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

In the matter of an application for the issue of a Writs of Certiorari, Mandamus and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Jagath Siriwardhana
   No.52/1, Circular Road,
   Diulapitiya

   And 11 other

Petitioners

Court of Appeal Writ
Application No: 16/2022

- Vs. -

1. S.S.R. de Silva Chairman, Gampaha District Thrift and Credit Co-operative Societies Union Ltd,
   No: 99, Colombo Road,
   Gampaha

   And 17 other

Respondents

On this 30th day of June 2023

Before: Hon. D.N. Samarakoon J.,

Hon. Neil Iddawala J.,

Counsel: Saliya Peiris P.C, Thanuka Nandasiri with Sithari Muthumala for the Petitioners.

J.M. Wijebandara with Kavindya Kuruwita Arachchi for the 1A, 3b, 5b, 6A, 7A and 8b Respondents.

Dushmanthi Poragama for the 2nd, 6th, 7th & 9th Respondents.

Sumathi Dharmawardena P.C, A.S.G. with Navodi De Zoysa, S.C. for the 10th to 12th Respondents.

Written Submissions on: 30.06.2023 by the Petitioners

16.06.2023 by the 10th to 12th Respondents

June 2023 by the 1st,3rd, 5th,6th ,7th & 8th Respondents

Date: 07.09.2023

D.N. Samarakoon, J.

O R D E R

The written submissions of the 1B,3B,5B,6B,7B,8B and 9B respondents summarises what happened and what has to be done. It says,

> "This application was filed on the 05th of May 2020. This was supported for notice only on 18th May 2023. At the stage of hearing given on the question of issuance of notice all parties made oral submissions. At the conclusion of oral submissions Your Lordships' Court directed parties to file written submissions. On the question of as to whether notice should be issued to the respondents at the first instance, or not".

This case came to be called before myself from 19.01.2022 and at that time the connected matter Writ 16 2022 was being taken up before Court No. 303. Application was made to have both cases in one court and I directed that either that case can come to this court, or this case can go to that court. The matter

was resolved by the Hon. President who sent that case too before this court. The case was called before the present Bench of this court on 18th May 2023, when it was supported, as said above.

There are two sets of objections for the issuing of notice. They are,

(01) 10th to 18th respondents represented by the state. They are mainly,

(a) The relief has already been granted,
(b) The relief is vague or ambiguous,
(c) There is no statutory duty

(02) 01st to 09th respondents, except 02nd and 04th, as indicated from their representatives in the opening sentence of this order. Their objections, while overlap with those of the state, also finds a basis on characteristics of the writ of mandamus and its alleged non availability.

This court will respond to the above objections in that order.

To understand the first set of objections, one must know about the reliefs prayed for. They refer to the Co operative Societies Statute No. 03 of 1996. They are in summary, (the paragraphs in the prayer of the petition are given)

(d) A mandamus directing the 11th respondent Commissioner of Cooperative Development of Western Province to investigate as provided in sections 46 and 47 into the misappropriation of membership fees or funds,

(this is the inquiry the first set of respondents say they did)

(e) A mandamus directing the 11th respondent to settle the whole or part of the deposits the petitioners deposited in the Gampaha District Thrift and Credit Co operative Societies Union Ltd., under sections 19 to 55,

(this is what the first set of respondents say vague or ambiguous)

(f) A mandamus directing the 11th respondent to resolve the dispute by himself under section 58,

(g) A mandamus directing the 11th respondent to resolve the dispute through arbitration under section 58,

(in respect of (f) and (g) both, the argument of both the sets of respondents is that the petitioners are not members or associate members and hence under section 58 they do not have a right)

Under (d) above, the sections 46 and 47 are as follows,

> "46. (1) Where the membership moneys or moneys which are not membership moneys of a Co-operative Society registered with the Registrar of Co-operative societies are misused the Registrar may of his own motion, and shall, on the application of majority of the committee, or of not less than onethird of the members, or representatives who are eligible to be present at a General meeting in terms of the by-laws of a registered society or one third of the total membership or one hundred members of the society which ever is less, hold an inquiry or direct some person authorized by him or order in writing in that behalf, to hold an inquiry into the constitution, working, and financial condition of the registered society…."
>
> "47. (1) The Registrar may of his own motion, or on the application of a majority of the committee, or of not less than one-third of the members or representatives who are eligible to be present at a general meeting in terms of the by-laws, or one-third of the total membership or one hundred members of the society whichever is less, or creditor of a registered society, inspect, or direct any person authorized generally or specially by him by order in writing in that behalf to inspect, the books of the society…."
>
> (for the sake of simplicity only the principal parts of the sections were quoted)

The first set of respondents referring to the word "may" state that Registrar's function is directory. But I do not see any lack of mandatory nature if the circumstances require a holding of an inquiry. The word "may" signify that he has a discretion. But it must be exercised judicially.

The position of the first set of respondents is that the 11th respondent has not refused to perform the public duty. This is an acceptance of the existence of a public duty in respect of paragraph (d) of the prayer.

The first set of respondents refer to a paragraph 54 and 55 of the petition where the following reasons are adduced to say that the investigation conducted is not an investigation under above sections. They are (as per paragraph 16 of the written submissions of these respondents)

(a) The report does not contain the entire assets of the 01st respondent society,
(b) The report does not contain the reasons for the present financial condition of that society,
(c) The report does not reflect that the purported investigation was done comprehensively and
(d) The report does not contain a mechanism to settle the dues owing to the depositors

In paragraph 22 of the same written submission the first set of respondents state,

> "Although the respondents concede that the petitioners do have a fair grievance, …"

Their grievance is that they, or most of them (there are 321 of them) deposited their life time earnings with the 01st respondent, ostensibly a bank, for a higher rate of interest, but now it appears, that 3000 million of their money is lost and those respondents who were the office bearers are either attempting to leave the country or to dispose their assets or to do both.

Considering these circumstances, Justices A. H. M. D. Nawaz and Sobhitha Rajakaruna issued an order to maintain status quo, as far back as on 15.09.2020 following the dicta of Neville Samarakoon C. J., in Billimoria's case which is to the effect that status quo could be maintained even before support takes place.

The first set of respondents state in paragraph 17 of written submissions, that,

> "Although the petitioners contend as above, it is clear that there is no statutory duty cast upon the respondents to perform an inquiry in the manner in which the petitioners so desire".

Why?

H. W. R. Wade & C. F. Forsyth, ninth edition, says at page 700, on "Discretion and its consequences",

> "The most active remedies of administrative law – declaration, injunction, certiorari, prohibition, mandamus – are discretionary and the court may therefore withhold them if it thinks fit. In other words, the court may find some act to be unlawful but may nevertheless decline to intervene. In contrast, habeas corpus may be claimed as of right and so may remedies in tort, contract or restitution.
>
> Such discretionary power may make inroads upon the rule of law and must therefore be exercised with the greatest care. The following passage from an earlier edition of this book has twice been approved judicially[1]:
>
> > "There are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right and to live under the rule of law, not the rule of discretion. **"To remit the maintenance of constitutional right to the region of judicial**

[1] Bugg vs. Director of Public Prosecutions [1993] Q. B. 473 at 499 and Rex vs. Wicks [1998] A. C. 92 at 121.

> **discretion is to shift the foundations of freedom from rock to sand** [Scott vs. Scott [1913] A. C. 417 at 477 (Lord Shaw)] The true scope of discretion is in the law of remedies, where it operates within narrow and recognized limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him". (page 700,701)

When, "there are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful:…" when "the citizen is entitled to resist unlawful action as a matter of right and to live under the rule of law, not the rule of discretion", how could a citizen be forced to accept an investigation, which he alleges was not properly done, without a court inquiring into that?

In one of the very next paragraphs of the written submissions, the first set of respondents state, that, a comprehensive inquiry was done under section 47(2) [paragraph 20]

What section 47(2) says is,

> "(2) The Registrar may of his own motion investigate or direct any person authorized by him to investigate the affairs of any registered society".

What is required is an investigation, more than an inquiry, although a part of the investigation is to inquire into something, investigation means more than just to inquire into it.

The Affidavit accompanying petitioners' petition gives a name of a person appointed to investigate but to the best of their knowledge did not do so.

Hence there is a matter to be looked into by this court at least as far as paragraph (d) of the prayer is concerned.

Then the question of petitioners not being members or associate members. This is in regard to paragraphs (f) and (g) of the prayer in respect of action to be taken under section 58, either by the Registrar himself, or through an arbitrator.

The petitioners have claimed that they are "associate members".

Section 39(1) says,

> "39. (l) A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or bylaws".

Section 12(1) defines an "associate member" as,

> "12.(1) A registered society may admit as any associate member, and [any] person who enters into a contract for the transaction of business with in accordance with the by-laws of the society…"

According to paragraph 48 of the written submissions of the first set of respondents,

> "The petitioners are only depositors and not individuals who have contracted with the Society…"

But a depositor is a person who has a contract with the society. He makes a deposit in return of an interest, which is a contract. He keeps a deposit subject to a promise that it will be returned at the end. This is also a contract. The grievance of the petitioners is that the 01st respondent and its office bearers fail to honour that contract. The first set of respondents say at paragraph 47 of the written submission that if the requirement of there being a contract is fulfilled there should be a specific "admission" to the Society. Whether there should be such specific admission or whether the petitioners by virtue of their contract become "associate members" by the operation of law is a deeper question which needs mature considerations.

The objection of the first set of respondents in respect of paragraph (e) of the prayer, directing the 11th respondent to take action to settle the deposits under section 19 to 55 is challenged on the basis that it is vague. In this regard the respondents have cited the case **C. A. Writ Application 132/2018 dated 03rd June 2021**. In that case there was a prayer for a mandamus to direct the 01st respondent to take action under sections 16,17,22,23,23A,23B,23D and 23G of the National Environment Act and to direct the 02nd respondent to act under section 8(a), 8(b), 8(i), 8(p) and 8(q) of Urban Development Authority Act. It was argued that the relief prayed for is too wide and vague.

What was decided was, that,

> "A petitioner invoking the jurisdiction of this court must seek relief that would address their grievance and must not refer to each and every section in the Act hoping and praying that his case would come under at least one of the said sections. In other words, the relief that is sought must be specific and should address the concerns of the petitioner".

The above passage basically says two things,

(01) Must seek relief that would address their grievance
(02) Must not refer to each and every section

What if the relief to be addressed for the grievance is embodied in several sections of an Act or Acts?

Therefore what is to be understood as meant is not the automatic dismissal of the application when there is reference to multiple sections, but to see whether the petitioners without a definite identification of a remedy attempt to come under some random provision.

The paragraph 27 of the written submission of the First set of respondents states, that, the above judgment was delivered by Hon. Justice Rajakaruna. However the downloaded copy of the judgment from the Court of Appeal website shows that **CA WRT/132/2018 H.K.D. Amarasinghe and Others vs Central**

Environmental Authority and Others was decided by Hon. Justice Arjuna Obeyesekere, P/CA.. sitting alone.

It was not only the references to sections quoted in written submissions by the respondents, which was reproduced in this order above, that were referred to by the petitioners in that case.

The petitioners in that case with regard to five writs of mandamus referred to 82 sections and 02 Gazette Notifications, which appears to be too much in any scale. **Furthermore, even in that case, the relevant pronouncement of Hon. Justice Obeysekera was the judgment in that case, not an order made at the stage of notice. Therefore, it appears that His Lordship came to the above conclusion having fully considered the application as well as objections.**

In regard to the question whether prayers are vague, the petitioners in their written submissions at paragraph 63 to 66 states, that, the petitioners have mentioned relevant sections under which the 11th respondent should act.

Assuming but not conceding that the prayers are vague, the petitioners state that the court can moderate the prayers and grant relief. In this respect the petitioners have cited **C. A. Writ 403/2019 decided on 12th June 2020**.

C.A WRIT 403/2019 U.A.A.J. Ukwatte Vs Akila Viraj Kariyawasam, Hon. Minister of Education too is a judgment of Hon Arjuna Obeyesekere,J.

Issuing a mandamus directing the admission of the 02nd petitioner to the Royal College, Colombo 07, Justice Obeysekera said,

> "In support of his argument, the learned Senior Deputy Solicitor General has cited the judgment of this Court in Surangi vs Rodrigo where this Court had held that "No court is entitled or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint." In that case, during the trial before the District Court, the plaintiff had sought to raise an issue relating to permanent alimony, although the prayer in the

plaint did not contain such a relief. This Court, while agreeing that issues are not restricted to pleadings, had arrived at the above conclusion for the specific reason that Section 40(e) of the Civil Procedure Code enacts that the plaint shall contain a demand of the relief which the plaintiff claims. **While this Court cannot grant relief where none has been prayed for, this Court has the power to issue a Writ which has been prayed for, albeit in a modified form**. In Premachandra and Dodangoda vs Montague Jayawickrema and Bakeer Markar the relief sought had been inter alia a Writ of Mandamus compelling the Governor to appoint the Petitioner as Chief Minister. It had however been conceded that appointment of the Chief Minister must be done by the Governor according to law and that Court cannot compel the appointment of any particular person. This Court had accordingly issued a Writ of Mandamus on the Governor to appoint a Chief Minister of the Province according to law, which was not the prayer of the Petitioner". (at page 39,40)

Hon Obeysekera J., further said,

"This Court is of the view that even if the Petitioners had not prayed for a Writ of Certiorari at all, and had limited their relief to the Writ of Mandamus, that would not have prevented this Court from issuing the Mandamus without formally quashing the impugned decision. This Court in **Dr. Lokuge vs Dr. Dayasiri Fernando and Others** having traced the development of what is now known as Certiorarified Mandamus has quoted the following passage from De Smith on Judicial Remedies: "In some situations, however, mandamus has been granted to undo what has been done; the courts merely treat the unlawful act as a nullity and order the competent authority to perform its duty as if it had refused to act at all in the first place". Administrative Law by Wade and Forsyth, explains in the following manner how a Certiorarified Mandamus would operate:

"Defective decisions are frequently quashed by a quashing order without any accompanying mandatory order. Once the decision has thus been annulled, the deciding authority will recognise that it must begin again and in practice there will be no need for a mandatory order. If on the other hand a mandatory order is granted without a quashing order, the necessary implication is that the defective decision is a nullity, for it is only on this assumption that a mandatory order can operate. A simple mandatory order therefore does the work of a quashing order automatically." (at page 42,43)

Dr. Lokuge vs Dr. Dayasiri Fernando and Others C. A. Writ Application 160/2013 decided on 16.10.2015 was written by Justice A. H. M. D. Nawaz.

His Lordship said,

"As I stated above certiorarified mandamus has not been foreign terrain for Sri Lanka as Dr. Sunil Coorey in his monumental work on administrative laws cites the case of Rasammah v Manamperi where Vythialingam J cited and adopted the words of S.A. De Smith in Judicial Review of Administrative Action, 1st ed., p 434 which were as follows- "Nor in general will it (mandamus) lie for the purpose of undoing that which has already been done in contravention of statute." The provenance of this passage is traceable to an old precedent of Ex parte Nash where Lord Campbell, C.J, in refusing to grant a mandamus commanding a railway company to remove its seal from the register of share holders on the ground that it has been irregularly affixed stated;

"The writ of Mandamus is most beneficial; but we must keep its operation within legal bounds and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done; but not for the purpose of undoing what has been done. We may upon an application for a mandamus entertain the question whether a corporation not having affixed its seal, be bound

to do so; but not the question whether, when they have affixed it, they have been right in doing so. I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute".

Much water has flowed down under the bridge since these words were echoed in the 19th century and with the expanding canvas of administrative law the aforesaid limitation on the scope of mandamus has ceased to exist. These developments are commented upon in several editions of Dr. Stanley de Smith's treatise Judicial Review of Administrative Action. **In the Fifth Edition which was restructured quite magnificently by the Rt. Hon The Lord Woolf and Jeffrey Jowell, Q.C the vanishing of the old trails of mandamus is captured in the following passage. "Many of the narrow technicalities which once applied to the grant of mandamus, for example, that it would not lie for the purpose of undoing that which has already been done in contravention of statute no longer restrict the remedy**."

(at page 12,13)

The Second Set of respondents also submitted that petitioners have failed to go before the Provincial High Court or to institute civil action. In respect of the former objection, it must be said that this court has jurisdiction to go into the matters in the petition. In regard to the latter, it is the experience of this court, that, when an action of this nature, which is governed by a statute, is instituted in the District Court the objection is often taken that the appropriate remedy is a constitutional writ. The allegation that there are disputed facts because there is an ongoing criminal prosecution cannot be accepted, because the present application is not on criminal liability but on the alleged statutory duty cast upon the respondents. It is not a question that can be resolved at this initial stage.

In this regard, this court also wishes to refer to a part of the Key Note speech delivered by His Lordship Justice Priyantha Jayawardena, P. C., at the National Law Conference, held at Nuwara Eliya on 04th June 2023, where it was said,

> "Another contributing factor is the raising of preliminary objections on….resulting in the delay of disposing of cases. In this regard, it is worthy of mention that there is currently a new trend of going before the Court of Appeal and objecting to the issuing of notices on the Respondents. Sometimes even the Respondents file limited objections in support of their preliminary objections. Thereafter, both parties file written submissions on the matter.
>
> I am at a loss to understand as to how anyone can object to the issuing of notices in such circumstances, because the Respondents are present in court having taken notice of the case.
>
> The situation worsens if the Court of Appeal issues notices on the Respondents, as they then come to the Supreme Court challenging that order".

While this court respectfully agrees with the above on principle, this court is constrained to observe that the above situation arises, mostly, due to strict adherence to Rule No. 02(1) of the Supreme Court Rules of 1990, which says,

> "Every application for a stay order, interim injunction or other interim relief (hereinafter referred to as "interim relief") shall be made with notice to the adverse parties or respondents (hereinafter in this rule referred to as "the respondent") that the applicant intends for such interim relief; such notice shall set out the date on which the applicant intends to support such application and shall be accompanied by a copy of the application and the documents annexed thereto…"

It may be observed, however, that Rule 02(1) is having the following provision too.

"Provided that –

(a) Interim relief may be granted although such notice has not been given to some or all the respondents if the court is satisfied that there has been no unreasonable delay on the part of the applicant and that the matter is of such urgency that the applicant could not reasonably have given such notice; and

(b) In such event the order for interim relief shall be for a limited period not exceeding two weeks sufficient to enable such respondents to be given notice of the application and to be heard in opposition thereto on a date to be then fixed".

It is the respectful observation of this court, that, the following of the procedure in Proviso (a) and (b) has two theoretical advantages, which are,

(i) That the court has to satisfy (**not prima facie, but satisfy**) at the very beginning that there is no unreasonable delay (**hence this objection cannot be taken up later**) and

(ii) That the court issues (formal) notice (paragraph (b) says "such respondents to be given notice of the application") at the first instance **and the respondents who come within two weeks cannot take up objection to notice**.

Practically too, it is observed, that, the respondent who comes to court, burdened with an interim order takes immediate steps to get rid of it. Sometimes he comes to court ready with papers to vacate the interim order, of which a minimum of 48 hours' notice could be given to the petitioner, to show cause, as to why the interim order should not be vacated. Although parties in such cases also try to file "limited objections", they can be encouraged to file the objections proper and the enthusiasm of the petitioner to keep the interim order and the equally strong enthusiasm of the respondent to get it vacated could be utilized to place parties within a strict time frame to argue the entire matter.

The petitioners have also submitted at paragraph 25 of their written submissions, that, whereas the respondents have failed to fulfill the requirements contained in sections 46 and 47, the purported report has been prepared merely to pretend that steps have been taken to resolve the grievances.

It is also submitted at paragraph 48 of the said written submissions, that, even if for a moment it is conceded that the said report has been prepared (which has been prepared) after instituting Writ 59/2020 in terms of sections 46 and 47, the respondents have failed to take any further steps as provided by the statute.

This raises a possibility of the petitioners' contention that the said report does not fulfill the requirements of sections 46 and 47 and the matters referred to under (a) to (b) in paragraph 16 of the written submissions of the First Set of respondents or some of them could be true, which is a matter for this court to go through.

It is also submitted in the petitioners' written submissions that there is a duty cast upon the Registrar to annually examine the books of the 01st respondent society, which, if he has done, he could have found out the malpractices of the then board of Directors.

It is also submitted at paragraph 59 that the petitioners are not mere customers of a bank but depositors who deposited their money anticipating the Commissioner's supervision. Paragraph 61 also submits that the purported report, although prepared after the institution of the Writ 59/2020 has been prepared without affording a hearing to the petitioners.

This brings me to the arguments made by both the sets of respondents based not on the prayers of the petition but on the substantive availability or non availability of the writ of mandamus.

Specific arguments in this regard have been raised for the second set of respondents who are 1B,3B,5B,6B,7B,8B and 9B.

Among other things, they refer to **Credit Information Bureau of Sri Lanka vs. Messers Jafferjee & (Pvt) Ltd., (2005) 1 SLR 89**, decided in the Supreme Court by J. A. N. de Silva J. (later Chief Justice)

Based on the decision of **P. K. Benarji V H. J. Simonds AIR (1947) Cal 347**, J. A. N. de Silva J., enumerated the following as "Some of the conditions precedents the issue of Mandamus".

> "(a) The Applicant must have a legal right to the performance of a legal duty by the parties against whom the Mandamus is sought (Ft v Barnstaple Justices) The foundation of mandamus is the existence of a legal right (Ex parte Napier)
>
> (b) The right to be enforced must be a "public right" and the duty sought to be enforced must be of a public nature
>
> (c) The legal right to compel must reside in the applicant himself (R vs. Lewisham Union)
>
> (d) The application must be in good faith and not for an indirect purpose
>
> (e) The application must be preceded by a distinct demand for the performance of the duty
>
> (f) The person or body to whom the writ is directed must be subjected to the jurisdiction of the court issuing the writ
>
> (g) The court will as a general rule and in the exercise of its discretion refuse writ of mandamus when there is another special remedy available which is not less convenient, beneficial and effective
>
> (h) The conduct of the applicant may disentitle him to the remedy
>
> (i) It would not be issued if the writ would be futile in result
>
> (j) Writ will not be issued where the respondent has no power to perform the act sought to be mandated".

However having reproduced them his lordship also said,

> **"Whether the facts show the existence of any or all pre-requisites to the granting of the wirt is a question of law in each case to be decided not in any rigid or technical view of the question, but according to a sound and reasonable interpretation".** (at page 94)

It was also said,

> "The learned counsel for the Appellant submitted that a writ of Mandamus being a public law remedy is not available to the Respondent as the Credit Information Bureau is not a State entity or instrument of the State. The answer to this is found in the following passage in Halsbury's Laws of England , Vol (1), 4th Edition (Administrative Law) paragraph 132, "An order of Mandamus will be granted ordering that an act to be done which a statute requires to be done and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body." The Credit Information Bureau is created by an Act of Parliament. It is not akin to a private club, as contended by the counsel for the Appellant, which is governed by its own constitution/ rules or regulations. Every action has to be taken within the four corners of the statute and according to the procedure set out in the Act". (at page 92)

As Nawaz J., referred to the judgment of Lord Campbell C. J., of 1850 in Ex parte Nash (1850) 15 A. B. 92, "much water has flowed down under the bridge since these words were echoed in the 19th century and **with the expanding canvas of administrative law the aforesaid limitation on the scope of mandamus has ceased to exist**". (at page 13)

In fact before commencing the part devoted to "Cetiorarified Mandamus", His Lordship said,

> "**I must observe that the question of issuing a certiorarified mandamus was not raised by the Petitioner but the Court deems it appropriate to discuss this relief as it has become a universal phenomenon in administrative justice**. In fact mandamus has done the work of certiorari in many a jurisdiction and many moons ago our courts have been cognizant of this remedy in the past rather than being dismissive of it. When mandamus is issued to quash an invalid exercise of power whilst the same writ at the same time commands the statutory functionary to retake the decision in accordance with law, it has been classified as certiorariied mandamus. The question before this Court is whether this Court can grant such a certiorariied mandamus on the facts and circumstances of this case". (at page 11)

Therefore a relief has been granted without being raised by the petitioner too. This shows that even at the time of **Rasammah vs. Manamperi 77 NLR 313 at 324** the courts in this country were mindful of granting a remedy within the scope or the reach of the entitlement of a party, without placing that party within a rigid form of specifications.

It appears that after more than six decades from **P. K. Benarji V H. J. Simonds AIR, in 1947**, the Indian courts too have taken a less legalistic view alloyed with substantive justice.

At least in one of the versions, it starts from **Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr on 3 March, 1966** and ends in **Radhey Shyam & Anr vs Chhabi Nath & Ors on 26 February, 2015,** both decided in the Supreme Court of India, on its way touching upon **Surya Dev Rai vs Ram Chander Rai & Ors on 7 August, 2003** and **T. C. Basappa vs T. Nagappa And Another on 5 May, 1954,** also decided in the same court.

In **Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr on 3 March, 1966,**

In a suit for defamation against the editor of a weekly newspaper, filed on the original side of the High Court, one of the witnesses prayed that the Court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial Judge passed an oral order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved Supreme Court under Art. 32 challenging the validity of the order. It was contended that : (i) the High Court did not have inherent power to pass the order; (ii) the impugned order violated the fundamental rights of the petitioners under Art. 19(1) (a); and (iii) the order was amenable to the writ jurisdiction of this Court under Art. 32.

It was held (Per Gajendragadkar C.J., Wanchoo, Mudholkar, Sikri and Ramaswami, JJ.) : Just as an order passed by the Court on the merits of the dispute before it cannot be said to contravene the fundamental rights of the litigants before the Court, so the impugned order, which is also a judicial order, cannot be said to affect the fundamental rights of the petitioners. It was directly connected with the proceedings before the Court inasmuch as the Court found that justice could not be done between the parties and that the matter before it could not be satisfactorily decided unless publication of the evidence was prohibited pending the trial. If incidentally, the petitioners were not able to report what they heard in Court, that cannot be said to make the impugned order invalid under Art. 19(1) (a). [761 D-F; 762 F-G]

Per Sarkar J. : This Court has no power to issue a certiorari to the High Court. [782 H]

Hence the Supreme Court said that it cannot issue a certiorari to the High Court.

The above was a nine judge bench.

It was obvious that the court did not want to rule that the High Court order violated a fundamental right.

In **Surya Dev Rai vs Ram Chander Rai & Ors on 7 August, 2003,** it was said,

> "While dealing with the question whether the orders and the proceedings of subordinate Court are amenable to certiorari writ jurisdiction of the High Court, we would be failing in our duty if we do not make a reference to a larger Bench and a Constitution Bench decisions of this Court and clear a confusion lest it should arise at some point of time. Naresh Shridhar Mirajkar & Ors. Vs. State of Maharashra and Anr. – (1966) 3 SCR 744, is a nine-Judges Bench decision of this Court".
>
> .....
>
> "And lastly, the passage from Halsbury quoted in Naresh Shridhar Mirajkar's case (supra) is from third edition of Halsbury Laws of England (Simond's Edition, 1955). **The law has undergone a change in England itself and this changed legal position has been noted in a Constitution Bench decision of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. – (2002) 4 SCC 388**."

The said passage said, among other things,

> "Certiorari does not lie to quash the judgments of inferior Courts of civil jurisdiction".

Surya Dev Rai decided otherwise.

As two judges could not in 2015 (that means both of them) agree on Surya Dev Rai decision, it was referred to a fuller bench, which case is,

Radhey Shyam & Anr vs Chhabi Nath & Ors on 26 February, 2015

The court identified the question to be decided as,

"Thus, the question to be decided is whether the view taken in Surya Dev Rai that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view"

It was decided,

"Accordingly, we answer the question referred as follows : "(i) Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution;

(ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction under Article 226.

Contrary view in Surya Dev Rai is overruled."

Although the contrary view in Surya Dev Rai was overruled, the court in **Radhey Shyam & Anr vs Chhabi Nath & Ors** followed the decision of **T. C. Basappa vs T. Nagappa And Another on 5 May, 1954,** the headnote of which said,

"**The issue of prerogative writs in the nature of habeas corpus, mandamus, quo warrantto, prohibition and certiorari had their origin in England**-in the King's prerogative power of superintendence over the due observance of law by his officials and Tribunals.

The powers of the Supreme Court as well as of all the High Courts in India under articles 32 and 226 of the Constitution respectively are very wide.

The Supreme Court as well as the High Courts in India can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner so long as the broad and fundamental principles of English law regulating the exercise of jurisdiction in the matter of granting such writs are adhered to".

The court in **Radhey Shyam & Anr vs Chhabi Nath & Or 2015,** quoted the following passage from T. C. Basappa vs. T. Nagappa saying,

> "Since the said judgment is followed in all leading judgments, relevant observations therein may be extracted :..."

> "The principles upon which the superior Courts in England interfere by issuing writs of certiorari are fairly well known and they have generally formed the basis of decisions in our Indian Courts. **It is true that there is lack of uniformity even in the pronouncements of English Judges, with regard to the grounds upon which a writ, or, as it is now said, an order of certiorari, could issue, but such differences of opinion are unavoidable in judge-made law which has developed through a long course of years.** As is well known, the issue of the prerogative writs, within which certiorari is included, had their origin in England in the King's prerogative power of superintendence over the due observance of law by his officials and Tribunals. The writ of certiorari is so named because in its original form it required that the King should be " certified of " the proceedings to be investigated and the object was to secure by the authority of a superior Court, that the jurisdiction of the inferior Tribunal should be properly exercised (1). These principles were transplanted to other parts of the King's dominions. In India, during the British days' the three chartered High Courts of Calcutta, Bombay and Madras were alone competent to issue (1) Vide Ryots of Garbandho v, Zemindar of Parlkime 70 I,A. 129 at page 140 writs and that too within specified limits and the power was not exercisable by the other High Courts at all. " In that situation " as this Court observed in Election Commission, India v. Saka Venkata Subba Rao (1), " the makers of the Constitution having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to

provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions " for any other purpose " being also included with a view apparently to place all the High Courts-in this country in somewhat the same position as the Court of King's Bench in England."

"The language used in articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be 'considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. **In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges**. We can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law".

Hence in overruling the opinion of Surya Dev Rai, that, the law has changed from the 03rd edition of Halsbury, the court perhaps unintentionally voiced the same principle enunciated in Surya Devi Rai, that, the law pertaining to writs have

changed and it is not necessary to "look back to the early history or the procedural technicalities of these writs in English law".

Article 226 of the Indian Constitution says,

> "226. (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

It was said in **Rupa Ashok Hurra vs Ashok Hurra & Anr on 10 April, 2002,** also by the Supreme Court, (which was not referred to above) that,

> "Inasmuch as the Supreme Court enforces the fundamental rights by issuing appropriate directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, it may be useful to refer to, in brief, the characteristics of the writs in general and writ of certiorari in particular with which we are concerned here. In English law there are two types of writs -- (i) judicial procedural writs like writ of summons, writ of motion etc. which are issued as a matter of course; these writs are not in vogue in India and (ii) substantive writs often spoken of as high prerogative writs like writ of quo warranto, habeas corups, mandamus, certiorari and prohibition etc.; they are frequently resorted to in Indian High Courts and the Supreme Court. "Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to

remove indictments for trial in that court; **mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty**. All three were called prerogative writs." In England while issuing these writs, at least in theory, the assumption was that the King was present in the King's Court. The position regarding the House of Lords is described thus, "of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country." in Rajunder Narain Rai Vs. Bijai Govind Singh (1836 (1) Moo. P.C. 117). They are discretionary writs but the principles for issuing such writs are well defined. In the pre-constitutional era the jurisdiction to issue the prerogative writs was enjoyed only by three chartered High Courts in India but with the coming into force of the Constitution, all the High Courts and the Supreme Court are conferred powers to issue those writs under Article 226 and Article 32, respectively, of the Constitution. In regard to the writ jurisdiction, the High Courts in India are placed virtually in the same position as the Courts of King's Bench in England. **It is a well-settled principle that the technicalities associated with the prerogative writs in English Law have no role to play under our constitutional scheme**. It is, however, important to note that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior court to an inferior court which certifies its records for examination. "Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities."

The court added,

> "In Naresh Shridhar Mirajkar & Ors. vs. State of Maharashtra & Anr. [1966 (3) SCR 744], some journalists filed a Writ Petition in the Supreme Court under Article 32 of the Constitution challenging an oral order passed by the High Court of Bombay, on the Original Side, prohibiting publication of the statement of a witness given in open court, as being violative of Article 19(1)(a) of the Constitution of India. A Bench of nine learned Judges of this Court considered the question whether the impugned order violated fundamental rights of the petitioners under Article 19(1)(a) and if so whether a writ under Article 32 of the Constitution would issue to the High Court. The Bench was unanimous on the point that an order passed by this Court was not amenable to the writ jurisdiction of this Court under Article 32 of the Constitution. Eight of the learned Judges took the view that a judicial order cannot be said to contravene fundamental rights of the petitioners. Sarkar,J. was of the view that the Constitution does not contemplate the High Courts to be inferior courts so their decisions would not be liable to be quashed by a writ of certiorari issued by the Supreme Court and held that this Court had no power to issue a writ of certiorari to the High Court. To the same effect are the views expressed by Shah and Bachawat, JJ. **Though, in his dissenting judgment Hidayatullah,J. (as he then was) held that a judicial order of the High Court, if erroneous,** could be corrected in an appeal under Article 136 of the Constitution, **he, nonetheless, opined that the impugned order of the High Court committed breach of the fundamental right of freedom of speech and expression of the petitioners and could be quashed under Article 32 of the Constitution by issuing a writ of certiorari to the High Court as subordination of the High Court under the scheme of the Constitution was not only evident but also logical"**.

Although what was said in **Surya Dev Rai vs Ram Chander Rai & Ors on 7 August, 2003,** that the dicta in **Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr on 3 March, 1966,** was based in the 03rd edition of Halsbury and cannot be the correct position was overruled in **Radhey Shyam & Anr vs Chhabi Nath & Ors on 26 February, 2015,** the court in that case based its judgment on **T. C. Basappa vs T. Nagappa And Another on 5 May, 1954,** which, in respect of the changing law on writs made observations similar as in **Surya Dev Rai.** This shows, with respect, that, Justice Hidayatullah's (later Chief Justice) dissenting opinion was correct.

The above Indian cases were considered since they have (even when they do not agree with each other) agreed that the formalities and technicalities in English law in respect of writs are not binding on Indian courts.

The relevant provision in the Sri Lankan constitution says,

> "140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person :..."

There will be no question in Sri Lanka whether the writ could be issued to a court of First Instance since it is specifically stated.

The relevant provision when first introduced by **Courts and their Powers Ordinance** (Courts Ordinance) of 1890 read,

> "**42**. The Supreme Court or any Judge thereof, at Colombo or elsewhere, shall have full power and authority to inspect and examine the records of

any court, and to grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari procedendo, and prohibition, against any District Judge, Commissioner, Magistrate, or other person or tribunal".

The phrase "according to law" was then interpreted "according to English law". The same interpretation is often given in regard to the same phrase in Article 140. It is true that there is a rule of interpretation that when a word or phrase is judicially interpreted, it is used in future legislation too in that meaning.

But as it was said in **Dr. Lokuge vs Dr. Dayasiri Fernando and Others C. A. Writ Application 160/2013 decided on 16.10.2015**, regarding an 1850 case, much water has flawed under the bridge thereafter. Therefore it is the view of this court that the phrase "according to law" too need not be interpreted as it was interpreted in its original form in 1890.

In **Esab India Limited vs Special Diriector of Enforcement ... on 8 March, 2011,** Dipak Misra Chief Justice followed what Krishna Iyer, J., said in R.S. Joshi, Sales Tax Officer, Gujarat and others versus Ajit Mills Ltd. and another, (1977) 4 SCC 98. It was said,

> "2. A prefactory caveat.- **When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal in interpreting the organic law of the nation...**"

Hence a court has to be liberal not verbal. The phrase "according to law" should assume the realities surrounding it.

Not only that, the situation in England itself has changed.

Justice U. de Z. Gunawardana, that sagacious and erudite Judge, issuing a certiorari to quash a decision to grant a license said in **FORBES & WALKER TEA BROKERS v. MALIGASPE AND OTHERS 1998 (2) SLR 378 at 409,**

> "**I take it that Rule of Law means that no one is above the law and a necessary corollary of that proposition is that no one can flout the law with impunity.** … **The certainty that irregularities or illegalities will be exposed and removed I think, is the most effective way of making public authorities or servants conscious of their duty to act in obedience to the law and so uphold the Rule If Law**. Perusing the judgments and authorities of more recent times on the matter of locus standi the impression is irresistible that there is need for greater certainty in this area for, **as at present, too much discretion seems to be allowed to the court so that the matter of standing seemingly depends on the whim of the individual judge before whom the application for review comes up for decision. Law ought, I presume, to move on the lines suggested by Lord Denning, MR in the direction of much wider concept of locus standi which has now been accepted in England by the adoption of the New Rules of Court of 1978**. Commenting on the new rules of court Lord Denning said: As a result therefore, of the new procedure, it can I hope be said that we have in England **an Actio Popularis** by which an ordinary citizen can enforce the law for the benefit of all - as against public authorities in respect of their statutory duties - The Discipline of Law - page 133. The strict concept that the applicant for judicial review must have an interest superior to that of the general public has been transformed in England and seems to be virtually jettisoned".

Although standing was not particularly a question in this application, what His Lordship says is relevant in determining the general availability of a writ which is called prerogative. On the other hand, it can be said that the question of locus standi has arisen in this case too, perhaps in a slight indirect manner, referring

to the membership. His Lordship was particularly mindful of the changing situation in England, where His Lordship noted a marked liberalization of rules. His Lordship said, at page 410,

> "The question has been raised in the following form: If a government department or a public authority transgresses the law can a member of the public come to court and draw the matter to its attention. He may himself be affected by the breach. So many thousands of others like him. **Is each and every one of them debarred from access to the court**?
>
> I am spared the need to answer that question in this case because the petitioner, as has been repeatedly stressed in this order, being a vaild licence holder, must be taken to have an interest superior to that of the general public. But one can be sure of one thing, if of no other, that is, that had the question enunciated above been raised in England, as at present, since the marked liberalization of rules as to standing after the process started somewhere in the late seventies or early eighties, that question would almost for certain be answered in the negative for the position is now settled that if it can be shown that the applicant for judicial review is affected in some demonstrable way, he ought, almost of necessity, to be accorded standing".

This is why in Surya Dev Rai, 2003, as quoted earlier, it was said,

> "**The law has undergone a change in England itself and this changed legal position has been noted in a Constitution Bench decision of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. – (2002) 4 SCC 388**".

In the circumstances, overruling the preliminary objections, this court issues notice on all respondents and grants the interim order staying the present members of the Board of Directors disposing of any movable or immovable asset

of the “Gampaha Sanasa District Bank” until the final determination of this application.

The court grants the application for substitution too.

In other words, the court while issuing notice grants prayers in paragraphs (B) and (C) also in Writ 59 2020 and paragraphs (G) and (H) in Writ 16 2022.

There is no order on costs.

Judge of the Court of Appeal

Neil Iddawala, J.

I agree.

Judge of the Court of Appeal