

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

**In the matter of an Application for mandates in the
nature of Writ of *Certiorari and Mandamus* under and
in terms of Article 140 of the Constitution of The
Democratic Socialist Republic of Sri Lanka**

Captain Channa D.L. Abeygunewardena,
No. 322/55, Saraswathie Estate,
Thalawathugoda.

Petitioner

CA/ WRIT/31/2016

Vs,

1. Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.
2. Dammika Ranathuga
Chairman
Sri Lanka Ports Authority,
No 19, Chaithya Road,
Colombo 01.
3. Sarath Kumara Pemachandra,
Managing Director,
Sri Lanka Ports Authority,
No 19, Chaithya Road,
Colombo 01.

4. Magampura Port Management Company (Pvt) Ltd,
Ports Administration Complex,
Mirijjawila, Hambantota.
5. Dammika Ranathunga
Chairman,
6. Dr. Lalith Perera
7. Sanjeeva Wijeratne
8. Thameera Manju
9. Uditha Gunawardena
10. Shirani Wanniarachchi
11. Jayantha Perera
5th to 11th Respondents are Directors of
Magampura Port Management Company (Pvt)
Ltd.
12. Sarath Perera
General Manager,
Magampura Port Management Company (Pvt) Ltd,
Ports Administration Complex,
Mirijjawila, Hambantota.

Respondents

Before : Vijith K. Malalgoda PC J (P/CA)

Counsel : Upul Jayasuriya with Sandamal Rajapakse for the Petitioner

Uditha Egalahewa PC with Ranga Dayanande for the 1st to 3rd Respondents

Athula Bandara Hearath with Shashika de. Silva for the 4th and 6th to 12th Respondents

Supported On: 11.02.2016

Written Submissions On: 31.03.2016

Order On: **29.07.2016**

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to the present application Channa D.L. Abeygunewaradena had filed the present application before this court inter alia, grant and issue

- a) A Mandate in the nature of a *Writ of Certiorari* quashing the decision of the 3rd Respondent to suspend the services as per letter dated 18.12.2015.
- b) A mandate in the nature of *Writ of Certiorari* quashing the decision of the 4th to the 12th Respondents terminating the service of the Petitioner as per letter dated 20.01.2016 (P27)
- c) A mandate in the nature of a *Writ of Mandamus* compelling the 1st to the 12th Respondents to re-instate/restore the Petitioner in the post of Deputy General Manager

Petitioner who was appointed as “Bunkering Consultant” and subsequently as “Deputy General Manager” (Bunkering) of the 4th Respondent Magampura Port Management Company (Pvt) Limited (here in after referred to as MPMC) with effect from 03.12.2014 was subsequently suspended from his services by a show cause letter dated 18.12.2015 issued by the 3rd Respondent. Thereafter his services were terminated by letter dated 20.01.2016 issued by the 12th Respondent.

When the present application was supported before me seeking the relief referred to above, the Respondents referred to above had raised a preliminary objection for the maintainability of the present application on the following grounds,

- a) Whether a *Writ of Certiorari* and *Mandamus* would lie in the present circumstances of the case

- b) whether any alternative remedy is available to the Petitioner
- c) Whether the 4th Respondent owe a statutory duty as alleged by the Petitioner

As revealed before this court the 4th Respondent is a company which is duly incorporated under the Companies Act No 7 of 2007 and the Petitioner was first appointed as “Bunkering Consultant” but later appointed as the Deputy General Manager-Bunkering with effect from 3rd December 2014 as per the terms and conditions specified in the letter of appointment produced marked P-4.

The said letter of appointment had been issued by the Chairman of MPMC (Private Limited) which is the 4th Respondent and nowhere in the said letter there is reference to the Sri Lanka Ports Authority the 1st Respondent to the present application.

The Petitioner had submitted that the MPMC Private Limited is a body owned, financed, operated and answerable solely to the Government of Sri Lanka through Sri Lanka Ports Authority and therefore the decisions taken by the 4th Respondent had a statutory flavour.

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 warehousing 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.

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.

Therefore this court is not inclined to accept the above argument for the reason that,

- a) the 4th Respondent is a duly incorporated company under the Companies Act No 7 of 2007
- b) the employment of the petitioner was based on an employment contract between the Petitioner and the 4th Respondent and not with the Sri Lanka Ports Authority.

In this regard this court is mindful of the decision in *Vidyodaya University V. Linus Silva 1 WLR 77* where the Privy Council dismissed the application for a *Writ of Certiorari* of an University Teacher for the reason that, his position was merely that of an employee under an ordinary contract of Master and Servants.

Professor Wade whilst commenting on the said decision submitted that “the mere fact that the University is established by a statute does not necessarily make its powers statutory; it may engage its employees under ordinary contract of service” (*Administrative Law H W R Wade and C F Forsyth 10th Edition pages 538,539*)

However the Petitioner whilst relying on the following observation made by Marsoof J in *Harjani and Another V. Indian Overseas Bank (2005) 1 Sri LR 167 at 176* to the effect, that “this court is bound to exercise supervising jurisdiction over the exercise of such powers despite the fact that some at least of these banks are local foreign banking companies,” submitted that, the Supreme Court in the said case had rejected the argument that writ would not lie against a company which is not a statutory body

on the grounds that the bank was attempting to take advantage of certain provisions relating to parate executions which had been conferred on the bank by statute.

However I see no relevance of the said decision of the Supreme Court to the case in hand for the reasons that,

- a) The said case does not refer to a contractual relationship between an employee and the employer.
- b) The circumstances under which the said observations were made by the Supreme Court are quite different to the circumstances of the present case.

As observed by me the Supreme Court had given its reasons for overruling the preliminary objection by the bank that a writ would not lie against a Company, for the following reasons.

“In the light of those decisions it is necessary to consider whether the *Writ of Certiorari* is available against a private banking company such as the 1st Respondent. The gist of the 1st respondent’s submission is that writ would not lie against a company which is not a statutory body. The said Respondents have sought to take advantage of the provisions of the recovery of loans by Banks (special Provisions) Act relating to parate execution. In fact in terms of the said Act the 1st Respondent had the option of either adopting a resolution under section 4 to sell by public auction the property mortgaged to it or authorize a person by resolution in terms of section 5 of the Act to take over possession to manage the said property and to utilize its produce or profits for the settlement of the loan. These powers have been conferred by the statute on any “bank” as defined in section 22 of the Act. The Act lays down special procedures for the exercise of the powers conferred on such Banks, and I am of the opinion that this court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these Banks are local or foreign Banking companies. For the foregoing reasons, the preliminary objection taken on behalf of the Respondent Bank is overruled....”

As observed by this court earlier the circumstances under which the said decision in the Hirjani's case was decided are different to the facts of the present case and therefore I see no relevance of the decision in Hirjani's case to the case in hand.

In the case of *Jayaweera V. Wijerathne (1985) 2 Sri LR 413* the question whether a *Writ of Certiorari* and *Mandamus* would lie for breach of contract of commercial nature was discussed by the Court of Appeal as follows; "where the relationship between the parties is purely a contractual one of a commercial nature neither *Certiorari* nor *Mandamus* will lie to remedy grievances arising from an alleged breach of contract of failure to observe the principle of natural justice even if one of the parties is a Public Authority."

Petitioner to the present application is also seeking a mandate in the nature of *Writ of Mandamus* to compel the 1st to 12th Respondents to reinstate/ restore the Petitioner in the post of Deputy General Manager, and it is important to consider whether the said Respondents have a public duty to reinstate/ restore the Petitioner for this court to grant such relief to the Petition.

As observed earlier in this order 4th Respondent is duly incorporated companies under the Companies Act No 7 of 2007 and 5th to 11th Respondents are Directors of the 4th Respondent MPMC (Private Limited). The said Respondent does not have a public duty to perform. As further observed by me in this order, Sri Lanka Ports Authority does not have a role to play under the provisions of the Sri Lanka Ports Authority Act, with regard to the functions of the MPMC (Private Limited). Under these circumstances I see no merit in the argument raised by the Petitioner, that the said Respondent has a public duty to perform with regard to the functions of the 4th Respondent. In the case of *Hakmana Multi-Purpose Co-operative Society Ltd V. Fernando (1985) 2 Sri LR 272* the Supreme Court held, that "The Petitioner before this court is seeking *Mandamus* to enforce a mere private duty arising from a contract. This clearly is outside the scope of *Mandamus*."

As observed in the case of *Vidyodaya University V. Linas Silva* the Petitioner has an alternative remedy to seek damages for wrongful termination and in addition he has a legal right to go before the Labour Tribunal to challenge the termination if it was an unlawful termination under the Industrial Disputed Act, but the Petitioner had invoked the jurisdiction of this court without seeking alternative remedies available to him.

In the case of *Mahanayake V. Chairman Ceylon Petroleum Corporation and Others* 2005 2 Sri LR 193 Sri Skandarajah J held that,

“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. In *Jayaweera V. Wijetathne*, 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. On the other hand the Petitioner had effective alternate remedies such as seeking redress before a Labour Tribunal under the Industrial Dispute Act. In *Hendric Appuhamy V. Johan Appuhamy* the court held where a specific remedy is given by a statute there by deprives the person who insists upon a remedy of any other form of remedy than that given by the statute. Under these circumstances a *Writ of Certiorari* will not be available to quash the order of termination dated 29.08.2000 or a *Writ of Mandamus* to compel the 01st 02nd: Respondents to reinstate the Petitioner with back wages.”

When considering the material already discussed above in this order I upheld the preliminary objections raised by the Respondents before me and dismiss this application in limine.

PRESIDENT OF THE COURT OF APPEAL