

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

In the matter of an Application for Mandates
in the nature of Writs of Certiorari and
Prohibition under and in terms of Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

N.K. Miranda
No. 62, Wellington Park,
Elapitiwala, Ragama.

PETITIONER

Vs.

CA (Writ) Application No. 36/2019

1. Nihal Sooriarachchi,
Chairman, Road Development Authority.
2. Kamal Amaraweera,
Director General,
Road Development Authority.
3. Hudson Silva,
Acting Director Administration,
Road Development Authority.
4. The Road Development Authority,

All of 1st Floor, Maganeguma
Mahamedura,
No, 216, Denzil Kobbekaduwa Mawatha,
Koswatta, Battaramulla.

RESPONDENTS

Before: Yasantha Kodagoda, P.C., J/ President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: Niran Anketell for the Petitioner

Ms. Maithri Amarasinghe Jayathilake, State Counsel
for the Respondents

Supported on: 19th June 2019 and 9th July 2019

Written Submissions: Tendered on behalf of the Petitioner on 9th July 2019

Decided on: 17th September 2019

Arjuna Obeyesekere, J

The Petitioner states that pursuant to an application submitted by him, and having faced an interview, the Director General of the Road Development Authority (RDA) had informed the Petitioner by letter dated 17th September 2018 annexed to the petition marked 'P2' that he *"has been selected for appointment as the Director (Administration) (Special Grade) in the Road Development Authority with immediate effect."* The final paragraph of 'P2' also stated that *"a formal letter of appointment will be issued to you after assuming duties and submitting certified copies of your certificates mentioned in the bio-data"*.

The Petitioner had immediately informed this to his then employer CNNC London Private Limited that he would be resigning from his post of Director of Administration and Academics and accordingly his resignation had been accepted with effect from 18th November 2018. The Petitioner had thereafter informed the RDA that he would be assuming duties on 17th November 2018,

which had been acknowledged by the RDA. However, by a letter dated 5th November 2018 annexed to the petition marked 'P6', the Acting Director (Administration) of the RDA, on behalf of the Director General had informed the Petitioner that "the Management of the RDA has decided to suspend your appointment with immediate effect." 'P6' was followed by letter dated 7th November 2018 annexed to the petition marked 'P7' by which the Petitioner was informed that "the letter of appointment dated 17th September 2018 issued to you for the above post is hereby cancelled."

The Petitioner states that he nonetheless reported to the RDA on 19th November 2018 and was handed over a letter dated 13th November 2018, annexed to the petition marked 'P9', addressed to him, informing him as follows:

"This has reference to your letter dated 8th November 2018 on the above subject.

Your attention is drawn to my letter of even number dated 07.11.2018 cancelling the selection of you to the post of Director Administration of this Authority w.e.f. 07.11.2018.

I was compelled to make the decision of cancellation, due to the findings of the investigation conducted by Internal Audit Division of this Authority on the allegation made against you. The investigation was conducted on a complaint received from a trade union of this Authority. In the complaint serious allegations have been revealed against you and for selecting you for the post.

In the process of Audit Investigation it was proven that you have been interdicted from service on 14.11.2017 while serving in the Fisheries Corporation as General Manager and after applying for the post of Director Administration in this Authority. This has not been revealed to the RDA by you. The disciplinary inquiry against you is reported to be still in progress.

Subsequently you have resigned from the Fisheries Corporation and joined CNNC London Pvt. Ltd. Company.

Your previous employer Ceynor Foundation Ltd. too has terminated your contract appointment on 02.10.2015 due to the charges of insubordination and immoralness according to the letter issued by General Manager of Ceynor Foundation dated 31.10.2018.

Considering the misconducts connected in your career history revealed in the investigation and according to the rules and regulations applicable in the Authority, decision was taken to cancel the selection of you to the post of Director Administration of the Authority. ♦

As such I regret to inform that your request cannot be reconsidered."

The above circumstances that led to the issuance of 'P6' and 'P7' have been explained in an affidavit submitted to this Court by the Director General of the RDA. He has stated that after issuing 'P2', complaints had been received that the Petitioner was unsuitable for appointment. The RDA had accordingly called for a report from the Cey-Nor Foundation Limited where the Petitioner had

been employed from 28th July 2014 to 3rd November 2015. The reply, which has been annexed to the said affidavit marked 'R4' contained the following:

“කැවත 2015.08.28 වන දින සිට ඔහුගේ සේවය දිරිම කර ඇතත් ඔහුගේ අභිකරු බව සහ අගිණ්ඩි බව තම නිලයේ බලතල අයුතු ලෙස යොදා ගැනීම සම්බන්ධව ඔහුගේ සේවය 2015.10.02 වන දිනෙන් අවසන් කර ඇත.”.

The RDA had also obtained a clarification from the Ceylon Fisheries Corporation where the Petitioner had been employed from 2nd November 2015 to 14th November 2017 which had by its reply marked 'R5' stated that, “වෝදනාවක් සම්බන්ධයෙන් 2017.11.14 වන දින වැඩ තහනම් කර ඇත. ඒ සම්බන්ධව පරීක්ෂණයක් පැවැත්වෙමින් පවතී.”

Although this Court has referred to the above documents, this Court must state that the Petitioner has disputed the accuracy of the above facts. This Court does not intend to go into the accuracy of the factual circumstances that led to the issuance of 'P6' and 'P7', nor is it the role of this Court to decide on disputed facts in an application of this nature.

Aggrieved by the decisions contained in 'P6' and 'P7', the Petitioner filed this application seeking *inter alia* a Writ of Certiorari to quash the decisions of the Respondents contained in documents 'P6' and 'P7'. It was the position of the learned Counsel for the Petitioner that the grounds relied on to issue the said letters were factually incorrect and that in any event the said letters do not contain any reasons.

During the course of her submissions, the learned State Counsel submitted that according to the Petitioner, the purported dispute before this Court arises

out of a contract of employment. The fact that the Petitioner has come before this Court on the basis that he has a valid contract of employment flowing from 'P2' is clear when one considers the averments in paragraphs 30 and 32 of the petition. It was her position that the jurisdiction of this Court to issue writs of Certiorari, conferred under Article 140 of the Constitution, is limited, *inter alia* to an examination of the legality of a decision of a public body exercising a public or statutory function, and that this jurisdiction cannot be extended to examine rights and obligations arising from a private contract, even though one party may be a public authority. This is an objection that goes to the root of this application and in the event the said objection is upheld by this Court, the necessity for this Court to consider the grounds urged by the learned Counsel for the Petitioner does not arise.

In considering the said objection, it would perhaps be appropriate for this Court to first of all consider the approach adopted by the Supreme Court and the Court of Appeal in this regard.

In Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another¹ a Writ of Certiorari was sought to quash the termination of an agreement between the petitioner and the Board of Investment. The respondents raised a preliminary objection that the petitioner was seeking relief based on a breach of a contractual right and therefore the petitioner cannot maintain the said application.

Having considered the underlying facts, this Court had held as follows:

¹ (2002) BLR 10

“An analysis of the relationship that existed between the parties reveals that as it was purely a contractual one of commercial nature, neither certiorari nor mandamus will lie to remedy the dispute over the rights of the parties. The purported breach of such rights (and) the grievances between the parties, arise entirely from a breach of contract, even if one of the parties was a statutory or public authority”²

This Court went onto consider if the fact of the Board of Investment being a statutory authority would lend to the commercial arrangement between the parties, a statutory flavour, thus enabling the petitioner in that case to invoke the writ jurisdiction of this Court. Having taken into consideration the fact that even though the power to enter into a contract arises from the statute, the terms and conditions between the parties were entirely contractual, and that the decision that was sought to be quashed was purely contractual, this Court held as follows:

“Therefore, the exercise of powers by parties in terms of the agreement, exclusively arises through the contract and though one of the parties is a public authority, rights of the parties are not amenable to writ jurisdiction.”³

A similar view has been expressed by this Court in **De Alwis v Sri Lanka Telecom and Others**⁴ where a writ of Certiorari had been sought to quash the decision to disconnect the telephone connection of the petitioner on the basis of non-payment of charges. The Court, while refusing the writ held as follows:

² Ibid. page 11.

³ Ibid. page 12

⁴ (1995) 2 Sri LR 38

*"The decision sought to be quashed is a decision founded purely on contract. The telephone was disconnected for failure to settle the outstanding bills as provided for in the agreement. This was a decision taken wholly within the context of the contractual relationship between the parties and not in the exercise of the powers of a public authority. Neither Certiorari nor Mandamus will lie to remedy the grievances arising from an alleged breach of contract."*⁵

This Court will now consider whether the position would be any different if the underlying contract is a contract of employment. The answer is found in the judgment of this Court in Gawarammana v Tea Research Board and others⁶ wherein Sripavan J (as he then was) had cited with approval the following passage of Thambiah J in Chandradasa v Wijeratne⁷.

"No doubt the competent authority was established by Statute and is a statutory body. But the question is, when the respondent as competent authority dismissed the petitioner, did he do so in the exercise of any statutory power?"

The Act does not deal with the question of dismissal of employees at all. It does not specify when and how an employee can be dismissed from service - the grounds of dismissal or the procedure for dismissal. So that, when the respondent made his order of dismissal, he did so in the exercise of his contractual power of dismissal and not by virtue of any statutory power.

⁵ Ibid. page 41

⁶ (2003) 3 Sri LR 120.

⁷ (1982) 1 Sri LR 412 at 415 – 416.

If the petitioner's dismissal was in breach of the terms of the employment contract, the proper remedy is an action for declaration or damages. The Court will not quash the decision on the ground that natural justice has not been observed."

Sripavan J thereafter held as follows:

*"The powers derived from contract are matters of private law. The fact that one of the parties to the contract is a public authority is not relevant since the decision sought to be quashed by way of Certiorari is itself was not made in the exercise of any statutory power."*⁸

Thus, whether a contract is entered for commercial purposes or for employment purposes, where such contract has no statutory nexus or where the act complained of does not arise in the exercise of a statutory power, such contract would be outside the scope of the Writ jurisdiction of this Court.

In Ceylon Petroleum Corporation and others vs Dayanthi Dias Kaluarachchi and others⁹, four former employees of the CPC who had retired from service on 31st December 2002 upon obtaining the compensation package offered under a voluntary retirement scheme (VRS), complained to the Court of Appeal that they were not paid arrears of the salary revision granted to the remaining employees of CPC consequent to a decision of the Cabinet of Ministers dated 27th August 2003, and that their legitimate expectation had been frustrated by the said decision. On an appeal filed by the Ceylon Petroleum Corporation against the judgment of this Court which had issued a Writ of Mandamus

⁸ Ibid. page 124

⁹ SC Appeal No. 43/2013; SC Minutes of 19th June 2019. Judgment of M.N.B.Fernando, J.

directing the Ceylon Petroleum Corporation to make the said payment, the Supreme Court, having considered whether the circular offering the VRS had a statutory flavor, held as follows:

“There was no material placed before this Court to substantiate that the VRS was approved by the Cabinet of Ministers on the request of the Minister, as stated in the judgment. The circular P5 by which the VRS was offered, issued under the hand of the Chairman/ Managing Director of CPC clearly stated that the VRS is offered by the Management with the concurrence of the General Treasury in view of the award of financial emoluments. Therefore, the attempt to sanctify the circular P5 to the level of a statutory duty of CPC, in my view has no merit and is erroneous. Similarly, circular P6 which covered incidental matters too was not issued as an exercise of power under section 7(1) of the CPC Act. The terms and conditions in the said circular does not have a statutory flavor or a statutory underpinning as stated in the judgment and on that ground too, the judgment is erroneous.

P5 is simply a circular issued in the course of contract of employment, by the employer offering a voluntarily retirement. The employees were free to accept or reject the VRS. P5 circular dated 15.10.2002 clearly spelt out the termination package, compensation to be calculated at two months’ salary for each year of service and one-month salary for balance years of service until the age of retirement and emoluments to be calculated upon the last drawn salary, i.e. salary of December 2002. This is the offer that was accepted by the 1500 employees as a full and final settlement and emoluments based on the last drawn salary. Vide 1R5 to 1R8. The respondents voluntarily accepted the compensation as a full and final

settlement based upon the last drawn salary and terminated their contracts of employment and retired from service. Any dispute pertaining to the terms of VRS is contractual and does not fall within the scope of writ application. Thus, no relief can be granted by a writ court based upon legitimate expectation or otherwise.

The relationship between the CPC a public corporation and its employees is entirely contractual and has no statutory flavour. In a plethora of Appellate Court decisions, it has been held that matters pertaining to contracts of employment does not come within the realm of writ applications."

The Supreme Court, having cited the findings of this Court in Gawarammana's case¹⁰, held that the judgment of this Court is erroneous as the relationship that existed between the parties was contractual.

This Court will now consider if the position would be different where the RDA is concerned. The RDA has been established by the Road Development Authority Act No. 73 of 1981. While Section 12 of the Act provides for the appointment of a Director General, Section 13(1) of the Act reads as follows:

"The Authority may, subject to the other provisions of this Act:

- (a) appoint, dismiss and exercise disciplinary control over such staff as may be deemed necessary by the Authority to carry out the functions of the Authority;*

¹⁰ Supra.

- (b) *fix the wages or salary or other remuneration of such staff;*
- (c) *determine the terms and conditions of the service of such staff; and*
- (d) *establish and regulate provident funds or schemes for the benefit of such staff and make contributions to any such fund or scheme."*

Although Section 13 empowers the RDA to recruit staff, it does not create a statutory nexus to each and every contract of employment that the RDA may enter into. The said power must be viewed as a provision that enables the RDA to carry out the functions assigned to it by the Act. The position of Director (Administration) is not a post that is provided for in the Act itself and therefore has no statutory link or nexus. Furthermore, 'P6' and 'P7' were not issued in the course of exercising any statutory function. Thus, this Court is of the view that 'P6' and 'P7' have been issued in the course of its contractual rights and not in the exercise of any statutory power conferred on the RDA.

This Court must refer at this stage to the judgment of this Court in **Jayasuriya vs Consumer Affairs Authority and others**¹¹ where the Director General of the Consumer Affairs Authority (CAA) challenged the decision of the Authority to terminate her services. Section 52(1) of the Consumer Affairs Authority Act provided for the appointment of a Director General, and it was submitted on behalf of the petitioner that her "*employment is a statutory function or should be considered as a function having such a flavour, in contrast to the ordinary relationship of master and servant.*" It was the position of the CAA that the services of the petitioner were terminated in terms of the contractual rights that the CAA exercised and enjoyed over the petitioner and not in terms of any

¹¹ CA (Writ) Application No. 1590/2006; CA Minutes of 20th November 2008.

provision of the CAA Act. Having considered the position of both parties, this Court held as follows:

“As has been contended by the learned State Counsel, on the line of authorities cited by him, the pertinent question is, in dismissing the petitioner, was the Authority exercising statutory powers or authority derived from contract of employment? It is quite apparent that the procedure under which the Director General can be removed, has not been specified anywhere in the Act. Even the period of time during which the Director General shall hold office is determined not by the statute but by the letter of appointment. Unlike in the case of the Chairman and certain other members of the Board no protection has been afforded to the post under consideration against arbitral dismissal. Since there is no special statutory provision either direct or by a necessary implication suggesting the manner in which the Director General should be removed from office or underpinning the position of Director General by restricting the freedom of the Authority to dismiss, in my opinion, the public law rights are not available to the petitioner.”

The above judgment fortifies the view that this Court has already expressed.

The learned Counsel for the Petitioner brought to the attention of this Court the judgment of this Court in **Neidra Fernando v Ceylon Tourist Board and others**¹² where this Court has taken a view contrary to those expressed in the aforementioned judgments. In that case, the petitioner had been dismissed from service based on the findings of an inquiry report. Although the petitioner

¹² (2002) 2 Sri LR 169 at 178. This judgment was followed by the same Bench in *Sirigampola vs Board of Investment* [(2002) 2 Sri LR 102]

had subsequently been reinstated in service, the petitioner had indicated her desire to continue with the case in order to quash the findings contained in the report. This Court has examined the said judgment and it appears that this Court was heavily influenced by the fact that there existed a report containing findings adverse to the petitioner, which required to be set aside. This is borne out by the following passage:

"Anyhow, as had been repeatedly pointed out above - no Court or tribunal other than a Court exercising judicial review functions can quash the report of the 3rd respondent recommending the ultimate punishment of dismissal of the petitioner. This consideration, that is, the non-availability, of any other means of quashing or challenging the report of the 3rd respondent injects an element of public law into the issue and should make the relevant report, one amenable to judicial review."

While it is factually incorrect to state that the findings of a report cannot be challenged in any other forum, this Court is not in agreement that judicial review becomes available to a petitioner just because he or she has no other means of quashing a report. With all due respect, that by itself does not inject an element of judicial review into the issue. The said reasoning fails to take into consideration the basic proposition that any disciplinary findings stems from the power of disciplinary control that an employer may exercise over an employee in terms of the contract of employment. If the source of the power is contractual and not statutory, a public law remedy would not be available. In these circumstances, this Court prefers to follow the judgment of this Court in

Gawarammana's¹³ case, which has been cited by the Supreme Court in Ceylon Petroleum Corporation vs Kaluarachchi.¹⁴

In the above circumstances, this Court agrees with the submission of the learned State Counsel that the purported complaints of the Petitioner are entirely contractual and that the Petitioner therefore cannot invoke the Writ jurisdiction of this Court. Hence, it would not be possible for this Court to entertain the application of the Petitioner, irrespective of the strength of the factual arguments. This Court accordingly refuses to issue notice on the Respondents and dismisses this application, without costs.

Judge of the Court of Appeal

Yasantha Kodagoda, P.C., J/ President of the Court of Appeal

I agree

President of the Court of Appeal

¹³ Supra.

¹⁴ Supra.