

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

In the matter of an application for mandate in the nature of a Writ of Certiorari and a Writ of Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ven. Buththala Rahula Thero  
Hangamuwa Rajamaha Viharaya,  
Doraweruwa,  
Polpitigama.

**Petitioner**

**Case No. C. A. (Writ) Application 96/2017 Vs.**

1. Nimal Kotawelagedara  
Commissioner General of Buddhist Affairs,  
'Dahampaya',  
No. 135,  
Srimath Anagarika Dharmapala Mawatha,  
Colombo 07.

1a. Sunanda Kariyapperuma  
Commissioner General of Buddhist Affairs,  
'Dahampaya',  
No. 135,  
Srimath Anagarika Dharmapala Mawatha,  
Colombo 07.

2. Athumalpitiye Dhammarama Thero  
Dharmarakshitha Piriven Viharaya,  
Kumbukwewa.

3. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

**Respondents**

**Before:** Janak De Silva J.

**Counsel:**

Dr. Sunil Cooray for the Petitioner

Sobitha Rajakaruna SDSG for 1a and 3<sup>rd</sup> Respondents

D.H. Weerathunga for the 2<sup>nd</sup> Respondent

**Written Submissions tendered on:**

Petitioner on 21.11.2018 and 28.01.2019

1a and 3<sup>rd</sup> Respondents on 07.01.2019

2<sup>nd</sup> Respondent on 07.01.2019

**Argued on:** 14.03.2019

**Decided on:** 29.07.2019

**Janak De Silva J.**

The Petitioner is seeking the following relief from Court:

- (a) A writ of certiorari to quash the decision taken to cancel documents marked as P6 and P5;
- (b) A writ of mandamus compelling the 1<sup>st</sup> Respondent to cancel certificate of declaration regarding Upasampada bearing no. 48640 marked P2 of the 2<sup>nd</sup> Respondent.

Section 41 of the Buddhist Temporalities Ordinance (Ordinance) requires both the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* as well as the Commissioner General of Buddhist Affairs (Commissioner General) to maintain two registers, namely registers of *upasampada bhikkus* and *samanera bhikkus*.

Section 41(5) of the Ordinance reads:

“41(5) The Mahanayaka Thera or Nayaka Thera of every *nikaya* shall from time to time make all such corrections, additions or alterations in his registers as may be necessary to keep up to date his registers of *upasampada bhikkhus* and *samaneras* of his *nikaya* and the relevant details regarding them; and whenever he makes any such modification in his registers he shall forthwith convey that fact to the Registrar- General who shall similarly modify the registers he is required to keep by this section.”

The present dispute is on the application of these provisions. It arose as a result of the 2<sup>nd</sup> Respondent possessing the following documents at material times to this application:

- (1) 2<sup>nd</sup> Respondent's declaration regarding upasampada bhikshu under section 41 of the Ordinance bearing no. 48640 (P2)
- (2) 2<sup>nd</sup> Respondent's declaration regarding upasampada bhikshu under section 41 of the Ordinance bearing no. 45589 (P5)
- (3) 2<sup>nd</sup> Respondent's declaration regarding samanera under section 41 of the Ordinance bearing no. 68896 (P6)
- (4) 2<sup>nd</sup> Respondent's declaration regarding samanera under section 41 of the Ordinance bearing no. 38699 (P7)

The 1<sup>st</sup> Respondent took steps to cancel the documents P5 and P6 consequent to a recommendation made by the relevant Maha Nayaka Thero by P8. It is this decision that the Petitioner seeks to quash by a writ of certiorari.

The learned counsel for the 2<sup>nd</sup> Respondent has raised a preliminary objection that the relevant Maha Nayaka Thero who wrote P8 is a necessary party and that this application must be dismissed in limine as he has not been made a Respondent. He relied on the decisions in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258] and *Mahanayake Thero, Malwatte Vihare v. Registrar General et al* (39 N.L.R. 186).

Amaratunga J. in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* (supra at 267) held as follows:

"The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine. *Jamila Umma vs. Mohamed, Karunarathna vs. the Commissioner of Cooperative Developments; British Ceylon Corporation vs Weerasekara*. **If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and the**

**failure to make such party a respondent is fatal to the validity of the application.**

*Mudiyanse vs. Christie Silva, Government Agent, Hambantota.*" (emphasis added)

In *Mahanayake Thero, Malwatte Vihare v. Registrar General et al* (supra) Soertsz J. held that the Registrar-General is under a legal duty under section 41 (5) of the Ordinance to remove the name of a Buddhist priest from the register on being required to do so by the Maha Nayaka on the ground that the priest has been expelled from the Order.

Clearly the Supreme Court took the view that the Registrar General at that time (now the Commissioner General) did not have any discretion in terms of section 41(5) of the Ordinance and must act as requested by the Mahanayaka Thero. In other words, the Registrar General (now the Commissioner General) is performing a ministerial act.

Jain and Jain, *The Principles of Administrative Law* (1988) 4th Ed. at page 325 state as follows:

"Functions dischargeable by the administration may either be ministerial or discretionary. A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or judgment of the authority. It does not involve investigation into disputed facts or making of choices. The authority concerned acts in strict obedience to the law which imposes on it a simple and definite duty in respect of which it has no choice."

If that is the correct position then the relevant Mahanayaka Thero is a necessary party and the application must fail for want of necessary party.

The learned counsel for the Petitioner contended that the position is different and that the Commissioner General need not act on the request of the relevant Mahanaka Thero but must act diligently without merely carrying out the modification as the relevant Mahanaka Thero or Nayaka Thero shall instruct him to do.

He relied on the decision in *Janananda Therunnanse v. Ratnapala Therunnanse* (61 N.L.R. 273) where Basnayake C.J. held that the corrections, additions or alterations which fall within the ambit of the section 41(5) of the Ordinance are only such as are of a routine nature and are undisputed and do not prejudice the rights of others and that the Registrar-General must not modify the registers he is required to keep unless the corrections, &c., made by the Mahanayaka or Nayaka fall within the ambit of the authority conferred by section 41 (5) of the Ordinance.

The Ordinance requires both the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* and Commissioner General to maintain two registers, namely register of *upasampada bhikkus* and *samanera bhikkus*. However a closer scrutiny of section 41(5) of the Ordinance shows that firstly it is the duty of the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* to maintain the two registers and the Commissioner General has been given the duty to modify the registers he maintains only where the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* informs him of a modification made by them to the registers maintained by them.

The Ordinance does not require the Mahanayaka Thera or Nayaka Thera to modify the registers they maintain merely because the Commissioner General modifies the registers maintained by him. In other words, the registers the Commissioner General is under a duty to maintain are such registers as reflecting the entries in the registers maintained by the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya*.

It appears from section 41(6) of the Ordinance that the duty imposed thereby on the Commissioner General to maintain these registers was to make them accessible to courts as well as the public for it was recognised that it was not in order to summon the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* to produce them to courts or to make them available to the public.

It is for those reasons, that even if the view in *Janananda Therunnanse v. Ratnapala Therunnanse* (supra) reflects the correct legal position, the relevant Mahanayaka Thero or the Nayaka Thero must be made a party to an application where the Commissioner General has decided as in this case to act on the request of the relevant Mahanayaka Thero or the Nayaka Thero under section 41(5) of the Ordinance.

There is also the question of delay. The Commissioner General has cancelled P5 and P6 on 19.04.2013 whereas this application was filed nearly four (4) years after the cancellation. In *Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura and another* [(1996) 2 Sri.L.R. 70] Jayasuriya J. held:

" A Petitioner who is seeking relief in an application for the issue of a Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief."

The Petitioner has also sought a writ of mandamus compelling the 1<sup>st</sup> Respondent to cancel certificate of declaration regarding Upasampada bearing no. 48640 marked P2 of the 2<sup>nd</sup> Respondent. The words "corrections., alterations and additions .... as may be necessary to keep up to date his registers of Upasampada bhikkus .... and the relevant details regarding them" (in section 41(5) of the Ordinance) suggest no doubt whatever to my mind that both total removal of the names of bhikkus and alterations, corrections and additions in and to the details were intended [*Mahanayake Thero, Malwatte Vihare v. Registrar General et al* (supra at 190)].

This also must fail for want of necessary parties as well as delay.

Amaratunga J. in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* (supra at 268) held that:

"A necessary party to an application for a writ of mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the writ of mandamus. All persons who would be affected by the issue of mandamus also shall be made respondents to the application".

Hohfeld<sup>1</sup> argued that there needs to be an understanding of the true nature of legal conceptions and relations to obviate the difficulties posed by artificial dichotomies and constructs. He pointed out that "right", "duty", "liberty" and "no-right" are connected in a fundamental way with each other. The existence of one brings about the existence of the other. Hofeld identified only jural correlatives and opposites whereas Glanville Williams identified a third set of jural relations which he referred to as jural contradictories. In this situation, the presence of one conception in one party means the absence of the contradictory in the other party.

As S.N. Silva C.J. held (at page 15) in *Urban Development Authority v. Abeyratne and Others* [(S.C. Appeal Nos. 85/2008 & 101/2008; S.C.M. 01.06.2009):

"Hence, stated in the form of a jural correlative, mandamus would lie when a statutory duty is cast upon a public authority with a correlative right to demand its discharge."

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<sup>1</sup> *Some fundamental legal conceptions as applied in judicial reasoning*, Volumes 23(1913) and 26(1917) of the Yale Law Journal

In terms of Section 41(5) of the Ordinance the duty of the Commissioner General to modify the register arises only where the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* has made a request. There is no such request to cancel P2. Hence no mandamus can be issued directing the 1a Respondent to cancel P2. In any event the relevant Mahanayaka Thera or Nayaka Thera of the *nikaya* who can make that request will be affected by a writ of mandamus but has not been made a Respondent.

On the issue of delay, P2 was registered in 2012 whereas this application was filed five years later in 2017.

For all the foregoing reasons, I dismiss the application without costs.

Judge of the Court of Appeal