

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

In the matter of an Application for a Mandate in the nature of Writ of Certiorari.

H. K. A. Pushpakumara
No. 63/9A,
Sri Rathnapala Mawatha,
Matara.

Petitioner

C. A. Writ Application 66/2012

Vs.

1. S. M. W. Fernando
Surveyor General,
Surveyor General's Department,
Colombo 05.
2. Provincial Surveyor General (Southern Province)
3. Justice N. E. Dissanayake
Chairman of the Administrative Appeal Tribunal,
No. 05, Dudley Senanayake Mawatha,
Colombo 08.
4. E. T. A. Balasingha
5. S. C. Mannapperuma

4th and 5th are members of the Administrative Appeals Tribunal, No. 05, Dudley Senanayake Mawatha, Colombo 08.

6. The Administrative Appeal Tribunal
No. 05, Dudley Senanayake Mawatha,
Colombo 08.

7. Public Service Commission
No. 356 B, Galle Road, Colombo 03.

Respondents

Before: Janak De Silva J.

Counsel:

Rohan Sahabandu P.C. with Chathurika Elvitigala and Vajirapani Seneviratne for the Petitioner

Kanishka De Silva SSC for Respondents

Written Submissions tendered on:

Petitioner on 22.10.2018, 21.02.2019 and 14.03.2019

Respondents on 25.10.2018 and 01.04.2019

Argued on: 28.01.2019

Decided on: 21.06.2019

Janak De Silva J.

The Petitioner was at all times material to this application a Government Surveyor serving at the Surveyor General's Department. He was asked to report to the Regional Office from 01.10.2007. He did not do so but continued working from his former place and kept sending the relevant papers/journals to the provincial office which were accepted.

The Respondents submit that as the Petitioner continuously failed to comply with the instructions given to him a vacation of post notice dated 05.12.2007 was issued on him stating that he was deemed to have vacated post with effect from 20.11.2007.

The Petitioner appealed against the said notice to the 7th Respondent which was rejected. He then appealed to the Administrative Appeals Tribunal (AAT) which by order dated 03.12.2009 (1R13) held that the conduct of the Petitioner does not show any intention to vacate his post. But the AAT held that his conduct does amount to insubordination. Accordingly, the AAT while annulling the order of the Public Service Commission (PSC) and reinstating the Petitioner imposed the following conditions on account of the fact that he was guilty of insubordination:

- (a) Deferment of five annual increments
- (b) Period of his absence up to date of resumption should be treated as no pay
- (c) He should be attached to a suitable duty station as decided by the Survey general to enable him to supervise and evaluate his performance intensively

The Petitioner claims that the said order of the AAT is ultra vires its powers and seeks a writ of certiorari to quash it.

The principal argument of the learned Presidents Counsel for the Petitioner is that the AAT could not have imposed the above conditions after rescinding the order of the PSC. It is his position that after finding that the order of the PSC is wrong the only option open for the AAT was to have rescinded the order of the PSC and stopped at that.

Article 59(2) of the Constitution stipulates that the AAT shall have the power to *alter, vary or rescind* any order or decision made by the PSC.

The dictionary meaning of the words *alter* or *vary* are become different or change in character whereas *rescind* means cancel or repeal [Oxford Advanced Learners Dictionary, 4th Ed. 1989, pgs. 32, 1073 and 1413].

Black's Law Dictionary, 8th Ed., 1332 defines *rescind* to mean abrogate, cancel, to make void, to repeal or annul, to void, repeal or nullify.

Hence adopting a dictionary meaning to the powers given to the AAT results in the following position. Where the AAT *alters* or *varies* an order of the PSC it does so by making changes to the order made by the PSC while maintaining the validity of the order of the PSC whereas when the AAT *rescinds* the order of the PSC, the order made by the PSC no longer exists.

The submission of the learned President's Counsel for the Petitioner is that as the AAT had annulled the PSC order it cannot thereafter make further orders. He relies on the dictum of Lord Denning in *Macfoy v. United Africa Company* [(1961) 3 All.E.R. 1169 at 1172] "you cannot put something on nothing – it will collapse".

I am not inclined to adopt such a narrow interpretation to the powers of the AAT.

Wade & Forsyth, *Administrative Law*, 9th Ed., page 213 reads:

"A statutory power will be construed as impliedly authorising everything which can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly."

The Petitioner was sent on vacation of post. It is against this order that he appealed to the PSC which rejected it. That appeal must be considered in the context of Chapter V, 7:4 of the Establishments Code which reads:

"If he volunteers an explanation within a reasonable time (the Disciplinary Authority can determine the 'reasonable time' for furnishing the explanation) it should be considered by the appropriate Disciplinary Authority in terms of the disciplinary rules, and permission to resume duties may be allowed or refused by that Authority (see also Chapter XLVIII)."

Chapter XLVIII, 37:2 of the Establishments Code reads:

"if the Disciplinary Authority considers, in view of the matters represented in the appeal submitted to him in terms of sub-section 37:1 above, that the officer has not reported for duty because of acceptable reasons, he may order reinstatement of the officer after imposing punishment for not reporting for duty without permission"

Thus, the Disciplinary Authority, the PSC in this case, could have imposed a punishment before accepting the explanation of the Petitioner and reinstating him. The AAT is sitting as an appellate body over the decision of the PSC and has therefore the same powers the PSC had in considering the appeal of the Petitioner.

A contrary interpretation leads to absurdity. A court must always avoid as far as possible, giving an entirely absurd interpretation to a section drafted by the legislature, unless a court looking to the plain and grammatical language used has no other option except to give such a construction [Bindra, *Interpretation of Statutes*, 10th Ed., page 275].

For example, if the narrow interpretation suggested by the Petitioner is adopted then all what the AAT could have done in this case is to have annulled the PSC order and leave it at that. But here the AAT after annulling the PSC order has ordered reinstatement. The Petitioner does not question that part of the order of the AAT which is not possible if the narrow interpretation suggested by the Petitioner is adopted.

For these reasons, I have no hesitation in rejecting the submission of the learned President's Counsel for the Petitioner. The order made by the AAT is within its powers.

The learned Senior State Counsel submitted that the Petitioner was guilty of undue delay as he invoked the writ jurisdiction of this Court more than 2 ½ years from the date of the AAT order and relied on the decisions in *Issadeen v. The Commissioner of National Housing and Others* [(2003) 2 Sri.L.R. 10, *Dharmaratne v. Samaraweera and Others* (2004) 1 Sri.L.R. 57, *Jayaweera v. Asst. Commissioner of Agrarian Services* (1996) 2 Sri.L.R. 70, *Sarath Hulangamuwa v. Siriwardena, Principal Visaka Vidyalyaya* (1987) 1 Sri.L.R. 275, 278].

The learned President's Counsel for the Petitioner countered by relying on the decision in *Biso Menike v. Cyril De Alwis and Others* [(1982) 1 Sri.L.R. 368] where it was held that writ of certiorari lies at the discretion of Court and will not be denied if the proceedings were a nullity even if there is delay, especially where denial of the writ is likely to cause great injustice. However as explained above the decision of the AAT is within its powers. The delay of more than 2 ½ years have not been explained by the Petitioner and that is also a ground for the refusal of the writ sought.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal