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

In the matter of an Application for a mandate in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution.

Suwada Hannadige Ranjith Wasantha
No-C-15, Mahaweli Niwasa,
New Town, Polonnaruwa.

Petitioner

CA/WRIT/248/2022

Vs.

1. Mr. Keerthi B. Kotagama
   Director General,
   Mahaweli Authority of Sri Lanka,
   No 500, T. B. Jayah Mawatha,
   Colombo 10.

2. Mr. D. M. N. J. Dhanapala
   Deputy Director General (Technical Service),
   Mahaweli Authority of Sri Lanka,
   No 500, T. B. Jayah Mawatha,
   Colombo 10.

3. Mrs. M. W. R. Nishanthi Delphet
   Director (Human Resources and Administration),
   Mahaweli Authority of Sri Lanka,
   No 500, T. B. Jayah Mawatha,
   Colombo 10.

4. Mrs. Himali Yalinga
   Director (Internal Audit),
   Internal Audit Division,
   Mahaweli Authority of Sri Lanka,
   No 500, T. B. Jayah Mawatha,
   Colombo 10.

5. Mr. P. G. Noel Jayasiri
   Resident Project Manager,
   Resident Project Manager's office,
   Mahaweli Authority of Sri Lanka,
   System B, Welikanda.

6. Mahaweli Authority of Sri Lanka
   No 500, T. B. Jayah Mawatha,
   Colombo 10.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Saliya Pieris, PC. with Pasindu Thilakarathna for the Petitioner.

Hashini Opatha SC for the Respondents

Argued on : 08.02.2023

Written Submissions: Petitioners - 14.03.2023

Respondents - --

Decided on : 31.03.2023

Sobhitha Rajakaruna J.

The Petitioner is a civil engineer who has served as an Assistant Resident Project Manager-technical services (covering up duties) of 6th Respondent-Mahaweli Authority of Sri Lanka ('MASL'). The Petitioner has been interdicted subject to a preliminary investigation on the pretext that the Audit Report dated 25.04.2022 bearing No. MASL/CIA/SYSB/2022/AR/15, marked 'P17', disclosed a failure of the Petitioner to carry out due supervision in the execution of his duties. The Petitioner seeks for a mandate in the nature of a writ of Certiorari quashing the decision of the 1st Respondent as contained in the letter of interdiction dated 09.06.2022, marked 'P20'. Additionally, a writ of Mandamus is also sought directing the 1st to 3rd Respondents to reinstate the Petitioner and to pay back wages.

The Petitioner's contention is that no preliminary inquiry was held prior to the interdiction and as such the interdiction has been effected in violation of the provisions of the Establishments Code of Government of Sri Lanka ('E-Code') upon which the disciplinary issues of the officers of MASL are governed as claimed by the Petitioner. Further, the Petitioner contends that he has been interdicted for collateral purposes and with mala fide. He alleges that he was reprimanded whilst several other officers were involved in making payments to the suppliers and his role was only to make recommendations for payments solely on the observations of the engineer who inspected the respective site.

When this matter was taken up for hearing on 08.02.2023, the learned President's Counsel for the Petitioner as well as the learned State Counsel who appeared for the Respondents agreed that the instant Application may be dealt with and determined solely on the basis of written submissions.

Although, the learned President's Counsel for the Petitioner when he was supporting the instant Application for formal notice challenged the letter of interdiction, marked 'P20', on the alleged grounds that the interdiction had been enforced without first conducting a preliminary investigation in view of Clauses 31:4 and 31:5 of the Chapter XLVIII of the E-Code, such argument has not been raised in the written submissions filed on behalf of the Petitioner. As opposed to the argument on the said Clauses 31:4 and 31:5 of the E-Code, the learned State Counsel contended that the 1st Respondent has the authority to interdict the Petitioner based on the contents of the Audit Report and on the subsequent reports in view of Clause 31:1 of the same Chapter of the E-Code, as prima facie it has

been disclosed that the Petitioner has committed a misconduct. It seems that the said argument of the learned State Counsel is unopposed and the Petitioner's point of view was brief and limited to be raised only at the threshold stage of this Case.

At the other extreme, the Petitioner claims that despite making an appeal to the 1st Respondent to conduct a preliminary investigation expeditiously, no such inquiry has been held up to date against him. Thus, the Petitioner argues that the prolonged delay to conduct the preliminary investigation is unreasonable and unfair as it is mandatory to hold a preliminary investigation, without delay, after interdiction in terms of Clause 31:6 of Chapter XLVIII of the E-Code. Additionally, the Petitioner refers to the Public Administration Circular No. 30/2019 dated 30.09.2019 by which Clause 13:2 of Chapter XLVIII of the E-Code has been revised.

The Clause 13:2;

> 'An authority ordering a preliminary investigation into an act of misconduct should, at the same time that such order is issued, strictly order the officer or the Committee of Officers of the preliminary investigation to conclude the preliminary investigation within a period of two months. However, in case where any additional period is required, the officer or the Committee of Officers of the preliminary investigation should obtain the approval of the relevant authority on submission of acceptable reasons. Nevertheless, all relevant parties should ensure that such preliminary investigation is carried out and completed with the least possible delay.'

In view of the said amendment to Clause 13:2 of the E-Code, a question arises whether the said amendment infer a mandatory requirement that a preliminary investigation should be concluded within a period of two months. On perusal of the provisions of the said amendment of the Clause 13:2, it implies that it is always not mandatory for the investigation officer or the investigation committee to conclude a preliminary investigation within such period if the relevant authority has granted approval for an additional period. However, it is bounden duty of the authority ordering a preliminary investigation to strictly order the officer or the committee of officers of the preliminary investigation to conclude such investigation within a period of two months. This is because it is stipulated in the same Clause that such preliminary investigation should be carried out and

completed with the least possible delay. To my mind, the words 'least possible delay' operate as a proviso to the requirement of directing inquiring officers to conclude a preliminary investigation within a period of two months. It cannot be assumed unlawful if a preliminary inquiry is being proceeded beyond a period of two months subject to such approval, provided that reasonable grounds exist for such extension of time.

It is no doubt that relevant authorities are bound to commence and conclude a preliminary investigation expeditiously upon an interdiction of an employee. What amount of delay would be inordinate? and what is a reasonable time? may vary from case to case as duly pointed out in ***Jayasinghe vs. The Attorney General and others (1994) 2 Sri. L.R. 74***, a case relied on by the Petitioner.

Now, I need to advert to the defense taken by the Respondents in respect of the alleged delay in conducting the preliminary investigation.

The 1st Respondent affirming the Affidavit submitted along with the Statement of Objections has declared that a preliminary investigation had been held in reference to the matters divulged in the said Audit Report by an independent committee and such Report is annexed thereto, marked 'R13'. It is observed that the Additional Secretary to Ministry of Irrigation has instructed to carry out a preliminary investigation in addition to the said Report marked 'R13'. The 1st Respondent further averse that a request has been made on 20.10.2022 (see-'R16') to the Secretary Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government through the Secretary to the Ministry of Irrigation to appoint an inquiry officer as provided in Public Finance Circular No. 1/2020, marked 'R15'. The 1st Respondent, accordingly, contends that the MASL has at all times acted within the provisions of the law and in a fair and reasonable manner.

The Petitioner was interdicted on 09.06.2022 and within 40 days the instant Application dated 15.07.2022 has been filed in this Court. A reasonable doubt arises whether the Petitioner has decided to recourse to this Court without exhausting the alternative remedies which will be adequate and efficacious. At this stage, I must consider this by drawing attention to remedies available for the Petitioner when the relevant authorities fail to commence and conclude preliminary investigation without any delay. It seems that the Petitioner has not filed any application before the labour tribunal on constructive termination. It is noted that the E-Code and the other laws provide a mechanism for

revision, variation or cancellation of any disciplinary order. Anyhow, I am aware that the Petitioner is not a public officer who can avail such remedy. No argument having regard to the availability of an alternative remedy for the Petitioner has been successfully mounted by the Respondents. Thus, in resolving the aforesaid issues, it is important to assay the questions of this case with a special emphasis on the reliefs prayed for by the Petitioner in the prayer of the Petition.

The Petitioner is primarily challenging the letter of interdiction, marked 'P20' and seeks an order directing the 1st to 3rd Respondents to reinstate the Petitioner with back wages. It cannot be assumed that the scheme of the E-Code or the Disciplinary Code of the MASL implies that an officer should be exonerated due to a moderate delay of conducting a preliminary investigation when it is disclosed, prima facie, that he has committed a misconduct found in law, particularly in Clause 31:1 of the said Chapter of the E-Code. Hence, I take the view that it will be grossly unfair and disproportionate for this Court to grant reliefs sought by the Petitioner at this stage impeding the disciplinary proceedings against the Petitioner as no adequate material is available before Court to arrive at a significant conclusion that there is an inordinate delay in commencing a preliminary investigation. As mentioned above the Petitioner has come to this Court within 40 days from the interdiction whereas the 1st Respondent has apparently taken several steps even after filing this Application to get a panel of inquiry officers appointed.

Ironically, the Petitioner has not filed a Counter Affidavit, although he has sought time to take steps to file a Counter Affidavit through a motion dated 16.12.2022. The proposition of the 1st Respondent laid down in his Affidavit justifying, to a reasonable extent, the alleged delay in commencing a preliminary investigation has not been satisfactorily challenged by the Petitioner and there is no adequate evidence before this Court to establish any inordinate delay. We are unaware of the steps taken by the 1st Respondent after the Judgement of this case was reserved by this Court. The prayer of the Petition does not contain a relief for a writ of Mandamus directing the relevant authorities to commence the preliminary investigation.

Moreover, the Petitioner has failed to establish that there is an error in the nature of blatant miscarriage of justice during the process of making the impugned order by the 1st Respondent. In keeping with the required basic elements to seek for judicial review, I must

refer to the dicta enunciated in ***Kalamazoo Industries Limited vs. Ministry of Labour and Vocational Training (1998) 1 Sri. L.R. 235,*** F.N.D. Jayasuriya J. has held that at p.249;

> *"Judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful . . . judicial review is a fundamentally different operation."*

Similarly, a mere assertion of the Petitioner that the interdiction itself is mala fide cannot be accepted without adequate evidence is placed before Court. Sripavan J. in ***Bandaranayake vs. Judicial Service Commission (2003) 3 Sri. L.R. 101*** has followed the following contents in '***Principles of Administrative Law' by Jain & Jain, 4th Edition 1988 (at p. 564);***

> *"The plea of mala fides is raised often but it is only rarely it can be substantiated to the satisfaction of Court. Merely raising doubt is not enough. There should be something specific, direct and precise to sustain the plea of mala fides. The burden of proving mala fides is on the individual making allegation as the order is regular on its face and there is a presumption in favour of the administration that it exercises its power in good faith and for the public benefit."*

I am convinced, based on the circumstances of this case and the material available to this Court, that the 1st Respondent has taken the impugned decision to interdict the Petitioner based on the Audit Report and subsequent Reports by arriving at a preliminary conclusion that, prima facie, it has been disclosed that the Petitioner has committed a misconduct. As I have held in ***W. G. Chamila vs. Urban Development Authority and others, CA/WRIT/215/2022 decided on 26.10.2022***, the statutory regime established in the E-Code, does not provide a mandatory pre-condition to conduct a preliminary investigation before interdiction and if the relevant authority is of the view that the first information itself on the suspected acts of misconduct committed by the officer is sufficient to establish the relevant matters, then such officer can be interdicted before a preliminary investigation. Hence, the Petitioner's argument, based on Clauses 31:4 and 31:5 of the E-Code, also fails.

For the reasons set out above, I am not inclined to grant any of the reliefs prayed for in the prayer of the Petition of the Petitioner. However, I deem it appropriate to make an observation in respect of the purported grievances of the Petitioner. Hence, I make the

observation that the Respondents should take all endeavours to commence and conclude the preliminary investigations expeditiously and the Petitioner's rights may be affected if no such inquiry has commenced by now. Subject to the above observations, I proceed to dismiss the instant Application.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal