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

Lanka Viduli Podu Sevaka
Sangamaya,
No. 50,
Sir Chittampalam A. Gardiner
Mawatha,
Colombo 2.
Petitioner

CASE NO: CA/WRIT/193/2015

Vs.

1. Ceylon Electricity Board,
   No. 50,
   Sir Chittampalam A. Gardiner
   Mawatha,
   Colombo 2.
   And 37 Others
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Indunil Bandara for the Petitioner.
Sanjeeva Jayawardena, P.C., with Charitha Rupesinghe for the 1st, 4th-7th, 9th-11th Respondents.

Faisz Musthapha, P.C., with Thushani Machado for the 12th Respondent.
Shantha Jayawardena with Niranjan Arulpragasam for the 13th Respondent.
Chaya Sri Nammuni, S.S.C., for the 2nd, 3rd, 36th-38th Respondents.

Decided on: 02.04.2019

Samayawardhena, J.

1. Introduction

The petitioner Trade Union filed this application against the Ceylon Electricity Board (CEB) seeking to quash by way of certiorari the decision contained in the Circular No. 2014/GM/46/Pers dated 27.11.2014 marked P11 whereby a category known as "*Unified Engineering Service*" was created and a special salary scale known as "*E Salary Scale*" was introduced for the Engineers and Engineering Assistants in the CEB. The petitioner says that this is unmistakably illegal and arbitrary, which created a great salary anomaly between the Engineering employees and the other employees of the CEB gravely endangering industrial peace.

The 1st respondent CEB and the other respondent Trade Unions supporting the Engineers filed objections and tendered written submissions against the petitioner's application. The remaining respondents including Ministers of Power and Energy, Finance,

and National Pay Commission filed objections and tendered written submissions, in support of the petitioner's application.

2. Merits of the Application

The learned President's Counsel appearing for the contesting respondents took up several preliminary objections seeking dismissal of the application *in limine* without going into the merits. To understand the said preliminary objections in the proper perspective, it is necessary to know the facts of the case. Hence I decide to consider the merits of the application first.

2.1. The Crucial Board Meeting of CEB on 26.11.2014

A Board Meeting of the Ceylon Electricity Board was held on 26.11.2014 at 4.00 pm—vide P5. The Minutes of this Board Meeting is crucial to decide this matter. The said Minutes under the heading "*PROGRESS OF THE PROPOSED COLLECTIVE AGREEMENT AND THE SALARY INCREASE FOR THE EMPLOYEES OF THE CEB*" read as follows:

> *Before the commencement of the formal proceedings of the meeting the Chairman brought to the notice of the meeting the present position of the progress of the proposed Collective Agreement and the salary increase for the employees of the CEB. He appraised the Board that he continued to further negotiated settlement on the proposed Collective Agreement and the salary increase.*
>
> <u>*After extensive negotiations with the Trade Unions at several occasions the Management was able to get the consent of most of the Trade Unions for a salary increase of 30% and to retain*</u>

LKR 1,000/= monthly allowance which is being paid for the last several years. The committee has also proposed to increase the annual bonus of 1 month salary by 50% (1 ½ months salary) with effect from January 01, 2015 for the next 3 years.

The Board after careful consideration of the contents of the proposed Collective Agreement and 30% increase of salary and the proposed bonus decided to consider them favourably as against the following.

(i) Improvement of overall efficiency and enhancement of productivity of services by the employees arising out the proposed salary increase.

(ii) Financial position of the CEB during the coming 3 years will be satisfactory due to low expenditure resulting from the low cost generation through coal power and improved hydro situation.

(iii) Adoption of performance appraisal scheme within the organization has been improved and will continue to maintain a higher standard of customer service.

(iv) Entering into Collective Agreement at least with a limited scope is a remarkable achievement in maintaining the industrial peace within the CEB during the next 3 year period.

In view of the above the Board decided to accept the proposed Collective Agreement which includes the above mentioned salary and bonus increase and recommend to the Secretary/Ministry of Power and Energy, Secretary/Ministry

of Finance and Planning and the Cabinet of Ministers for approval.

The following can be deducible from the above Minutes:

a) There shall be a consensus between the Board and the Trade Unions for a salary hike, which shall be included in the Collective Agreement to maintain industrial peace within the CEB (which happens one in three years), and;

b) If there is such a consensus, for it to take effect, the approvals from the Secretary/Ministry of Power and Energy, Secretary/Ministry of Finance and Planning, and the Cabinet of Ministers are necessary.

Further, according to the said Minutes, "*the Committee*" has proposed salary increase of 30%, retaining of LKR 1,000/= monthly allowance and increasement of annual bonus by 50%, with effect from 01.01.2015-31.12.2017.

This has been incorporated in the Collective Agreement marked P6 signed on 01.12.2014 for the period 01.01.2015-31.12.2017 between the CEB and the Trade Unions of the CEB including the petitioner.

What is "*the Committee*" above referred to? That is the "*Committee on Salary Revision of CEB Employees-2015*" appointed by the Chairman of the CEB comprising of five Members, as per 1R9, to consider "*Next salary revision due from 01st of January 2015*", which "*need to be processed through the proposed Collective Agreement.*" Professor Perera, Vice

Chairman of the CEB has been appointed as the Chairman of the Committee.

2.2. Unusual Decisions soon after the Main Decision

After the said decisions (subject to the approvals) by the Board *inter alia* for 30% salary increase across the board effective from 01.01.2015 for the next three years, the Minutes of the same day, under the heading "*UNIFIED SERVICES IN THE CEB*", read as follows:

> *During the discussion Chairman sought instructions from the Secretary, Ministry of Power and Energy with regard to Engineering Scale issue and in response Secretary, Ministry of Power and Energy advised that this request may be considered positively and requested the Board to consider setting up a Unified Service for Technical, Financial IT and other professional grades and further requested the Vice Chairman to submit a report on this matter based on his committee report dated November 18, 2014, urgently.*
>
> *Accordingly, an addendum to the committee report was submitted to the Board by the Chairman of the committee Prof. K.K.C.K. Perera, Vice Chairman, before the Board Meeting was adjourned for the day. The Board considered the contents of the addendum along with the committee report submitted to the Board on November 18, 2014 and requested the GM to issue the necessary circular instructions accordingly as recommended in the addendum dated November 26, 2014 submitted by the Vice Chairman*

and directed the Vice Chairman to submit further proposal with regard to other professional services as well.

The "*Committee Report*" above referred to is the Report of the "*Committee on Salary Revision of CEB Employees-2015*" marked 1R10, and "*Addendum*" is 1R11.

It is noteworthy that in the said Committee Report 1R10, the proposed "*E Salary Scale*" by the Engineers' Union has neither been recommended nor approved but only accepted as a policy. In Annexure 6 thereof, it is particularly mentioned that, the proposed "*E Salary Scale*" for the Engineers is a matter to be considered separately, and it is beyond their mandate to make recommendations on the "*E Salary Scale*".

In the first place, I must say that, soon after the Board decided to accept the proposed Collective Agreement for 01.01.2015-31.12.2017 (P6), which included the 30% salary increase across the board subject to the approval of the Secretary/Ministry of Power and Energy, Secretary/Ministry of Finance and Planning, and the Cabinet of Ministers, the Board cannot, immediately thereafter, and out of the blue, hurriedly formulate another salary revision for the Engineers. That is plainly *ultra vires*.

According the said Minutes under the heading "*UNIFIED SERVICES IN THE CEB*", the following very unusual things have happened in the Board Room <u>while the Board Meeting in progress</u>.

a) The Chairman of the Board has taken instructions, "<u>*During the discussion*</u>" at the Board Meeting, from the

Secretary of the Ministry of Power and Energy regarding Engineering Salary Scale issue.

It may be noted that, according to the Minutes, Board Meeting started late in the evening at 4.00 pm, and this has happened—presumably at night, after main business of the Board Meeting under the heading "*PROGRESS OF THE PROPOSED COLLECTIVE AGREEMENT AND THE SALARY INCREASE FOR THE EMPLOYEES OF THE CEB*" was over.

b) The Vice Chairman of the CEB (who was the Chairman of the "*Committee on Salary Revision of CEB Employees-2015*") has been asked to submit a Report on the Engineering Salary Scale "urgently". The Vice Chairman also would have been attending the Board Meeting.

c) Then the Vice Chairman has, in a great hurry, prepared the addendum 1R11 recommending a separate salary scale known as "*E Salary Scale*" for Engineers and Engineering Assistants "*before the Board Meeting was adjourned for the day*"! That means, without consulting the other Members of the Committee.

It may be recalled that this Committee was appointed to consider "*Next salary revision due from 01st of January 2015*" for the next three years, and the Committee had already by their Report 1R10 has informed the Board that the proposed "*E Salary Scale*" for the Engineers is a matter to be considered separately, and it is beyond their mandate to make recommendations on the "*E Salary*

> *Scale*" notwithstanding the Committee accepts it as a policy.

This decision to create a new salary scale only for the Engineers has been given effect to by the Circular No. 2014/GM/46/Pers purportedly dated the following day, i.e. 27.11.2014 marked P11. Why I stated "purportedly dated 27.11.2014" was because this has been first made known by way of an email on 08.01.2015 marked P10(a), i.e. on the date of the Presidential Election. This Board Meeting was held and the Circular was dated after the nominations for the Presidential Election were called on 21.11.2014. The *modus operandi* is clear.

When P6 Collective Agreement was signed on 01.12.2014 between the CEB and the Trade Unions including the petitioner's one, they were unaware of this salary revision contained in P11!

According to the first part of the Minutes under the heading "*PROGRESS OF THE PROPOSED COLLECTIVE AGREEMENT AND THE SALARY INCREASE FOR THE EMPLOYEES OF THE CEB*", the Board recommendation or decision alone is not enough for a salary increase, the approval of *inter alia* the Minister of Power and Energy, Minister of Finance and Planning, and also the Cabinet of Ministers is necessary.

The 2nd respondent-Minister of Power and Energy, 36th respondent-National Salaries and Carder Commission, 37th and 38th respondents-Minister of Finance and its Secretary, 15th-36th respondents-National Pay Commission by their statements of objections/written submissions/document marked CA1 to the

Counter Affidavit state in unison that their approvals were not taken for the said Special Salary Scale for the Engineers. How can the CEB then enforce the "*E Salary Scale*" except by force? How can they enforce it without it being incorporated in the relevant Collective Agreement P6?

I do not say for a moment that creation of a "*Unified Engineering Service*" and a special salary scale known as "*E Salary Scale*" for Engineers is outrageous. They can be distinctly treated in terms of salary and otherwise for the unique nature of their duties in the CEB. Comparison of an officer in Class II Grade II of the Engineering Service with that of in the same Class and Grade of any other service of the CEB may be highly unreasonable. But there is a procedure to do it. That procedure has outrageously been violated by the CEB in this instance when they arbitrarily created "*Unified Engineering Service*" and a special salary scale known as "*E Salary Scale*" for Engineers. I have no scintilla doubt that, on merits, the petitioner must succeed in this application.

3. Technical Objections

The learned President's Counsel for the 1st respondent-CEB and the 12th respondent-Ceylon Electricity Board Engineers' Union have taken up several technical objections to the maintainability of this application.

Despite the petitioner being entitled to succeed on merits, is the petitioner disentitled to the relief on those technical objections?

3.1. *Locus Standi*

The learned President's Counsel for the 12th respondent-Ceylon Electricity Board Engineers' Union, in his ingenuity, strenuously argues, as a threshold matter, that the petitioner being a Trade Union has no *locus standi* to file this application. It appears that this argument has not been mounted in writ applications before.

The learned President's Counsel relies on *The Ceylon Mercantile Union v. The Insurance Corporation of Sri Lanka (1977) 80 NLR 309, Environmental Foundation Limited v. Urban Development Authority of Sri Lanka [2009] 1 Sri LR 123, Ceylon Electricity Board Accounts' Association v. Minister of Power and Energy (SC FR No.18/2015 decided on 03.05.2016)* in support. In my view, those three cases have no application to the case at hand.

The first one, *The Ceylon Mercantile Union v. The Insurance Corporation of Sri Lanka (1977) 80 NLR 309*, is a case filed by a Trade Union in the District Court on an alleged violation of a contract by the defendant corporation. Sharvananda J. (later C.J.) at pages 313-314 first recognized the quasi corporate state given to a Trade Union by statute in this manner:

> *In this case, the plaintiff is a registered Trade Union. While it is not a legal person, it is endowed by the legislature with many rights characteristic of a Corporation—rights which an unincorporated Corporation does not possess. It can own property through its trustees. (Section 42 of the Trade Union Ordinance, Chap. 138). A registered Trade Union may sue or be sued in its registered name (section 30). Every Trade*

> *Union shall be liable on any contract entered into by it or by any agent acting on its behalf (section 28). It can be sued by its own member for wrongful expulsion, i.e. breach of contract. (Bonsor v. Musicians' Union (1956) AC 104; (1955) AER 518) A registered Trade Union might sue in its own name for defamation where the defamatory statement touches its collective reputation. (General and Municipal Workers v. Gillian (1945) 2 All ER 593) A registered Trade Union may thus be described as having been given a quasi corporate status by the legislature which has however carefully avoided conferring corporate personality on a Trade Union. A registered Trade Union has thus been given recognition by law as a body distinct from individuals who from time to time compose it, although it is an unincorporated body. By registration, the Trade Union acquires some 'existence' in law apart from the members. It is thus a statutory legal entity capable of rights and duties. "A Trade Union (which is a body unincorporate) is a separate entity." per Lord Denning in Willis v. Association of Universities (1964) 2 All ER 39 at 42.*

Then it is clear that the attempt to equalize a Trade Union with a Partnership on the basis that both are unincorporated bodies is not entitled to succeed. A Partnership has no such legal recognition where the members of a Partnership are personally liable for the debts and obligations of the partnership. A Partnership is not at all a separate entity like a Trade Union before the eyes of the law.

Having stated so, Sharvananda J. posed the pertinent question:

> *The question that arises in this case is whether the plaintiff-Union has, as a quasi-Corporation, a cause of action which would entitle it to the declaratory judgment prayed for.*

Thereafter the following answer was given:

> *The plaintiff is an Association having as its members, among others, 77 percent of the non-executive staff of the defendant-Corporation, each one of whom entered into individual contracts with the defendant-Corporation on the basis of the specimen agreement referred to as X and Y. But the plaintiff-Union has as such not entered into any such contract. The dispute complained of in the plaint is the dispute of each member with the Corporation. The plaintiff-Union has no direct interest in the said dispute. In the circumstances, it has no locus standi at all and is not entitled to come to Court for any relief based on the contracts of its members.*

Then at page 315 it was held that:

> *Thus, though the legislature is aware of the status and function of a Trade Union, it has to date failed to make statutory provision for a registered Trade Union to represent its members in civil proceedings in a Court of Law.*

It is then abundantly clear that the Supreme Court decided that the plaintiff Trade Union had no *locus standi* to institute that action in the District Court because the plaintiff did not have a cause of action against the defendant. The instant action, which is a writ application, is clearly distinguishable.

One does not need to have a cause of action accrued to him as in a civil action, to file a writ application, which is a public law remedy. Civil Procedure Code has no applicability in writ applications. Writ application is not a civil action. It was held by the majority of the Supreme Court in *Silverline Bus Co. Ltd. v. Kandy Omnibus Co. Ltd. (1956) 58 NLR 193* that an application for a writ of certiorari does not fall within the ambit of the expression "civil suit or action".

The other two cases, *Environmental Foundation Limited v. Urban Development Authority of Sri Lanka [2009] 1 Sri LR 123* and *Ceylon Electricity Board Accounts' Association v. Minister of Power and Energy (SC FR No.18/2015 decided on 03.05.2016)*, are Fundamental Right Applications filed under Article 126(2) of the Constitution. Article 126(2) reads as follows:

> *Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.*

Environmental Foundation Limited v. Urban Development Authority of Sri Lanka [2009] 1 Sri LR 123, S.N. Silva C.J. extended the word "*person*" to include incorporated bodies.

In *Ceylon Electricity Board Accounts' Association v. Minister of Power and Energy (SC FR No.18/2015 decided on 03.05.2016)*, Sripavan C.J. stated that "*the Court has extended the meaning of "person" to incorporated bodies by judicial decisions. I am unable to extend the meaning of "person" to unincorporated bodies like a trade union as that was never the intention of the legislature*." Therefore it was held that a Trade Union has no *locus standi* to file a Fundamental Right Application. As I will explain later, Fundamental right jurisdiction is different from writ jurisdiction.

For whatever it is worth, I must mention that, section 2(s) of the Interpretation Ordinance, No. 21 of 1901, as amended, states that: "*In this Ordinance and in every written law, whether made before or after the commencement of this Ordinance, unless there be something repugnant in the subject or context "person" includes any body of persons corporate or unincorporate."* And also, there are instances where the Trade Unions have successfully filed Fundamental Rights Applications—vide for example, *Augustine Perera v. Richard Pathirana, Minister of Education [2003] 1 Sri LR 125*.

Be that as it may, writ jurisdiction is conferred upon this Court by Article 140 of the Constitution. It reads as follows:

> *Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of first instance or*

> *tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.*

Unlike Article 126(2) of the Constitution where the word "person" has been given a unique place, in Article 140, there is no personalization of the application, or rather the applicant. The word "person" has no place in Article 140. The word "person" used there at the end is referable not to the applicant, but to the person against whom writ is sought.

In Sri Lanka, fundamental right jurisdiction exists apart from and independent of writ jurisdiction where the latter is exercised independently by the Court of Appeal subject to appeal to the Supreme Court, and the former exclusively by the Supreme Court. Fundamental right jurisdiction is invoked in relation to violation of fundamental rights expressly stated in the Constitution whereas the writ jurisdiction is, broadly speaking, invoked to control the power of the bodies, which discharge duties of public nature. The acts complained of in a writ application do not necessarily give rise to complain of violation of fundamental rights guaranteed by the Constitution.

In *Pathirana v. Victor Perera (DIG Personal Training Police) [2006] 2 Sri LR 281 at 284-285*, Sriskandarajah J. stated:

> *In applications for writs the courts have relaxed the rules of standing even wider than the rules of standing in*

fundamental rights applications in order to ensure good administration.

In Shell Gas v. Consumer Affairs Authority CAM 22.08.2014, Marsoof J. (P/CA) observed:

"Courts in Sri Lanka as well as in other jurisdictions have liberally interpreted rules of standing in regard to matters of vital concern to society....Time and time again, our Courts have repeated that the fact that the irregularity or the grievance for which redress is sought is shared by a large number of people or society as a whole would not prevent one of the many affected persons from seeking relief from the court. There can be no doubt that a consumer such as the intervenient-petitioner will have locus standi to challenge an order or action of a statutory body such as the Consumer Affairs Authority in an appropriate case."

An association or group that seeks to represent some or all of its members were also said to have standing in relation to the matters affecting the interest of their members; Consumers Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and others [2006] 1 Sri LR 174. In Jayathilaka v. Jeevan Kumarathunga and Others CA 1312/2004-BASL News August 2004 a person who has a long standing association and interest in a particular field such as sports was given standing to challenge an appointment of the Chef De Mission for Olympic Games. A movement called Green Movement of Sri Lanka was given standing in C.A. (writ) Application No.

> *2047/2003 C.A. Minutes 06.06.2006 where the Green Movement of Sri Lanka having the objects of preserving the environment and natural resources of Sri Lanka, instituted proceedings on the complaint of the villagers who are directly affected but do not have sufficient resources to present their grievance before a court of law.*

In *Wanasinghe and others (Citizens Movement for Good Governance) v. University of Colombo [2006] 3 Sri LR 322 at 327-329* also Sriskandarajah J. took the same view.

Who can file a writ application? The short answer is—any "*person*" (as defined in section 2(s) of the Interpretation Ordinance) who has "*sufficient interest*" as opposed to the outdated requirement of "*personal interest*" because of the element of "*public interest*". This includes a Trade Union. High-flown technical objections regarding *locus standi* have no place in the modern administrative law. *(Vide Wijesiri v. Siriwardene [1982] 1 Sri LR 171, Perera v. Central Freight Bureau of Sri Lanka [2006] 1 Sri LR 83, Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority [2003] 3 Sri LR 146, Premadasa v. Wijewardena [1991] 1 Sri LR 333, Vasudeva Nanayakkara v. Governor, Central Bank of Sri Lanka [2009] BLR 41)*

In *Wijesiri v. Siriwardene [1982] 1 Sri LR 171,* Wimalaratne J. on behalf of the Supreme Court at page 175 stated:

> *In this connection it would be relevant to refer to the views of an eminent jurist on the question of locus standi. Soon after the decision of the Privy Council in Durayappah Vs. Fernando (1967) 3 WLR 289, in an Article entitled Unlawful*

Administrative Action in (1967) 83 L.O.R. 499, H. W. R. Wade expressed the view that <u>one of the merits of Certiorari is that it is not subject to narrow rules about Locus standi, but is available even to strangers, as the Courts have often held, because of the element of public interest</u>. In other words it is a genuine remedy of public law, and all the more valuable for that reason (at p. 504). As regards the applications for Mandamus they should, in his view, in principle be no more exacting than it is in the case of the other prerogative remedies, because public authorities should be compellable to perform their duties, as a matter of public interest at the instance of any person genuinely concerned; and in suitable case, subject always to discretion, the Court should be able to award the remedy on the application of a public spirited citizen who has no other interest than a due regard for the observance of the law-Wade-Administrative Law (4th Ed) 608. The result of a restrictive doctrine of standing, therefore, would be to encourage the government to break the law; yet this is exactly what the prerogative writs should be able to prevent (p. 609). To restrict Mandamus to cases of personal legal right would in effect make it a private law remedy (p 610). These observations, with which I am in respectful agreement, appear to make the second requirement, insisted upon by Tambiah J. i.e.: some personal interest in the matter complained of, unnecessary. But the first requirement ought, in my view, to be satisfied and it is satisfied if the applicant can show a genuine interest in the matter complained of, and that he comes before Court as a

> *public-spirited citizen concerned to see that the law is obeyed in the interest of all, and not merely as a busy body perhaps with a view to gain cheap publicity. As to whether an applicant satisfies this second requirement will depend on the facts of each case.*

In *Perera v. Central Freight Bureau of Sri Lanka [2006] 1 Sri LR 83 at 89-90,* Marsoof J. stated:

> *As Lord Denning noted in R v. Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Business Ltd., (1982) AC 617 English Courts have orchestrated the generous view that "if there is good ground for supposing that a government department or public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced". In the course of his judgment in the same case, Lord Diplock observed as follows—"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of court to vindicate the rule of law and get the unlawful conduct stopped."*
>
> *The change in legal policy reflected in the decision of the House of Lords in this case was considered by Lord Diplock to be a major step "towards a comprehensive system of*

administrative law" which he regarded as the greatest achievement of the English Courts during his life time.

The rationale for the expanding canvas of locus standi in the context of certiorari and prohibition was explained by H.W.R. Wade-Administrative Law (8th Edition) pages 362 to 363 in the following words-

"The prerogative remedies, being of a 'public' character as emphasized earlier, have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully. As Devlin J said: Orders of certiorari and prohibition are concerned principally with public order, it being the duty of the High Court to see that inferior courts confine themselves to their own limited sphere". In the same sense Brett J. had said in an earlier case that the question in granting prohibition "is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed". Consequently the court is prepared to act at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public."

Wade further goes on to observe at page 683 that-"...the House of Lords is clearly now determined to prevent

> *technicalities from impeding judicial review so as to protect illegalities and derelictions committed by public authorities".*
>
> *Sri Lankan Courts too have been quick to recognize standing of any citizen to seek relief against public authorities that stray outside their legitimate bounds.*

The question whether a Trade Union can file a writ application has been answered by Professor Wade (Administrative Law, 9th Edition, page 686) positively in the following manner:

> *Lord Denning added: 'The court would not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to any one whose interests are affected by what has been done'. The same tendency is illustrated by the courts' willingness to grant certiorari to a trade union acting on behalf of one of its members [as] in Minister of Social Security v. Amalgamated Engineering Union [1967] AC 725. This practice is now common.*

If a total stranger can successfully file an application for writ in the spirit of "public interest", why cannot the petitioner Trade Union, which represents (as seen from *inter alia* the relevant Collective Agreement marked P6) a segment of employees affected by the decision reflected in P11, which is sought to be quashed by certiorari, file this writ application?

I overrule the preliminary objection regarding standing of the petitioner to file this application, and hold that a Trade Union on behalf its members can file a writ application.

3.2. CEB is an Independent Entity

The principal preliminary objection taken up by the learned President's Counsel for the 1st respondent-CEB is that the CEB is an independent and autonomous entity created and governed by the Ceylon Electricity Board Act, No.17 of 1969, as amended, and therefore the Board of Directors can take decisions as to remuneration of employees as an independent institution. The unsustainability of this objection can easily be demonstrated by the Board Minutes of the fateful day (26.11.2014) marked P5, which I quoted above. If I may repeat a portion, it reads:

> *In view of the above the Board decided to accept the proposed Collective Agreement which includes the above mentioned salary and bonus increase and recommend to the Secretary/Ministry of Power and Energy, Secretary/Ministry of Finance and Planning and the Cabinet of Ministers for approval.*

This has again been emphasized *inter alia* in the Minutes of the Board Meeting held on 11.02.2015 marked P17. It reads as follows:

> *The Chairman-CEB stated that publicity has been given that some CEB trade unions have lodged a complaint with the CID and Bribery Commission highlighting a financial fraud with regard to the newly introduced "E-Scale".*

> *The Board emphasized that the required approvals should be obtained from the Management Services Department and the Finance Ministry by the CEB in order to regularize the salary revisions and the proposed E-Scale.*

If the Board could decide the remuneration of the employees of the CEB without any interference and sanction from any quarter, there is absolutely no necessity to talk about Collective Agreements and approvals from the Secretary/Ministry of Power and Energy, Secretary/Ministry of Finance and Planning, and the Cabinet of Ministers for the salary increase. From the above it is abundantly clear that the Board cannot, on its own, decide on remuneration of the employees of the CEB.

The CEB is estopped in law from taking up a different position now.

The Minister of Power and Energy in paragraph 11 of his affidavit filed with the statement of objections of the 2nd and 3rd respondents states:

> *Answering the averments contained in paragraph 28 of the petition I admit that the approval of my Ministry, the Ministry of Finance, and the approval of the Salaries and Cadre Pay Commission and the Cabinet approval has not been obtained for this revised salary scale.*

Although it is not necessary, let me add the following for completeness. The CEB is a Government-owned corporation, which is fully controlled by the Government. It comes under the Ministry of Power and Energy. The Members to the Board of

Directors of the CEB are appointed, in terms of section 3 of the Ceylon Electricity Board Act, by the Ministers of Power and Energy, and Finance. It is a waste of time to quote the sections of the Act extensively to convince that the CEB is not an independent and autonomous entity where the Board of Directors has been given a free hand to take any decision including salary enhancement according to the whims and fancies of the directors. Let me touch upon a few sections in passing. Section 9 of the Act says that all officers and servants of the Board shall be deemed to be public servants within the meaning the Penal Code. Section 40 says that after the coming into operation of the Act, there may be granted to the Board, with the prior approval of the House of Representatives, from the Consolidated Fund such sum of money and on such terms as may be determined by the Minister in charge of the subject of Finance in consultation with the Minister. Sections 41, 42, 43,44 etc. provide for borrowings by the Board with consent and concurrence of the Finance Minister and the Subject Minister, which are guaranteed by the Government and charged on and paid out of the Consolidated Fund. Section 49(2) says that the accounts of the Board for each financial year shall be audited by the Auditor-General. Section 57 provides for acquisition of immovable property under the Land Acquisition Act for the Board, and section 61 provides for special Grant or Lease of immovable property to the Board under State Lands Ordinance.

It is absolutely clear that the CEB is not the private property of its Board of Directors. The money which the CEB needs is raised not by issuing shares, but by borrowing. Borrowing from whom? Predominantly from the Treasury. When borrowed from

others, the guarantor is the Government. If the CEB cannot repay, the loss falls on the Consolidated Fund, which means the tax-payer, i.e. the general public. If the Board mismanages the affairs of the CEB, thereby inevitably causing huge losses, what is the end result? The public would be forced to bear the burden including payment of higher amount for electricity. Then it is clear that the CEB is discharging functions of public nature. Their decisions have a direct bearing on the general public. Hence their decisions shall be subject to judicial review. Professor Wade—Administrative Law 9th Edition—at 145-146 states "*The actions of public corporations are judicially reviewable in the same way as those of other bodies, where they have powers of a public law character….The modern law of judicial review is, in this regard, guided by function rather than form.*"

It is common knowledge that the frontiers of certiorari have extended with the passage of time. It started against inferior courts, and then extended to statutory bodies, and now covers non-statutory bodies which discharge duties of public nature.

In *Harjani v. Indian Overseas Bank [2005] 1 Sri LR 167 at 172-173,* Marsoof J. stated:

> *The dynamism of law has driven the traditional remedy of certiorari away from its "familiar moorings by the impetus of expanding judicial review" (H.W.R. Wade & C.F. Forsyth, Administrative Law, 8th Edition, page 627). As Professor Wade observes, Courts have through their decisions extended the pale of judicial review "to bodies which, by the traditional test, would not be subject to judicial review*

and which, in some cases, fall outside the sphere of government altogether." (ibid.) A variety of commercial, professional, sporting and other activities are regulated by powerful bodies which are devoid of statutory status, and Courts in Sri Lanka and elsewhere have demonstrated a willingness to 'recognize the realities of executive power' and to review the decisions of a number of such bodies. In their desire to prevent the abuse of 'executive power' in the hands of these powerful non-statutory bodies, the courts have ventured to review the decisions of these bodies. The limits of this new jurisdiction have been explored in a series decisions such as R v. Criminal Injuries Compensation Board, ex parte Schofield [1971] 1 WLR 926, ex parte Tong [1976] 1 WLR 1239, ex parte Cummins [1992] 4 Admin. LR 747, R v. Criminal Injuries Compensation Board ex parte P [1995] 1 WLR 845. As Lord Parker, C.J. observed in R v. Criminal Injuries Compensation Board ex parte Lain [1967] 2 All ER 770 at 778:

"The exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time, being extended to meet varying conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later, again it extended to cases where there was not lis in the strict sense of the word, but where immediate or subsequent rights of citizens were affected."

> *It is noteworthy that the decision in R v. Panel on Takeovers and Mergers ex parte Datain [1987] 1 QB 815 extended the application of prerogative remedies to the London Takeover Panel, which is a non-statutory body regulating the conduct of takeovers and mergers in the London Stock Exchange on a voluntary basis through a process of self regulation. In R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Limited [1993] 1 All ER 422, the English Courts have held that the London Stock Exchange, which has been constituted as a limited liability company, is subject to judicial review. In decisions such as the Governor and Company of the Bank of Scotland, Petitioners [1989] BCLC 700, R v. FIMBRA, ex parte Cochrane [1991] BCLC 106, SIB Anor v. FIMBRA & Anor [1992] Chancery 268 and R v. LAUTRO, ex parte Ross [1992] 1 All ER 422 the Courts have held that although judicial review is not available in the context of purely contractual powers, the authority of a contractual nature which various self-regulating organizations have over their members help these organizations to perform their public functions, and accordingly the failure of such an organization to perform a contractual obligation may be subjected to judicial review. The rationale for making such non-statutory bodies amenable to prerogative remedies appears to be that they are discharging functions of a public nature.*

I hold that the decision contained in circular P11 is amenable to judicial review. I overrule that objection.

3.3. Futility

The learned President's Counsel for the CEB took up another preliminary objection on futility. This was based on the developments said to have taken place subsequent to the filing of this application. The Court allowed the learned President's Counsel for the CEB to tender the documents in that regard by way of a motion with copies to the Attorneys-at-Law of the opposite parties with the sole object of seeing whether settlement is possible, and, simultaneously, fixed the matter for the Judgment allowing the parties to file written submissions in between. Before filing writing submissions, the learned counsel for the petitioner informed Court that the petitioner's grievance has not been addressed by the alleged subsequent developments and therefore there was no compromise.

The CEB cannot now seek dismissal of the petitioner's application *in limine* stating that *status quo* has changed subsequent to the filing of the application.

It is well settled law that rights of the parties shall be determined at the time of the institution of the action. *(Talagune v. De Livera [1997] 1 Sri LR 253 at 255, Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training [1998] 1 Sri LR 235 at 248, Lalwani v. Indian Overseas Bank [1998] 3 Sri LR 197 at 198)*

In the application for writ of mandamus, in *Abayadeera v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo [1983] 2 Sri LR 267 at 280,* it was held that:

> *The petition in this case was filed on 30.6.83. The Emergency (Universities) Regulations No. 1 of 1983, cited by learned counsel for the petitioners, and on which he founded an argument, were made on 21.7.83. In our view these regulations have no application, for, rights of parties are their rights at the date the petitioners' application was made (Jamal Mohideen & Co. v. Meera Saibo 22 NLR 268, 272, Silva v. Fernando 15 NLR 499, 500) and must be decided according to the law as it existed when the application was made (10 NLR 44 at 51); Ponnamma v. Arumugam 8 NLR 223, 226.*

In *Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training [1998] 1 Sri LR 235 at 248*, the petitioners sought to quash the arbitral award by certiorari and prohibition. Dismissing that application, Jayasuriya J. *inter alia* stated:

> *It is trite law that a court or tribunal must determine and ascertain the rights of parties as at the date of the institution of the action or as at the date of the making of the reference for arbitration. Commencement of the action is the time at which the rights of the parties are to be ascertained. Vide Silva v. Fernando 15 NLR 499 (PC), Mohamed v. Meera Saibo 22 NLR 268, Bartleet v. Marikkar 40 NLR 350. The claim and demand on behalf of the workers who were members of the fourth respondent trade union had been made on 12th of March, 1988. The reference by the Minister of Labour for settlement by arbitration had been made on the 24th of November, 1989 and the statement of the matter in dispute has been framed*

> *by the Commissioner of Labour and specified on the 24th of November, 1989. In the circumstances, the arbitrator had jurisdiction, authority and right to decree the grant of a salary increase of Rs. 250 with effect from 24.11.89.*

The petitioner does not admit, nor was the Court convinced, what was improperly and forcibly done by P11, was undone subsequent to filing of this application.

It appears that what has been done is in order to keep the said arbitrary salary increase for Engineers intact, some attempts have been made to increase the salaries of the other employees. Is that the solution to the problem? Who will ultimately bear the burden?

Even if it were undone, this Court does not act in vain by formally quashing that decision by certiorari to impress upon the other bodies who discharge functions of public nature that the same fate will befall on them if they also behave in the manner the CEB did in this instance.

In *Sundarkaran v. Bharathi [1989] 1 Sri LR 46* the petitioner-appellant applied for certiorari and mandamus against the refusal to issue a liquor license for 1987. When it came before the Supreme Court the matter was only academic as the year 1987 had lapsed. Nonetheless, whilst allowing the appeal, Amarasinghe J. took the view that "*The court will not be acting in vain in quashing the determination not to issue the licence for 1987 because the right of the petitioner to be fully and fairly heard in future applications is being recognised.*"

In *Nimalasiri v. Divisional Secretary, Galewela [2003] 3 Sri LR 85*, Sripavan J. (later C.J.) stated:

> *Learned State Counsel urged that it is a futile exercise to issue a writ of certiorari because the decision complained of related to the year 2002 which had already expired. However, following the decision in Sudakaran v. Barathi and others [1989] 1 Sri LR 46 this Court issues a writ of certiorari quashing the decision of the second respondent contained in the letter dated 27.08.2002 marked (P4). Thus this Court is not acting in vain because the right of the petitioner to be fully and fairly heard in future application is recognized.*

I overrule the objection on futility.

3.4. Administrative Inconvenience

The learned President's Counsel for the CEB also states that, if this Court is to quash P11 at this juncture, there will be serious consequences. I do not anticipate such dire consequences.

In any event, if the decision is patently illegal, the decision is a nullity. It is null and void *ab initio*. There is no legal requirement to quash a decision which is null and void *ab initio* although Courts formally do so out of abundance of caution to manifest the intention of the Court in unambiguous terms. When the decision is *ex facie* illegal, Court cannot turn a blind eye on the basis that, making it right, would cause grave inconvenience to the ones who are already beneficiaries of that illegal decision.

In *Pathirana v. Victor Perera (DIG Personal Training Police) [2006] 2 Sri LR 281 at 291,* Sriskandarajah J. quashed the impugned circular by way of certiorari overruling a similar objection taken up by the State:

> *The learned Senior State Counsel for the Respondents objected to the relief claimed by the Petitioner on an additional ground urged at the time of argument namely; that the impugned circular was in operation from 2001 January and if it is quashed by this court now it will cause administrative inconvenience. In view of this submission this court requested the Counsel for the Respondent to produce the list of officers who were benefited by the impugned circular. Document X, Y and Z were produced by the respondents giving the list of officers. A perusal of this list shows that twelve officers were reinstated after the circular came into effect and one of them were reinstated after this action was instituted. In Consumers Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and three Others [2006] 1 Sri LR 174 this Court held, citing the Judgment of Congreve v. Home Office (1976) QB 623 that when an order is ultra vires, the order was acted upon and the quashing of that order would cause administrative inconvenience cannot be a criterion to refuse a writ of certiorari.*

I reject that objection.

4. Conclusion

The preliminary objections taken up against the maintainability of the application are not entitled to succeed.

The decision contained in P11 is bad—incurably bad. Illegal—*ex facie* illegal. Null and void—null and void *ab initio*. I quash P11 by certiorari, which I do unhesitatingly.

The 1st respondent CEB shall pay the petitioner a sum of Rs. 200,000/= as costs of the application.

Application allowed.

Judge of the Court of Appeal