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

In the matter of an Application for Writs of Certiorari and Mandamus under Article 140 of the Constitution.

Rt. Rev. Dr. Cleatus Chandrasiri Perera
Roman Catholic Bishop of Rathnapura,
Bishop's House, Madola, Awissawella.

Petitioner

C. A. (Writ) Application 95/2013

Vs.

1. Hon. Bandula Gunawardane
Minister of Education,
'Isurupaya', Sri Jayawardenapura Kotte,
Battaramulla.

1A. Hon. Akila Viraj Kariyawasam
Minister of Education,
'Isurupaya', Sri Jayawardenapura Kotte,
Battaramulla.

2. Secretary to the Ministry of Education
'Isurupaya', Sri Jayawardenapura Kotte,
Battaramulla.

3. R. B. Gankewela
Senior Assistant Secretary,
Combined Service and Lands,
Minister of Education,
'Isurupaya', Sri Jayawardenapura Kotte,
Battaramulla.

4. R. Abeysinghe
Provincial Director of Education,
Rathnapura.

4A. M. S. Kuruppuarachchi
Provincial Director of Education,
Rathnapura.

5. H. A. Hemawathie Hamine
Zonal Education Director,
Zonal Education Office, Kegalle.

5A. N. Sirisena
Zonal Education Director,
Zonal Education Office, Kegalle.

5AA. M. I. D. D. C. Iddamalgoda
Zonal Education Director,
Zonal Education Office, Kegalle.

5AAA. N. A. D. R. Hemantha
Zonal Education Director,
Zonal Education Office, Kegalle.

6. B. A. B. P. Wijethunga
Acting Principal,
KG/Ambepussa Maha Vidyalaya,
Ambepussa.

6A. G. A. Anoma Kumari
Principal,
KG/Ambepussa Maha Vidyalaya,
Ambepussa.

7. Hon. Attorney General
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

Jacob Joseph for the Petitioner

Anusha Samaranayake DSG for the Respondents

Written Submissions tendered on:

Petitioner on 31.05.2019

Respondents on 31,05.2019

Argued on: 03.05.2019

Decided on: 19.07.2019

Janak De Silva J.

KG Ambepussa (Roman Catholic) Sinhala Mixed School, Warakapola was vested in the State in terms of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 08 of 1961 as amended (1961 Act) read with Vesting Order No. 953 published in Ceylon Gazette Extraordinary dated 12.03.1962(P1). After the vesting the name of the school was changed to KG Ambepussa Sarasavi Prathamica Viduhala. Prior to that the school belonged to the Bishop of Galle who is claimed to be the predecessor of the Petitioner.

The Petitioner claims that this school was functioning till 1999 when it was amalgamated with KG Ambepussa Maha Vidyalaya (P3). The Petitioner claims that thereafter the students of KG Ambepussa Sarasavi Prathamica Viduhala were admitted to KG Ambepussa Maha Vidyalaya and KG Ambepussa Sarasavi Prathamica Viduhala was closed down.

Thereafter requests had been made to divest the school vested in the State which was rejected and hence the Petitioner seeks the following relief:

(a) A writ of certiorari to quash the decision of the 4th to 6th Respondents to hold classes of KG/ Ambepussa Maha Vidyalaya at KG/(Roman Catholic) Sinhala Mixed School and the decision of the 1st, 2nd and 3rd Respondents refusing to divest the school,

(b) a writ of mandamus directing the 1st, 2nd and 3rd Respondents to make order, divesting the property belonging to the Petitioner vested in the State where the KG/(Roman Catholic) Sinhala Mixed School at Mahahena Warakapola was conducted, which property is more fully described in the schedule to the petition.

1961 Act

The 1961 Act provided for the vesting in the State the property of assisted schools of which the Director of Education is or becomes the Manager under the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960. The vesting was to take place in terms of an Order made by the Minister in terms of section 4(1) of the 1961 Act. It was recognized that the property so vested in the State may not be needed for a school at some later stage. Therefore section 10(1)(a) of the 1961 Act provided that the Minister, by subsequent Order published in the Gazette shall, if such property ceases to be used, or is not needed for the purpose of a school conducted and maintained by the Director for and on behalf of the Crown, revoke that Vesting Order in so far as it relates to such property with effect from the date on which such property so ceased to be used or was not so needed.

One of the conditions under which a divesting order can be made was discussed in *Methodist Trust Association vs. Minister of Hindu Resources and Others* [(2006) 3 Sri. L. R. 85] where Sriskandarajah J. held that section 10(1)(a) of the 1961 Act states that "if such property ceased to be used or is not needed for the purpose of **a** school conducted and maintained by the Director for on behalf of the Crown..." (emphasis added) and that "a" is used in legislative drafting as the indefinite article, and often it is used as part of the statement of the universal description, while the word "the" is used in the definite article.

In that case the property was used for C/Maradana (Methodist Mission) Tamil Maha Vidyalaya, Colombo at the time of vesting. This school ceased to exist and at the time the application for divesting was made the property was not been used for any school but it was contended by the State that the said property was needed for another school as it was to be given to Ashoka Junior School situated in the adjoining land to expand the school facilities. This Court refused the writ of mandamus sought directing divesting on this ground.

Accordingly, even if the property ceased to be used for the school that was existing at the time it was vested in the State still the Minister can refuse to divest if the property is needed for another school conducted and maintained by the Director on behalf of the State.

In the instant case the divesting was refused by P17 wherein the 2nd Respondent states that the said property is still been used for education purposes and the primary section of KG/Ambepussa Maha Vidyalaya is due to be established there. The Petitioner admits that a year 1 class for 13 tamil students of KG/Ambepussa Maha Vidyalaya commenced at the property in dispute on 23.01.2013 (paragraph 27 of the petition) but claims that it is a vain attempt to prevent the divesting of the said property. The Petitioner claims that conducting of such classes commencing from 23.01.2013 is a colourable exercise of power and is mala fide and abuse and/or misuse of power.

I hold that the Petitioner has not established that the use of the property for the year 1 class for tamil students of KG/Ambepussa Maha Vidyalaya is a mala fide act or an abuse of power. In this regard I wish to refer to the decision in *Gunasinghe v. Hon. Gamini Dissanayake and others* [(1994) 2 Sri. L. R 132] where this court held that where mala fides is alleged on the ground that the Petitioner was a supporter of the Sri Lanka Freedom Party (SLFP) and found employment at the Department of Census and Statistics by the SLFP, the bare averment would not make the acquisition *mala fide.* **When *mala fides are* alleged against the repository of a power, it must be expressly pleaded and properly particularised.**

Indeed, the Petitioner has pleaded mala fides in this application. But it has not been particularised. In *Gunasinghe v. Hon. Gamini Dissanayake and others* case (supra), this Court went on to state (at page 136) as follows:

> "One who alleges *mala fide* should establish it to the satisfaction of Court. No doubt the petitioner simply alleges that the acquisition of his land was motivated by political reasons. But as stated earlier he has failed to satisfy this Court that the 1st respondent was influenced by the 3rd respondent and the result was that the former decided to acquire the land in question and thereafter necessary steps were taken to acquire it. There is no convincing evidence before this Court to come to the finding that the 1st respondent exercised his powers in bad faith. If there is sufficient evidence that he exercised his power due to political reasons as alleged by the petitioner or for any other consideration, then it could be held that the acquiring authority had acted in bad faith or *mala fide.* But such evidence is not forthcoming in this case."

In *Seneviratne and others v. Urban Council Kegalla and others* [(2001) 3 Sri.L.R. 105 at 110] this court held as follows:

> "The petitioners have also submitted that there is malice in respect of this acquisition. **It is to be noted that question of malice and the absence of a public purpose are linked. In the instant case the presence of a public purpose negatives the allegations of malice."** *(emphasis added)*

Similarly, in any event the mere allegations of mala fides are negated in this case as admittedly a year 1 class for 13 tamil students of KG/Ambepussa Maha Vidyalaya commenced at the property in dispute on 23.01.2013.

The learned counsel for the Petitioner placed reliance on the decision in *Methodist Trust Association of Ceylon v. Divisional Director of Education of Galle and Others* [CA (Writ) 192/2015, C.A.M. 08.01.2019] where Samayawardhena J. issued a writ of mandamus directing divesting of the property in issue on the basis that the request for divesting was rejected after the school in issue was closed down by giving various false reasons. The decision of this court in *Methodist Trust Association vs. Minister of Hindu Resources and Others* (supra) was not considered by Court in *Methodist Trust Association of Ceylon v. Divisional Director of Education of Galle and Others* (supra). In any event, the need of the property for another school in this case arose before the application was filed whereas in that case it appears that the need was put forward after the application was filed.

The learned counsel for the Petitioner also relied on the decision of the Supreme Court in *Archbishop of Colombo v. Hon. Akila Viraj Kariyawasam, Mininster of Education and Others* [SC Appeal 54/2007, S.C.M. 22.06.2018]. However, the issue in that case was whether recourse can be had to section 18 of the Interpretation Ordinance to revoke a divesting order made in terms of section 10 of the 1961 Act whereas no divesting order has been made in this case.

The learned Deputy Solicitor General raised an objection in relation to the prayer for a writ of certiorari on the basis that the Petitioner has failed to identify the documents sought to be quashed. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition. I am in respectful agreement with these dicta and hold that the prayer for a writ of certiorari in the petition is defective.

The common law grounds heads of judicial review are illegality, irrationality and procedural impropriety [*Council of Civil Service Union v. Minister for the Civil Service* (1985) AC 374(HL)]. There Lord Diplock went on to state:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The Petitioner has failed to establish any of the above grounds.

For all the foregoing reasons, I dismiss the application but in the circumstances of the case without costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal