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**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 under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wickramaarachchi Appuhamilage Sanath
Wickramaarchchi.
No. 387/23,
Pokuna Junction,
Kadawatha Road,
Ganemulla.

PETITIONER.

Case No. CA/WRIT/105/2013

Vs.

1. State Pharmaceuticals Corporation of Sri Lanka
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.
2. Hon. Rajitha Senarathne
Minister of Health an Indigenous Medicine,
Ministry of Health and Indigenous Medicine,
No.385,
Rev. Baddhegama Wimalawansa Mawatha,
Colombo 10.
3. Sarath Liyanage,
Chairman,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo. 01.

4. Dr.M. Hashim Mohamed Rumie,
Managing Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Baron Jayathilake Mawatha,
Colombo 01.

5. Dr. P.G. Maheepala,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathiaka Mawatha,
Colombo 01.

- 5A. Mukthar Marikkar,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathiaka Mawatha,
Colombo 01.

6. Mrs. Dmitha Rathnayake,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.

7. Dr. Ranjanee Gamage,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.

- 7A. P.P.K.D. De Zoysa,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,

Colombo 01.

8. Dr. R.R.M.L.R. Siyabalagoda,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.

9. Dr.B.G.N. Rathnasena,
Director,
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.

10. Dr. D.M.R.D. Disanayake,
Secretary,
Ministry of Health & Nutrition,
No. 385,
Rev. Baddhegama Wimalawansa Thero
Mawatha.
Colombo 10.

10A Dr. T.R.C. Ruberu,
E.N.T. Surgeon,
No.3,
Durdanes Hospital,
Colombo 03.

11. M.M.C. Ferdinrando,
Secretary,
Ministry of Power & Energy,
72, Ananda Coomaraswamy Mawatha,
Colombo 07.

12. Kanthi Wijetunga,
Secretary,
Ministry of National Heritage,
8th Floor, Sethsiripaya,
Battaramulla.
13. Dr. Kanishka Karunaratne,
Director,
National Cancer Institute of Sri Lanka.
Maharagama.
14. K.M. Jayathilake,
Additional Director General,
Department of Management Audit,
General Treasury,
The Secretariat,
Colombo 1.
15. Dr. Kamal Jayasinghe,
Director,
Medical Supplies Division,
357, Baddegama Wimalawansa Mawatha,
Colombo 10.
16. Dr. N. Rathnasena,
Consultant Surgeon,
National Hospital,
Colombo 10.
17. Dr. M.B.A.P. de Silva,
Consultant Surgeon,
Colombo North Teaching Hospital,
Ragama.

18. A.M.P.M.B. Atapattu,
Deputy Director,
Department of Development Finance,
National Treasury,
The Secretariat,
Colombo 01.
19. Suranganie Perera,
Deputy General Manager (Technical &
Laboratory)
State Pharmaceuticals Corporation of Sri Lanka,
No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.
20. Dharma Hewa Maduma
Inquiring Officer,
231/14, First Lane,
Kalapaluwawa Road, Rajagiriya.

RESPONDENTS

Case No. C.A. (Writ) /105/2013

Before : E.A.G.R. Amarasekara, J.

Counsel : Nihal Jayawardane P.C. for the Petitioner.

Arjuna Obesekera D.S.G. for the Respondents.

Decided On: 20/07.2018

E.A.G.R Amarasekara, J

Consequent to a Preliminary investigation conducted by the Ministry of Health over an allegation that the Petitioner had violated the Government Procurement Guide Lines and Tender Procedure and the consequential inquiry conducted that found the Petitioner guilty of 4 of the 5 charges leveled against him, the Petitioner was demoted to the post of Manager, Research and New Projects from the post he held as Deputy General Manager (Commercial) - (vide P26). Being dissatisfied with the said decision the Petitioner has filed this application, seeking inter alia the following relief.

- a) A writ of certiorari quashing the determination of the 20th Respondent inquiry officer,
- b) A writ of certiorari quashing the demotion of the Petitioner, as conveyed by letter marked as P26,
- c) A writ of Mandamus directing the 20th Respondent to make an appropriate determination on the basis of the available evidence,
- d) A writ of Mandamus directing the 1st – 9th Respondents to restore the Petitioner to the post of Deputy General Manager.

In reply, the Respondents have filed the following;

- a) The statement of objections of the 1st, 3rd to 9th and 19th Respondents together with documents marked as R1-R7 and the inquiry officer's report R8 too has been filed on behalf of the same set of Respondents by a motion dated 29.01.2018.
- b) The statement objections dated 23.01.2014 of the 2nd, 10th, 11th and 15th Respondents together with documents marked as R1-R10.

This matter was taken up for argument on 16.02.2018 and the counsel for the Petitioner and the counsel for 1st, 3rd to 9th Respondents made their oral

submissions. They too have filed their written submissions as directed by this Court.

Factual Matrix with regard to the Tender

1. The 15th Respondent, Director of the Medical Supplies Division has issued an order list dated 15.03.2010 marked P12, for the supply of cellulose wadding worth Rs.87, 010,500.00 – (vide P12).
2. A further order list was placed on the same day for the supply of 180,000 rolls of cellulose wadding – (vide R1).
3. Based on the aforesaid order lists, tender specifications and the tender documents for the supply of aforesaid rolls of cellulose wadding were prepared and the Technical Evaluation Committee (TEC) comprising 5th Respondent as the chairman and 16th – 19th Respondents as members (vide P14) approved the specifications - (vide P15).
4. As per the document marked R2, the Standing Cabinet Appointed Procurement Committee (SCAPC) has approved the tender documents to invite worldwide tenders- (vide R2).
5. The Technical Evaluation Committee in its report marked as P15A recommended the awarding of the tender to the M/S Sisili Projects Consortium (Pvt) Limited – (vide P15A).
6. At a meeting held on 22.02.2011 where the Petitioner too was present, the Standing Cabinet Appointed Procurement Committee (SCAPC) of the ministry of Health decided to award the tender for the supply of 202,500 rolls of Cellulose Wadding BP to M/S Sisili Projects Consortium (Pvt) Limited. – (vide P17).

The learned Counsel for the 1st – 10th, 10A, 11th, 15th and 19th brought to the attention of this court that certain procedures as laid down in the Government Procurement Guidelines marked as WS1 in its paragraph 8.1.1, 8.2.1, 8.3.1 (a), 8.3.1 (b), 8.4.1 (b), 8.6. (a), 8.6 (b), and 8.7 should have been followed after the decision of the Standing Cabinet Appointed Procurement Committee (SCAPC) marked as P17. It is clear that before awarding the contract, from the date of the decision of SCAPC (P17), two weeks should have been allowed to unsuccessful bidders for appeals, and furthermore the decision of SCAPC should have been approved by the Cabinet of Ministers. Without waiting for the appealable period to expire and the cabinet approval, in breach of the Procurement Guidelines and the accepted procedure, the Petitioner has written to the M/S Sisili Projects Consortium (Pvt) Limited by a letter dated 01.03.2011 marked as P18, informing that SCAPC had decided to award the tender to the said company. This court observes that P17 cannot be treated as a final decision with regard to the tender in question according to the Procurement Guide Lines. By P18 dated 01.03.2011 the Petitioner has informed the M/S Sisili Projects consortium (Pvt) Limited that SCAPC had decided to award the tender to it but has not mentioned that there is an appealable period and the need for the Cabinet Approval. Furthermore, the petitioner has requested the said company to submit a performance bond within 14 days. By the document marked R6 the said company has accepted the order placed by the Petitioner through the aforesaid letter marked P18. The document marked P26 shows that there had been an appeal which was rejected by the Procurement Appeal Board on 31.03.2011. This shows that the aforesaid communication marked P18 was sent to the said company before the decision of the appeal made by an unsuccessful bidder against the decision marked P17.

As per the documents marked R9 and R10 the Cabinet has cancelled the award and the tender and decided to call for fresh tenders. Furthermore, it has decided to take appropriate disciplinary measures against the Petitioner.

In the above circumstances, the 1st Responded had issued the letter dated 26.08.2011, marked as P23, interdicting the Petitioner. P23 indicates that there had been an investigation by the Ministry Investigating unit prior to the interdiction.

The charge sheet dated 01.09.2011 marked as P22 was issued and in response to the said charge sheet the petitioner has written the letter dated 12.09.2011, marked as P24. Even though the Petitioner has taken up the position that he wrote P18 to avoid delay in procuring cellulose wadding BP, this court observes that in P24 he has not stated that he bypassed the tender procedure to avoid delay. This indicates that his defence that he acted to avoid delay is an afterthought.

Later on, an inquiry was conducted by the 20th Respondent and at the conclusion of the inquiry, the Petitioner was found guilty of the charges No. 1,3,4 and 5 and he was exonerated from the 2nd charge on the basis that it was a repetition of the 1st charge. On the findings of the inquiry held, the Petitioner was demoted to Manager, Research and New Projects by letter dated 28. 11.2012 marked as P26.

In such a backdrop the Petitioner prayed for the reliefs mentioned before in this order. However, this court is mindful of the fact that this is not an appeal but an application to invoke the writ jurisdiction of this court.

When this court exercises its writ jurisdiction conferred on it by Article 140 of the constitution, this court has to review the matter based on the following three grounds;

1. Illegality,
2. Procedural Impropriety,
3. Irrationality.

The Petitioner does not place sufficient material before this court to show that there was an illegality in the manner the disciplinary inquiry was conducted. He does not complain that the disciplinary inquiry was conducted by someone without authority. Furthermore, he does not complain that there has been procedural impropriety. A charge sheet was served on the Petitioner and he was given an opportunity to show cause. Furthermore, during the inquiry he was able to cross examine the witnesses against him and had the opportunity to place evidence to support his case. Therefore, the only ground this court should consider is whether the decision of the inquiry officer is irrational. Counsel for the Petitioner in his

written submissions at paragraph 3.12, while referring to the document marked as 10B, argues that as per the list of duties the Petitioner holds a responsibility to send faxes to suppliers once the files are returned from the Ministry. The document marked as 10B seems to be an evaluation form to be filled by a supervising officer. Item 11 of that form indicates that there is a responsibility cast on the relevant officer to inform the award of tenders to the relevant suppliers no sooner he receives the files from MPC/SCAPC but item 3 of the said form cast a responsibility on the Petitioner to follow the tender procedure. Being a senior responsible officer who participated in SCAPC meetings he should have known that there is an appealable period against the decision of SCAPC and furthermore, the decision of SCAPC has to be approved by the Cabinet of Ministers. Therefore, I cannot come to the conclusion that the decision in P26 dated 28.11.2012 is irrational. On the other hand, P26 is based on the findings of the disciplinary inquiry held with regard to the charges leveled against the petitioner. Though certain proceedings of the inquiry are marked as P28, the Petitioner who alleged irrationality of the decision taken by the 1st Respondent has not taken steps to tender a copy of the determination made after the inquiry. He who alleges irrationality must place the materials to establish such irrationality. However, a copy of the determination has been tendered with one set of the objections. Therefore, the Petitioner fails in establishing that P26 is based on irrational findings.

The counsel for the Respondents in his written submissions, while referring to the decisions in **Perera V National Housing Development Authority (2001) Sri L.R 50 at 53** and **Ratnayake and others V C. D Perera and others (1982) 2 Sri L.R 451 at 456**, has demonstrated that one who seeks a Writ of Mandamus must establish that he is denied a legal right which is co-related to a public legal duty of a public authority. Thus, a mandamus is granted to compel the performance of the duties of a public nature and not merely of a private character. Hence, a writ of mandamus will not be available for the enforcement of a private right stemming from a contract of the parties.

To establish that a Writ of Mandamus does not lie with regard to the rights and duties emanating from contractual relationships, including a contract of employment, the learned Counsel for the Respondents has cited the decisions in **K.**

S. de Silva Vs National Water Supply and Drainage Board (1989) 2 SLR 01 and Mendis Vs Seema Sahitha Panadura Janatha Santhaka Pravahana Sewaya and others (1995) 2 SLR 284.

The Learned DSG for the Respondents further argues that even a Writ of Certiorari being a Public Law remedy would not apply to disputes arising from a contractual arrangement.

“Contractual and commercial obligations are enforceable by ordinary action and not by judicial review. An employee of the BBC failed in her application for a quashing order to quash her dismissal by the corporation since the ordinary contractual obligations of master and servant had never been within the prerogative remedies, which had not been extended by order 53 and Senior Courts Act 1981. A civil servant also failed in attempting to have a disciplinary penalty quashed, since his proper course was to sue for breach of contract. The court of appeal similarly rejected an application for a quashing order to quash the dismissal of a male nurse by the health authority. Lord Donaldson MR said that ‘[e]mployment by a public authority does not per se inject any element of public Law. It could be different if there were statutory “underpinning” of the employment such as statutory restrictions on dismissal, which would support a claim of ultra vires, or a statutory duty to incorporate certain conditions in the terms of employment, which could be enforced by a mandatory order.” (vide Administrative Law- eleventh edition – H.W.R. WADE & C.F. FORSYTH at pages 574 and 575)

In the matter before this court it is common ground that the Petitioner had a contract of employment with the 1st Respondent and the 1st Respondent has the disciplinary authority over the Petitioner. On the face of it the dispute has arisen out of the said contract of employment. The Petitioner has not shown that his employment has any ‘statutory underpinning’. No statutory restriction on dismissal or statutory duty incorporated in the contract of employment was established by the Petitioner.

In that backdrop, it is my considered view that the Petitioner's application has to be dismissed.

Hence the application is dismissed.

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E.A.G.R. Amarasekara.

Judge of the Court of appeal.