

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

E.J.K. P. Piyadasa,  
No. 212, Thanayamwatta,  
Bulathgama,  
Balangoda.

**Case No. C.A. (PHC) 176/2006**

**Petitioner-Appellant**

**H.C. Ratnapura Case No. HCR/RA/109/99 Vs.**

1. Urban Council of Balangoda,  
Balangoda.
2. W.N.G. Weerasinghe,  
The Chairman,  
Urban Council,  
Balangoda. (ceased to hold office)
- 2A. M.H. Seelawathie,  
  
Secretary and Special Commissioner,  
  
Urban Council of Balangoda,  
  
Balangoda. (ceased to hold office)
- 2B. S.H.A. Karunaratne,  
  
Secretary and Special Commissioner,  
  
Urban Council of Balangoda,  
  
Balangoda.

3. A.W. Rathnasiri Wimalaweera,  
The Secretary,  
Urban Council,  
Balangoda. (ceased to hold office)
- 3A. M.H. Seelawathie,  
  
Secretary and Special Commissioner,  
Urban Council of Balangoda,  
Balangoda. (ceased to hold office)
- 3B. S.H.A. Karunaratne,  
  
Secretary and Special Commissioner,  
Urban Council of Balangoda,  
  
Balangoda.
4. The Commissioner of Local Government of the  
Sabaragamuwa Province,  
Provincial Council of Sabaragamuwa,,  
Rathnapura.
5. The Minister of Local Government,  
Provincial Council of Sabaragamuwa,,  
Rathnapura.
6. D.V. Charith Suranga,  
No. 60, Main Street,  
Balangoda.
7. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondents-Respondents**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

A. Dharmaratne for Petitioner-Appellant

W. Dayaratne P.C. with Shiroma Peiris for 1<sup>st</sup> to 3<sup>rd</sup> Respondents-Respondents

Manohara Jayasinghe State Counsel for 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents-Respondents

**Written Submissions tendered on:**

Petitioner-Appellant on 19<sup>th</sup> March 2018

1<sup>st</sup> to 3<sup>rd</sup> Respondents-Respondents on 25<sup>th</sup> April 2018

4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents-Respondents on 20<sup>th</sup> March 2018

**Argued on:** 14<sup>th</sup> February 2018

**Decided on:** 30<sup>th</sup> May 2018

**Janak De Silva J.**

This is an appeal against the judgement of the High Court of the Sabaragamuwa Province holden in Rathnapura dated 8<sup>th</sup> June 2006.

The Petitioner-Appellant (Appellant) is a vendor engaged in the retail sale of fish at stall nos. 9 and 10 at the Balangoda public market. He was earlier occupying stall nos. 3 and 4 at the said public market from 1971 and 1969 respectively on lease agreements and in 1979 consequent to improvements made to the said public market he occupied stall nos. 9 and 10. The Appellant claimed that there was animosity between the 2<sup>nd</sup> Respondent-Respondent (2<sup>nd</sup> Respondent) and the Appellant due to a complaint he lodged against the 2<sup>nd</sup> Respondent over an attempt to charge for the water supplied to fish stalls at the said public market when other stalls like vegetable stalls were not to be charged. The Appellant claimed that the decision not to charge for the water supplied to other stalls like vegetable stalls was due to the father of the 2<sup>nd</sup> Respondent himself

been a vegetable seller at the said market. Ultimately no charge was imposed on the water used by the meat and fish stalls.

The Appellant submitted that due to this animosity the 2<sup>nd</sup> Respondent initiated a process whereby tenders were called for several stalls at the Balangoda public market including the fish stalls he was occupying except the vegetable stalls. The Appellant states that he submitted a tender for the fish stalls he was occupying (although at times he claims that his two sons submitted a tender) but the tender was awarded to the 6<sup>th</sup> Respondent-Respondent (6<sup>th</sup> Respondent).

The Appellant thereafter filed an application in the High Court of the Sabaragamuwa Province holden in Rathnapura and sought, inter alia, the following relief:

- (a) Issue a mandate in the nature of a writ of certiorari quashing the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and Respondents to call for tenders in respect of stall nos. 9 and 10 at the Balangoda public market and the notice of the 1<sup>st</sup> Respondent calling for tenders in respect of the said stalls (P9).
- (b) Issue a mandate in the nature of a writ of certiorari quashing the decision of the 5<sup>th</sup> Respondent to call tenders in respect of stall nos. 9 and 10 at the Balangoda public market as contained in letters P10 and P14;
- (c) Make order quashing the decision of the 1<sup>st</sup> and or the second respondent to award the tender in respect of the stall nos. 9 and 10 at the Balangoda public market to the 6<sup>th</sup> Respondent for the year 2000;
- (d) Issue a mandate in the nature of a writ of mandamus compelling the respondents to extend the validity of the lease granted to the Appellant to engage in the sale of fish at stall nos. 9 and 10 at the Balangoda public market upon payment of the annual lease rental.

The main ground urged on behalf of the Appellant to impugn the decision to call for tenders is that in terms of Local Government Circular No. 1980/46 dated 31.12.1980 (P11) tenders could have been called in respect of stalls being currently operated only when the stall becomes vacant which was not the case in the instant case. The Appellant submitted that he was operating his fish stalls and as such no tenders could have been called for those stalls.

The position of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents-Respondents (1<sup>st</sup> to 3<sup>rd</sup> Respondents) is that the Local Government Circular No. 1980/46 dated 31.12.1980 (P11) is prior to the 13<sup>th</sup> Amendment to the Constitution and that the subject of Local Government is included in the 9<sup>th</sup> Schedule and therefore the 5<sup>th</sup> Respondent-Respondent has the power to exercise his rights with regard to any decision concerning Local Government according to law. It was submitted that approval from the 5<sup>th</sup> Respondent-Respondent was granted by P14 to call for tenders for the fish stalls.

The learned High Court judge held that the Appellant had acted in bad faith in challenging the decision to call for tenders after he himself took part in the impugned tender proceedings and failed to secure the tender.

The learned Presidents Counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents-Respondents (“1<sup>st</sup> to 3<sup>rd</sup> Respondents”) submitted that the relationship between the Appellant and the 1<sup>st</sup> Respondent-Respondent the Balangoda Urban Council was contractual in nature and that the Appellant was not entitled to the remedies sought by way of writs of certiorari. He relied on the decision *in Podi Nona v. Urban Council, Horana*<sup>1</sup> where the petitioner sought a writ of certiorari to quash a decision of the local authority cancelling a lease in her favour of a stall at the public market, Horana. This court held that the petitioner was not entitled to the remedy by way of certiorari as the relationship between the parties were contractual and that there was another remedy for the petitioner.

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<sup>1</sup> (1981) 2 Sri.L.R. 141

However, in the instant case, the Appellant is not challenging any decision to cancel the lease between him and the 1<sup>st</sup> Respondent. He concedes that it had ended and hence the prayer for a writ of mandamus compelling the Respondents to extend the validity of the leases granted to the Appellant. He is impugning the decision to call for tenders. There is no contractual relationship between the parties on that issue and I am of the view that the decision in *Podi Nona v. Urban Council, Horana* is irrelevant to the availability of a writ of certiorari.

The Appellant is not impugning the validity of circular marked P11. His contention is that the procedure specified therein was not followed in the instant case. It is not in dispute that the Appellant did, either by himself or through his sons, submit a tender when tenders were called. It is only when he was unsuccessful did he seek to impugn the tender process.

In *Jayaweera vs. Asst. Commissioner of Agrarian Services, Ratnapura and another*<sup>2</sup> Jayasuriya J. stated as follows:

"A petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief."

An individual who has acquiesced in a decision may not be granted a remedy if he subsequently seeks to challenge it.<sup>3</sup> However, acquiescence is relevant only where there is a latent lack of jurisdiction. No amount of waiver or acquiescence can validate a decision where there is a patent lack of jurisdiction. In *Beatrice Perera v. The Commissioner of National Housing*<sup>4</sup> Tennakoon C.J. explained the difference in the following terms:

"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of

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<sup>2</sup> (1996) 2 Sri.L.R. 70

<sup>3</sup> Lewis, *Judicial Remedies in Public Law*, 5<sup>th</sup> ed., 415

<sup>4</sup> 77 N.L.R. 361

power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a *defectus jurisdictionis* and the second a 'latent' or 'contingent' want of jurisdiction or a *defectus triationis*. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are *non coram iudice* and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction.<sup>5</sup>

I am of the view that the matters urged on behalf of the Appellant do not raise a patent lack of jurisdiction. The main ground urged on behalf of the Appellant is that tenders could not have been called as the Appellant was in occupation of the relevant stalls and that they were not vacant as required by the relevant circular. This is an issue that goes to latent lack of jurisdiction and can be cured by waiver or acquiescence as was done when the Appellant, either directly or through his sons, tendered for the tender process.

In *Pradeshiya Sabhawa, Hingurakgoda and Others v. Karunaratne and others*<sup>6</sup> The 1<sup>st</sup> and 2<sup>nd</sup> petitioners - respondents filed an application for writs of Certiorari and Mandamus in the High Court pleading that the Hingurakgoda Pradeshiya Sabha acted contrary to law in selecting lessees for the shops at Hingurakgoda. The High Court issued a writ quashing the selections and issued Writ of Mandamus compelling the Pradeshiya Saba to make the selections according to the

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<sup>5</sup> *ibid.* page 366

<sup>6</sup> (2006) 2 Sri.L.R. 410

tender procedure. In appeal, the Court of Appeal held that as the petitioner - respondents admit that they made an application and participated at the interview but were not selected, the petitioner- respondents having accepted the selection criteria are not entitled to claim that the method of selection is invalid. It was further held that they cannot challenge the method of selection by way of writ of mandamus directing a new method of selection.

The question of granting a writ of mandamus as prayed for by the Appellant does not arise since, for the reasons set out above, he is not entitled to a writ of certiorari quashing the decision of the 1<sup>st</sup> and or the second respondent to award the tender in respect of the stall nos. 9 and 10 at the Balangoda public market to the 6<sup>th</sup> Respondent for the year 2000.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned High Court Judge of the High Court of the Sabaragamuwa Province holden in Rathnapura dated 8<sup>th</sup> June 2006.

Accordingly, I dismiss this appeal with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal