

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

Ven. Prof. Muwaetagama
Gnanananda Thero,
Sirivijitha Maha Viharaya,
New Elpitiya South,
Gelioya,
Kandy.
Petitioner

CASE NO: CA/WRIT/376/2015

Vs.

Bhikku University of Sri Lanka,
Puttalam Road,
Anuradhapura.
and 31 Others.
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: S.C.B. Walgampaya, P.C., with Upendra
Walgampaya for the Petitioner.
Susantha Balapatabendi, Senior D.S.G., for the 1st-
32nd Respondents.
Manohara de Silva, P.C., with Harsha Munasinghe
for the 32nd Respondent.

Decided on: 16.01.2019

Samayawardhena, J.

Applications have been called for the post of *Mahopadyaya* (Vice Chancellor) of the 1st respondent Bhikku University from Bhikku applicants.

There is a procedure laid down in the Buddhasravaka Bikku University Act, No. 26 of 1996, as amended by Act No. 15 of 2012, in that process. The parts of the Act relevant for the present purposes read as follows:

7(1)(b) The Mahopadayaya of the university shall be a disciplined Upasampada Bhikku who has completed twenty years after Upasampada. He shall be a person holding a post-graduate degree in Buddhist Studies or in any other subject connected thereto from a recognized university on a research done within a period of not less than two years and having ten years' experience in the field of teaching. In addition he shall be required to possess a good knowledge of oriental languages.

7(2)(ii) The council shall select three names from among Bhikku applicants who possess the qualifications specified in subsection (1)(b) and submit those names to the Uththarithara Sabhawa constituted under section 12 of this Act.

7(2)(iii) The Uththarithara Sabhawa constituted under section 12 of this Act shall examine the educational and other qualifications of the Bhikku applicants and select and recommend the name of one Bhikku applicant to the

President through the Minister, within three months of the submission of the names.

7(2)(iv) The Bhikku recommended by the Uththarithara Sabhawa shall be appointed by the President as the Mahopadayaya of the university for a period of three years. No Bhikku shall be appointed as Mahopadayaya of the university for more than two consecutive terms.

Several Bhikkus including the petitioner (Ven. Prof. Muwaetagama Gnanananda Thero) and the 32nd respondent (Ven. Dr. Waradiwela Wijayasumana Thero) have applied for the post.

The Council of the 1st respondent university (consisting of the 6th-19th Respondents) has sent three names, which included the names of the petitioner and the 32nd respondent, to the *Uththarithara Sabhawa* to take the final decision.

The *Uththarithara Sabhawa* (consisting of the 5th, 20th-31st respondents including the incumbent Mahopadyaya of the University, Mahanayaka Theros of Malwatta, Asgiriya, Amarapura Chapters, Mahanayaka Thero of Ramanna Maha Nikaya, Chief Incumbent of Atamastanaya) has unanimously decided to select and recommend the 32nd respondent for the said post.

The petitioner has filed this writ application seeking to challenge the said decision of the *Uththarithara Sabhawa*.

The petitioner states that the said decision contains an error of law on the face of the record, and is illegal, null and void and of

no force or effect in law and therefore shall be quashed by way of certiorari.

On what basis does the petitioner state so? The petitioner says that:

In terms of section 7(1)(b) of the said Act one of the essential qualifications for selection and appointment as Mahopadyaya is that the candidate for appointment should hold a post-graduate degree in Buddhist Studies or in any other subject connected thereto from a recognized university on a research done within a period of not less than two years and having ten years' experience in the field of teaching. In addition he shall be required to possess a good knowledge of oriental studies.

While the petitioner possesses the above qualifications, the 32nd respondent does not possess the qualifications.

The petitioner says that the 32nd respondent does not possess required qualifications in two respects: the 32nd respondent does not have a post graduate degree in Buddhist Studies, and also he does not have a good knowledge of oriental languages.

On what material does the petitioner come to that conclusion? That is by looking at the *curriculum vitae* cum the mission statement of the 32nd respondent tendered to the University Council marked P5 as part of the selection process.

The petitioner states that according to P5, both the 32nd respondent's post graduate qualifications—M.Phil and Ph.D—are in the field of Education and Sociology and not in the field of

Buddhist Studies. This is disputed by the respondents—the University Council, the *Uththarithara Sabhawa* and the 32nd respondent in their objections.

The title of the thesis successfully submitted to the university in fulfilment of the requirements of the M.Phil degree of the 32nd respondent when translated into English is titled: “*The Educational Value of the Concept of Management as reflected in Buddhism*”. The 32nd respondent whilst tendering a copy of the thesis marked 32R1, in his statement of objections states:

This research is based on a deep and comprehensive research of “Sutta Pitakaya” and “Vinaya Pitakaya”. In this research Buddhist thoughts, values and concepts related to Management concepts were researched through a deep study of “Sutta Pitakaya” and “Vinaya Pitakaya”. I dealt with how the modern Management concepts could be shaped and developed utilizing the Buddhist thoughts reflected in “Sutta Pitakaya” and “Vinaya Pitakaya”.

The title of the thesis successfully submitted to the university in fulfilment of the requirements of the Ph.D degree of the 32nd respondent when translated into English is titled: “*The Concept of Socialization as depicted in Early Buddhism—An Analytical Study*”. Whilst tendering a copy of the thesis marked 32R6, the 32nd respondent in his statement of objections states in this regard as follows:

“Samajanuyojanaya” means the way of adopting new members of society in accordance with such society. In this research it was studied through the “Sutta Pitakaya” and

“Vinaya Pitakaya” how Buddhist thoughts and concepts and principles have addressed this “Samajanuyojanaya” concept. Therefore this research too is based on a deep and comprehensive research of “Sutta Pitakaya” and “Vinaya Pitakaya”. The analysis is made under the following chapters which are reproduced below for convenience of Court.

- (1) *Introduction*
- (2) *Buddhist Concept of Man*
- (3) *Buddhist Concept of Society*
- (4) *Buddhist Concept of “Socialization/ Samajanuyojanaya”*
- (5) *“Uttara” and “Ati Uttara Pawrusheeya Samajanuyojanaya”*: *In this chapter it was studied that how people are shaped and introduced to the society and the path which they ought to be followed to attain “Nibbana” after they enter the Buddhist order.*

Therefore the 32nd respondent states that *“My M.Phil and Ph.D are directly connected to Buddhist Studies and philosophy.”*

I must stress that this has not been denied by the respondent University Council and the *Uththarithara Sabhawa*.

It is significant to note that, according to section 7(1)(b), the applicant shall have *“a post-graduate degree in Buddhist Studies or in any other subject connected thereto”*. Therefore, even assuming not conceding that the postgraduate degrees of the 32nd respondent are not directly in Buddhist Studies, they are at

least connected to Buddhist Studies. Hence, the contention of the petitioner that the 32nd respondent does not have a postgraduate degree in Buddhist Studies and therefore he is disqualified to be selected as *Mahopadyaya* is misconceived both in law and fact.

The next point of the petitioner is that the 32nd respondent does not have a good knowledge of oriental languages as, according to the *curriculum vitae* marked P5, the 32nd respondent has only Grade B for Pali in G.C.E. (A/L) examination, and has obtained only the *Pracheena Praramba* qualifications at the G.C.E. (O/L) and (A/L) examinations for Sinhala, Pali and Sanskrit.

It is noteworthy that, according to section 7(1)(b), the applicant shall only possess “a good knowledge of oriental languages”. The applicant need not have paper qualifications for that purpose. Hence, the contention of the petitioner that the 32nd respondent does not have a good knowledge of oriental languages based on the *curriculum vitae* and therefore he is disqualified to be selected as *Mahopadyaya* is also misconceived both in law and fact.

It is relevant to note that in terms of section 7(2)(iii), the *Uththarithara Sabhawa* shall examine the educational and other qualifications of the Bhikku applicants and select and recommend the name of one Bhikku applicant to the President to be appointed as *Mahopadyaya*.

What are “*the other qualifications*” the 32nd respondent possess, which the petitioner in paragraph 15 of the counter affidavit says “*irrelevant*”.

The 32nd respondent has:

- (1) At that time completed 37 years after higher ordination (whereas according to section 7(1)(b) the applicant shall have only 20 years).
- (2) Joined the 1st respondent Bikku University as a Temporary Lecturer and rose to the post of Senior Lecturer Grade 1.
- (3) Served in the said university as the acting Vice Chancellor more than ten times.
- (4) Served as the Dean of the Faculty of Language and Cultural Studies for three years.
- (5) Served as the Head of the Department of Social Studies and Comparative Studies.
- (6) Served as a Member of both University Council and the Senate.
- (7) Served as a Student Counsel.
- (8) Served as a Member or Chairman in many Committees such as Finance Committee, Leave Committee, Accounting Committee, Mahapola Aramudala Committee, Examination Branch, External Exam Committee, Examination Fraud Investigating Committee, Examination Reforms Committee, Research and Publication Committee, Library Committee, Post Graduate Committee.

According to section 7(4) of the Act, *Mahopadyaya* shall be the Chief Executive Officer and the Chief Academic Officer of the

Bikku University, and that may be the reason why the Act provides that the *Uththarithara Sabhawa* shall examine not only the educational qualifications but also the other qualifications of the Bhikku applicants in selecting one for the said position.

In between the petitioner and the 32nd respondent, there is no dispute that the 32nd respondent is more senior and more experienced than the petitioner.

I see nothing wrong in the decision taken by the *Uththarithara Sabhawa* to select and recommend the 32nd respondent for the post of *Mahopadyaya* of the 1st respondent university. There is absolutely no error of law on the face of the record to quash that decision by way of writ of certiorari. There is no substantive or procedural *ultra vires* in that process.

This Court in the guise of exercising writ jurisdiction cannot usurp the powers vested by law in the *Uththarithara Sabhawa* and reassess the qualifications of the petitioner and the 32nd respondent and select the better one for the said post.

Is it reasonable for the petitioner to expect this Court to read the theses of the 32nd respondent and decide whether the latter's post-graduate degrees are in Buddhist Studies or in any other subject connected thereto? This Court without specialized knowledge and skills is ill equipped to decide them. On the other hand, what is the proof before this Court that the petitioner's post-graduate degrees are in Buddhist Studies or in any other subject connected thereto except his *ipse dixit* in paragraph 15(ii) of the petition and corresponding affidavit that

“While I possess the above qualifications, the 32nd respondent does not possess the qualifications”?

Under judicial review, this Court, unless there is an obvious error on the face of the record, will not overturn a decision on merits.¹ In any event, this is not possible when the facts are in dispute as in this case.

In *Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training*², the petitioners sought to quash the arbitral award by certiorari and prohibition. Dismissing that application, Jayasuriya J. *inter alia* stated:

There is no misdirection in point of fact or law which vitiates the award. There is no failure on the part of the arbitrator to take into consideration the effect of the totality of the oral and documentary evidence placed before him and there is no improper evaluation of the evidence placed before the arbitrator on a consideration of the award and the totality of the evidence placed before him in this matter. This court must keep prominently in forefront that it is exercising in this instance a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of certiorari in relation to an award made by an arbitrator will be forthcoming to quash such an award only if the arbitrator wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces

¹ Vide my Judgment in *Chithrasiri v. National Gem and Jewellery Authority*, CA/WRIT/38/2016 decided on 31.05.2018

² [1998] 1 Sri LR 235 at 248-249

an award which is eminently irrational or unreasonable or is guilty of an illegality. The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part, it had to be allowed to stand unreversed. It is pertinent to refer to the principles laid down by Prof. H. W. R. Wade on "Administrative Law" 12th edition at pages 34 to 35 wherein the learned author states: "Judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful....judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, a court, on review, is concerned only with whether the act or order under attack should be allowed to stand or not". In the circumstances the objective of this court upon judicial review in this application is to strictly consider whether the whole or part of the award of the arbitrator is lawful or unlawful. This court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of supervisory jurisdiction and judicial review of an award of an arbitrator.

In *Public Interest Law Foundation v. Central Environmental Authority*³ Gunawardana J. held:

³ [2001] 3 Sri LR 330 at 334

There is a distinction between appeal and review. If one appeals against a decision, one is claiming that the decision is wrong and that appellate authority or court should change the decision. The Court of Appeal, if it is persuaded by the merits of the case (appeal), may allow the appeal and thereby substitute its view for that of the Court or tribunal of first instance. Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong, but whether the decision is lawful or not. In the words of Lord Brightman: "Judicial review is concerned, not with the decision but with the decision making process" (Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 at 1173) It is worth observing that the review procedure is not well suited to determination of disputed facts-factual issues arising in this case being imprecise and disputed.

This application of the petitioner is clearly devoid of merit. Even though the decision was taken by the *Uththarithara Sabhawa* to select and recommend the 32nd respondent for the above post as far back as on 16.06.2015, formal appointment could not be made because of the *ex parte* interim order obtained by the petitioner from the previous Bench of this Court on 06.10.2015, which is still in operation. This is a huge, if not irreparable, loss to the 32nd respondent, who is to retire in a few years' time.

I dismiss the application of the petitioner. The petitioner shall pay a sum of Rs.200,000/= as costs of the action to the 32nd respondent.

Judge of the Court of Appeal