

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

1. Vignan Educational Foundation (Pvt.) Ltd.
73/3B Makandana
Madapatha.
2. Hitihamilage Don Oshala Lakmal Anil Herath
Director
Vignan Educational Foundation (Pvt.) Ltd.
73/3B Makandana
Madapatha.

C.A 1696/2006 (Writ)

PETITIONERS

Vs.

1. Board of Investment of Sri Lanka
Level 125, West Tower
World Trade Centre
Echelon Square
Colombo 1.
2. Prof. Lakshman R. Watawala
Chairman
Board of Investment of Sri Lanka
Level 125, West Tower
World Trade Centre
Echelon Square
Colombo 1.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Faiz Mustapha P.C. with T. Machado for Petitioners
Milinda Gunathilleke D.S.G for the Respondents

ARGUED ON: 18.11.2013 & 17.03.2014

DECIDED ON: 26.08.2014

GOONERATNE J.

This is an application for a Writ of Certiorari and Prohibition by the Petitioner Company. The 2nd Petitioner is a Director of the Company. According to the Respondents in their submissions to this court and as urged in the written submissions the subject matter of this application is based on a contract. Petitioners have prayed for a Writ of Certiorari to quash the decision suspending the 1st Petitioner Company from conducting lecture courses for IMTU Medical Degree as in letter marked P21 dated 10.11.2006. (as per sub para 'a' of the prayer to the Petition) Prohibition is sought restraining the Respondents from taking steps as per letter P21.

In the body of the petition it is stated that approval was sought by the 1st Respondent to establish a vocational course for Information Technology and para medicals and for twinning programmes for foreign universities. By letter P2 approval was granted by the 1st Respondent, subject to conditions. One such condition was that Petitioners cannot undertake lectures for medical degree. Thereafter the Petitioner Company made an application to the Human Rights Commission (P3), complaining about not being permitted to conduct lecture courses for medical degree. The Commission held inquiries for several days and 1st Respondent by P4 informed the Petitioners, that approval was granted to conduct lecture courses (pre clinical) of a medical degree offered by a foreign university. P 4 states subject to conditions that project to be located outside the Western Province. In this regard the Human Rights Commission by report P7, stated inter alia, to locate the project outside the Western Province would be violative of article 12 of the Constitution. However by letter P8 the 1st Respondent granted approval and 1st Respondent and Petitioner entered into an agreement P10 dated 18.7.2002. Emphasis is made to clause 10(2) of P10. It is pleaded that the Petitioners spent a large sums of money to set up the project expending of Rupees 25 million to construct a building.

Consequent to all above Petitioner Company published a notice calling for application to follow a MBBS course (P11). However the Sri Lanka Medical Council published in the Ceylon Observer on 23.9.2001 to the effect that the Medical Council will not recognize the above degree course (P12). Thereupon the IMTU University in Tanzania instituted a Writ Application (CA 955/2003) to quash such decision. The said application had been settled as in document P13 & P14.

The 1st Petitioner Company published a further advertisement by P15 & P16 for posts of Lecturer for the above project. As described in documents P17 & P18 Professor Carlo Fonseka, was invited to join the 1st Petitioner Company and his views are contained in the document P18. In response several students and Lecturers submitted applications (P19 & P20). The Petitioner also states that in terms of the IMTU Rules lecture courses should commence before 01.03.2007 (P20a). To the surprise and dismay of the Petitioner Company they received by facsimile a letter of 10.11.2006 (P21). I would for purpose of clarity incorporate the following paras 26, 27 & 28 of the petition since the basis of filing this application and the grievance of the Petitioner could be fathomed.

1. The Petitioner states that it received a letter from the 1st Respondent dated 15.11.2006 requesting the 1st Petitioner Company within 7 days to furnish to the 1st Respondent the following documents.
 - (a) Approval from the University Grants Commission
 - (b) Approval from the Medical Council
 - (c) Approval from the Ministry of High Education.
 - (d) Affiliation agreement signed with the International Medical and Technological University for medical degrees to be conferred.
 - (e) Approval from the Ministry of Health to undertake the lecture courses.
2. The 1st Petitioner Company states that in response to the aforementioned letter the 1st Petitioner Company addressed a letter dated 16.11.2006 protesting and stating inter alia:
 - (a) That the 1st Respondent had requested the 1st Petitioner Company to submit approvals from the University Grants Commission, Sri Lanka Medical Council, Ministry of Higher Education and Ministry of Health to the said project. However the 1st Respondent is well aware, prior to the granting of approval of the said project the 1st Respondent had written to the above mentioned institutions requesting their comments.
 - (b) As a reply to the 1st Respondent's letter dated 24.08.2001 to the UGC, the Chairman of the UGC by his letter dated 29.01.2002 had stated that the proposed project does not come within the purview of the Universities Act.

- (c) As a settlement to an application filed by IMTU Tanzania in the Court of Appeal against the Sri Lanka Medical Council bearing case No. C.A 955/03 the SLMC has agreed not to state that it will not recognize the pre-clinical courses conducted by IMTU conducted in Sri Lanka. Therefore the question of approval or recognition by the SLMC does not arise.
- (d) As a reply to the BOI letter dated 20.11.2001 to the Ministry of Higher Education, the Secretary of the Ministry of Higher Education by his letter dated 21.8.2001 has requested the 1st Respondent to consult the UGC and SLMC.
- (e) The Ministry of Health – Director Private Health Sector Development by his letter dated 25.01.2002 addressed to the 1st Respondent has stated that the project does not come within their purview.

It was further stated therein due to the aforementioned reasons that the question of approval of the said project does not arise.

3. The petitioners state that the said decision contained in the said letter (P21) dated 10.11.2006 suspending the 1st Petitioner Company from conducting lecture courses is illegal null and void and of no force or avail in law inasmuch as –

- (a) The said decision is ultra vires and totally without jurisdiction;
- (b) The provision of the BOI law or the said agreement entered into between the 1st Petitioner Company and the 1st Respondent do not empower the 1st Respondent to make the said order of suspension.
- (c) The Petitioners are not in breach of the terms of the said agreement which do not in any event empower the respondents to make the said order of suspension.
- (d) The said decision is arbitrary , capricious and unreasonable;
- (e) The 1st Petitioner Company had a legitimate expectation to conduct lectures (Pre-clinical part) for medical degree to be offered by foreign universities in terms of the agreement with the 1st Respondent;
- (f) The said decision violates the principles of natural justice for the reason that the petitioners views were not sought nor were they afforded an opportunity of being heard prior to the suspension of lectures (Pre-clinical part) for medical degree to be offered by foreign universities and in effect altered the terms and conditions of the said agreement;
- (g) The 1st respondent held out to the 1st Petitioner Company that it was entitled, in terms of the Agreement (P10), to conduct lectures (Pre-clinical part) for medical degree to be offered by foreign universities, and the 1st Respondent is therefore stopped from canceling lectures (Pre-clinical part) for medical degree to be offered by foreign universities;
- (h) Offend the principles of proportionality inasmuch as –

- (i) The 1st Petitioner Company has expended large sums of money to commence operations of the said project; and
 - (ii) The 1st Petitioner Company has selected lecturers and students to conduct lecture courses (Pre-clinical part) for medical degree to be offered by foreign universities and grave prejudice will be caused to the students if they are unable to follow lectures after tendering their applications to follow the said course and the lecturers will be deprived of the opportunity of securing employment for the said project.
- (i) The said decision to suspend ‘lectures (Pre-clinical part) for medical degree to be offered by foreign universities’ is vitiated by the failure to give reasons by the respondents.

The learned Deputy Solicitor General on behalf of the Respondents submitted mainly on the aspect that relationship between parties is based on a contract and the subject matter is a contractual dispute, not subject to the writ jurisdiction of this court. Petitioner, according to the Respondent is in breach of their obligation as per the agreement P10. Further Petitioner also has an alternate remedy to resort to the arbitration process to resolve any dispute arising from the agreement. It is pleaded that as per document R1, large sums of money as reflected therein is due and owing to the 1st Respondent.

Respondent state that in terms of clause 9 of the agreement P10, Petitioner is obliged to maintain accounts and make it available. The 1st Respondent by R2 called upon the Petitioner Company to submit accounts, but failed to submit accounts and thereby failed to comply with clause 9 of P10. Several letters R3, R4 and R5 were sent by the 1st Respondent but there was no compliance by the Petitioner. Accordingly due to continuous breaches of the said agreement P10 the Respondent issued R6. The 2nd Petitioner responded by letter of 08.08.2005 and denied any breach of agreement and sought time to make payment, until a legal dispute is resolved with the Sri Lanka Medical Council (R7). In view of the continuous breaches by the Petitioners, Respondent plead that as per Clause 11 of P10, Respondent entitled to withdraw all or part of the privileges, and as such P21 had been dispatched to the Respondent, as entitled to suspend as in P21.

On perusing Agreement P10 and the several correspondence between parties it is evident that the basis of the grievance of the parties concerned emanate from a contract. If parties choose to enter into an agreement it is essential that each party attempts to fulfill each others' obligations. Respondents have urged in their pleadings the several items of breach of contract, to hold the Petitioner liable. Therefore there is justification

on the part of the Respondents to issue document P21. It is apparent the initial clause in P10 namely clause (1) gives the basic guidance, together with the condition referred to in document P2. Attention of this court has been drawn to clauses 1, 2, 9, 3(a), 4(c) & 11(1) of P10. The material placed before court is to the effect that the above all important clauses referred to above had been breached by the Petitioner. The explanation offered by the Petitioners are more or less evasive answers to same. Documents R2, R3, R4, R5 & R8 support the position of the Respondent. All this is in violation of clause 8 & 9 of agreement P10.

There are several violations demonstrated by the Respondent party for which the Petitioner is responsible. It appears that the Petitioner has violated all relevant and important conditions of the agreement. However the law would not in any event favour the Petitioner in Writ Applications not only on the basis of violation but as the writ jurisdiction cannot be extended in the way pleaded by the Petitioner to the case in hand. The rights sought to be enforced are rights that arise from the agreement between parties and no writ would lie.

This principle was clearly articulated in *vehicles Lanka (Pvt.) Ltd. Vs. The Board of Investments* CA Writ 945/2006 decided on 27.6.2006. In that judgment the following authorities were incorporated, which is very relevant to the case in hand.

Clive Lewis on Judicial Remedies in Public Law

“The Courts have drawn a distinction between rights derived from contract rights which can be classed as private law rights, and rights derived from public law. By ‘Public Law’ rights, the Courts generally mean the ability to invoke the supervisory.

In Jayaweera V. Wijeratne 1985 (2) SLR 413...

“Where the relationship between the parties is purely contractual and one of a commercial nature neither certiorari or mandamus will lie to remedy grievances arising from an alleged breach of Contract or failure to observe the principles of natural justice even if one of the parties is a public authority”.

The Petitioners are not without a remedy. If the Petitioners so desire could resort to the Arbitration process (Clause 18 of P10). In this regard Clause 20 may also be relevant. Agreement P10 contemplates of other methods to ease the burden of parties to the agreement. Availability of alternative remedies would deprive the Petitioner for relief by way of a Writ Application.

In all the above circumstances this court is reluctant to extend the writ jurisdiction in view of the above. As such we refuse to grant the relief prayed for in the prayer to the petition. Application dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL