IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA.

Court of Appeal Case No:
CA (PHC) 107/2014.

Provincial High Court of
North Central Province Case
No: 10/2013

In the matter of an Appeal in terms of Article 154P of the Constitution of Democratic Socialist Republic of Sri Lanka read with Section 11 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990

Ven. WalawaHangunuwawe Dharmarathana Thero.
Mihintale Rajamaha Viharaya,
Mihintale.

Petitioner.

-Vs-

1. Mihintale Pradeshiya Sabhawa,
   Mihintale.

2. U.B. Sirisena,
   President,
   Mihintale Pradeshiya Sabhawa,
   Mihintale.

2A. Darmasena Seneviratne,
   President,
   Mihintale Pradeshiya Sabhawa,
   Mihintale.

3. H.M.G. Anura Kumara,
   Secretary,
   Mihintale Pradeshiya Sabhawa,
   Mihintale.

3A. W.M.W.P.Wijesundara,
   Secretary,
   Mihintale Pradeshiya Sabhawa,
   Mihintale.

4. Lalitha Jayasundara,
Medical Centre,
No.10D,
Dewanampiyathissa Road,
Mihinthale.

5. G.K. Rohan Punsiri Gajanayake
No.10D,
Dewanampiyathissa Road,
Mihinthale.

Respondents.

AND NOW BETWEEN

Ven. WalawaHangunuwawe Dharmarathana Thero.
Mihintale Rajamaha Viharaya,
Mihintale.

Petitioner-Appellant

-Vs-

1. Mihintale Pradeshiya Sabhawa,
Mihintale.

2. U.B. Sirisena,
President,
Mihintale Pradeshiya Sabhawa,
Mihintale.

3. H.M.G. Anura Kumara,
Secretary,
Mihintale Pradeshiya Sabhawa,
Mihintale.

4. Lalitha Jayasundara,
Medical Centre,
No.10D,
Dewanampiyathissa Road,
Mihinthale.

5. G.K. Rohan Punsiri Gajanayake
No.10D,
Dewanampiyathissa Road,
Mihinthale.

Respondent-Respondents.

Before: **Prasantha De Silva, J.**

K.K.A.V.Swarnadhipathi, J.

Counsel: Senany Dayaratne A.A.L with Eshanthi Mendis A.A.L for the Petitioner-Appellant.

Thanuka Nandasiri A.A.L with Geeth Karunaratne A.A.L for the Respondent-Respondents

Written Submission

Filed on: 21.06.2018 and 28.10.2021 by the Petitioner-Appellant.

04.07.2018 by the Respondent-Respondents.

Argued on: 02.08.2021

Decided on: 10.11.2021

Prasantha De Silva, J.

Judgment

It appears that the Petitioner-Appellant had instituted Writ Application bearing No. 10/2013 in the Provincial High Court of Anuradhapura, praying for the following reliefs,

a. Issue Notices on the Respondents;
b. Quash **P15** on the ground that the procedure followed in issuing **P15** was illegal and/or wrongful;

c. Issue a writ of Mandamus to remove Ven. Rathanasaara Thero's name and replace the same with the incumbent Viharadhipathi's name as lessor or the owner of the property; and,
d. Order that the file relating to the said shop and **P15** be submitted to the Court.

After filing of objections by the 1st, 2nd and 3rd Respondent-Respondents, the learned High Court Judge having heard both parties had dismissed the said application of the Petitioner on 28.08.2014 with costs. Being aggrieved by the said Order, the Petitioner-Appellant had preferred this appeal to this Court.

It was submitted on behalf of the Petitioner-Appellant that in or around 1982, when Mihintale new town was created, some private properties were acquired, including part of the land which belonged to the Mihintale Rajamaha Viharaya and aggrieved parties were later granted compensation. In lieu of the acquisition of a property that belonged to Mihintale Rajamaha Viharaya, an alternative property was given to the temple, i.e. a shop bearing assessment No. 10D in Dewanampiyatissa Mawatha.

It was further submitted that the then Viharadhipathi of Mihintale Rajamaha Viharaya, Ven. Naamalwewa Sri Rathanasara Thero maintained the said property bearing No. 10D under his name with the beneficial interest vested with the temple and leased it out to the 4th Respondent to carry out a medical centre. The 5th Respondent was the 4th Respondent's spouse and the said lease rentals collected from the said property bearing No.10D was the income towards the Mihintale Rajamaha Viharaya.

The Malwathu Chapter informed the Commissioner-General of Buddhist Affairs, by letter dated 09.03.2012 that a decision had been taken to appoint Petitioner-Appellant in the present action, Ven. Walawahengunawewa Dharmarathana Thero, to carry out the functions of the Viharadhipathi of Mihintale Rajamaha Viharaya until the conclusion of the Criminal matter filed before a Court of Law against Ven. Naamalwewa Rathanasara Thero, who was the then Viharadhipathi.

As there were disruptions caused by Ven. Naamalwewa Rathanasara Thero, the Petitioner-Appellant filed action bearing No. 24856/SP in the District Court of Anuradhapura and obtained injunctive relief to carry out the duties of the Viharadhipathi of Mihintale Rajamaha Viharaya during Poson festive season.

While the Cases were pending against Ven. Naamalwewa Rathanasara Thero, he passed away and therefore, by letter dated 11.01.2013 under the hand of Deputy Commissioner for Commissioner General of Buddhist Affairs, the Petitioner-Appellant was informed that he was appointed as the Viharadhipathi of Mihintale Rajamaha Viharaya by a decision made by the Malwathu Chapter Marked as **P4** and also appointed the Trustee of the property of the Mihintale Rajamaha Viharaya with effect from 11.01.2013.

The Attorney-at-Law for the Petitioner-Appellant had informed the 3rd Respondent by letter dated 26.02.2013 marked **P14** that the former Viharadhipathi Naamalwewa Rathanasara Thero was not the Viharadhipathi at the time he issued the letter mentioned therein, and that any decision made subsequent to the removal of Ven. Naamalwewa Rathanasara Thero would be null and void.

In this respect, it is the duty of Court to ascertain whether the impugned property is a Sangika property, Private property or a Temple property.

The Petitioner-Appellant has drawn the attention of the Court to the statement made by the Chairman of the Pradeshiya Sabha, the 2nd Respondent, at the meeting held on 29.11.2012, stating that the property in question, in fact, belongs to the Mihintale Raja Maha Viharaya [The Pradeshiya Sabha sessional minutes, stating at P129 of the brief at page 133 (තීරණ අංක 58/2012)], which minuted as follows;

තීරණ අංක 58/2012-

02. අංක D-10 කඩ කාමරය පවරා දීම සම්බන්ධව මිහින්තලේ රජමහා විහාරයේ රතනසාර හිමි හා D-10 කඩ කාමරය පවරා ගැනීම සම්බන්ධව මිහින්තලේ, යාපනේ පාර, කේ. රොහාන් පුන්සිරි මහතා ඉදිරිපත් කර තිබූ ලිපිය සභා ගත කරන ලදී.

ගරු මන්ත්‍රී දේශබන්දු ඩබ්. හේමරත්න මහතා: පසුගිය කාල වකවානුව තුල ක්‍රියාත්මක කල ආකාරයට විධිමත්ව ලබාදීම සුදුසු යැයි මා යෝජනා කරනවා.

ගරු මන්ත්‍රී ආර්. ඒ. අනිල් පුශ්පානන්ද මහතා: ලිපි දෙකේ පරස්පරතාවයක් තිබෙනවා. කඩ කාමර කාටවත් දීලා නැහැ. වෙළඳ අයිතිය පමණයි දීලා තියෙන්නේ. ගිවිසුමෙත් සඳහන් වෙලා නැහැ. කඩ කාමර දීලත් නැහැ. උත්තරීතර සභාවට ලැබෙන ලිපි නීත්‍යානුකූල වෙන්න ඕන. වෙළඳ අයිතිය ලබාගැනීම හා බැහැර කිරීම පිළිබඳව ගිවිසුමේ සඳහන් ආකාරයට විය යුතුයි.

ගරු සභාපති දේශකීර්ති යූ. බී. සිරිසේන මහතා: ලිපියේ මට අයිති යනුවෙන් සඳහන් වන්නේ ඔවුන් මිහින්තලේ පරණ නගරයේ පැවති කඩ වෙනුවට මෙම කඩ කාමර ලබා දුන් නිසයි. වන්දි වශයෙන් ලබාදී තිබෙන්නේ.

Although it appears that an alternative shop premises was given instead of the acquired shop premises in the Old Town, Mihintale, the said minutes [P12] does not substantiate that the shop premises D-10 was given in lieu of the acquisition of the property that belonged to the Mihintale Rajamaha Viharaya as a Sangika property or a Temple property. It is observable that the said minutes 58/2012 states that "කඩ කාමර කාටවත් දීලා නැහැ. වෙළඳ අයිතිය පමණයි දීලා තියෙන්නේ. ගිවිසුමෙත් සඳහන් වෙලා නැහැ....."

It was the contention of the Respondent-Respondents that the impugned property is owned by the 1st Respondent- Mihintale Pradeshiya Sabhawa and it was leased to the Petitioner-Appellant's predecessor- Naamalwewa Rathanasara Thero, who was the chief incumbent of the Mihintale Rajamaha Viharaya during that period. The said Naamalwewa Sri Rathanasara Thero by letter marked V1, had informed the 1st Respondent-Pradeshiya Sabha that he finds it difficult to maintain the shop premises 10D and for the 1st Respondent to take over the same thus the 1st Respondent had obliged.

However, after receiving the letters [P21] and [V1] executed by the Appellant's predecessor and the request letter [P20] by the 5th Respondent, the 1st Respondent-Pradeshiya Sabha had executed lease agreement marked and produced as [P15].

The Appellant contended that his predecessor had no right to execute the said letter V1 as he was prohibited by Court order dated 21.05.2012 marked as P18(a) to engage in any activity pertaining

to the position of chief incumbent of the said temple. As such, the said Naamalwewa Sri Rathanasara Thero has no right to execute [P15] renouncing the leasehold rights/trade rights in respect of the shop premises 10D and request the 1st Respondent to transfer the leasehold rights/trade rights to the 5th Respondent.

Thus, it was the position of the Petitioner-Appellant that the process followed by the 1st Respondent-Pradeshiya Sabha in view of executing lease agreement P15 with the 5th Respondent is improper, illegal and wrongful.

Be that as it may, it was the position taken up by the Respondent-Respondents that the impugned property, shop premises 10D, is not a Sangika property or a Temple property.

It is pertinent to note that the learned High Court Judge held that there was no evidence to prove that the property in question was a Temple Property and there was a lease agreement between the former Viharadhipathi Naamalwewa Sri Rathanasara Thero and the 1st Respondent-Respondent-Pradeshiya Sabha.

The said position was substantiated by letter [P13] sent to the Petitioner-Appellant by the 3rd Respondent-Respondent in response to the letter [P11] by the Petitioner-Appellant, which refers to the property in question [shop premises 10D].

“ඔබතුමා විසින් මා වෙත 2013.01.18 දිනයෙන් එවන ලද එන්තරවාසිය හා බැඳේ.

මිහින්තලේ ප්‍රාදේශීය සභාවට අයත් අංක ඩී-10 දරණ කඩ කාමරය සම්බන්ධයෙන් එම එන්තරවාසියෙන් දන්වා තිබූ අතර එම කඩ කාමරය සම්බන්ධව අදාළ ලිපිගොනු ආශ්‍රයෙන් පහත සඳහන් කරුණු ඔබතුමා වෙත ඉදිරිපත් කරමි.

නගර හා ග්‍රාම නිර්මාණ දෙපාර්තමේන්තුව මගින් මෙම කඩ කාමර ප්‍රාදේශීය සභාවේ සන්තකයක් ලෙස පවරා දී තිබූ අතර, ඒ අනුව එම කඩ කාමර වෙළඳ අයිතීන් බදු දීම යටතේ බදුකරුවන්ට ලබාදී ඇත. අංක ඩී-10 කඩ කාමරයද ඒ ආකාරයට ලබාදී ඇත.

එම කඩ කාමරයේ වෙළඳ අයිතිය රතනසාර හිමියන්ට බදු දී තිබූ අතර, රතනසාර හිමියන් විසින් 2012.12.10 වන දින ලිපියක් ඉදිරිපත් කරමින් එම කඩ කාමරයේ ඉදිරි නඩත්තු කටයුතු කරගෙන යෑමට රතනසාර හිමියන්ට ඇති අපහසුතාවය හේතුවෙන් එම කඩ කාමරය ප්‍රාදේශීය සභාවට භාරගන්නා මෙන් රතනසාර හිමියන් විසින් දන්වා එවා ඇත”.

Apparently, it was informed that the possession of the shop premises had been given by the Department of Town and Country Planning to the 1st Respondent-Respondent and that the trade rights (ගවළඳ අයිතිය) of the said shop premises had been leased out, and such trade rights have been leased to Naamalwewa Sri Rathanasara Thero, the former Viharadhipathi of the Mihintale Raja Maha Viharaya.

Since the Petitioner-Appellant is of the view that the impugned property is a Temple property the burden of proving the same, squarely and fairly rests with the Petitioner-Appellant.

Nevertheless, the Petitioner-Appellant had not discharged the burden by proving contrary to the contention of the Respondent-Respondents.

The Petitioner-Appellant had stated in his written submissions, that due to the destruction of documents by the acts of the former Viharadhipathi the said Naamalwewa Sri Rathanasara Thero, the Petitioner-Appellant's efforts to protect the temple property had become difficult.

However, it is observable that the Petitioner-Appellant had not made any attempt to prove that the impugned property was given in lieu of the acquisition of a property belonging to the Mihinthale Rajamaha Viharaya by providing proof of a vesting Order or that steps had been taken to vest the property in the Pradeshiya Sabha in terms of law.

Furthermore, the Petitioner-Appellant had not proved that the lease rentals were collected from the shop premises 10D by the former Viharadhipathi on behalf of the Mihintale Raja Maha Viharaya. Apparently, the Petitioner-Appellant had not made any request to the 1st Respondent-Respondent-Pradeshiya Sabha in obtaining a copy of the agreement between the former Viharadhipathi Naamalwewa Sri Rathanasara Thero and the 1st Respondent-Respondent-Pradeshiya Sabha, to substantiate the contention of the Petitioner-Appellant that the property in question is a Temple property.

Thus, the Petitioner-Appellant had failed to produce any evidence whatsoever to prove the fact that the property in question was owned by Mihintale Rajamaha Viharaya and, the Buddhist

Temporalities Act is applicable to the said property. The Appellant had failed to establish that the impugned property is a Temple property thus it is seen that any of his rights or interests were affected through the decision which he sought to quash.

Since in the instant case, the dispute arose pertaining to a lease agreement [P15] executed between the 1st Respondent-Pradeshiya Sabha and the 5th Respondent-Respondent. It was the contention of the Respondent-Respondent that the Appellant had erroneously filed a writ application in the Provincial High Court and prayed for a writ of Certiorari to quash the procedure followed by the 1st Respondent-Respondent Pradeshiya Sabha in respect of the execution of the lease agreement marked as **P15** and sought a writ of Mandamus against the 1st Respondent to enter his name as the lessee to the said property.

It is worthy to note that the Petitioner-Appellant's application is entirely based on the said lease agreement [P15]. Thus the Appellant has to seek a remedy under the Contract Law through civil litigation which eminently falls within the sphere of Private Law and not Public Law. Apparently, the decision sought to be quashed by way of Certiorari was not made in the exercise of any statutory power. As such, the writ jurisdiction is not the proper forum to challenge such contractual relationship, devoid of statutory flavour, inasmuch as the Appellant has no *locus standi* to maintain this application, since it is outside the scope of writ jurisdiction, irrespective of the alleged offender being a Public Authority.

Nevertheless, it was contended by the Respondent-Respondents that the Appellant had erroneously invoked the writ jurisdiction of the Provincial High Court and pursued for a writ of Certiorari to quash the lease agreement [**P15**] and sought a writ of Mandamus against the 1st Respondent-Respondent to enter his name as the lessee to the property in question, which is misconceived in Law by pursuing the writ jurisdiction for a contractual relationship.

As such, the Respondent-Respondents had taken up the view that this is a dispute which should be adjudicated under the Private Law and the Appellant lacks jurisdiction to challenge the same by way of a writ of Certiorari. Thus, the Appellant had no *locus standi* to maintain the initial writ application-on the basis that the relationship between the parties was contractual, hence the

Appellant was not entitled to the remedy by way of Certiorari provided that another remedy was available.

The Court observes that the Petitioner-Appellant has taken up the position that the procedure in which the impugned lease agreement [P15] has been executed by the 1st Respondent-Respondent, had not complied the Pradeshiya Sabha Act.

Apparently, the Petitioner-Appellant has raised the said issue at the argument before us and it had not been taken up before the learned High Court Judge.

Since this appeal emanates from the Order made by the learned High Court Judge, the Petitioner-Appellant is not entitled to urge a new position for the first time in appeal, since it was not urged before the High Court. Because its not fair for the learned High Court Judge to found him at fault for not evaluating an issue, which was not placed before him.

Thus, the Appellate Court need not consider a new position which was not urged before the High Court Judge.

The said issue has been dealt with in the Case of *Chandrasiri Fernando Vs Titus Wickramanayake [CA 226/1997(F) CA Minutes 14.02.2012]* and the Case of *Chrishanthi Peiris Vs Matilda Fernando & 3 Others [CA 816/1999(F) 2012 B.L.R 354]*.

In was cited in the Case *Podi Nona Vs Urban Council Horana [1981 (2) S.L.R 141]* which held, the Respondent was the owner of the public market and was entitled to lease out the stalls in the market by calling for tenders. The Petitioner sought a writ of Certiorari to quash a decision of the Local Authority to cancel a lease in her favour of a stall at the Public Market Horana. If the Petitioner felt that there was a breach of the contract, she had a remedy in the proper forum for breach of Agreement.

It was held that the relationship between the parties was contractual and accordingly that the Petitioner is not entitled to obtain a writ of Certiorari, as another remedy was open to her.

In support of the Respondent-Respondent's said contention, the Case *Gawarammana Vs Tea Research Board and others [2003 (3) S.L.R 120]* was cited. It held that;

(1) The employment of the Petitioner under the Tea Research Institute was contractual and as such, no writ lies to remedy grievances from an alleged breach of contract or failure to observe the principles of Natural Justice.
(2) Powers derived from a 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 in itself was not made in the exercise of any statutory power.

In the Case of *Jayaweera Vs. Wijeratne [1985 (2) S.L.R 413]*, His Lordship Justice G.P.S.De Silva- later became the Chief Justice, emphasized that "where the relationship between the parties is a purely contractual one of a commercial nature, neither Certiorari nor Mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of Natural Justice even if one of the parties is a Public Authority".

I quote, Professor H.W.R. Wade in his **Administrative Law 10th edition** page 526 and 527 discuss the law pertaining to the above as follows.

> "A distinction which needs to be clarified is that between public duties enforceable by a mandatory Order, which are usually statutory, and duties arising merely from the contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by a mandatory order, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

Further, Dr. Sunil F.A. Cooray in his **Principles of Administrative Law in Sri Lanka 3rd edition Vol-2** discuss the above contention as follows;

> "The exercise of power arising purely from the contract by one of the contracting parties who was a "Public Authority" cannot be quashed by Certiorari whether such contract be a lease of a shop premises by a local authority, a contract of employment, or a contract of a dealership. A writ of Certiorari will not lie to quash a decision of the Maha Sangha Sabha

or the Sangha Sabha of a Buddhist Nikaya because such Sabha is a domestic tribunal functioning under an agreement of parties and not under any statutory provision".

In the light of the above facts placed before Court by the Respondent-Respondents and the trite law established through the case laws and scholarly articles, it amply demonstrates that in a situation where the relationship between the parties was based on a contractual obligation, no writ of Certiorari lies in such an instance.

Hence, the Petitioner-Appellant is not entitled to seek relief by way of writ of Certiorari and since the Petitioner-Appellant had failed to establish any statutory duty cast upon the 1st Respondent-Respondent in favour of the Petitioner-Appellant, no relief can be sought by way of a writ of Mandamus.

As such, it is noteworthy that the learned High Court Judge has considered the facts stated before him and correctly decided that the Petitioner-Appellant had failed to establish any interest towards the impugned property.

Therefore, we see no reason for us to interfere with the order of the learned High Court Judge dated 28.08.2014 thus we affirm the same.

Hence, we dismiss the appeal with costs.

JUDGE OF THE COURT OF APPEAL

K.K.A.V.Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL