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

In the matter of an application for mandate in the nature of a writ of ***certiorari*** under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Sri Lanka Transport Board
No.200,
Kirula Road, Narahenpita
Colombo 5.

C.A. (WRIT) Application No.0311/2017

PETITIONER

- **Vs -**

1. T. Piyasoma
   The Arbitrator
   No.77, Pannipitiya Road
   Battaramulla.

2. H.A. Cyril
   No.198/A, Mahawatta
   Alubomulla.

3. Mr. R.P.A. Wimalaweera
   Commissioner General of Labour
   Department of Labour
   2nd Floor, Labour Secretariat
   Colombo 5.

4. Hon. W.D.J. Seneviratne
   Minister of Labour
   Trade Union Relations & Sabaragamuwa Development
   2nd Floor, Labour Secretariat
   Colombo 5.

5. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

RESPONDENTS

Before: **N. Bandula Karunarathna J.**
&
R. Gurusinghe J.

Counsel: Ranjith Ranawaka, AAL with Kosala H. Perera AAL for the petitioner
J.P. Gamage with Rasika Wellappili, AAL for the 2nd respondent
Nayomi Kahawita, SC for the 1st and 3rd – 5th respondents.

Written Submissions: By the petitioner on 06.12.2018
By the 2nd respondent on 25.07.2019
Further written submissions by the petitioner on 21.01.2020
Additional written submissions by the 2nd respondent on 31.01.2020.

Argued on: 10/12/2019 & 28.06.2021

Judgment on: **02/08/2021.**

N. Bandula Karunarathna J.

The petitioner instituted this application seeking inter alia;

i. a writ of certiorari to quash the award of the 1st Respondent dated 05.12.2016 marked as P2,
ii. costs and
iii. any other relief to be granted.

The 1st respondent was the arbitrator appointed by the Minister of Labour and Labour Relations under Section 4(1) of the Industrial Disputes Act, to conduct the Arbitration Case No. A /3573. The 2nd respondent was an employee of the petitioner (Sri Lanka Transport Board) who served at the depot in Ratmalana as a technician (grade II) when this incident took place on 24.07.2004.

One security officer attached to the petitioner-board at the depot in Ratmalana had recovered some motor spare parts in the locker of the 2nd respondent, and he was handed over to the police of Mount Lavinia.

The police produced the 2nd respondent (H.A. Cyril) to the Magistrate's Court of Mount Lavinia, on a B report bearing No: B 2808/2004. After two years, the 2nd respondent was discharged from the case on 19.04.2006, since the police didn't take steps to file a plaint against him. The police of Mount Lavinia filed another case against the 2nd respondent bearing No: 3993 and the learned Magistrate of Mount Lavinia, after trial delivered the judgment dated 09.12.2009 and acquitted the 2nd respondent from the charges levelled against him under sections 370 and 394 of the Penal Code, since there was no evidence against him to prove the charges.

The petitioner commenced a disciplinary inquiry against the 2nd respondent by letter dated 06.11.2006. This was almost two years after the alleged incident. The disciplinary inquiry was suspended during the time the case at the Magistrate's Court was proceeding. The petitioner had recommended a disciplinary inquiry against the 2nd respondent once again in 2010 by letter dated 15.02.2010. The order of the inquiry was delivered on 20.04.2010 and the 2nd respondent was not found guilty on 1st and 2nd charges and was found guilty on 3rd, 4th, 5th, 6th and 7th charges.

By letter dated 21.06.2010 the 2nd respondent was informed that his service was temporarily suspended for 6 months and he was transferred to the depot at Homagama. The 2nd respondent appealed against the said order and the order was confirmed by the appeal-board.

The minister in charge of labour matters referred this dispute for arbitration by letter dated 04.08.2014 and the 1st respondent the arbitrator had delivered the award dated 05.02.2016 after a due inquiry in respect of the matter before him.

The matter, referred for arbitration was as follows:

> "ශ්‍රී ලංකා ගමනාගමන මණ්ඩලයේ කාර්මික නිලධාරියකු ලෙස සේවය කර ති එව්. . සිරිල් නැමැත්තාගේ සේවය 2004.07.29 දින සිට වැටුප් රහිතව තහනම් කිරීමනේ හා එදින සිට 2010.07.13 දින දක්වා කාලයට වැටුප් නොගෙවීමනේ සහ ස්ථාන මාරුකිරීමනේ මනේම 2010.11.13 දින සිට 2011.05.12 දින දක්වා නැවත සේවය අත්හිටුවීම තුලින්ද යම් අගතියක් සිදු වී න්ද? එසේ සිදු වී ත්නම් ඔහුට හිමිවිය යුතු සහනය කවරේද?"

The arbitrator, after evaluating the evidence placed before him and came to a conclusion that the petitioner should pay the 2nd respondent, for the period 29.07.2004 to 12.05.2011;

(i) salaries,
(ii) all allowances,
(iii) annual increments and related allowances,
(iv) festival-advance-payment not paid during the period and
(v) disaster-advance-payment and any other payment.

By letter dated 06.11.2006 the petitioner had sent a notice of disciplinary inquiry to the 2nd respondent. This letter had been submitted by both parties, marked as, R 12 by the Sri Lanka Transport Board on 19.05.2015 and A 3 by the 2nd respondent. The police of Mount Lavinia filed a new case bearing No. 39933 against the 2nd respondent at Magistrate's Court, Mount Lavinia. The charges were framed under sections 370 and 394 of the Penal Code. After trial, the judgment of the said case was delivered on 09.12.2009. The accused was acquitted and discharged due to the following reasons.

(i) The person who had the custody of the items in question was not called to give evidence.
(ii) Therefore, removal of the items without the consent of the custodian was not disclosed.
(iii) The police failed to submit sufficient evidence to prove the charges.

The petitioner states that the disciplinary inquiry was held as per the provisions of the Disciplinary Code (DC) of Sri Lanka Transport Board (SLTB). As per clause No. 4 of the Disciplinary Code, which deals with the procedure on Serious Misconducts by Employees.

Sub section 4.3 states;

> that within 14 days after suspending of services, charge sheet should be issued by the employer and the employee should reply within 14 days. However, as per the last paragraph of the clause 4.3, it is stated that issuing the charge sheet and conducting the inquiry can be delayed, until the court-case is over. This paragraph has been marked as R 9, by SLTB at the arbitration.

In dealing with the power of the minister to act under Section 4(1) it will be relevant to quote the observations of Lord Esher in Queen v. The Commissioner for Special Purposes of Income Tax [1 (1888) 21 Q.B.D. 313 at3191- (1888) 21 Q.B.D. 313 at 319.

> "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There is not for them exclusively to decide whether that state of acts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."
>
> "But there is another state of things which may exist. The Legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction, to determine whether the preliminary state of facts exists as well as jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature is establishing such a tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. "
>
> "In the second of the two cases I have mentioned it is an erroneous application of formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends."
>
> "No reference is contemplated by the Section when the dispute is not an industrial dispute, or even if it is so, it no longer exists, or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or settlement between the parties or where the industry in question is no longer in existence."
>
> "In the instant case the parties under the Collective Agreement had referred the matter for adjudication to a Board of arbitrators. Our Section 4, in my opinion, is wider than the corresponding Indian Section and as l pointed out, even if the parties do not consent to

such reference, the Minister is empowered to such a reference. The Indian case therefore has no application to our Section 4 (1) of the Act. The Minister's decision under Section 4 (1), in the circumstances of this case and his reference dated 15th April 1968 to the Labour Tribunal (V) for settlement by arbitration cannot be questioned by the Court, and is a valid decision."

Considering the above-mentioned authority, I decide that the minister's decision under section 4 (1), of the Industrial Dispute Act cannot be questioned by this Court, if the arbitrator had acted without violating the rules of natural justice.

The judgment of the case No. 39933 was delivered on 09.12.2009 acquitting and discharging the 2nd respondent for the reasons stated in the said judgment. The SLTB directed the inquirer to restart the domestic inquiry by its letter dated 15.02.2010. The domestic-inquiry-report was delivered on 21.06.2010.

The 1st respondent has stated in his award, "most delayed domestic inquiries commenced thereafter".

"ඊට පසුව ලංකා ගමනා ගමන මණ්ඩලය සිදුකර ඇත්තේ යළි පැනගිය විනය පරීක්ෂණය පැවැත්වීමයි."

The petitioner's grievance is that the 1st respondent has failed to consider the reason for the delay to commence the domestic inquiry. It was due to the pending cases filed by the police. The petitioner was unable to conduct the inquiry as per clause 4.3 of the disciplinary code. The petitioner stated that the 1st respondent had failed to consider that while a criminal case is instituted, the general practice of the Labour Tribunal is to lay by the case until the final determination of the case of the Magistrate's Court. Clause 4.3 itself permits to hold disciplinary inquiries, if police investigations or court cases are in progress against the employee.

The petitioner further states that this conclusion is baseless and incorrect. Page No.3 of the proceedings of 19.03.2015, does not indicate such admission by the witness. The delay in issuing the charge sheet for two years and four months was due to case B/2808/4 of Magistrate's Court, which was instituted by the police during that period. The 1st respondent had ignored and not considered this vital documentary evidence. The 1st respondent had only considered case No. 39933 in the Magistrate's Court, in which the 2nd respondent was acquitted and discharged. The 1st respondent had wrongly come to the conclusion that SLTB also should discharge the 2nd respondent from the charges framed against him.

The petitioner argues that the 1st respondent has failed to consider the very reasons for the discharge of the 2nd respondent in both occasions were, purely based on technical grounds and not on any merits. The 1st respondent has failed and ignored to consider that the criminal case B/2808/4 was discharged due to non-filing of the charges by the police and in case No. 39933, the accused was acquitted and discharged due to the failure of the police to prove charges of the Penal Code by not producing essential witnesses.

The petitioner says that, the 1st respondent has failed to consider the facts on grounds of justice and equity and he has also failed to give reasons for the award granted. The petitioner further states that certain allowances such as festival-advance-payments, disaster-advance-payments etc. are payments subject to recovery from monthly salary. As per the award, these advance payments to be paid for the period from 29.07.2001 to 12.05.2011 are incorrect. The petitioner further states that the 1st respondent has acted arbitrarily and has not exercised judiciously and reasonably.

It is my view that the 2nd respondent is not entitled for the festival-advance-payments and the disaster-advance-payments, as it applies in a timely manner.

The petitioner states that if the decision of the 1st respondent's award is implemented it will cause a bad example to around 30,000 employees of the board and deteriorate the disciplinary control of the petitioner-board. I do not agree with the said argument by the petitioner for the reason being that, whenever there is enough evidence to prove any charge against an employee, he could be found guilty and the employer could take disciplinary action against the said person. In the present case, the 2nd respondent was acquitted and discharged by the Magistrate's Court, as there was no evidence against him.

The petitioner further states that on the above premise the petitioner is entitled to invoke the jurisdiction of this Court for issue of a writ of certiorari to quash the purported award of the 1st respondent dated 2016.12.05 marked as P2.

There is a fundamental question as to the areas in which writs of certiorari and mandamus, being public law remedies, would lie. It is clear these writs come within the purview of administrative law which is a branch of law that has been developed by courts for the control of the exercise of governmental or statutory powers by mainly public authorities. The distinction between the public law and private law, which is a concept of recent origin in English law but, which has been a basic concept of Roman law should be borne in mind in considering this matter. The distinction between public law and private law in Roman law (being the genus of our common law) jus publicum and jus privatum - is clearly stated in institutes (1.1.4) by Justinian - R. W. Lee; in his work on the Elements of Roman Law (4th Edition page 35), states as follows with regard to the division of Roman law to branches as public Law and private Law;

> "This is the division which the Roman lawyers take as the primary line of cleavage in the legal system. Public Law has regard to the Constitution of the Roman State. Private Law is concerned with the interest of individuals."

The classification is intelligible and convenient, though there are points at which the two overlap. The first includes constitutional law, administrative law, criminal law and procedure and jus sacrum. The second comprises those branches of law which regulate the relations of citizens to one another, family law, property, obligations and succession. The institute is mainly concerned with private law. It ends with one title on criminal law. which belongs to the jus publicum.

Writs of certiorari and prohibition are instruments of public law to quash and restrain illegal governmental and administrative action. Similarly, the writ of mandamus lies to enforce the performance of a statutory duty by a public authority. They are instruments of judicial review of administrative action.

In Administrative Law by H. W. R. Wade and Forsyth (1994), 7th Edition at page 627, it is stated as follows.

> "But both certiorari and prohibition in their modern applications for the control of administrative decisions, lie primarily only to statutory authorities. The reason for this is that nearly all public administrative power is statutory. Powers derived from contract are matters of private law and outside the scope of prerogative remedies."

The authors cite the dictum of Lord Goddard CJ in the case of R v. National Joint Council for Dental Technicians (1953); 1 OB Pg. 704 at 707). The citation is thus:

> "But the bodies to which in modern times the remedies of these prerogative Writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction."

It is thus seen that prerogative remedies such as certiorari and prohibition lie in situations where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the public. The essential ingredient is that a member of the public who is affected by such a decision has to submit to the jurisdiction of the authority whose action is subject to review. In other words, there is an unequal relationship between the authority wielding power and the individual who has to submit to the jurisdiction of that authority. The principles of administrative law that have evolved such as the doctrine of ultra vires, error on the face of the record, rules of natural justice, requirement of procedural fairness and the reasonableness of decisions, coupled with the remedies by way of prerogative writs, lie to correct any illegality or injustice that may emanate from this unequal relationship. It is in this context that the view has been firmly held that relationships that are based on contract, without any statutory underpinning and actions of companies and private individuals and bodies, are not subject to judicial review by way of the writs of certiorari and prohibition.

In the case of Jayaweera v. Wijeratne -1985 2 SLR 413, a writ of certiorari and mandamus were sought to quash the decision of a competent authority of a business undertaking vested in the government, terminating the agency of the petitioner.

G. P. S. de Silva, J. (as he then was) held (at page 47):

> "The case before us is one where there is an ordinary contractual relationship of principal and agent. I therefore hold that the remedy of Certiorari is not available to the petitioner."

Considering the above-mentioned authority, it is my view that there was a contractual relationship between the petitioner and the 2nd respondent. There was no contractual relationship between the petitioner and the 1st respondent.

This court has jurisdiction to issue a writ against the 1st respondent if the following requirements have been established:

(i) The respondents to the application for the writ must be an inferior court of first instance or other institution or any other person or tribunal, the latter phrase, not being construed ejusdem generis with the regularly established Courts.

(ii) The person or tribunal against whom or which certiorari is sought must have legal authority to determine a question or questions. The remedy by way of certiorari is only available to quash something which is a determination or decision.

(iii) The determination to be quashed should have adversely affected the rights of a person or persons.

(iv) The body against which the writ is sought must have been under a duty to act judicially or was acting in a quasi-judicial capacity.

At the same time, it is important to note that the grounds on which the writ lies;

a) want or excess of jurisdiction,
b) denial of natural justice and
c) error on the face of the record.

In the present case, the petitioner failed to prove the above-mentioned ingredients except "error on the face of the record". That is because the arbitrator had decided to pay the festival-advance-payments and disaster-advance-payments to the 2nd respondent and it was unreasonable to do so as the festive season and the period of disaster had already lapsed. Therefore, the 2nd respondent is not entitled for salary advances for the yester years.

There is no proof to say that the 1st respondent acted against the doctrine of ultra vires and violation of rules of natural justice. Not only that, the petitioner has not proved that the requirement of procedural fairness was violated. Also, there was no proof to say that the 1st respondent has acted unreasonably.

It is evident that the petitioner has purposely delayed the disciplinary inquiry against the 2nd respondent, and has not taken action with due diligence in respect of the cases at the Magistrate's Court against the 2nd respondent, as the virtual complainant. There are no justifiable reasons for the petitioner to delay the disciplinary inquiry for such a long period, after suspension of services of the 2nd respondent without salary. The 2nd respondent had been discharged from the main charges even after the disciplinary inquiry. According to the available evidence and documents before this court, the whole conduct of the petitioner is mala fide, arbitrary and capricious.

When considering all the above, the decision of the arbitrator to pay the festival-advance-payments and disaster-advance-payments to the 2nd respondent is unreasonable. It should not have been ordered to pay. Therefore, we issue a writ of certiorari to quash a part of the award of the 1st respondent. The connected Extra Ordinary Gazette No. 2024/52 dated 23.06.2017 should be amended accordingly by deleting the following words in one before the last paragraph, of the said Gazette as he is not entitled for them.

"ඔහුට නොගෙවෙන ලද උත්සව අත්තිකාරකම්, පදා අත්තිකාරකම්"

The rest of the said Extra Ordinary Gazette No. 2024/52 dated 23.06.2017 and the decision of the arbitrator (P2) dated 05.02.2016 should be remained as it is.

Thus, the petitioner should pay the following to the 2nd respondent for the period from 29.07.2004 to 12.05.2011.

i. Arrears of Salaries,
ii. Arrears of all allowances,
iii. Arrears of annual increments and related allowances.

Subject to the above variation, that is to say, festival-advance-payments and disaster-advance-payments should not be paid during the said period as he is not entitled for that, we affirm the decision of the arbitrator (P2) dated 05.02.2016.

The application of the petitioner is partly allowed. No order for cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal