

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, Prohibition and  
Mandamus under and in terms of Article 140 of the  
Constitution.*

CA/WRIT/40/2022

Tharanga Vishvajith Sembukuttiarchchi  
140/1, Mahabuthgamuwa,  
Angoda.

**Petitioner**

Vs.

1. Construction Industry Development  
Authority  
“Savsiripaya”, 123, Wijerama  
Mawatha, Colombo 07.
2. Prof. N. T. Sohan Wijesekara  
Chairman  
Construction Industry Development  
Authority,  
“Savsiripaya”, 123, Wijerama  
Mawatha, Colombo 07.
3. Eng. Prasad Amarasooriya  
Director General (Acting),  
Construction Industry Development  
Authority,  
“Savsiripaya”, 123, Wijerama  
Mawatha, Colombo 07.
4. Udaya S. Abeyratne  
Working Director/Member of the  
Board of Management,
5. Eng. R. G. S. K. Rajapaksha  
Director/Member of the  
Board of Management,

6. Ajantha Galhena  
Director/Member of the  
Board of Management,
7. Prof. Mrs. Chitra Weddikara  
Director/Member of the  
Board of Management,
8. Ch. QS. Upul Shantha  
Director/Member of the  
Board of Management,
9. Eng. M. G. Hemachandra  
Director/Member of the  
Board of Management,
10. Eng. M. H. Samantha Indika  
Director/Member of the  
Board of Management,
11. Eng. A. W. Gamage  
Director/Member of the  
Board of Management,
12. Eng. Major Ranjith Gunatilleke  
Director/Member of the  
Board of Management,
13. Eng. J. A. Tissa Seneviratne  
Director/Member of the  
Board of Management,
14. Mr. Susantha Ranjith Liyanarachchi  
Director/Member of the  
Board of Management,

4<sup>th</sup> to 14<sup>th</sup> Respondents all at  
Construction Industry Development  
Authority, “Savsiripaya”, 123,  
Wijerama Mawatha, Colombo 07.

15. Eng. Keerthi Ranjith Abesiriwardana  
The Secretary,  
State Ministry of Rural Housing and  
Construction & Building Materials  
Industries Promotions, 2<sup>nd</sup> Floor,  
“Sethsiripaya”, Sri Jayawardanepura  
Kotte, Battaramulla.
16. Hon. Indika Anuruddha Herath  
M.P., State Ministry of Rural Housing  
and Construction & Building Materials  
Industries Promotions, 2<sup>nd</sup> Floor,  
“Sethsiripaya”, Sri Jayawardanepura  
Kotte, Battaramulla.
17. N.S. Wathukarawatta  
Acting Director (Finance),  
Construction Industry Development  
Authority, “Savsiripaya”, 123,  
Wijerama Mawatha,  
Colombo 07.
18. P. A. S. Athula Kumara  
Director General,  
Department of Public Enterprise  
Ministry of Finance,  
Colombo 01.

**Respondents**

**Before** : Sobhitha Rajakaruna J.  
Dhammika Ganepola J.

**Counsel** : Dilrukshi Dias Wickramasinghe PC with Dilumi De Alwis and Sithari  
Perera for the Petitioner.

Udara Thilakawardena with Nadeesha Abeyratne for the 1<sup>st</sup> Respondent.

Prince Perera for the 2<sup>nd</sup> to 14<sup>th</sup> and 17<sup>th</sup> Respondents.

Hashini Opatha, SC for the 15<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> Respondents.

**Argued on** : 15.06.2022

**Written Submissions** : Petitioner - 15.07.2022

1<sup>st</sup> Respondent - 15.07.2022

2<sup>nd</sup> to 14<sup>th</sup> and 17<sup>th</sup> Respondents - 15.07.2022

**Decided on** : 29.07.2022

**Sobhitha Rajakaruna J.**

The Petitioner is seeking, *inter alia*, for a writ of Certiorari quashing the decision to terminate the services of the Petitioner with effect from 08.10.2021 as contained in the letter dated 31.12.2021, marked 'P7'.

In terms of the said letter 'P7', the services of the Petitioner have been terminated due to purported misappropriation of funds disclosed in an internal audit. The 1<sup>st</sup> to 14<sup>th</sup> and 17<sup>th</sup> Respondents along with their Statement of Objections have submitted two internal audit reports and a letter issued by an Assistant Director (Internal Audit) marked as 'R7', 'R8' and 'R10' respectively. The Petitioner also, along with his Counter Affidavit, has submitted a report prepared by Mr. M. G. Kandeepan (Chief Internal Auditor) marked as 'C8'.

During the initial stages of the sequence of events in regard to this case, the Petitioner has been served with a letter dated 17.02.2021 ('P27') by one of the Assistant Directors of the 1<sup>st</sup> Respondent-Construction Industry Development Authority ('CIDA'), to inform the Petitioner that a vehicle with a driver has been allocated to him with effect from 19.02.2019 in lieu of a transport allowance. The payment of the transport allowance to the Petitioner was withheld with effect from 19.02.2021 by the same letter 'P27'. The Petitioner claims that he has been receiving a monthly transport allowance of Rs. 50,000.00 together with a monthly fuel allowance since May 2019 until the issuance of the said letter 'P27'. The Petitioner in response to the said letter 'P27' has informed the said Assistant Director by

his letter dated 18.02.2021 ('P28') that he would not be requiring an official vehicle and further that he would continue to use his personal vehicle. The document dated 18.02.2021, marked 'P29' evinced that the 2<sup>nd</sup> Respondent-Chairman ('Chairman') on his own has decided to provide a vehicle and a driver to the Petitioner as his preferred option in respect of his entitlement for official transport.

Before the termination of services, the Petitioner was placed on compulsory leave and such decision has been taken consequent to a meeting held on 08.10.2021. The purpose of the said meeting which was presided by the said Chairman, was to discuss the affairs of the Petitioner. The minutes of the said meeting is marked as 'R5'. The participants of the meeting have discussed on the effect of the Public Enterprise Department Circular 01/2015 ('PED Circular 01/2015') and have observed that an officer who is entitled to an official vehicle has the option of either to use the official vehicle or to avail a monthly transport allowance and monthly fuel allowance. However, it is apparent that the Petitioner has been provided a vehicle and a driver notwithstanding the provisions of the said Circular, but merely on the basis that providing a vehicle to the Petitioner is more favourable to CIDA.

Furthermore, it appears that a vehicle and a driver had been provided to the Petitioner despite his refusal to accept such a vehicle and his willingness to accept the other benefits instead, under the aforesaid Circular. Based on the Chairman's decision that providing a vehicle and a driver to the Petitioner is more favourable to CIDA, several subsequent decisions have been taken against the Petitioner by the authorities. Moreover, allegations have been raised against the Petitioner for accepting the transport allowance and the fuel allowance when a decision had been taken to provide a vehicle and a driver to the Petitioner.

The Petitioner was placed on compulsory leave with effect from 08.10.2021 by virtue of the letter dated 08.10.2021, marked 'P6'. The allegation against the Petitioner in the said letter 'P6' is that the Petitioner has misappropriated a sum of Rs.538,720.00 by accepting the monthly transport and fuel allowance for the months from February to September 2021 during which period the Petitioner was prohibited by the Chairman from receiving such allowances.

At this juncture, I need to examine the Audit Reports tendered to Court as the cause for termination of services of the Petitioner shown in the letter of termination marked 'P7', is based on an Audit Report.

The objective of the internal Audit Report 'R7' dated 09.11.2021 is 'to identify who had the responsibility over assigning duties of keeping custody of all paying documents and the filing of paid documents during preceding five years'. No action has been proposed against the Petitioner in the said report. The Audit Report dated 01.10.2021 marked 'R8' proposes that the question on PED Circular 01/2015 should be referred to the Board of Management of CIDA in order to obtain a directive in that regard. The Petitioner alleges that the Audit Report marked 'C8' has been issued by Mr. M. G. Kandeepan soon after the Petitioner was placed on compulsory leave. The said Mr. Kandeepan has inter alia recommended as follows;

- a) "Since a letter has been issued by the authorities discontinuing the transport allowance paid to Mr. Vishvajith from February 2021, it is an indecent act to obtain such allowance from February to October 2021. It is the responsibility of a disciplined officer to adhere to the decisions made by his superior although such decisions are unfair".
- b) "It is recommended to acquit Mr. Vishvajith from all the other charges and to reinstate him in the same position whilst issuing a warning letter to avoid him repeating such acts in future".
- c) "Decision to recover the allowances that were paid during last 10 months is against the rule of natural justice and the circulars; and it is favourable for both parties to pay the transport allowance to Mr. Vishvajith as opted by him earlier".
- d) "It should be understood that it is favourable for both parties to let bygones be bygones and come in to terms with their differences and continue work in a peaceful manner".

In such a backdrop, it is pertinent to note that no effective investigation has been carried out in those Audits to establish the purported allegations against the Petitioner and also no due recommendation has been made against the Petitioner based on the provisions of the said Circular. By observing all facts of this case, it appears that the crucial issues of this case revolve around the PED Circular 01/2015 dated 25.05.2015 ('P25A').

The provisions which are material to this case are Clause 3.3, Clause 3.4 & Clause 3.5 of the said PED Circular 01/2015. Those provisions read as follows;

- 3.3 An officer who is entitled to an official vehicle has the option either to use the official vehicle or to avail a monthly transport allowance of Rs.30,000/ and monthly fuel allowance applicable to the post. However, such officers shall not be provided with a driver or driver's allowance.
- 3.4 The transport allowance and the fuel allowance would be added to the monthly salary.
- 3.5 The officers who are entitled to official assigned vehicles or a transport allowance are not permitted to use any other official vehicle including those in the vehicle pool.

In the circumstances, the pivotal question that this Court should examine is;

- a) whether an officer has an absolute discretion, in terms of the PED Circular 01/2015, to opt either to use the official vehicle or to receive a monthly transport and fuel allowance in lieu of an official vehicle;
- b) whether the said Chairman or the CIDA has the authority to prevent an officer of CIDA enjoying the discretion as mentioned above, on the pretext that providing a vehicle and a driver is more favourable to CIDA.

The said PED Circular has been issued by the Department of Public Enterprises of the Ministry of Finance and the signatory to the said Circular is the Secretary to the Treasury. It is no doubt that the above Circular has been issued based on the Government policy on transport facilities for the offices in commercial corporations, statutory boards and state-owned companies.

As per the website of the Ministry of Finance–Sri Lanka, its functions, inter alia, are; providing policy guidance to relevant State Ministries and formulating policies in relation to the subject of Finance in conformity with the prescribed Laws, Acts and Ordinances. Further, the said Ministry has responsibilities in relation to macro-economic policies, annual budget and Appropriation Acts, public financial management etc.

I take the view that a Government formulates its policy such as what is incorporated in the above PED Circular, usually based on several facts & law including constraints upon its resources and on social security and public welfare. Hence, those factors need to be

taken in to consideration when assaying the question whether the said Chairman or the CIDA has the power to deny the rights of an officer under the said PED Circular 01/2015.

Similarly, it is observed that the Clause 6 of the said PED Circular 01/2015 deals with the 'clarifications' on the said Circular. Any such clarification regarding the Circular may be obtained from the Additional Director General or the Director of the Department of Public Enterprises. As I have observed earlier, the internal auditor in 'R8' has recommended to refer the issue on the said Circular to the Management of CIDA and not to the Public Enterprises Department (PED). I draw my attention to the letter issued by the said PED dated 10.02.2021, marked 'P45A' by which the said Department has categorically informed the Secretary to the Ministry (with copies to the Director General to CIDA, Auditor General and the Petitioner) to get a clarification if needed on the provisions of the said Circular from the PED.

The Petitioner by his letter dated 02.03.2021 has requested the Director General of CIDA to seek clarifications from the PED on his entitlement for the monthly transport allowance and however, the said Chairman without adhering to such request has withdrawn both the vehicle and the payment of those allowances by his letter dated 05.03.2021, marked 'P33'.

In ***State of UP vs. S. K. Theater Production (2007) 10 SCC 198, 200 (para 11)***, it was held as follows;

*"It is well settled that a relevant factor for interpretation, if there is some ambiguity in a circular is how the circular has been understood by the department itself which issued it."*

However, I am of the view that the said Clause 3.3 of the PED Circular 01/2015, in an ambiguous language, provides that an officer who is entitled to an official vehicle is given two options and that is;

- a) To use the official vehicle or
- b) To avail the monthly transport allowance of Rs.30,000.00 and monthly fuel allowance applicable to the post.

(The relevant monthly transport allowance of Rs.30,000.00 has been enhanced to Rs.50,000.00 by virtue of Circular No. PED 01/2015 (i) dated 27.10.2016 marked 'P25B')



There is no provision in the said Circular which restricts, impliedly or expressly, an officer using his discretion to opt either to use the official vehicle or to receive such allowances. The Secretaries to Ministries or the Chairmen of Commercial Corporations, Statutory Boards and Government Owned Companies to whom this Circular is being addressed also have not been bestowed with any authority in terms of the said Circular to compel any officer to select a particular option in line with the wish of such Secretary/Chairman/Head of the Institution. I have arrived at the said finding as the said Circular is based on a Government policy and is issued by the Ministry of Finance which has a prime duty and a responsibility than the said Chairman/Head of the Institution to consider the financial constraints, if any, due to the implementation of this Circular.

Thus, I take the view that the PED is empowered to give an interpretation at any point of time on the aforesaid discretion of an officer in respect of the said Clause 3.3 and it is obvious that during the period relevant to the instant application, the said Department has not issued any special interpretation upon the said discretion. It is pertinent to note that the Director General of PED is the 18<sup>th</sup> Respondent of this application and the Attorney General who appears for the PED and also for the 15<sup>th</sup> and 16<sup>th</sup> Respondents filing a motion dated 20.04.2022, has informed Court that no objections would be filed in respect of the instant application of the Petitioner. In the circumstances, I hold that the said Chairman has no authority whatsoever to discriminate an officer when using his or her discretion under the said Clause 3.3 of the Circular. The said Chairman among other decisions particularly in his decision reflected in 'P33', has clearly oppressed the discretion of the Petitioner, impeding him from exercising such discretion at his pleasure.

Now, I advert to examine whether the services of the Petitioner have been terminated unlawfully. The Petitioner has been serving at CIDA as the Director (Finance) until his services were terminated with effect from 08.10.2021. The Respondents do not dispute that the Petitioner is an eligible officer under the Public Administration Circular 22/99, dated 08.10.1999, marked 'P25C' to avail the benefits in terms of the said PED Circular 01/2015 as amended by PED Circular 01/2015 (i). The PED also has not made any direction during the period relevant to this case that a probationer is not entitled to the benefits under the said clause 3.3 of the said Circular. In any event, I am of the view that the benefits under the said clause 3.3 are being given to officers for them to execute official

duties effectively and such efficiency of work is expected from all the officers irrespective of the fact that he or she is confirmed in service or not.

As mentioned earlier, the Petitioner has been paid the said transport and fuel allowance until 19.02.2021 by the CIDA. The Petitioner's contention is that he has received allowances every time with the approval of the Director General of CIDA, although the Respondents complain that the Petitioner has improperly received the said allowances during a period where such payments were withheld by the Chairman. Further, it is observed that no formal disciplinary inquiry has been held against the Petitioner before taking the decision to terminate his services. The Petitioner avers in his Petition referring to several instances that his services has been terminated due to malice and *mala fides* on the part of the said Chairman.

On a careful consideration of all the circumstances, I take the view that the decision to terminate the services has been taken as a consequence to the decisions of the said Chairman or of other authorities interfering with the discretion of the Petitioner when he was exercising his rights under the PED Circular 01/2015. In light of the above, I hold that the Chairman has assumed a jurisdiction which he does not have and has exceeded his jurisdiction by acting contrary to the rule of natural justice and also by arriving at a decision which is eminently irrational and unreasonable in respect of the concept of the discretion of an officer embodied in Clause 3.3 of the said Circular. Therefore, in addition to the decision to terminate the services, any subsequent act or decision flowing therefrom, particularly the charges against the Petitioner on misappropriation of funds are also ultra vires and void.

Having considered the legality of the impugned decisions of the said Chairman and other authorities, now it is necessary to proceed to resolve the objections raised by the Respondents other than the 15<sup>th</sup>, 16<sup>th</sup> & 18<sup>th</sup> Respondents who have not filed statement of objections.

The contention of the 1<sup>st</sup> to 14<sup>th</sup> & 17<sup>th</sup> Respondents ('Respondents') is that the Petitioner has an alternative remedy and accordingly, the Petitioner should have applied to the Labour Tribunal in the first instance as the Petitioner is not entitled to invoke the jurisdiction of this Court upon his termination of services. On principle, I agree that in terms of Section 31(B) of the Industrial Disputes Act, a workman should first make an

application to the Labour Tribunal for relief or redress in respect of the termination of services by his employer.

In terms of Section 31(C)(1) of the said Industrial Disputes Act, where an application under Section 31(B) is made to the Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries and make an order as may appear to the Tribunal to be just and equitable. Thus, in my view, what is applicable to the Labour Tribunals is the law of equity and essentially not the common law. This Court exercises writ jurisdiction by virtue of the provisions of Article 140 of the Constitution and thereby it exercises not the Appellate or Revisionary jurisdiction. The Petitioner's instant application to this Court is for Judicial Review in Administrative Law. In that context, the Labour Tribunal is not competent to quash an order or a decision of a public authority based on principles of ultra vires.

Certainly, the Labour Tribunal is qualified to analyze evidence and arrive at a conclusion whether the termination of services is just and equitable. Anyhow, for the reasons set forth, the Labour Tribunal is not empowered to quash the said Chairman's aforesaid unlawful decision which is the root cause for the termination of services of the Petitioner. In the circumstances, I am of the view that the Petitioner will not be able to secure an effective and efficacious remedy by applying to Labour Tribunal at the first instance. The reasons for my said findings are that not only the wrongful decisions of the Chairman but even the subsequent decisions of the authorities flowing from the Chairman's said decision should become void for the Petitioner to get an effective and efficacious remedy upon his all grievances.

My view is that not only the Petitioner but many others including the officers of the CIDA would probably get affected by not giving due effect to the said clause 3.3 of the said Circular and therefore, such wrongful decisions are definitely tend to be quashed through an application for Judicial Review. Thus, if an unlawful decision of a public authority affects the public as a whole other than the person who has resorted to the Review Court, such facet certainly should be taken in to consideration when the Review Judge focuses his mind to the aforesaid 'effective and efficacious remedy'.

The Supreme Court has dealt with section 4(1) and 20 of the Industrial Disputes Act in *E.S. Fernando vs United Workers Union and another (1989) 2 Sri. L.R. 199*. G.P.S. De Silva J. in that case held as follows;

*“To disentitle the petitioner-appellant to the remedy by way of certiorari, the "alternative remedy" must be an adequate and an effectual remedy”*

**(Also see- *J S H Jayamaha vs. Provincial Public Service Commission, Kurunegala and others CA/PHC/188/2014, decided on 15.07.2018* and *Wickramasinghage Francis Kulasooriya and another vs. Officer-in-Charge, Police Station, Kirindiwela and others CA(Writ) 338/2011, decided on 22.10.2018*)**

Further, the 1<sup>st</sup> Respondent contends that the Petitioner should have made a complaint to the Labour Commissioner with regard to the change in conditions of employment in order to seek remedies under sections 2 and 3 of the Industrial Disputes Act. This argument of the 1<sup>st</sup> Respondent fails in view of my above findings.

The Respondents by way of further objections assert that the Petitioner has committed a criminal misappropriation of Rs.538,720.00 of state money due to which the Respondents has lost confidence and trust placed on the Petitioner. Moreover, the 1<sup>st</sup> Respondent alleges that the CIDA has conducted an inquiry regarding the actions of the Petitioner in order to provide him with a fair hearing. I cannot accept these assertions based on my above findings that the decision to terminate the services emerges from an unlawful decision of the said Chairman in reference to clause 3.3 of the said Circular.

Similarly, the argument of the Respondents that the Petitioner was under a three-year probationary period and his services could be terminated at any given time upon valid reasons, is not strong enough to outweigh my above findings in respect of the unlawful decisions of the said Chairman and other authorities.

The Respondents attempt to emphasize the fact that the Petitioner did not possess required experience for the post of Director of Finance and whereby, he was recruited as a probationer. The Respondents further state that if the Petitioner submits wrong information with regard to his experience and qualifications, his services can be terminated as per Clause 6 of the letter of appointment. Anyhow, I observe that no lawful inquiry has been conducted against the Petitioner based on those alleged grounds and accordingly, I am not inclined to accept the said proposition of the Respondents.

In the circumstances, I proceed to issue a mandate in the nature of a writ of certiorari quashing the letter of termination dated 31.12.2021 marked as ‘P7’ and all the decisions reflected in the said letter ‘P7’. Furthermore, I issue a mandate in the nature of a writ of

Mandamus directing the 1<sup>st</sup> to 14<sup>th</sup> Respondents to reinstate the Petitioner with immediate effect under the same conditions of service prevailing at the time of his termination together with all emoluments lawfully entitled by the Petitioner for the period commencing from the date of termination until his reinstatement and without break of service.

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**