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

In the matter of an Application for mandates in the nature of writs of Certiorari, Mandamus and Prohibition, under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Dr. Chandana Kasthuriarachchi,
No. 575/4, Kumarapeli Mawatha,
Daranagama,
Delgoda.

Case No. CA Writ 359/2020

**PETITIONER**

1. University of Colombo
No. 94, Kumarathunga Munidasa
Mawatha, Colombo 03.

and 31 others

**RESPONDENTS**

**Before:** Hon. Justice D. N. Samarakoon

Hon. Justice Sasi Mahendran

**Counsel:** Kuwera de Zoysa, PC with A. Maharoof instructed by Sanjaya Fonseka for Petitioner

Uditha Egalahewa, PC with N.K. Ashokbhavan instructed by H. Chandrakumar de Silva for the 01st, 02nd, 27th and 28th respondents

**Written Submissions on:** 23.02.2022 by the petitioner

09.02.2022 and 03.02.2022 by respondents

**Date:** 08.11.2022

**D.N. Samarakoon, J.**

In **Gawarammana vs. Tea Research Board and others 2003, 2003 (3) SLR 120** Sripavan J. (later Chief Justice) said at page 122,

> "In R v Electricity Commissioner at 204 the writ of certiorari was said to be available against "**any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially**". Accordingly, the person determining the questions must have **legal authority** to do so. This being so, it is necessary to ascertain in the first instance **whether the decision sought to be quashed was made in the exercise of any statutory power**".

In respect of the preliminary objection taken up by the respondents it has been cited the cases of,

1. The Council of Vidyodaya University of Ceylon v. Linus Silva ([1964] UKPC 47] or [66 NLR 505]
2. Weligama Multi Purpose Co-Operative Society Ltd v Chandradasa Daluwatta ([1984] 1 SLR 195)
3. Jayaweera v. Wijeratne ([1985] 2 SLR 413)
4. Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120)
5. Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193)
6. Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96)
7. U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015)
8. Captain Channa D.L.Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016)
9. Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019)

What was said in **Rex v Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd: CA 1923** by Atkin L. J., in full was,

> "Atkin LJ described the scope of the prerogative writs of prohibition and certiorari: 'both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. **Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.'**"

Said in 1924, this dictum is 98 years old, but its correctness is not questioned, even today.

The Petitioner, in his Written Submissions at paragraph 04 states, that,

It was the respondent's contention that,

(a) The matter impugned in the petitioner's application was a matter of Private Law which does not entail Prerogative remedies and therefore such a private matter cannot be raised under the jurisdiction vested in Your Lordships' Court under and in terms of Article 140 of the Constitution and

(b) The matter impugned was a matter stemming from an employer employee relationship and that such employment matters do not fall within the jurisdiction of Your Lordships' Court.

The aforesaid two are, in fact, one, it says,

**The matter impugned in petitioner's writ application, stemming from an employer employee relationship, is a Private Law matter, which does not entail Prerogative remedies and hence such a private law matter cannot be raised under the jurisdiction vested in the Court of Appeal under Article 140 of the Constitution.**

This objection of the respondents has its root mainly in two cases, viz.,

(1) **The Council of Vidyodaya University of Ceylon v. Linus Silva ([1964] UKPC 47]** or **[66 NLR 505]** and

**(2) Perera vs. The Municipal Council of Colombo 48 NLR 66**

The purpose of considering the cases cited for the respondents in the ensuing paragraphs is not to adhere to those, because in several of those cases, except one, the relevant statute has not been considered. The decisions would have been otherwise if the relevant statutes have been brought to the notice of relevant Courts.

In **Weligama Multi Purpose Co-Operative Society Ltd v Chandradasa Daluwatta ([1984] 1 SLR 195)** [a Five Bench judgment] Sharvananda J., had, among other things, followed Perera's case. He said, [at page 199]

> "The Writ will not issue for private purpose, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by the ordinary contractual remedies such as damages, specific performance or injunction. They are not enforceable by Mandamus which is confined to public duties and is not granted where there are other adequate remedies. Perera v. Municipal Council of Colombo (4)".

In **Jayaweera v. Wijeratne ([1985] 2 SLR 413),** G. P. S. de Silva J., (later Chief Justice) among other things, said,

> "Applying this principle,- the Judicial Committee of the Privy Council in the University Council of the Vidyodaya University v. Linus Silva (2) dismissed the application made by a University teacher for a writ of certiorari to quash the decision of the Council of the University to terminate his appointment".

In **Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120),** Sripavan J., (later Chief Justice) was, among other things, influenced by the decision of Jayaweera vs. Wijeratne (1985). He said,

> "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.** (Vide Jayaweera v Wijeratna) (8)".

In **Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193),** Sriskandarajah J., among other things, also referred to Jayaweera vs. Wijeratne (1985) and said,

> "The order is arising out of a contract of employment and the termination complained of based upon a breach of her contract of employment. In Jayaweera v Wijeratne, G.P.S. de Silva J held where the relationship between the parties is a purely contractual one of a commercial nature neither certiorari nor mandamus will lie".

In **Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96),** Chandra Ekanayake J., followed Perera vs. The Municipal Council of Colombo 48 NLR 66 and said,

> "In this context it would be pertinent to consider the decision of the Supreme Court in Perera v Municipal Council of Colombo) wherein it was

held that; "in an application for writ of mandamus the applicant must have the right to the performance of some duty of a public and not merely of a private character".

In **U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015)**, Chitrasiri J., followed, among other things, the cases of (1) Weligama Multi Purpose Co-Operative Society Ltd v Chandradasa Daluwatta (2) Jayaweera vs. Wijeratne (1985) (3) Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another (4) Gawaramanna v. The Tea Research Board and (5) Mahanayake v. Chairman Ceylon Petroleum Corporation and Others.

In fact, one who finds Chitrasiri J.'s judgment can find most of the cases referred to earlier and eventually go to the two roots aforesaid.

In **Captain Channa D.L. Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016)**, Vijith K. Malalgoda J., among other things, followed (1) The Council of Vidyodaya University of Ceylon v. Linus Silva (1964) (2) Jayaweera vs. Wijeratne (1985) and (3) Mahanayake v. Chairman Ceylon Petroleum Corporation and Others.

Finally, in **Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019)**, Murdu N. B. Fernando, P.C. J., among other things followed (1) Gawaramanna v. The Tea Research Board and (2) Weligama Multi Purpose Co-Operative Society Ltd v Chandradasa Daluwatta.

Therefore, it could be seen, that, all the cases referred to, either stem from Silva or Perera.

**The University Council of the Vidyodaya University appealed from the judgment of the Supreme Court of Ceylon, to the Judicial Committee of the Privy Council. The latter, in its judgment, said no less and no more than**

**the Preliminary Objection raised by the respondents, which was framed afore.**

The said proposition, if slightly modified, will represent the judgment of the Privy Council,

> "…**an employer employee relationship, is a Private Law matter, which does not entail [certiorari] remedies and hence such a private law matter cannot be raised under the [writ] jurisdiction…"**

The Privy Council never used the term "Prerogative", used by the present respondents.

It said,

> "The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of **certiorari**".

In the original Written Submissions of the respondents dated 09.02.2022 alone, the term "Prerogative" has been used in paragraphs 2(a), 6,9,13,14,16,17,18,23,26 and 36.

A term is so used with a purpose.

Edward Jenks, D. C. L. says a breve or 'writ' was originally a short written command issued by a person in authority and 'tested' or sealed by him in proof of its genuineness. He further states that in the days when writing was a rare art the fact that a command was written in itself was a feature which distinguished it from a spoken command the receipt of which or, its terms, could be denied or questioned. He concludes that Norman Conquest and the establishment of centralized monarchy swallowed inferior writs making the word 'writ' exclusively referring to the King's Writ[1].

[1] The Prerogative Writs in English Law, Edward Jenks, D.C.L., Yale Law Journal, Vol. XXXII, April 1923, No. 6.

He also refers, quoting from Bracton, to the 'official' writs, which were issued by the office (not the court) of chancery and the 'judicial' writs issued by courts. The writs 'of course' were limited to 'official' writs. Therefore, courts had a discretion in issuing 'judicial' writs. It may be noted that the chancery office issued 'official' writs at the payment of a particular fee. Jenks says,

" But what a curious requirement for a "prerogative" writ!'

He says,

> "….**But we must remember that, with the accession of the youthful George III, the lukewarm indifference with which the country had tolerated the occupants of the throne since the Revolution, was changed into an enthusiastic welcome for the first native-born ruler who had worn the Crown since 1688. <u>In that enthusiasm it became the fashion to attribute all good things to a benevolent monarch; and the "high prerogative writ" appears in legal literature</u>.** The conspicuous example is, of course, Blackstone; but the even greater authority of Lord Mansfield led the way. With him the Mandamus, if not "an high prerogative Writ," is at least "a prerogative writ"; and **the laudatory addition "high" would come naturally from Blackstone, always a little inclined to the florid**, and full of admiration for the young Prince who had been brought up on his (Blackstone's) famous lectures.'"

**This makes it clear that these are 'judicial' writs, but not 'prerogative' writs in reality, in spite of the mere appellation to a Royal sanction.** It is merely an accident in history as to why they are called 'prerogative'.

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The Privy Council considered section 18 of Vidyodaya University and Vidyalankara University Act No. 45 of 1958. The said section says,

> "" 18. Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following, powers and duties:—
>
> (d) after consideration of the recommendations of the Senate, and subject to ratification by the Court, but without prejudice to anything done by the Council before such ratification,—
>
> (i) to institute, abolish, or suspend Professorships, Lectureships, and other teaching posts, and
> (ii) to determine the qualifications and emoluments of teachers;
>
> (e) **to appoint officers whose appointment is not otherwise provided for, and to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University**;…"

The Privy Council said,

> "The circumstance that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18 (e) are other than ordinary Contracts of master and servant".

Now, it was seen, that, "…**Wherever any body of persons <u>having legal authority</u> to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.'**"

Not only the University was established by statute, but section 18(e) specifically granted the power of suspension and dismissal. It was either on the ground of incapacity or on any "**conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit…"** This, the requirement of two thirds vote, is thus a statutory safeguard in respect of officers and teachers. **The Privy Council has not said, if this statutory power is not legal authority, what is legal authority.**

The writer **A. W. Bradley**, says in **"CASE AND COMMENT NATURAL JUSTICE AND ACADEMIC FREEDOM"**,

> "Seldom can the weaknesses of English administrative law have been so strikingly revealed as in the Judicial Committee's decision in Vidyodaya University Council v. Silva [1965] 1 W.L.R. 77. The concept of natural justice, as there interpreted, is shown to be markedly inferior to the American principle of due process; and in contrast with French law, English law is seen to provide no effective safeguards for those in public employment as regards the exercise of disciplinary powers. **In distinguishing between chief constables, who are entitled to natural justice, and university professors, who are not, the Judicial Committee have cut the ground from under the feet of those who welcomed Ridge v. Baldwin as a notable step towards administrative justice**".

The Privy Council, in University Council of Vidyodaya University vs. Linus Silva, quoted the passage below from Ridge vs. Baldwin,

> "" The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So, the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

In **Ridge vs. Baldwin**, Lord Reid said, at page 80,

> "Then there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in Wood vs. Woad L. R. 9 Ex. 190. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make decisions until it has afforded to the person affected a proper opportunity to state his case".

Lord Reid allowed the appeal.

Lord Evershed, although dismissed the appeal, said at page 85,

> "I turn accordingly to what have appeared to me to be the most difficult question raised in this appeal; that is to say, first, whether the exercise of the statutory jurisdiction by the watch committee, which, in my opinion, was vested in them without regard to the regulations, required the observance by the watch committee of what are called the principles of natural justice and second, if so, whether on the facts of this case such principles were in fact observed.
>
> It has been said many times that the exact requirement in any case of the so called principles of natural justice cannot be precisely defined; that they depend in each case upon the circumstances of the case. According to Sir Frederick Pollock, the meaning of the phrase "natural justice" is "the ultimate principle of fitness with regard to the nature of man as a rational and social being" and he went on to point out that the origin of the principles could be traced to Aristotle and the Roman jurists. ("Jurisprudence and Legal Essays" (1961), page 124) Your Lordships were, therefore, not unnaturally referred to a great many cases, but, as I believe that Your Lordships agree, it is by no means easy to treat these directions as entirely uniform and still less easy to be able to extract from them the means of propounding a precise statement of the circumstances or of the cases in which the principles can be invoked before the courts. I am, however, content to assume that the invocation should not be limited to cases where the body concerned, whether a domestic committee or somebody established by a statute, is one which is exercising judicial or quasi judicial functions strictly so called – but that such invocation may also be had in cases where the body concerned can properly be described as administrative – so long as it can be said, in Sir Frederic Pollock's language, that the invocation is required in order to conform to the

ultimate principle of the fitness with regard to the nature of man as a rational and social being.

On the other hand, it is (as I venture to think) no less plain now that Parliament may by appropriate language in a statute make it clear that the activity or discretion of the body constituted by the statute is not to be subject to any control or interference by the courts.

At this stage I venture to make two points. First, since there is no question here of bias or any suggestion that the watch committee acted otherwise than entirely in good faith, the only principle of natural justice here involved is that enshrined in the Latin phrase "audi alteram partem". Second, I for my part conclude that if the principles of natural justice can properly be invoked in this case and if it should be held that such principles were not observed, then the decision of the watch committee was not void but voidable only".

Lord Morris of Borth-Y-Gest, (who incidentally wrote the sole opinion in University Council of Vidyodaya University vs. Linus Silva), said at page 113,

"The watch committee were under a statutory obligation (see Police Act 1919 section 4(1)) to comply with the regulations made under the Act. They dismissed the appellant after finding that he had been negligent in the discharge of his duty. That was a finding of guilt of the offence of neglecting or omitting diligently to attend to or to carry out his duty. Yet they had preferred no charge against the appellant and gave him no notice. They gave him no opportunity to defend himself or to be heard. Though their good faith is in no way impugned, they completely disregarded the regulations and did not begin to comply with them".

His Lordship allowed the appeal.

Lord Hodson said at page 136,

> "In all cases where the courts have held that the principles of natural justice have been flouted, I can find none where the language does not indicate the opinion held that the decision impugned was void. It is true that the distinction between void and voidable is not drawn explicitly in the cases, but the language used shows that where there is a want of jurisdiction as opposed to a failure to follow a procedural requirement the result is a nullity. This was, indeed, decided by the Court of Exchequer in Wood vs. Woad where, as here, there was failure to give a hearing".

Lord Hodson allowed the appeal.

Lord Devlin also allowed the appeal.

**Hence, the House of Lords decided by a majority of 4 to 1, that when a statute gives power, "audi alteram partem" applies. <u>It imposes a duty to act judicially</u>.**

This was exactly what the Supreme Court said in the Five Judge Bench which heard **(1) Weligama Multi Purpose Co operative Society Ltd., vs. Chandradasa Daluwatta, (1984).**

Sharvananda J., (later Chief Justice) writing the judgment of the Five Judge Bench of the Supreme Court said,

> "Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be

enforceable by Mandamus the duty to be performed must be of a public nature and not of merely private character.. **A public duty may be imposed "by either statute,** charter or the common law or custom."- Short on Mandamus at page 228".

In **(2) Jayaweera v. Wijeratne ([1985] 2 SLR 413)** G.P.S. de Silva J., said,

> "On the other hand, Administrative Law is primarily, if not entirely, concerned with the exercise of powers and duties of governmental, **statutory** and public authorities".

In the University Council of Vidyodaya University vs. Linus Silva (1964), there was a statute regulating the power, which was section 18(e).

In "CASE AND COMMENT NATURAL JUSTICE AND ACADEMIC FREEDOM", it is said,

> "**Before Vidyodaya University v. Silva, it had seemed that Ridge v. Baldwin was authority for the proposition that where a public body was exercising a statutory power to dismiss public officers for cause shown, this power had to be exercised in accordance with natural justice**; failure to give a hearing rendered the dismissal void and the court could make a declaration to this effect or, alternatively, grant certiorari quashing the dismissal ([1964] A.C. 40, 126)".

In **(3) Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120)**, Sripavan J., said,

> "The learned Counsel for the petitioner was unable to show **any statutory provisions or any rules made** by the Tea Research Board which advert to the powers or duties attached to the post of "Transport Officer" and the procedure for termination of services from the Tea Research Institute".

**This shows that if there were "any statutory provision or any rules made", the decision would have been otherwise.**

**However, as it will be seen later, there were statutory provisions with regard to the procedure for termination in that case, which were not brought to the notice of the Court.**

In Vidyodaya University and Vidyalankara University Act No. 45 of 1958, section 18(e) categorically said,

> "18. Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following **powers and duties**:-
>
> .....
>
> (e) to appoint officers whose appointment is not otherwise provided for **and to suspend or dismiss any officer or teacher** on the grounds of incapacity or conduct which, in the opinion of not less than two thirds of the members of the Council, renders him unfit to be an officer or teacher of the University;..."

Hence the University Council of Vidyodaya University was exercising a statutory power when it dismissed Mr. Linus Silva. As per **Ridge vs. Baldwin** and all other decided cases, cited by the respondents and considered upto now, except University Council of Vidyodaya University vs. Linus Silva (1964), when the dismissal is effected acting upon a statutory authority it was held to be an act void, if rules of natural justice have not been adhered to and therefore could be quashed by certiorari.

Sripavan J., in Gawarammana vs. Tea Research Board and others (2003) quoting Thambiah J., in Chandradasa vs. Wijeratne, (1982) 1 SLR 412, said,

> ""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 ……..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."

It was said, "…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…"**

**This was exactly what, the Vidyodaya University and Vidyalankara University Act No. 45 of 1958 in its section 18 (e) provided for.**

Not only the said section say, "…and to suspend or dismiss any officer or teacher…", but also it specified the grounds of dismissal too saying, **"on the grounds of incapacity or conduct which, in the opinion of not less than two thirds of the members of the Council, renders him unfit to be an officer or teacher…"**

In **(4) Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193),** Sriskandarajah J., said,

> "'A writ of mandamus only commands the person or body to whom it is directed to perform a public duly imposed by law. In other words, **a writ of mandamus would lie where a statute mandates certain action in defined circumstances** and despite the existence of such circumstances, the required action has not been performed."

In **(5) Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96)**, Chandra Ekanayake J., said,

> "…that a writ mandamus did not lie because the petitioner's office was **not one which conferred on him a statutory right to the performance of his duties and functions** and his claim to reinstatement was merely a dispute about a private right."

In **(6) U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015)**, Chitrasiri J., said,

> "As mentioned in the authorities referred to above, if no **public duty** exists at a given instance, then the courts do not invoke and exercise its writ jurisdiction".

In **(7) Captain Channa D.L. Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016)**, Vijith K. Malagoda J., said,

> "However in the statutory provisions referred to above we see no reference what so ever to the MPMC Private Limited **and this court is of the view that the MPMC Private Limited is not established under the provisions of the Sri Lanka Ports Authority Act** but it is a duly incorporated company under the Companies Act".

MPMC was Magampura Port Management Company (Pvt) Ltd.

In **(8) Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019),** Murdu N. B. Fernando, P.C. J., said,

> "The relationship between the CPC a public corporation and its employees is entirely contractual **and has no statutory flavor**. 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".

Neither Ridge vs. Baldwin, nor Vidyodaya University vs. Linus Silva or Rex vs. Electricity Commissioners, ex parte London Electricity Joint Committee Co., referred to a "statutory flavour". Although the later case, **(9) M. S. S. Salahudeen vs. Sri Lankan Airlines Ltd., CA Writ Application 99 2012 CA Minutes dated 23.09.2019,** has not referred to Dayanthi Dias Kaluarachchi vs. Ceylon Petrolium Corporation, it has also said, "The Supreme Court as well as this Court have consistently upheld the argument that this jurisdiction cannot be extended to examine rights and obligations arising from a private contract, **even if the act that is being challenged is that of a statutory authority, unless there is a statutory flavour** to the act that is being impugned".

Hence, the 9 cases considered up to now, cited by the respondent, except the University Council of Vidyodaya University vs. Linus Silva (1964), (and Dayanthi Dias Kaluarachchi vs. Ceylon Petrolium Corporation, 19.06.2019 and M. S. S. Salahudeen vs. Sri Lanka Airlines Ltd., 23.09.2019) shows that in all those cases, it has been held, that, **if the powers granted are statutory,** a certiorari will lie to quash the decision, in the event the rules of natural justice have not been adhered to. The University Council of Vidyodaya University vs. Linus Silva (1964), with respect, stands a lone sentinel to a lopsided logic. All the other 6 cases considered, (except the aforesaid) despite just citing either Perera or Silva, or one of their off shoots, had enunciated, the principle, that **if the power to dismiss is statutory**, the none compliance of the rules of natural justice, would attract a writ of certiorari.

**But instead of so saying, as it will be seen, in most of those cases, the respective Courts have not heed to the fact that there existed a Statutory Provision with regard to the power of dismissal.**

In CASE AND COMMENT NATURAL JUSTICE AND ACADEMIC FREEDOM, it was said, that,

"…In Wood v* Woad (1874) L.R. 9 Ex. 190, an authority much relied on in Ridge v. Baldwin, Kelly C.B. stated that the committee of a mutual insurance society were " bound in the exercise of their functions by the rule expressed in the maxim audi alteram partem, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence".

**Hence, it is submitted with respect, that the University Council of Vidyodaya University vs. Linus Silva (1964), was not decided on sound principles of law.** It violates a principle adhered to in the cursus curie (jurisprudence of a Court) of the House of Lords (Ridge vs. Baldwin) as well as that of the Supreme Court of this Country. As aforesaid, even the 6 cases considered, cited for the respondent, show it.

In **The Passenger Cases, 48 U.S. (7 How.) 282,470 (1849)** Chief Justice Taney wrote: I … am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion **when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning** by which it is supported.

Perhaps the Privy Council may have been swayed by an "agreement", which the University relied upon but was denied by Linus Silva. It was said in the judgment,

"In an Affidavit of the Vice-Chancellor it was stated that there was a form of agreement for use on the appointment of teachers in the University and it was stated that the respondent had been given a draft agreement in the usual form in order that he should sign it but that he had failed and neglected to sign it".

It was also said,

"In an Affidavit in reply the respondent denied that any draft agreement was sent to him and stated his belief that no form of agreement was in existence at any material time".

The "CASE AND COMMENT NATURAL JUSTICE AND ACADEMIC FREEDOM", said,

"Moreover, a distinction is drawn in section 18 between (a) teachers and officers, who may be dismissed only for incapacity or misconduct and by a two-thirds majority of the council, and (b) all other employees, who have no protection. **Assuming that there was a contractual relationship between Silva and the university as envisaged by section 83, and some inconclusive affidavit evidence about an unsigned formal agreement was before the court, why should this prevent the court enforcing the statutory restrictions on the university's powers?"**

The respondents, in their Written Submissions dated 09.02.2022 at paragraph 34 has cited **M.S.S. Salahudeen vs. Sri Lanka Airlines Ltd., ((Unreported) CA Writ 99/2012, CA Minutes of 23.09.2019)** as one recent case referring to The University Council of Vidyodaya University vs. Linus Silva (1964). In Salahudeen, decided by Arjuna Obeysekera J., quoting from the Supreme Court judgment of Chandradasa vs. Wijeratne [1982] 1 SLR 412 it was said,

""As observed by Lord Norris[2] of Broth-Y-Guest[3] in University Council of Vidyodaya University v. Linus Silva (66 NLR 505 at p.518) the mere fact that the University is established by Statute does not necessarily make its powers statutory; it may engage its employees under ordinary contracts of service. ***The Act does not deal with the question of dismissal of employees at all***..."

[2] Lord Morris

[3] Borth-y-Gest (Not Broth but Borth and not Guest)

The afore quoted passage gives the impression that the "Act" which was instrumental in the University Council of Vidyodaya University vs. Linus Silva (1964), did not provide for the dismissal of employees.

But the **Vidyodaya University and Vidyalankara University Act No. 45 of 1958**, expressly did so. Section 18(e) said,

> "18. Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following **powers and duties**:-
>
> .....
>
> (e) to appoint officers whose appointment is not otherwise provided for **and to suspend or dismiss any officer or teacher** on the grounds of incapacity or conduct which, in the opinion of not less than two thirds of the members of the Council, renders him unfit to be an officer or teacher of the University".

The examination of the judgment of Tambiah J., in Chandradasa vs. Wijeratne [1982] 1 SLR 412, shows that the words, "***The Act does not deal with the question of dismissal of employees at all***..." appears in the next passage. Tambiah J., was referring not to the "Act" in the University Council of Vidyodaya University vs. Linus Silva (1964), but to the Act relevant to the case his lordship decided[4].

In paragraph 35 the respondents have cited **Nadarajah Kumarasivam vs. W. Karunajeewa, Chairman, Peoples' Bank, ((Unreported) CA (Writ) 622/2010, CA Minutes of 27.03.2014)** in which case the respondents cite,

[4] "As observed by Lord Norris of Borth-Y-Guest in University Council of Vidyodaya University v. Linus Silva (66 NLR 505 at p.518) the mere fact that the University is established by Statute does not necessarily make its powers statutory; it may engage its employees under ordinary contracts of service.

**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".

"It appears to this court that this is more or less a matter of contract and cannot be subject to the writ jurisdiction of this court".

GOONERATNE J. in that case has also said,

"In perusing the material placed before this court by way of pleadings and the annexed documents, it is very apparent that the Petitioners are guilty of laches. There is in fact an unexplained delay of almost 2 years. (vide (1928) 29 NLR 389; 69 NLR 211; 1982 (1) SLR 123, 130, 205(1) SLR 67). I do agree with the Respondents that the People's Bank is a primarily a licenced Commercial Bank and the District Co-operative Bank is a Development Bank, which functions of one another may be different, as such the 3rd Respondent would have undergone logistical and administrative difficulties in the absorption process of the Petitioners. The Petitioners who were employees of the former Vavuniya District Co-operative Bank entered into contracts with 3rd Respondent to be bound by its terms and conditions, letters R2(a) - R2(i) being letters of appointment containing several conditions. (in this regard further documents are marked and produced (R3(a) to R11(a) as described in para 4C of the objections). It appears to this court that this is more or less a matter of contract and cannot be subject to the writ jurisdiction of this court".

Hence, it is clear that, that was a case based on a contract. The University Council of Vidyodaya University vs. Linus Silva, (1964) is different to that.

The respondents state in their reply Written Submissions dated 03.03.2022, at paragraph 45, that,

"…However, even the petitioner agrees that, the mere fact that a public body has such powers does not make employment matters as matter of any statutory **flavour** and bring them within the scope of administrative law and writ jurisdiction".

The respondents state in paragraph 46 of their reply Written Submissions, that,

**"The mere fact that an Act establishing a body provides for powers pertaining to the appointment, disciplinary control, dismissal and punishment of employees does not make the exercise of such powers as matters of statutory flavour".**

This is not a sound proposition of law, especially in view of the statement of Lord Atkin in **Rex v Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd: CA 1923.** The oft quoted passage refer to "legal authority", which has been interpreted, among other things, arising from a statute. When the powers of appointment, disciplinary control and dismissal are governed by a statute, it is "statutory power", which demonstrates "legal authority" and the wielder of such power is exercising a "public duty". **There is no requirement of a "statutory flavour" superadded** [added to what has already been added:] to it.

Having said that, the statement in paragraph 46, the respondents, in their reply Written Submissions at paragraphs 55 and 56 refer to **Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120**) and Tea Research Ordinance No. 12 of 1925, section 12(1)at paragraphs 59,60 and 61 refer to **Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193)** and Ceylon Petroleum Corporation Act No. 28 of 1961, section 6(b) and Interpretation Ordinance, section 14(f) at paragraph 66 refer to **Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019)** and the same Act at paragraphs 68 and 69 refer to **Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96)** and Samurdhi Authority of Sri Lanka Act No. 30 of 1995, section 14(3) at paragraphs 70 and 71 refer to **U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015)** and Peoples' Bank Act No. 29 of 1961, section 5(1)(t) and 5(1)(s) at paragraph 73 refer to **Nadarajah Kumarasivam vs. W. Karunajeewa, Chairman, Peoples' Bank ((Unreported) CA (Writ) 622/2010, CA Minutes of 27.03.2014)** and the same

Act at paragraphs 74 and 75 refer to **Captain Channa D.L.Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016)** and Sri Lanka Ports Authority Act No. 51 of 1979, section 7(1)(b) and 7(1)(e) and at paragraph 76 refer to **M.S.S. Salahudeen vs. Sri Lanka Airlines Ltd., ((Unreported) CA (Writ) 99/2012, CA Minutes of 23.09.2019)**.

**The aforesaid is in reply to the petitioner's argument that the afore referred to cases are on contract and not on statutes.** The respondents wish to contend that although each of the said Act referred to powers of dismissal, yet the respective Courts decided that there is no **statutory flavour**.

In **Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120),** Tea Research Ordinance No. 12 of 1925, section 12(1) provided,

"

General powers. **12**.

[ 5, 24 of 1948.]

(1) The board shall have full power and authority generally to govern, direct, and decide all matters connected with the appointment of officers and servants of the institute and the administration of its affairs and the accomplishment of its objects and purposes".

In **Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120),** the Tea Research Ordinance No. 12 of 1925, section 12(1), did not expressly provide for the power of dismissal despite the deeming provision in section in Interpretation Ordinance section 14(f).

Sripavan J., said, "The learned Counsel for the petitioner was unable to show any statutory provisions or any rules made by the Tea Research Board which

advert to the powers or duties attached to the post of "Transport Officer" and the procedure for termination of services from the Tea Research Institute".

His lordship quoting from Chandradasa vs. Wijeratne, (1982), Tambiah J.'s judgment said,

"**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**..."

The last part in "bold" letters show, that, if the Act expressly provided for dismissal, the decision would have been otherwise. Tea Research Ordinance No. 12 of 1925 section 12(1) was not brought to the notice of the Court not considered by Court. Interpretation Ordinance section 14(f) was not brought to the notice and not considered by Court. Hence the judgment is one given in ignorance of a material provision of law and per incuriam. Therefore, it does not represent valid law, despite its reference to the implied statement that if there were any Statutory Provision or any Rules made pertaining to dismissal a writ would issue.

In **Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193),** Ceylon Petroleum Corporation Act No. 28 of 1961, section 6(b), provided,

*Powers of the Corporation.* *6. The Corporation may exercise all or any of the following powers: –*

.....

*(b) to employ such officers and servants as may be necessary for carrying out the work of the Corporation;*

Interpretation Ordinance section 14(f) says,

"

Commencement of time **14**. In all enactments-

.....

Appointments and dismissals. (f) for the purpose of conferring power to dismiss, suspend, or re-instate any officer, it shall be deemed to have been and to be sufficient to confer power to appoint him.

In **Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193),** Ceylon Petroleum Corporation Act No. 28 of 1961, section 6(b), did not expressly provide for dismissal.

Sriskandarajah J., said, "Subsequently she was called for an interview and after an interview on 11.08.2000, she was appointed as a Record Keeper, Grade B4 from 15.08.2000 by the letter of appointment P3. Her service was terminated by letter dated 29.08.2000 P4 on the basis that she has misrepresented and misled the interview board by suppressing her personal data.

The Petitioner in this application is seeking to quash the aforesaid order of termination of her employment P4. The order is arising out of a contract of employment and the termination complained of based upon a breach of her contract of employment".

**The Court did not even consider Ceylon Petroleum Corporation Act No. 28 of 1961, section 6(b), let alone Interpretation Ordinance section 14(f).** The

Court was persuaded not to grant a writ because the petitioner has preferred an application to the Human Rights Commission. The judgment said,

> "The Petitioner had decided to seek the intervention of the Human Rights Commission in this matter and the Human Rights Commission after an inquiry recommended that the Petitioner should be re-instated. The 02nd Respondent Corporation did not act upon this recommendation and the chairman of the 02nd Respondent by his letter dated 21.05.2001,2R14 informed the Human Rights Commission as to why he was not implementing the recommendation.
>
> …….
>
> Therefore The Petitioner in this application cannot seek a writ of mandamus against the 03rd Respondent the Human Rights Commission as it is not a natural person and the Petitioner has failed to name the members of the commission to seek this remedy. Further a writ of mandamus may issue to compel something to be done under a statue it must be shown the statute impose a legal duty".

Hence it is clear that the Court was moved not to grant writs on other reasons. It has not considered Ceylon Petroleum Corporation Act No. 28 of 1961, section 6(b), togetherwith Interpretation Ordinance section 14(f). If the Court had done so, the decision could have been otherwise. Therefore, two material statutory provisions have not been considered.

In **Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019),** the same Act became material.

In **Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019),** the Supreme Court said,

"The 1st Appellant to this Appeal Ceylon Petroleum Corporation is a statuary Corporation established under Ceylon Petroleum Corporation Act No 28 of 1961".

**The Court did not consider Ceylon Peterolium Corporation Act No. 28 of 1961, section 6(b).** It was also said,

"Thus, based upon the above dicta, **I am inclined to accept that in the instant appeal before us, an enforcement of a mere duty stemming from a contract of employment cannot be enforced by a writ of mandamus** on the basis of either procedural or substantive legitimate expectation in the absence of any statutory duty on the appellant CPC. Therefore, the contention of the Court of Appeal is erroneous and has no justification".

In **Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96),** Samurdhi Authority of Sri Lanka Act No. 30 of 1995, section 14(3) provided,

Appointment of officers and servants of the Authority.**14**.

.....

(2) The Authority shall have the power to appoint such number of officers, agents and servants as it considers necessary for the efficient discharge of its functions and the performance of its duties under this Act, and to exercise disciplinary control over and dismiss any officer, agent or servant so appointed.

In **Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96),** the Court did not refer to Samurdhi Authority of Sri Lanka Act No. 30 of 1995, section 14(3). The Court said,

"The petitioner in the present case undoubtedly has attempted to invoke the writ jurisdiction of this Court to secure a private remedy. Further the

decision to terminate the petitioner's service had been solely due to the fact that the he did not possess the minimum educational qualification required on terms of scheme of recruitment marked as 1R1. In those circumstances in my view no failure of justice **too** has been occasioned".

In **U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015),** Peoples' Bank Act No. 29 of 1961, section 5(1)(t) and 5(1)(s), provided,

"

Powers of the Bank. 5. (1) In carrying out its purposes, the Bank may exercise, perform and do all or any of the following powers, acts and things, subject however to the restrictions, qualifications and limitations set out in subsection (3) and (4) of this section:

.....

(s) to employ such officers and servant. as may be necessary for carrying out the work of the Bank;

(t) to make rules in respect of the conditions of service and for the disciplinary control of the officers and servants of the Bank;

In **U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015),** the Court did not consider Peoples' Bank Act No. 29 of 1961, section 5(1)(t) and 5(1)(s). What it stated was,

"She also has alleged that the respondents have not even followed the Rules of Procedure laid down in the People's Bank Code of Disciplinary Rules contained in the circular bearing No.326j2002, marked P6, when the 1st respondent Bank decided to withhold a part of her gratuity, having violated the rules of natural justice".

Without drawing its attention to the said sections, the Court, with regard to the proposition "that certiorari will not lie when there is no statutory **flavour**", followed, Weligama Multi Purpose Co-Operative Society Ltd v Chandradasa Daluwatta ([1984] 1 SLR 195), Chandradasa vs. Wijeratne [1982] 1 SLR 412, Jayaweera v. Wijeratne ([1985] 2 SLR 413, Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96), Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120) and Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193.

In **Nadarajah Kumarasivam vs. W. Karunajeewa, Chairman, Peoples' Bank ((Unreported) CA (Writ) 622/2010, CA Minutes of 27.03.2014),** same Act was material.

In **Nadarajah Kumarasivam vs. W. Karunajeewa, Chairman, Peoples' Bank ((Unreported) CA (Writ) 622/2010, CA Minutes of 27.03.2014),** the Court did not consider Peoples' Bank Act No. 29 of 1961, sections 5(1)(t) and 5(1)(s), although it referred to section 24(1) of the said Act with regard to a matter not connected to dismissal. The Court said,

> "It appears to this court that **this is more or less a matter of contract** and cannot be subject to the writ jurisdiction of this court".

In **Captain Channa D.L.Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016),** Sri Lanka Ports Authority Act No. 51 of 1979, section 7(1)(b) and 7(1)(e), provided,

"

| | |
|---|---|
| *Powers of the Ports Authority.* | 7. (1) Subject to this Act, the Ports Authority may exercise all or any of the following powers :- |

.....

*(b) to employ such officers and servants as may be necessary for carrying out the work of the Authority;*

……

*(e) to make rules in relation to the officers and servants of the Authority including their appointment, promotion, remuneration, discipline, conduct, leave, working times, holidays and the grant of loans and…"*

In **Captain Channa D.L.Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016),** *the Court did consider, Sri Lanka Ports Authority Act No. 51 of 1979, section 7(1)(e)* and said,

> "Whilst referring to the powers of the Sri Lanka Ports Authority the Petitioner had referred to the following provisions of the Sri Lanka Ports Authority Act,
>
> 7 [1] (e) to make rules in relation to the officers and servants of the Authority, including the appointment, promotion, remuneration, discipline, conduct, leave, working times, holidays and grant of loans and advances of salary to them
>
> (i) To acquire any under taking affording facilities for the loading and discharging or ware housing of goods in any specified port or bunkering of vessels in such port
>
> (m) To enter into and perform directly or through any other or agent authorized in that behalf by the Authority. All such contracts as may be necessary for the performance of the functions and the exercise of the powers of the Authority and had argued that the MPMC is designed to perform the duties entrusted with the Sri Lanka Ports Authority and

therefore the MPMC is no more than an adjunct or agent of a statutory body, the Sri Lanka Ports Authority".

But, the Court decided,

> "However in the statutory provisions referred to above we see no reference what so ever to the MPMC Private Limited and this court is of the view that the MPMC Private Limited is not established under the provisions of the Sri Lanka Ports Authority Act but it is a duly incorporated company under the Companies Act".

Hence, in that case the writ was not issued, on the basis that MPMC is not established under the Sri Lanka Ports Authority Act. Hence further, it is not an authority for the proposition that the Court did not grant a writ, even when powers of appointment (hence also power of dismissal as per Interpretation Ordinance, section 14(3), as respondents argue) is given by a statute.

In **M.S.S. Salahudeen vs. Sri Lanka Airlines Ltd., ((Unreported) CA (Writ) 99/2012, CA Minutes of 23.09.2019),** the only Act referred to was in a quotation from Chandradasa vs. Wijeratne (1982) 1 SLR 412 and that was Business Undertakings (Acquisition) Act, No.35 of 1971. The Court said,

> "The Writ jurisdiction conferred on this Court by Article 140 of the Constitution is limited inter alia to an examination of the legality of a decision of a body exercising a public or statutory function . The Supreme Court as well as this Court have consistently upheld the argument that this jurisdiction cannot be extended to examine rights and obligations arising from a private contract, even if the act that is being challenged is that of a statutory authority, unless there is a statutory **flavour** to the act that is being impugned".

In the circumstances, in (1) **Gawaramanna v. The Tea Research Board ((2003) 3 SLR 120),** the Court failed to consider Tea Research Ordinance No. 12 of 1925, section 12(1) togetherwith Interpretation Ordinance section 14(f). The case was

decided on the basis that there was no statute governing dismissal. In (2) **Mahanayake v. Chairman Ceylon Petroleum Corporation and Others (2005) 2 SLR 193),** in (3) **Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation ((Unreported) SC/Appeal/43/2013, SC Minutes of 19.06.2019,** in (4) **Siva Kumar v. Director General of Samurdhi Authority of Sri Lanka and Another ((2007) 1 SLR 96)**, in (5) **U.L. Karunawathie v. People's Bank ((Unreported) CA (Writ) 863/2010, CA Minutes of 12.05.2015)** and in (6) **Nadarajah Kumarasivam vs. W. Karunajeewa, Chairman, Peoples' Bank ((Unreported) CA (Writ) 622/2010, CA Minutes of 27.03.2014),** the respective Courts did not refer to the relevant statutes. In (7) **Captain Channa D.L.Abeygunawardena v. Sri Lanka Ports Authority ((Unreported) CA (Writ) 31/2016, CA Minutes of 29.07.2016), the Court did consider Sri Lanka Ports Authority Act No. 51 of 1979, section 7(1)(e), but held that MPMC is not established under that Act.** In (8) **M.S.S. Salahudeen vs. Sri Lanka Airlines Ltd., ((Unreported) CA (Writ) 99/2012, CA Minutes of 23.09.2019),** no statute was there to be referred to.

The cases referred to under (1), (2), (3), (4), (5) and (6) have not referred to the relevant Acts.

**Can it be said that those cases decided that despite the presence of relevant Acts and statutory provisions that granted power of dismissal[5], there was no statutory flavour?**

**The answer is provided by the respondents themselves.**

It is submitted in reply Written Submissions of the respondents, at paragraph 83,

> "83. **Justice P. S. Narayana, in his book "Law of Precedents"** (4th edition, Asia Law House) states that,

[5] or statutory powers which read with the relevant provision of the Interpretation Ordinance deemed to have granted such power

"**When a decision is silent about a particular question**, while deciding whether it would be binding on such question as a precedent, **the principle of sub silentio would be made applicable. <u>What had not been decided cannot be taken as decided</u>** (at page 326),

.....

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, **which the particular point of law involved in the decision is not perceived by the Court or present to its mind.** The Court may consciously decide in favour of one party because of Point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it is also decided Point B in his favour; but Point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on Point B. Point B is said to pass sub silentio (at page 327)". [**the emphasis only**, was added in this preliminary order]

On the aforesaid principle, envisage that Point A is whether the dismissal arose on contractual authority and Point B is whether a statute governed the power of dismissal

The cases referred to under (1), (2), (3), (4), (5) and (6) did not decide on Point B, because in each of those cases, the Courts did not refer to the relevant Act, whereas an Act (expressly or impliedly) granting a power of dismissal existed.

Therefore, the cases referred to under (1), (2), (3), (4), (5) and (6) are not authorities to the proposition, that, "even if there is a statute granting a power of dismissal, yet the employment is considered as contractual, as there is no statutory **flavour** in the act of dismissal", simply because the Courts did not consider the relevant statutes.

In case referred to under (7), the Court did consider the relevant statute, but held that the agency in question was not established under that statute.

Upon the same principle enunciated by Justice P. S. Narayana, this Court does not consider the two cases relied upon by the petitioner, Jinasena vs. University of Colombo ((2005) 3 SLR 9) and Dr. Darshana Wickremasinghe vs. University of Ruhuna ((Unreported) SC/Appeal/111/2010, SC Minutes of 09.12.2016)

The respondents have submitted in reply Written Submissions that the respondents raised only the present preliminary objection, but it has stated several other preliminary objections in its Limited Objections which might be relied upon in future.

At the oral hearing, the respondents did not reserve a right to raise further preliminary objections.

However, on the policy of this Court that no litigant, be it a state agency or an individual petitioner, should be shut out from access to justice, the respondents are granted the right to raise any further preliminary objection relied upon in its Limited Objections, if respondents so desire.

In the aforesaid circumstances, the preliminary objections raised are overruled. There is no order on costs.

Judge of the Court of Appeal

Hon. Sasi Mahendran, J.

I agree.

Judge of the High Court of Civil Appeal