mandate in the nature of *Writ of Mandamus* directing one or more or all the Respondents to confirm the Petitioner in the post of District Director of the 1st Respondent Authority or its successor

The Petitioner who is a project co-ordinator of the 1st Respondent Authority was serving as the Acting District Director of Hambantota District from 31.08.2010. By letter dated 12.01.2012 the Petitioner had requested the 2nd Respondent to confirm his appointment as the District Director. The said request made by the Petitioner was recommended to the 9th Respondent who was the then Secretary to the Ministry of Economic Development by the 2nd Respondent and sought special approval to confirm the Petitioner along with three others in their positions.

However as revealed before us, the 2nd Respondent by his letter dated 15.03.2012 (two months after his recommendation to the 9th Respondent) informed the Petitioner, that due to certain complaints received against him in the nature of ,

1. The Petitioner has failed to be present at his office during working hours
2. The Petitioner has failed to manage his employees properly
3. The Petitioner has treated external parties who are working with the 1st Respondent Authority in an unnecessary and unethical manner
4. The Petitioner has failed to maintain proper administration and supervision in respect of development activities and he has failed to adhere to the relevant circulars of the Government and the 1st Respondent Authority

that he has been transferred to the office of the District Director of Matara as a project co-ordinator.

It was further informed by the said letter that a preliminary investigation being conducted by the 11th Respondent on the said complaints. By another letter he received from the 11th Respondent dated 16.03.2012 the acting allowance paid to him was suspended with immediate effect. The Petitioner has thereafter reported to Matara Office on 22.03.2012 to his substantive post.

The Petitioner was summoned for the said preliminary investigation on two occasions and his statement was recorded. Subsequent to the recording of the statement of the Petitioner he has received a letter dated 14.06.2012 from the 9th Respondent informing the Petitioner that,

- a) The 11th Respondent has completed the preliminary investigation and forwarded the said report to the meeting of the Board of Directors which was held on 14.06.2012.
- b) After considering the said report which was forwarded by the 9th Respondent, it was decided by the Board of Directors to conduct a further investigation regarding the said allegations.

- c) The 2nd, 9th, 10th and 11th Respondents were appointed as the investigation committee.
- d) The said investigation would be held on 21.06.2012 at the Head Office of the 1st Respondent Authority and the Petitioner was requested to attend the said inquiry with the documentary evidence to be submitted to the investigation committee.

The investigation referred to above had been conducted as scheduled and according to the Petitioner, six officers along with the Petitioner were summoned for the said inquiry and the attendance was signed. Even though six officers were summoned, only five officers were present.

The 11th Respondent, was asked by the 2nd Respondent to explain the allegations against the five officers present and thereafter two officers from the internal audit division submitted certain documentation in order to substantiate the allegations and the Petitioner and the four others denied the allegations against them, with documentation to support their version.

However as submitted by the Petitioner, no charges were framed against them or read out to them at the said inquiry and the inquiry was lasted for about two hours.

On 05.07.2012 the 2nd Respondent had issued a letter to the Petitioner and by the said letter the Petitioner was informed that, according to the audit report dated 23.05.2012 prepared by the 9th Respondent and submitted to the Director Board on 14.06.2012 through the 2nd Respondent,

- a) Five charges in respect of distributing banana plants in the Hambantota District under the “Divinaguma Project 2011.”
- b) Six charges connected with submitting fraudulent documents in respect of obtaining plants

were made against the Petitioner and a committee comprising of 2nd, 9th and 10th Respondents having conducted an inquiry on 21.06.2012 by summoning the relevant officers before them had found the Petitioner guilty of all the charges and decided to,

- i. Removal of the Petitioner from his acting appointment and confirm him in the post of project co-ordinator
- ii. Defer the next two salary increments of the Petitioner

As observed by this court the document P-6 refers to 11 charges against the petitioner and after the said investigation/ inquiry the Petitioner was found guilty of all the said charges. However the position taken up by the Petitioner, right throughout this case was that, the Petitioner was neither served or informed of any charges prior to the said investigation/inquiry nor a proper disciplinary inquiry held against him.

In this regard the Respondents have drawn the attention of this court to the section 7 of the Administrative Code of the 1st Respondent Authority where it is provided for a Summary Procedure to conduct a disciplinary inquiry. Whilst relying on the provisions of the said section, the Respondents took up the position that the inquiry referred to in P-6 was conducted under section 7 of the Administrative Code.

According to section 7 of the Administrative Code of the 1st Respondent a summary inquiry will be held against an employee, when that employee was found responsible with clear evidence for committing minor offence after a preliminary investigation.

Under section 7.2 there is duty on the officer who conducted the summary inquiry to explain the charges to the employee. Under the same Administrative Code minor offence is identified as an offence where dismissal or a fine up to three days salary is not warranted and schedule (b) to section 4 of the said Code identifies some of the minor offences as,

- a) Failure to report to work without valid reason
- b) Getting late to report to work without valid reason
- c) Causing damage to property by negligent Act
- d) Work slow or work without due attention
- e) Sleep during office hours
- f) Disrespect to public
- g) Falsely pretending as sick during office hours

Section 14.2 of the Administrative Code further provides that, when imposing a sentence for committing a minor offence, more than one punishment cannot be imposed. For example a warning and a fine cannot be imposed together and it should be only one punishment.

However when considering the letter dated 15.03.2012 which was issued at the time the Petitioner was transferred to Matara to his substantive post, we observe that the allegations leveled against the Petitioners were coming under the schedule (b) of the section 4 but, the charges under which the summary proceedings were carried out as referred to in P-6 does not come under any of the minor offences identified under schedule (b) to section 4 of the Administrative Code.

When considering the above provisions of the Administrative Code of the 1st Respondent this court cannot agree with the arguments raised by the Respondents that the disciplinary inquiry referred to above was conducted under the summary procedure identified in the Administrative Code of the 1st Respondent Authority.

According to P-5 a committee comprising of 4 members including the 2nd, 9th, 10th and 11th Respondents were nominated to hold the investigation by the Board of Directors but according to P-6 the committee which considered the material against the Petitioner comprised only three members including 2nd, 9th, and 10th Respondents and the 11th Respondent was summoned as a

witness before the said committee. In these circumstances it is further observed that there wasn't a proper appointment to the committee to investigate the irregularities committed by the Petitioner.

The Respondents have further argued that, the Petitioner is estopped from objecting to the procedure followed in conducting the inquiry for the reasons, that

- a) The procedure followed is provided under section 7 of the Administrative Code
- b) Petitioner had consented for the conduct of the said inquiry by signing the attendance on that day

However this court cannot agree with the said argument raised on behalf of the Respondent for the reason that,

- a) The procedure followed by the Respondents in conducting the disciplinary inquiry is contrary to the provisions of the Administrative Code of the 1st Respondent.
- b) Even if there was consent, (Petitioner has challenged this position) a consent given to an illegal procedure to follow, cannot be considered as true consent.

When going through the procedure followed by the Respondents in conducting the disciplinary inquiry against the Petitioner this court further observes that, the Respondents have failed to hold a proper disciplinary inquiry by

- a) Informing the charges against the Petitioner
- b) Giving an opportunity to get ready for the inquiry
- c) Place the evidence against the Petitioner when he is present before the inquiry and giving him an opportunity to cross examine the witnesses
- d) Give an opportunity to place his evidence before the inquiry

e) The charges said to have been considered at the inquiry were not the charges informed to the Petitioner when his acting appointment was removed and transferred to a different district and thereby he was misled of the charges against him

and thereby failed to follow the principles of Natural Justice when conducting the said inquiry.

It is observed by Mallick, that “Natural Justice” requires that persons liable to be directed by acts decision, or proceedings of any authority be given adequate notice of what is proposed- so that they may be in a position to make a representation on their behalf, to appear at hearing and enquiry and effectively prepare their own case and answer the case. Writs Law and Practice M.R. Mallick at page 757.

In the case of *Triambak Pati Tripathi Vs, B.H.S.J. Education Allahabad AIR 1973 AII 1* it was held that, “one of the essential principles of Natural Justice is that the persons whose rights are to be affected must be given notice of the case or the charges which he has to meet.”

In the case of *Sevaragen V. Race Relation Board [1976] 1 AII ER 12 (CA)* Lord Denning M.R. has held that, “the fundamental rule is that if a person be subjected to pains or penalties, or exposed to perverse proceedings, or deprived of remedies or redress, or in some other way adversely affected by the investigation and report, then he should be informed the case against him and be afforded fair opportunity of answering it.”

In the case of *Nanaykkara V. University of Peradeniya (1985) 1 Sri LR 174* it was held that, “the right to a fair hearing is a rule of universal application and in case of administrative acts or decisions affecting the rights the duty to afford it is a duty lying upon everyone who decide anything.”

When considering the material already discussed above it is clear that the Respondents have acted in violation of rules of Natural Justice when conducting the disciplinary inquiry as referred to in P-5 and imposing a punishment to the petition as revealed in P-6.

This court is further mindful of the fact that, even at the time the petitioner was transferred to Matara by letter dated 15.03.2012 his substantive post was project co-ordinator but was only acting as District Director. This court is unaware of the qualifications required to be appointed to the post of District Director. An acting appointment is made on service requirements and in the said circumstances petitioner is not entitled as of right to be appointed as an acting Director of the 1st respondent Authority.

In the said circumstances this court concludes that the Petitioner is entitled to the relief claimed in paragraphs (h) and (i) of his petition and therefore make order granting the relief prayed for in paragraphs (h) and (i) of the Petition with cost to be paid to the Petitioner fixed at 10,000/-.

However I am not inclined to grant relief as prayed in paragraph (j) and (k) to the petition.

President of the Court of Appeal