

**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 Writs of *Certiorari* and
Mandamus in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

G.K. Ariyaratne,
Sriya Stores,
Welimadathanne,
Welimada.

Petitioner

CA (Writ) Application No: 395/2013 Vs.

1. Dr. P.B. Jayasundara,
Secretary,
Ministry of Finance and Planning,
The Secretariat,
Colombo 01.
2. Mrs. N. Godakanda,
Director General,
Department of Management Service,
General Treasury,
Colombo 01.
3. R. Semasinghe,
Director General,
Department of Trade & Investment Policy,
The Secretariat,
Colombo 01.
4. Dhammika Perera,
Secretary,
Ministry of Transport,
D.R. Wijewardene Mawatha,
Colombo 10.

5. Hon. Kumara Welgama, M.P.,
Minister of Transport,
Ministry of Transport,
D.R. Wijewardene Road,
Colombo 10.
6. Sri Lanka Transport Board,
200, Kirula Road,
Colombo 05.

Respondents

Before : A.L. Shiran Gooneratne J.

Counsel : K. Deekiriwewa for the Petitioner.

Nayomi Kahawita, SC for the Respondents.

Argued on : 30/10/2017

Written Submission on: 29/03/2018

Judgment on : 17/05/2018

A.L. Shiran Gooneratne J.

The Petitioner, aggrieved by the decision of the 3rd and/ or 1st, 2nd, 4th, 5th Respondents, with holding the issue of a permit for the importation of a motor vehicle as envisaged in document marked P5, inter alia, is seeking for a writ of Certiorari to quash the said decision and a writ of Mandamus to compel the said Respondents to issue a permit to the Petitioner for the importation of a motor vehicle on concessionary terms.

The Petitioner claims that prior to his employment with the 6th Respondent, he was an employee of the Ceylon Transport Board, the Janatha Santhaka Pravahana Sevaya Limited and the Cluster Bus companies established under the relevant statutory provisions. Therefore, the Petitioner contends that his continuous service in the Sri Lanka Transport Board (6th Respondent) for 12 years, in a “senior position” entitle him for a duty free permit to import a vehicle on concessionary terms under the eligibility criteria recognized in paragraph 01.01.(h), of the treasury circular No. 01/2013, dated 02/08/2013, marked P2. Accordingly, in order to obtain a duty free permit the Petitioner should fulfill the eligibility criteria as per the said circular dated 02/08/2003, marked P3.

In support of his contention, the Petitioner has drawn attention of Court to the case of *Metropolitan Bus Company Limited Vs. Commissioner of Labour CA/Writ/143/2003*, where the court held,

“in this instant case, even though the employees were given new letters of appointment they continued in their employment without a break in service in the same capacity with the Petitioners after the Petitioners companies were formed, therefore at the end of the period of the service of the employees of the Petitioners are liable to pay gratuity for the entire period of the service of the employees after deducting the gratuity if any was already paid. The order of the commissioner in this therefore is legal and the Petitioner has not shown any ground to set aside the said order of the commissioner”

Accordingly, the Petitioner contends that, if an employer can be made liable to pay gratuity for continued service, and employee in similar circumstance should also be entitled to the issuance of a vehicle permit in terms of the said Treasury Circular marked P2.

The Respondents submit that, the above case was filed to challenge a decision of the Commissioner of Labour in respect of payment of gratuity and therefore, it is totally different from the issue to be determined in the instant case.

The Petitioner has also submitted the case of *Labour Officer Vs. Distilleries Company of Sri Lanka (2000) 2SLR 380*, where the Court decided a similar issue to the issue in CA/Writ/143/2003, where the Court held that;

“Section 7 (c) of Act No. 23 of 1987, (Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, hereinafter sometimes referred to as the Act No. 23 of 1987) is unambiguous in that it requires the employer to add the period of employment in the corporation to the period of service under the company for the purpose of gratuity”

As pointed out earlier, the Petitioner has to satisfy Court on the eligibility criteria for a permit to be issued. The criteria applicable to the Petitioner set out in sub clause 01.01. (h) (i), states as follows;

“the officers who have actively worked in a Senior Level Executive Grade for 12 years and have been made permanent in the respective grade in public corporations and statutory institutions.”

In implementing government policy through circular marked P3, to determine eligibility of the employees of the 6th Respondent Board and similar institutions, the Respondents have considered the following criteria, ie, the completion of 12 years of active service under a fully owned government company and the seniority at an Executive Grade to be reflected in terms of the Management Circular No. 30, in order to maintain uniformity in issuing the permits in terms of P3. The Petitioner is required to satisfy both of the said requirements.

The Respondents admit that, the Petitioner was an employee of the Sri Lanka Central Transport Board and was absorbed into the Cluster Bus companies established under Act No. 23 of 1987, without any break in his service in spite of the said companies undergoing several structural changes. However, the question for determination is whether, the Petitioner can be classified as having completed 12 years of active service under a fully owned government company.

As contended by the Respondents it is observed that, in *Labour Officer Vs. Distilleries Company of Sri Lanka, (2000) 2SLR 380*, the question of whether the employment of the said workers can be considered as employment under, fully government owned company or not was not gone into by the Court. In order to

advance the argument that, the Petitioner was continuously employed in “fully state owned companies” the Petitioner at paragraph 19, of the Petition has annexed document marked P8 (a), dated 09/05/2003, addressed to the New Eastern Bus Company by the Director General of Public Enterprises and document marked P8 (b) dated 03/10/2001, a letter addressed to the Sri Lanka Central Transport Board by the Department of Public Finance.

Documents marked P8 (a), and P8 (b), refers to Treasury share holding in New Eastern Bus Company Limited and the Metropolitan Bus Company respectively. The said documents describe the total share holding of the government in the said entities and classifies such entities as government owned enterprise. The breakdown of the share holding as reflected in the said documents indicates that, the Treasury holds the majority of the shares. As reflected, the said share holding by the treasury cannot be classified to mean that the said entity is fully owned by the government. Therefore, the Petitioner has failed to satisfy Court the requirement of the 12 year active service, in a fully owned government entity and accordingly, the Petitioner is not eligible to obtain a permit under circular marked P3.

The Respondents have also made reference to the Management Service Circular No. 30 dated 22/09/2006, marked R1, and states that, the 6th Respondent did not re-structure the salaries of its employees under the said management circular, “in order to make the grades of its employees parallel to the grades of the

other public corporations, statutory bodies and fully owned government companies”. Therefore as set out in the said circular, the level of seniority that was taken into consideration was “Middle Level Management” in consideration of the required qualifications of the officers falling under the relevant grades as stipulated in the said Management Circular No.30. The Petitioners application has been refused since he had failed to qualify in the said category based on the post held at the time the application was made for the concessionary permit.

In response, the Petitioner in his counter affidavit at paragraph 06, states that, the 6th Respondent has taken necessary steps to re-group its employees under the management circular No 30. However, the Petitioner has failed to satisfy Court that the said re-grouping has in fact taken place and the grade held by the Petitioner at the time of making the application conformed to the criteria stipulated by the said Management Circular. The Petitioner has also failed to show any illegality in the decision that the Officers Holding Senior Level Executive post could be considered as being parallel or equivalent to middle level management in terms of the eligibility criteria as stipulated in the said Management Circular. Therefore, it is clear in the given circumstances that, the Petitioner has not satisfied the required criteria as envisaged in circular marked P3, to be eligible for a concessionary permit.

The Petitioner has also prayed for a writ of Mandamus to compel the Respondents to issue a permit to the Petitioner for the importation of a motor

vehicle on concessionary terms. It is noted that in the instant case the authority having the power to decide in granting a concessionary permit to import a motor vehicle has validly exercised its power not to grant the Petitioner a permit.

It is trite law that, a mandate in the nature of Mandamus cannot be issued if the Petitioner fails to establish a legal right and a corresponding legal duty on the statutory functionary.

In the case of *Perera Vs. National Housing Development Authority 2001* (3) *SLR 50 at page 53* the court held, that;

"on the question of legal right, it is to be noted that the foundation of mandamus is the existence of a legal right. Mandamus is not intended to create a right but to restore a party who has been denied his right to the enjoyment of such right"

In the circumstances the Petition is dismissed without costs.

Parties in C.A. (Writ) 406/2013, C.A. (Writ) 407/2013, C.A. (Writ) 408/2013, C.A. (Writ) 409/2013, C.A. (Writ) 410/2013, C.A. (Writ) 411/2013, C.A. (Writ) 412/2013, C.A. (Writ) 418/2013, C.A. (Writ) 419/2013, C.A. (Writ) 420/2013, C.A. (Writ) 424/2013 have agreed to abide by the Judgment delivered in this case.

JUDGE OF THE COURT OF APPEAL