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

In the matter of an appeal under Article 154 (P)(6) of the Constitution read with the provisions of High Court of the Provinces (Special Provinces) Act No. 19 of 1990.

Southern Provincial Co-Operative Employee's Service Commission,

Planning Secretarial Complex,

S.H.Dahanayake Mawatha,

Galle.

1st Respondent-Appellant

Case No. CA(PHC) 71/2013

H.C. Galle Case No. Writ 04/2012

Vs.

01. Bentota Multi Purpose

Co-operative Society Ltd.

Elpitiya Road,

Bentota.

Petitioner-Respondent

02. Sirisoma Rubasinghe

"Sigiri",Devuru Kanda,

Kitulpitiya,Uluvike.

2nd Respondent-Respondent

03. P.L.Jagath Chandra Kumara

"Isuru Nivasa"

Guruhengoda,

Rantotavilla.

3rd Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Nayomi Kahawita State Counsel for the 1st Respondent-Appellant

Upul Kumarapperuma with Bhagya Pieris for the Petitioner-Respondent

W. Dayaratne P.C. with Nadeeshan Kekulawala for the 2nd Respondent-Respondent

Written Submissions tendered on:

1st Respondent-Appellant on 10.07.2018

Petitioner-Respondent on 06.07.2018

2nd Respondent-Respondent on 06.07.2018

Argued on: 16.05.2018

Decided on: 09.08.2018

Janak De Silva J.

This is an appeal against the judgement of the learned High Court Judge of the Southern Province holden in Galle dated 4th April 2013.

The 3rd Respondent-Respondent (3rd Respondent) was employed as a driver by the Petitioner-Respondent (Respondent). He was served with a charge sheet containing three charges of misconduct and was found guilty of two charges at a disciplinary inquiry. The Respondent terminated his services.

The 3rd Respondent appealed to the 1st Respondent-Appellant (Appellant). The Appellant made order dated 03.12.2011 under section 11(1)(1) of the Southern Provincial Co-operative Employees Service Commission Statute No. 1 of 1998 (Statute) directing the Respondent to reinstate the 3rd Respondent. The Respondent failed to comply with the said order. As such the Appellant made order dated 10.01.2012 directing the Respondent to give effect to the said order.

The Appellant filed the above writ application in the High Court of the Southern Province holden in Galle and sought the following relief:

(a) Writ of certiorari quashing the decision by the Appellant dated 03.12.2011;
(b) Writ of certiorari quashing order dated 10.01.2012;
(c) Writ of mandamus directing the Appellant to order the 1st Respondent to give effect to the decision arrived at the disciplinary inquiry.

When the argument was taken up, the Respondent raised a preliminary objection namely that the Appellant was not duly established since the Statute has not been published in the Gazette in accordance with section 1 of the Statute.

There is an inconsistency between the Sinhala and English text of the Statute. However, the Sinhala text of the Statute, which is the authoritative text, reads:

"මෙම ප්‍රඥප්තිය ශ්‍රීලංකාවේ දකණු පළාත් සභාවේ 1998 වර්ෂයේ අංක 01 දරන සමුපකාර සේවක කොමිෂන් සභා ප්‍රඥප්තිය යනුවෙන්හැඳින්විය හැකි අතර දකණු පළාත් සභාවේ අනුමැතිය ලැබීමෙන් පසු අමාතවරයා විසින් ගැසට් පත්‍රයේ පළ කරනු ලැබීමෙන් පසු එදින සිට වලංගු වේ. "මින් පසු පත් කරනු ලැබූ දිනය යනුවෙන් මෙය හැඳින්වේ"

There is no dispute between the parties that the Statute was approved by the Southern Provincial Council on. 14.10.1998. The dispute is on whether it was duly published in the Gazette by the Minister.

The Respondent at the hearing before the High Court produced a copy of Gazette No. 1,066 dated 05.02.1999 (Appeal Brief page 425) which contains, at page 253, the Statute. It begins with "Provincial Council Notifications" and is under the hand of the Council Secretary of the Southern Provincial Council.

The Respondent submitted that this does not comply with section 1 of the Statute as it requires the publication of the Statute in the Gazette by the Minister whereas in this case it was published under the hand of the Council Secretary of the Southern Provincial Council.

The learned High Court Judge agreed with this submission. Therefore, he concluded that the orders dated 03.12.2011 and 10.01.2012 were made by an institution without legal authority and issued the writs prayed for in the petition. Hence this appeal.

Article 154H of the Constitution states that every statute made by a Provincial Council shall come into force upon such statute receiving the assent of the Governor. Therefore, the Statute came **into force** on 17.12.1998 when the Governor gave his assent to it.

Section 1 of the Statute states that it **becomes valid** from the date it is published in the Gazette by the Minister.

The first question that arises for determination is whether there is in fact a conflict between these two provisions and if so, which provision prevails. In my view, this Court need not make a finding on this perceived conflict as it does not make a difference to the final analysis.

If there is indeed a conflict, clearly the constitutional provision prevails as the Grundnorm in the sense propounded by Kelson and the Statute must be held to have come into force from 17.12.1998 independent of its publication in the Gazette as required by section 1 of the Statute. In this situation, the Appellant obtains a duly constituted legal status and the conclusions of the learned High Court Judge must be held to be erroneous.

On the other hand, it may be argued that there is in fact no conflict between section 1 of the Statute and Article 154H of the Constitution. In this situation, the constitutional provision gives the Statute the force of law while the requirement of publishing the Statute in the Gazette becomes an administrative act to make the Statute operational.

Where a Minister is assigned certain **administrative functions**, it is not a requirement that the Minister must personally give his mind to it. A responsible officer can exercise it under the authority of the Minister.

Lord Greene MR. in *Carltona Ltd. v. Commissioner of Works* [(1943) 2 All.E.R. 560 at 563] held:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the minister by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such officials is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for any important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers being responsible to Parliament will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them. "

The principle enunciated in this case, which is sometimes referred to as the *Carltona* principle, has been adopted and applied by the superior courts in *M.S. Perera v. Forest Department and another* [(1982) 1 Sri.L.R. 187] and *Kuruppu v. Keerthi Rajapakse, Conservator of Forests* [(1982) 1 Sri.L.R. 163].

In *M.S. Perera v. Forest Department and another* (supra) Sharvananda J. (as he was then) held (at page 192):

> "Constitutionally there is no delegation by the Minister to his officials. When an officer exercises a power or discretion entrusted to him, constitutionally and legally that exercise is the act of the Minister. If a decision is made on the Minister's behalf by one of his officials, then that constitutionally is the Minister's decision. It is not strictly a matter of delegation. It is that the official acts as the Minister himself and the official's decision is the Minister's decision. **When a Minister is entrusted with administrative as distinct from legislative functions, he is entitled to act by any authorised officer of his department.**" (emphasis added)

For the foregoing reasons, I hold that the publishing of the Statute in the Gazette under the hand of the Council Secretary of the Southern Provincial Council complies with the requirement in section 1 of the Statute.

Thus, in either of the two situations discussed above, the Statute is in force and therefore the conclusion of the learned High Court Judge that the Appellant is an institution without legal authority is erroneous.

If there was a need to make a definite finding on the first question identified above, I would have held that the constitutional provision gives the Statute the force of law while the requirement of publishing the Statute in the Gazette becomes an administrative act to make the Statute operational.

There is a second question that arises independent of the first question. That is whether the relief claimed by the Respondent should be granted even if the learned High Court Judge was correct in concluding that the Appellant is an institution without legal authority.

Prerogative writs are not issued as a matter of course. It is a discretionary remedy. There are several grounds on which relief is withheld even where the party seeking relief makes out a case for its issue. One such ground is the probable consequences of its issue.

In *P.S. Bus Co. Ltd. v. Members and Secretary of Ceylon Transport Board* (61 N.L.R. 491) Sinnatamby J. held:

> "The Court will also consider the probable consequences of granting the writ-vide 9 Halsbury P 81 (Hailsham ed.) and the cases referred to therein. In the present case the consequences of granting the writ can only be described as disastrous. It would result in all the legislation passed by Parliament since it came into existence and all its actions liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it would disturb the peace and quiet of the country and, above all, it will bring the government of the country to a stand- still. I take the view that in these circumstances even if the grounds on which the application is made are valid no Court would exercise its discretion in favour of the petitioner. I accordingly refuse the, application."

Although in the instant case, the above concerns are not present in the same magnitude, if the Court was to issue the writs prayed for by the Respondent on the basis that the Appellant is an institution without legal authority, it certainly will have drastic consequences. The Statute has been acted upon as valid for nearly 19 years and the validity of the acts of the Appellant will be under serious threat if the writs of certiorari are issued on the basis that the Appellant is an institution without legal authority.

The status of all the present and past employees of the Appellant will be under question. It is the same for the several decisions, directives, by laws and rules made by the Appellant in relation to third party rights. *Decisions of public bodies may affect not only the claimant, but third parties who may have acted in the belief that the decision was valid. The court may have regard to the interests of such third parties, whether or not they are before the court, in deciding whether to*

exercise remedial discretion to refuse relief. [*Judicial Remedies in Public Law*; Clive Lewis, page 426, 5th Ed.]

In these circumstances, I hold that the relief prayed for by the Respondent should not have been granted on the alleged ground that the Appellant is an institution without legal authority.

For the foregoing reasons, I set aside the judgement of the learned High Court Judge of the Southern Province holden in Galle dated 4th April 2013.

The learned High Court Judge granted the relief claimed for by the Respondent on the basis of the preliminary objection raised by the Respondent. The merits of the case were not considered by the learned High Court Judge.

In these circumstances, I am of the view that this Court will be usurping the jurisdiction of the High Court if we go on and consider the merits and decide. Furthermore, the Court will be depriving a party the right of appeal he has from a judgement of the High Court after considering the merits.

Therefore, we direct the learned High Court Judge of the Southern Province holden in Galle to expeditiously hear and determine this matter.

Appeal is partly allowed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal