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

1. Abdul Lathiff Mohamed Anver
2. Mohamed Anver Mohamed Farsan

Both of No.184/3, Puttlam Road,
Kurunegala

**Petitioners**

**Case No: CA(PHC) 17/2006**

**P.H.C Kurunegala**

**Case No: H.C.W 08/2001**

**Vs.**

Provincial Revenue Commissioner
Department of Provincial Revenue.
N.W.P Kurunegala
And Another

**Respondents**

1. Abdul Lathiff Mohamed Anver
2. Mohamed Anver Mohamed Farsan

Both of No.184/3, Puttlam Road,
Kurunegala

**Petitioners-Appellants**

**Vs.**

Provincial Revenue Commissioner
Department of Provincial Revenue.
N.W.P Kurunegala
And Another

**Respondents-Respondents**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

S.N. Vijithsinghe for Petitioners-Appellants

S. Wimalasena SSC for Respondents-Respondents

**Written Submissions tendered on:**

Petitioners-Appellants on 11.12.2017 and 05.10.2018

**Argued on:** 30.08.2018

**Decided on:** 28.02.2019

**Janak De Silva J.**

This is an appeal against the order of the learned High Court Judge of the North-Western Province holden in Kurunegla dated 21.11.2005.

The Petitioners-Appellants (Appellants) filed the above styled action in the High Court of the North-Western Province holden in Kurunegala against the Respondents-Respondents (Respondents) for action taken to recover stamp fees due on deed marked P1. The claim of the Respondents was that although stamp fees had been paid on P1, there was still a deficiency to be recovered by the provincial revenue authorities.

The learned High Court Judge dismissed the application on several grounds and hence this appeal.

***Absence of Prayer for Writ of Certiorari***

Prayer (a) to the petition filed in the High Court reads:

> "වගඋත්තර කරුවන් විසින්, පෙ 8, දරණ ලියවිල්ලෙන් මෙම නඩුවට අදාල දේපළ රු 7, 200, 000.00 (රු හැත්තෑ දෙලක්ෂ) කට තක්සේරු කර ඇති තීරණය සහ නිවේදනය (වලංගු නැති තීරණයක් ලෙස පත්කොට එය ඉවත් කරන ලෙසත්)"

The learned High Court Judge has held that as there is no prayer for the issue of a writ of certiorari the Appellant is not entitled to a writ of certiorari quashing P8.

The learned Counsel for the Appellant submitted that the caption refers to the application as one made under Article 154P(4)(b) for a writ of certiorari. It was further submitted that Imam J. in *Lukmanjee and another v. Sylvester and others* [(2005) 1 Sri.L.R. 233] held that it is now settled that strict pleadings are not insisted on and that the object of a pleading is that both parties should know what the real issues between them are. In that case, the particular writ prayed for was not specified in the prayer but Imam J. held that on a perusal of the averments contained in the petition and the relief prayed for it was clear that the petitioners were seeking a writ of mandamus. The decision in *Dayananda v. Thalwatte* [(2001) 2 Sri.L.R. 73] was distinguished.

It is an established principle that Court cannot grant relief not prayed for by a party [*Sirinivasa Thero v. Sudassi Thero* (63 N.L.R. 31), *Wijesuriya v. Senaratne* (1997) 2 Sri.L.R. 323, *Surangi v. Rodrigo* (2003) 3 Sri.L.R. 35, *National Development Bank v. Rupasinghe and others* (2005) 3 Sri.L.R. 92, *Doris Siriwardena et al v. De Silva* (2006) 2 Sri.L.R. 309]. The application of that principle to a writ application is seen in *Dayananda v. Thalwatte* (supra) where Jayasinghe J. (with Jayawickrema J. agreeing) held (at page 80):

> "An aggrieved person who is seeking to set aside an unfavourable decision made against him by a public authority could apply for a prerogative writ of certiorari and if the application is to compel an authority to perform a duty he would ask for a writ of mandamus and similarly if an authority is to be prevented from exceeding its jurisdiction the remedy of prohibition was available. **Therefore, it is necessary for the Petitioner to specify the writ he is seeking supported by specific averment why such relief is sought.** Even though the Petitioner has set out in the caption that "In the matter of an application ... for writ of quo warranto and prohibition" there is no supporting averment specifying the writ and there is no prayer as regards the writ that is being prayed for. **The failure to specify the writ therefore renders the application bad in law.**" (emphasis added)

With the greatest of respect to Imam J., in my view he erred in *Lukmanjee and another v. Sylvester and others* (supra) in distinguishing *Dayananda v. Thalwatte* (supra) when the facts in the two cases as to the defective prayer were identical. A judge sitting alone regards himself as bound by the decision of two or more judges. [*Walker and Sons & Co. (U.K.) Ltd. v. Gunatilake and others* (1979) 1 Sri.L.R. 231 at 245]. Therefore, we overrule *Lukmanjee and another v. Sylvester and others* (supra) on that point.

Accordingly, I hold that the learned High Court Judge correctly concluded that as there is no prayer for the issue of a writ of certiorari the Appellant is not entitled to a writ of certiorari quashing P8.

***Failure to Follow Legal Procedure***

The learned counsel for the Appellant submitted that the Respondents failed to follow the proper procedure set out in Finance Statute No. 08 of 1990 of the North Western Province (Finance Statute) for any one or more of the following reasons:

(a) P1 was not impounded as required
(b) The impounded instrument must be referred to an assessor
(c) The assessor must then send a notice of assessment
(d) Instead in this case the 1st Respondent has sent P8
(e) This deprived the Appellants an opportunity of appealing to the 1st Respondent against the determination of the assessor
(f) P8 is not signed by the 1st Respondent

I will consider each of these positions in relation to the Finance Statue.

Although the Finance Statute does refer to impounding of instruments not duly stamped, the failure to do so does not prevent steps been taken to recover the stamp duty due on that instrument.

Documents marked P3 and P4 are letters exchanged between the 1st Appellant and Mrs. A.K.C. Kulasekera, Assessor, Provincial Revenue Department, North Western Province. They in turn refer to previous correspondence between the 1st Appellant and Mrs. A.K.C. Kulasekera which the Appellants did not tender with their pleadings. Accordingly, the learned High Court Judge was correct in concluding that it is not possible to accept the position advanced by the Appellants.

It is true that section 57(1) of the Finance Statute refers to an assessor sending a notice. However, section 104(4) read with section 106 of the Finance Statute permits the 1st Respondent to perform any function or exercise any power conferred on an assessor by the Finance Statute. Hence there is no legal impediment to the 1st Respondent sending P8.

It is true that in the 1st Respondent exercising the power given to an assessor, it may deprive a party of the right of appeal to the 1st Respondent against a decision of an assessor. However, that deprivation, if it can be termed as such, is as a result of the provisions in the Finance Statute itself and as such there can be no cause for complaint unless the constitutionality of the relevant provisions of the Finance Statute is impugned which is not the case here.

It is not in dispute that the seal of the 1st Respondent appears on P8 with the name and designation although it is not signed. The learned counsel for the Appellant relied on section 100(1) of the Finance Statute to establish it must also be signed and the failure to do so makes it invalid. However, section 73(1) of the Finance Statute states that any notice to be given by the Commissioner or an assessor under it is valid if it bears the name or signature. The requirement is in the alternative and hence I hold that P8 is valid.

***Certified Copy of P1***

The learned High Court Judge correctly observed that the document P1 marked with the petition was neither the original nor a certified copy. It is a photocopy and on the top of the first page it can be seen that someone has written "True photo copy of original". There is no certification of that statement by anyone.

In *Shanmugavadivu v. Kulathilake* [(2003) 1 Sri.L.R. 215] the Supreme Court held that the requirements in Rules 3(1)(a) and 3(1)(b) of the Court of Appeal (Appellate Procedure) Rules 1990 (1990 Rules) are imperative.

Learned counsel for the Appellant cited *Kiriwanthie and another v. Navaratne and another* [(1990) 2 Sri.L.R. 393] to support the proposition that the non-compliance with the relevant rules does not require automatic dismissal. However, in *Shanmugavadivu v. Kulathilake* (supra) Bandaranayake J. held that after the 1990 Rules were enacted the ratio of *Kiriwanthie and another v. Navaratne and another* has no application.

The requirement is that originals or certified copies of material documents must be annexed to the petition. [*Urban Development Authority v. Ceylon Entertainments Limited and others* (2004) 1 Sri.L.R. 95]. P1 is the deed which is the subject matter of the dispute between parties and hence is a material document.

However, the learned counsel for the Appellant submitted that the Respondents have admitted the authenticity of P1 in their objections and as such the learned High Court Judge erred in referring to the failure to file a certified copy of P1 as a ground for dismissal. There is merit in this submission. In *Celweera S.A. v. Malship Bulkfert (Pvt) Ltd.* [(2003) 1 Sri.L.R. 29] the Supreme Court held that in view of the admission of the document "D" by the respondent as the arbitration agreement, the respondent could not have invited the court to dismiss the application on the ground that there was no copy of the agreement as required by section 31(2)(b) of the Arbitration Act No. 11 of 1995. Hence, I hold that the learned High Court Judge erred in relying on non-compliance with Rule 3(1)(a) of the 1990 Rules as a ground for dismissal.

***Alternative Relief***

The learned High Court Judge further held that as the Appellants did not resort to the Board of Review against P8 relief should not be granted. The learned counsel for the Appellants relied on the dicta of Gratiaen J. in *Sirisena v. Kotawera-Udagama Cooperative Stores Ltd.* (51 N.L.R. 262) where he held that even though an alternative remedy was available, a writ of certiorari would lie to quash the proceedings of a tribunal which flagrantly exceeded the limited statutory powers conferred on it. My research has found that this decision was quoted with approval by the

present Supreme Court in *Kanagaratna v. Rajasunderam* [(1981) 1 Sri.L.R. 492]. However, as explained later, P8 is not, firstly a decision affecting the rights of the Appellants, and secondly, in any event the 1st Respondent had the power to issue it.

The general principle is that an individual should normally use alternative remedies where available rather than judicial review [*R. (Davies) v. Financial Services Authority* (2004) 1 W.L.R. 185; *R. (G) Immigration Appeal Tribunal* (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [*Rodrigo v. Municipal Council Galle* (49 N.L.R. 89); *Gunasekera v. Weerakoon* (73 N.L.R. 262); *Obeysekera v. Albert & others* (1978-79) 2 Sri.L.R. 220); *Rev. Maussagolle Dharmarakkitha Thero and another v. Registrar of Lands and others* (2005) 3 Sri.L.R. 113].

The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [*R (Cowl) v. Plymouth City Council* (2002) 1 W.L.R. 803; *R. v. Barking and Dagenham LBC Ex. P. Lloyd* (2001) L.G.R. 421; *R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal* (2008) E.L.R. 739].

However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available [*Sirisena v. Kotawera-Udagama Cooperative Stores Ltd.* (supra), *E.S. Fernando v. United Workers Union and another* (1989) 2 Sri.L.R. 199]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists.

However, I am of the view that none of those considerations are present in this case and that the learned High Court Judge was correct in holding that relief should not be granted as the Appellants did not have recourse to the Board of Review against P8.

***Legal Effect of P8***

There is another matter which must be considered by this court although not referred to by the learned High Court Judge.

There is a consistent line of authorities where our courts having adopted the influential speech of Lord Atkin in *R. V. Electricity Commissioners ex parte London Electricity Joint Committee Company Ltd.* [(1924) 1 K.B. 171 at 205] and declined to issue a writ of certiorari as the facts did not establish that the decision maker had determined questions affecting the rights of subjects. [*De Mel v. De Silva* (51 N.L.R. 105), *Dias v. Abeywardena* (68 N.L.R. 409), *Fernando v. Jayaratne* (78 N.L.R. 123), *G.P.A. Silva and others v. Sadique and others* (1978-79) 2 Sri.L.R. 412, *Dayaratne v. Rajitha Senaratne, Minister of Lands and others* (2006) 1 Sri.L.R. 7].

The relevant part of P8 reads:

> "To: ඒ. එල්. එම්. අන්වර් මයා, නො. 184රැ3, පුත්තලම් පාර, කුරුණෑගල වෙතය.
>
> ඔබ විසින් ලියවා අත්සන් කරන රැ ඔබට ලියා දෙන ලද්දා වූද ඩී. බී. වඳුරාගල නොතාරිස් විසින් සහතික කරන ලද්දා වූද 1998.04.30 වැනි දින 16991 අංකය දරණ ඔප්පුව සම්බන්ධයෙන් 1900 අංක 8 දරණ මුදල් ප්‍රඥප්තියේ 77(1)(අ) වැනි වගන්තිය යටතේ නියම කරන මුද්දර ගාස්තු ප්‍රමාණය දැක්වෙන ගැසට් නිවේදනයේ 2රැ3 විෂය අංකය යටතේ පහත දැක්වෙන විස්තර අනුව අයවිය යුතු මුද්දර ගාස්තුව වන රු. 287000 ට ඌනතාවය වශයෙන් රු. 200000ක් සහ මුද්දර ගාස්තු 57(1) (ආ) වගන්තිය යටතේ දණ්ඩනය වශයෙන් රු. 600000 ක් ගෙවන ලෙස නැතහොත් නොගෙවා සිටීමට ඇති හේතු දක්වන ලෙස මුද්දර ගාස්තු ප්‍රඥප්තිය 57 වැනි වගන්තිය යටතේ ක්‍රියා කිරීමට පළාත් ආදායම් කොමසාරිස් එව්. එස්. රාජසිංහ වන මම මෙයින් ඉල්ලා සිටිමි. **මාසයක් ඇතුළතදී මේ ගෙවිය යුතු මුදල නොගෙවුවහොත් හෝ මා සෑහීමකට පත්වන පරිදි කරුණු ඉදිරිපත් නොකළහොත් එය අයකර ගැනීම සඳහා ඔබට විරුද්ධව ක්‍රියා කරනු ලැබේ.**" (emphasis added)

Clearly the 1st Respondent was giving the Appellants an opportunity of showing cause as to why the sum demanded should not be paid. The Appellants were given one month within which to show cause why the said sum was not due. Further action was to be taken only upon the failure of the Appellants to show cause. Hence P8 did not determine the legal rights of the Appellants.

Therefore, in any event P8 was not amenable to a writ of certiorari as it did not have effect *proprio vigore*.

In order to avoid any doubt, the Appellants are not entitled now to show any cause to P8 as they were given a period of one month to do so. Instead they rushed to Court seeking to assail P8 claiming it to be *ultra vires*.

For the foregoing reasons and subject to my conclusions on certified copy of P1, the appeal is dismissed with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal