METHODIST TRUST ASSOCIATION OF CEYLON

Vs.

DIVISIONAL DIRECTOR OF EDUCATION OF GALLE AND OTHERS

COURT OF APPEAL
SAMAYAWARDHENA, J.
CA/WRIT/192/2015

Writ of mandamus—Mandamus can be issued against natural, juristic or non—juristic persons—Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, section 10(1)(a) — Vesting Order—Divesting Order—Rule 5 of the Court of Appeal (Appellate Procedure) Rules 1990— Articles 140 and 141 of the Constitution

The petitioner filed this application seeking a writ of mandamus directing the respondents to make a divesting order in respect of the Maitipe Methodist Mixed School, Galle, vested in the Crown in 1963, in terms of the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961.

Under section 10(1)(a) of the Act, if a property so vested ceases to be used or is not needed for the purpose of a school, the Minister shall make an order of divesture. The respondents did not dispute that the said school had ceased to function as a school since 2003.

The repeated requests made by the petitioner to the respondents to divest the property were turned down without acceptable reasons. When this application was filed, the respondents took up a new position that the property was needed for a new project, yet to be implemented, under the theme "The closest school is the best school." However, no meaningful steps had been taken to that effect and the school was still found to be abandoned and neglected.

In the caption of the application, the respondents had only been cited by designation and not by name. At the argument, relying on *Haniffa v. The Chairman, Urban Council, Nawalapitiya 66 NLR 48*, it was strenuously submitted on behalf of the respondents that the petitioner's application shall be dismissed *in limine* as mandamus can only be issued against natural persons.

Held:

1. The rights of the parties shall be determined at the time of the institution of the action. As the property ceased to be used and was also not needed for the purpose of the school at the time of the institution of the action, mandamus shall be issued compelling the Minister to make the divesting order.

2. Disposing of cases on technical grounds is easy and speedy. But that is not what the aggrieved party expects from the court. The aggrieved party wants the case to be disposed of on the merits rather than on technical grounds. These are courts of law and not academies of law.

3. When the petitioner has sought mandamus against all the respondents, including the Minister who can be compelled to make the divesting order, the application need not be dismissed on the ground that the petitioner has failed to particularly identify the Minister by name.

4. Haniffa 's case, which held *"A Mandamus can only issue against a natural person, who holds a public office"* need not be mechanically followed. When Haniffa's case was decided in 1963, the Court of Appeal (Appellate Procedure) Rules of 1990 were not in existence. After the said Rules came into force, the Rules shall take precedence and there is no room to rely on Haniffa's case to summarily dismiss applications for mandamus on the purported ground that the respondent against whom mandamus is sought has not been cited by name.

5. Rule 5 stipulates how a public officer shall be cited in a writ application. According to Rule 5(1), Rule 5 applies to all writ applications without any distinction between mandamus and other prerogative writs. Nowhere in Article 140 of the Constitution or in Rule 5 of the Court of Appeal (Appellate Procedure) Rules of 1990 does it state that mandamus can only be issued against a natural person.

6. Rule 5(2) says that in the caption of the petition the public officer can be cited by official designation only and not by name and, if necessary, his name can be disclosed in the body of the petition. Rule 5(3) says that no application shall be dismissed due to the

misdescription of such a public officer. Rule 5(4) says that if such public officer has ceased to hold office (a) at the time of filing the application, (b) during the pendency of such application, and (c) after the delivery of the order but before it is complied with, the application can be maintained against his successor by official designation.

7. That mandamus can only be issued against natural persons is no longer valid. Mandamus, like any other prerogative writ, can be issued against natural, juristic or non-juristic persons, including tribunals, corporations, public bodies, and public officials identified by their official designations, provided the other requirements to issue a writ of mandamus are fulfilled.

Cases referred to:

1. Talagune v. De Livera [1997) 1 Sri LR 253 at 255
2. Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training [1998) 1 Sri LR 235 at 248
3. Lalwani v. Indian Overseas Bank [1998] 3 Sri LR 197 at 198
4. Abayadeera v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo [1983) 2 Sri LR 267
5. Vellupillai v. The Chairman, Urban District Council (1936) 39 NLR 464 at 465
6. W. M. Mendis & Co v. Excise Commissioner [1999) 1 Sri LR 351 at 354- 355
7. Edirisinghe v. Wimalawardena [2002) 3 Sri LR 343
8. Perera v. Geekiyana [2007] 1 Sri LR 2020
9. Senanayake v. Siriwardene [2001] 2 Sri LR 371 at 375
10. Adlin Fernando v. Lionel Fernando [1995] 2 Sri LR 25 at 29
11. Haniffa v. Chairman, Urban Council, Nawalapitiya (1963) 66 NLR 48
12. Mahanayake v. Chairman, Ceylon Petroleum Corporation [2005] 2 Sri LR 193,
13. Dayaratne v. Rajitha Senaratne, Minister of Lands [2006] 1 Sri LR 7 at 17,
14. Martin v. Assistant Commissioner of Agrarian Services [2011) 2 Sri LR 12
15. Palitha Fernando v. Registrar General (CA/WRIT/43/2012, CA Minutes of 07. 07. 2015)

16. Rizvi v. Magistrate, Samanthurai (CA/PC/APN/150/2016, CA Minutes of 18. 05. 2017)

17. Thiagarajah v. Karthigesu (1966) 69 NLR 73 at 78

18. Somapala v. Wanasundara [2011] BLR 80 at 82

19. Regent International Hotels Ltd v. Cyril Gardiner [1978- 79- 80] 1 Sri LR 278 at 290

20. Suriyarachchi v. Sri Lanka Medical Council (CA/WRIT/187/2016, CA Minutes of 31. 01. 2017)

21. Government Registered Medical Officers Association v. Hon. John Seneviratne, Minister of Health (CA/WRIT/1498/2000, CA Minutes of 24. 02. 2004)

22. Ekanayake v. Attorney General (CA/WRIT/58/2012, CA Minutes of 25. 04. 2016)

23. Sri Lanka Medical Council v. Suriyarachchi (SC/APPEAU184/2017, SC/SPL/LA/41/2017, SC Minutes of 21. 09. 2018)

APPLICATION for Writ of Mandamus.

Lakshan Dias for the Petitioner.

Anusha Fernando, D. S. G., for the Respondents.

cur. adv. vult.

January 8, 2019

SAMAYAWARDHENA, J.

The petitioner-the Methodist Trust Association of Ceylon-filed this application seeking a writ of mandamus directing the respondents to make a divesting order in respect of the Maitipe Methodist Mixed School, Galle, which was vested in the Crown in 1963 by the Gazette marked P3.

Only the 2nd, 4th, 9th and 10th respondents filed objections to this application. These respondents do not dispute that the said school has ceased to function as a school since 2003. According to 2R1 dated 30. 10. 2015, the 2nd respondent admits that the school is now closed. Therefore, there is no necessity to scrutinise the large number of documents tendered by the petitioner together with the petition to prove this fact.

The letter P16 issued by the 1st respondent and the photographs P 10(a) (e) alone are more than sufficient to understand the present status of the buildings of the school. They are in a shocking state of dilapidation as a result of nearly one and a half decades of disuse!

Once the petitioner came to know that the school was closed and abandoned, the petitioner made repeated fervent written requests to divest the school to its original owner-the Methodist Church of Sri Lanka. These requests have either been put into the waste-paper basket or turned down by giving various, in my view, false reasons. For instance, by P7 dated 25. 04. 2008, the 9th respondent turned down the request by merely stating that the 3rd respondent does not recommend the request when such a recommendation is not required in law for that purpose. Then by P12 dated 16. 09. 2008, the 9th respondent refused the request stating that according to the 3rd respondent, the buildings of the school were being used to run the primary section of another school, namely, G/Aththiligoda Sudarshi School, and the land was being used to conduct practical tests for the agriculture subject in that school. This is undoubtedly a falsehood as seen from a large number of documents tendered by the petitioner including P16 dated 05. 03. 2013, whereby the 1st respondent has candidly admitted that the school has been closed and abandoned for several years. Then by P15 dated 05. 02. 2013, the 3rd respondent informed the 9th respondent that the said premises were needed for a Teacher Training Center. The 9th and 10th respondents, in paragraph 7 of their statement of objections, admit that *"the proposal to construct a Teacher Training Centre did not get off the ground'*. The petitioner in paragraphs 30 and 31 of the petition states that thereafter the authorities attempted to hand over the premises to the Medical Faculty of the Ruhuna University, and then the petitioner wrote P18 dated 26. 05. 2014 to the 2nd respondent protesting that move and insisting on divestiture. This has not been disputed by the respondents as a falsehood. It is against this backdrop that the petitioner filed this application on 29. 04. 2015.

It is interesting to note that the respondents in their objections tendered nearly one year after the fifing of this application, came out with a new position to deny divestiture. That is, the respondents have now (after the filing of this application) identified the premises in question as part of the project *'Langama Pasala Hondama Pasala'* ('The closest school is the best school'), initiated by the 10th respondent, which was to commence in 2016. However, it appears to me that apart from proposals and recommendations, nothing has happened in this regard either and the school is still abandoned and neglected.

Section 10(1)(a) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, which is the immediately relevant section in this regard, reads as follows:

Notwithstanding that any property used for the purpose of any school to which this Act applies has vested in the Crown by virtue of a Vesting Order, the Minister, by subsequent Order published in the Gazette (in this Act referred to as a "Divesting Order"), shall, if such property ceases to be used, or is not needed for the purpose of a school conducted and maintained by the Director for and on behalf of the Crown, revoke that Vesting Order insofar as it relates to such property with effect from the date on which such property so ceased to be used or was not so needed;

As I stated earlier, there does not seem to be any dispute that the property has ceased to be used as a school since around 2003, but the argument of the learned Deputy Solicitor General for the respondents is *"since the premises in question have presently been identified for the purpose of a school, the 10th respondent cannot be compelled in law to make an order divesting the property to the petitioner."*

Firstly, in my view, this new proposal after the institution of this action is yet another false reason or subterfuge not to accede to the petitioner's lawful demand.

Secondly, the rights of the parties shall be determined at the time of the institution of the action. (*Talagune v. De Livera,1Kalamazoo Industries Ltd v. Minister of Labour and Vocational Training,2Lalwani v. Indian Overseas Bank3*)

In the application for a writ of mandamus in *Abayadeera v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo*, *4* it was held:

The petition in this case was filed on 30. 6. 83. The Emergency (Universities) Regulations No. 1 of 1983, cited by learned counsel for the petitioners, and on which he founded an argument, were made on 21. 7. 83. In our view these regulations have no application, for, rights of parties are their rights at the date the petitioners' application was made (Jamal Mohideen & Co. v. Meera Saibo 22 NLR 268, 272, Silva v. Fernando 15 NLR 499, 500) and must be decided according to the law as it existed when the application was made (10 NLR 44 at 51); Ponnamma v. Arumugam 8 NLR 223, 226.

In *Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training (supra)*, the petitioners sought to quash the arbitral award by certiorari and prohibition. Dismissing the application, Jayasuriya J. inter alia stated:

It is trite law that a court or tribunal must determine and ascertain the rights of parties as at the date of the institution of the action or as at the date of the making of the reference for arbitration. Commencement of the action is the time at which the rights of the parties are to be ascertained. Vide Silva v. Fernando 15 NLR 499 (PC), Mohamed v. Meera Saibo 22 NLR 268, Bartleet v. Marikkar 40 NLR 350. The claim and demand on behalf of the workers who were members of the fourth respondent trade union had been made on 12th of March, 1988. The reference by the Minister of Labour for settlement by arbitration had been made on the 24th of November, 1989 and the statement of the matter in dispute has been framed by the Commissioner of Labour and specified on the 24th of November, 1989. In the circumstances, the arbitrator had jurisdiction, authority and right to decree the grant of a salary increase of Rs. 250 with effect from 24. 11. 89.

In the facts and circumstances of this case, until the new idea was conceived after the institution of the action, the property was not needed for the purpose of a school. It was, if at all, needed for other purposes such as a Teacher Training Center, Medical Faculty etc. The idea contained in P12 is false. The 9th and 10th respondents in their objections have admitted that *"in terms of the applicable law the said premises can only be used for the purpose of a school."*

Hence, it is my considered view that the property has ceased to be used for the purpose of a school and was also not needed for the purpose of a school at the time of the institution of the action, and therefore mandamus shall be issued against the 10th respondent compelling him to make a divesting order in terms of section 10(1)(a) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act.

The learned Deputy Solicitor General for the respondents has, for the first time, taken up two preliminary objections to the maintainability of this application in the written submissions filed in lieu of oral submissions.

Before I deal with these two preliminary objections, I must make the following general observation. Disposing of cases on technical grounds is easy and speedy. But that is not what the aggrieved party expects from the Court. The aggrieved party wants the case to be disposed of on the merits rather than on technical grounds. It is generally the wrongdoer who cannot meet the case on the merits and tries to cling onto technical

objections to defeat justice. We must understand that we are working in Courts of Law and not in Academies of Law (*Vellupillai v. The Chairman, Urban District Council,5W. M. Mendis & Co. v. Excise Commissioner,6Edirisinghe v. Wimalawardena,7Perera v. Geekiyana8*) and therefore, in my view, we must, as much as possible, try to dispose of cases on the merits rather than on technical grounds. I fully endorse the following observation made by *Wigneswaran J. in Senanayake v. Siriwardene.9*

Courts are fast making use of technical grounds and traversing of procedural guidelines to dispose of cases without reaching out to the core of the matters in issue and ascertain the truth to bring justice to the litigants. This tendency is most unfortunate. It could boomerang on the judiciary as well as the existing judicial system.

The first objection of the learned Deputy Solicitor General is *"The petitioner has failed to identify the particular respondent who it seeks to compel to divest. In terms of section 10 of the Act it is the Minister of Education who can be compelled to make a divesting order. Accordingly, the relief prayed for should have been specifically pleaded against the respondent." The petitioner in the prayer to the petition (maybe out of an abundance of caution) has sought mandamus against "the Respondents"* including the 10th respondent-the Minister of Education, who, according to the learned Deputy Solicitor General, "can be compelled to make a divesting order". It is up to the petitioner to seek all the reliefs against all the respondents, and it is up to the Court to finally decide which relief or reliefs shall be granted against which respondent or respondents (*Adlin Fernando v. Lionel Fernando10*). It is naive to argue that the petitioner's application shall be dismissed in limine as the petitioner has not sought mandamus only against the 10th respondent but against all the respondents including the 10th respondent. I reject this objection without hesitation.

The other objection is that *"a writ of mandamus will only lie against a natural person"* and *"since the 10th respondent has not been referred to (in the caption) by name (but only by designation), a writ of mandamus as prayed for cannot issue and the application of the petitioner should be dismissed in limine."*

On what basis is this popular objection-that mandamus can only be issued against natural persons who hold public office-taken to secure dismissal of writ applications in limine? It is on the basis of the decision

in *Haniffa v. The Chairman, Urban Council, Nawalapitiya.11* This decision has mechanically been followed by a number of later decisions of this Court. (*Mahanayake v. Chairman, Ceylon Petroleum Corporation,12Dayaratne v. Rajitha Senaratne, Minister of Lands*,13 *Martin v. Assistant Commissioner of Agrarian Services14* and a large number of unreported cases including *Palitha Fernando v. The Registrar General,15Rizvi v. The Magistrate, Samanthurai.16*)

Sometimes I wonder whether *Haniffa's* case is being so blindly followed by this Court because it is a Supreme Court decision. However, we must understand that when Haniffa's case was decided in 1963, the Supreme Court was not the apex court of this country and the court of final appeal was the Judicial Committee of the Privy Council of the United Kingdom. The Supreme Court at that time was akin to the present Court of Appeal. Final appeal to the Privy Council was abolished by section 18 of the Court of Appeal Act, No. 44 of 1971.

Is the Judgment in Haniffa's case a well-considered Judgment? This is a nagging question for me. Reproduced below is the full Judgment delivered by Tambiah J. (with the agreement of Sriskandarajah J.) in Haniffa's case:

In this application the petitioner has made the Chairman, Urban Council, Nawalapitiya, the respondent. The petitioner should have named the person against whom a Writ of Mandamus can be issued. The Chairman, Urban Council, Nawalapitiya, is not a juristic person. The Privy Council has pointed out that the juristic person must be created specially by statute (62 NLR 169, 174, and at 182- 183; 65 NLR 253). Even if the Chairman, Urban Council, Nawalapitiya, was a juristic person I fail to see how we can issue a Mandamus on a juristic person. A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court. Therefore the contention of Counsel for respondent must prevail. The application is dismissed with costs fixed at Rs. 157. 50.

On what basis was it decided in Haniffa's case that mandamus can only be issued against a natural person who holds public office? It is on the basis that *"If such a [natural] person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court."*

In the first place, why are we so pessimistic that the orders of this Court will not be obeyed by juristic persons and public officers cited only by official designation? Is this a good ground to refuse mandamus? In my view, it is not. Can a Court, for example, refuse to enter a money decree in a recovery matter on the ground that the defendant has no assets?

We shall give solutions to existing problems. We shall not refuse to give solutions upon imaginary or hypothetical problems. (*Thiagarajah v. Karthigesu,17Somapala v. Wanasundara18*)

The observation in *Haniffa's* case that *"If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court"* presupposes the position that if mandamus is issued against a juristic person, as opposed to a natural person, in the event of a violation the juristic person cannot be dealt with for contempt of court. This is not correct. When a writ of mandamus is issued against a juristic person, the parties who must obey it are those in control of the affairs of the juristic person, and in case of a violation, they can be dealt with for contempt. In R *egent International Hotels Ltd v. Cyril Gardiner*,19Samarakoon C. J. (with Ismail and Wanasundera JJ. agreeing) held:

When an injunction is obtained against a juristic person the parties who must obey it are those in control of the affairs of the juristic person. In this case the injunction must necessarily be honoured primarily by the Directors of the Company. They are the persons whom the plaintiff sought to bind. There was no requirement in law that they must also be directed. The section requires only a direction on the Corporation and then the officers of the Corporation whose duty it is to do or refrain from doing the acts set out in the order are the persons who are automatically bound by the Enjoining Order. If they fail, they are guilty of contempt and they are the persons to be charged.

I do not think that public officers will disobey orders of this Court made upon the decisions that they or their predecessors have taken in the discharge of their official duties. They have no personal "interest in those decisions. ln fact, in practical terms, in almost all the cases where mandamus is sought and allowed, mandamus is ultimately issued not against the public officer who made the decision, but against the incumbent public officer who holds that office. Moreover, in most cases, the case itself is instituted against the successor in office, as the public

officer who made the impugned decision has ceased to hold office by that time. This goes to show the illogicality and fallacy of the argument that when mandamus is sought the public officer shall be cited by name only and not by designation.

When mandamus is sought, public officers are made respondents by name and designation, for otherwise their applications are destined to be dismissed *in limine* on the basis of the Judgment in *Haniffa's* case. Quite often, holders of public office change, and whenever there is such a change a substitution is made and the caption is amended adding the successor in office by name and notice is then issued upon the successor. This is a never-ending process until the Judgment is delivered. If the holder of the public office changes even after the delivery of the Judgment but before giving effect to it, still the successor needs to be substituted, as the former has been cited by name.

One of the main causes for laws delays in writ applications, in my view, is this unfounded and irrational objection. Arguments are postponed due to the constant change in holders of public office. During the period (26. 10. 2018- 13. 12. 2018) where there was uncertainty about holders of public office including ministers and their secretaries, I believe, no application for mandamus could be taken up for argument or issued because of the need to change the caption to fall in line with the dicta in *Haniffa's* case!

Even though in *Haniffa's* case it was decided *"A Mandamus can only issue against a natural person, who holds a public office"*, in *Abayadeera v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo (supra)*, this Court did not agree and took the view that mandamus can be issued against any person, corporation, tribunal and public body. Atukorala J. as the President of the Court of Appeal (with Tambiah and Monemalle JJ. concurring) had this to say at page 279- 280:

A Mandamus can be directed to a Corporation.

"The Order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

(Halsbury's Laws of England, 4th Edn. Vol. 1, p. 111, para. 89).

In *Pathirana v. Goonesekera 66 NLR 464, 467*, Weerasooriya, S. P. J. observed-

"Where officials having a public duty to perform, refuse to perform it, mandamus will lie on the application of a person interested to compel them to do so. The rule would also apply where a public body fails to perform a public duty with which it is charged."

In *Abayadeera's* case, the petitioners sought mandamus against the Vice Chancellor and the Dean of the Faculty of Medicine of the University of Colombo. Whilst dismissing the application on non-joinder of necessary parties, the Court, *inter alia*, held at page 281:

In our view the proper body to be directed by a Mandamus, assuring that a writ can go, is the University of Colombo and not the respondents to this application. The University of Colombo therefore is a necessary party and ought to have been made a party to these proceedings. The failure to do so is fatal to the petitioners' application.

In the recently decided *Suriyarachchi v. Sri Lanka Medical Council*, popularly known as the SAITM case,15Malalgoda J. as the President of the Court of Appeal (with Thurairaja J. agreeing) rejected the argument of the respondent-The Sri Lanka Medical Council-that mandamus sought against the said Council cannot be issued as it is not a natural person. In the Judgment, the Court referred to the aforementioned Abayadeera case (supra) and two other unreported Judgments of this Court (*Government Registered Medical Officers Association v. Hon. John Seneviratne, Minister of Health21and Ekanayake v. Attorney-General22*) to conclude that the archaic argument that mandamus can only be issued against a natural person is no longer valid. This is what Malalgoda J. stated:

The learned President's Counsel for the 1st respondent whilst relying on the case of Haniffa v. The Chairman Urban Council Nawalapitiya 66 NLR 48 argued that a Mandamus cannot lie against the Sri Lanka Medical Council as it is a juristic person and not a natural person.

However in this regard this court is mindful of the decision in Abayadeera and 162 others v. Dr. Stanley Wijesundara, Vice Chancellor, University of Colombo and another [1983] 2 Sri LR 267 where Atukorale J (P/CA) whilst referring to the decision in the Haniffa's case had observed that;

The law has been stated as follows in paragraph 112, page 127, Vol. 1, of Halsbury's "Laws of England", 4th Edition.

"The Order of Mandamus will not be granted against one who is an inferior or ministerial officer bound to obey the orders of a competent authority to compel him to do something which is part of his duty in that capacity."

The Vice Chancellor and the Dean of the Faculty of Medicine are officers of the University. The Council is the executive body and governing authority of the University and can exercise and discharge the powers and functions of the University, including the power to hold examinations. The Senate has control and general direction of, inter alia, education and examinations. The Vice Chancellor is subject to the directions issued by the Council and it is his duty to give effect to the decisions of the Council and the Senate. The Dean is the Head of a Faculty, and the Faculty which has powers over matters relating to examinations, is subject to the control of the Senate. It seems to us that the respondents are officers within the intendment of the above quotation from Halsbury.

In terms of s. 29 (b) of the Universities Act, the University has the sole power to hold examinations, including the 2nd MBBS examination. The power is reposed in the University. In their own petition, the petitioners state that they are entitled to require the University that it holds the 2nd MBBS examinations for them and others of their batch and those repeating the said examination, and that the University has the obligation to provide such an examination. The petitioners want this obligation of the University enforced through its officers or agents. It appears to us, assuming that the Writ of Mandamus can issue, it must be directed to someone in whom is lodged the power to do the act ordered to be done. What if the University of Colombo takes up the position that it has not been made a party to the application and has not been heard and therefore not bound in any way by these proceedings? In Jayalingam v. The University of Colombo CA application No 415/81, we find that the petitioner in that case, who was an external student, asked for a Writ of Mandamus on the University of Colombo to accept his application and permit him to sit the Final Examination In Laws, on the basis that it was the

University that had the power to conduct external examinations for enabling those who are not students of the University, to obtain degrees of the University.

Learned Counsel for the petitioners relied on the decision in Haniffa v. The Chairman, U. C., Nawalapitiya (supra). In this case, the petitioner made the Chairman, U. C., Nawalapitiya, the respondent to his petition. He was not named. Tambiah, J. pointed out that the Chairman was not a juristic person; that even if the Chairman was a juristic person, since disobedience to Writs of Mandamus is punishable as contempt of Court, a person who asks for a Mandamus to compel a public officer to perform a duty should name the public officer who holds the office. It is in this context, that Tambiah, J. said, "I fail to see how we can issue a Mandamus on a juristic person." . . .

In Pathirana v. Goonesekera 66 NLR 464, 467, Weerasooriya, S. P. J. observed,

"Where officials having a public duty to perform, refuse to perform it, mandamus will lie on the application of a person interested to compel them to do so. The rule would also apply where a public body fails to perform a public duty with which it is charged." . . .

Apart from this, the petitioners presented their petition on the basis that the respondents are the persons who are entrusted with the duty of carrying out the obligation which was reposed in the University, to hold the 2nd MBBS examination for them only. At the time they were made respondents, the 1st respondent held the office of Vice Chancellor by virtue of an appointment made by the Chancellor, and the 2nd respondent held the office of Dean of the Faculty of Medicine, by virtue of her election by the Faculty (Sections 34 (1) and 49 (1) of the University Act). Under the Emergency Regulation, they cease to hold their respective office. The 1st respondent now holds the office of Vice Chancellor on an appointment made by the Minister (Reg. 3(2); the 2nd respondent now holds office as Dean on an appointment made by the Vice Chancellor. It is now sought to compel the 1st respondent to perform a duty on the basis that he has, by reason of Regulation 4 (a), absorbed in himself all the powers and duties of the University. Would not all these result in a change in the character of the

petition and in the conversion of the original petition into a petition of another kind? What if the regulations are withdrawn tomorrow? Then the argument of learned Counsel for the petitioners, based on the Emergency Regulations, loses its validity.

In our view the proper body to be directed by a Mandamus, assuring that a writ can go, is the University of Colombo and not the respondents to this application. The University of Colombo therefore is a necessary party and ought to have been made a party to these proceedings. The failure to do so is fatal to the petitioners' application . . . "

In the case of the Government Registered Medical Officers Association and another v. Hon. John Seneviratne Minister of Health and four others CA Application 1498/2000 CA minute dated 24. 02. 2004 K. Sripavan J (as he was then) issued a writ of Mandamus directing the 4th respondent Sri Lanka Medical Council to take steps in terms of law duly recognize the MD degree awarded.

Recently in the case of Ekanayake v. Attorney General and two others CA Application 5812012(CAminute dated 25. 04. 2016) this court reaffirm the position taken in the Abeydeera 's case referred to above and observed that "the law seems to have moved away. Today a juristic person, no less than a natural person, can be commanded to carry out its public duty" and rejected the argument that Mandamus cannot lie against a public body such as the Sri Lanka Ports Authority.

When considering the decisions referred to above I see no merit in the said argument raised by the 1st respondent.

On appeal, on behalf of the Supreme Court, Prasanna Jayawardena J. (with Nalin Perera J. (as His Lordship the present Chief Justice then was) and Wanasundera J. concurring) upheld the Judgment of the Court of Appeal. (*Sri Lanka Medical Council v. Suriyarachchi23*)

There is one other point that goes to the root of the matter, which has escaped the attention of the Court in the above cases (except *Dayaratne v. Rajitha Senaratne (supra)*, which I will refer to later). That is, Rule 5 of the Court of Appeal (Appellate Procedure) Rules of 1990, which is directly relevant to the matter under consideration, i. e. how a public officer,

when he is made a respondent for acts or omissions done in his official capacity, shall be identified or cited in a writ application.

The Court of Appeal (Appellate Procedure) Rules of 1990 have been made by the Chief Justice together with three Judges of the Supreme Court, in accordance with Article 136 of the Constitution of the Republic and published in the Government Gazette (Extraordinary) No. 645/4 dated 15. 01. 1991. By the time these Rules were made, the Supreme Court was (and still is) the highest and final superior Court of the Republic.

It is noteworthy that when *Haniffa's* case was decided in 1963, the Court of Appeal (Appellate Procedure) Rules of 1990 was not in existence. Hence, after the said Rules came into force (by Gazette No. 697 of 10. 01. 1992 inter alia Rule 5 came into force on 27. 04. 1992, and Rule 5(5) "in particular came into force on 31. 12. 1991), the Rules shall invariably take precedence and thereafter there is no room to rely on Haniffa's case to summarily dismiss applications for mandamus on the purported ground that the party against whom mandamus is sought has not been made a respondent "by name".

Rule 5 of the Court of Appeal (Appellate Procedure) Rules of 1990 reads as follows:

(1) This rule shall apply to applications under Articles 140 and 141 of the Constitution, in which a public officer has been made a respondent in his official capacity, (whether on account of an act or omission in such official capacity, or to obtain relief against him in such capacity, or otherwise).

(2) A public officer may be made a respondent to any such application by reference to his official designation only (and not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name. If a respondent cannot be sufficiently identified in the manner, it shall be sufficient if his name is disclosed in the averments in the petition.

(3) No such application shall be dismissed on account of any omission, defector irregularity in regard to the name designation, description, or address of such respondent, if the Court is satisfied that such respondent has been sufficiently identified and described, and has not been misled or prejudiced by such omission, defect or

irregularity. The Court may make such order as it thinks fit in the interest of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any such omission, defect or irregularity.

(4) (a) In respect of an act or omission done in official capacity by a public officer who has thereafter ceased to hold such office, such application may be made and proceeded with against his successor, for the time being in such office, such successor being made a respondent by reference to his official designation only, in terms of sub-rule (2).

(b) If such an application has been made against a public officer, who has been made a respondent by reference to his official designation (and not by name) in respect of an act or omission in his official capacity, and such public officer ceases to hold such office, during the pendency of such application, such application may be proceeded with against his successor, for the time being, in such office, without any addition or substitution of respondent afresh, proxy or the issue of any notice, unless the Court considers such addition, substitution, proxy or notice to be necessary in the interest of justice. Such successor will be bound, in his official capacity, by any order made, or direction given, by the Court against, or in respect of, such original respondent.

(c) Where such an application has been made against a public officer, who has been made a respondent by references to his official designation (and not by name), and such public officer ceases to hold such office after the final determination of such application, but before complying with the order made or direction given therein, his successor, for the time being in such office will be bound by and shall comply with, such order or direction.

(5) The provisions of sub-rules (4)(b) and (4)(c) shall apply to an application under Article 140 and 141 filed before such date as may be specified by the Chief Justice by direction, against a public officer, in respect of an act or omission in his official capacity, even if such public officer is described in the caption both by name and by reference to his official designation.

(6) Nothing in this rule shall be construed as imposing any personal liability upon a public officer in respect of the act or omission of any predecessor in office.

(7) In this rule, "ceases to hold office" means "dies, or retires or resigns from, or in any other manner ceases to hold, office."

According to Rule 5(1), Rule 5 applies to all writ applications made under Articles 140 and 141 of the Constitution of 1978, as amended.

Article 140 says the Court of Appeal has the power inter alia to issue "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"; and Article 141 inter alia says the Court of Appeal has the power to issue *"orders in the nature of writs of habeas corpus"*.

Article 140 does not make a distinction between mandamus and other prerogative writs, and nowhere in the Article does it state that mandamus can only be issued against a natural person. According to Article 140, mandamus, like any other prerogative writ, can be issued *"against the judge of any Court of First Instance or tribunal or other institution or any other person"*. Similarly, Rule 5 does not make a distinction between mandamus and other writs and does not state that mandamus can only be issued against a natural person.

In summary, Rule 5(2) says that in the caption of a writ application, the public officer can be cited by official designation only and not by name and, if necessary, for clarity, his name can be disclosed in the body of the petition. Rule 5(3) says that no application shall be dismissed due to misdescription of such public officer-it is a curable defect. Rule 5(4) says that if such a public officer has ceased to hold office (a) at the time of filing the application, (b) during the pendency of such application, and (c) after the delivery of the order but before it has been complied with, the application can be filed and proceeded with against his successor by official designation.

Dayaratne v. Rajitha Senaratne(supra) may be the first case where Rule 5 was referred to in an application for a writ of mandamus. In that case, it is important to understand that both respondents against whom mandamus was sought had been cited both by name and official designation. Pending determination of the case, both ceased to hold office. Nonetheless, even at the time of argument, the petitioner had not taken steps to add or

substitute the successors in office in order to proceed with the application. When this matter was inter alia raised as-a preliminary objection, the petitioner relied on Rule 5(4)(b) read with 5(5) to argue that the application can be proceeded with against the respondents' successors in office for the time being without addition or substitution. This argument was rightly rejected by Marsoof J. as the President of the Court of Appeal (with Sri Skandarajah J. agreeing) on the basis that Rule 5(4)(b) read with 5(5) was inapplicable in this instance, as this case was filed against the public officers both by name and designation; as such, for the said Rules to be applicable, the case should have been filed before the specified date nominated by the Chief Justice, which, in this instance, was 31. 12. 1991 (vide Gazette No. 697 of 10. 01. 1992), but the case had been filed long after the said specified date. This finding is in complete consonance with Rule 5. Rule 5 applies in applications where a public officer is made a respondent by his official designations only and not by name. The only exception is Rule 5(5), which is applicable only in respect of applications filed before 31. 12. 1991. The reference to Haniffa's case by Marsoof J. at page 17 of the Judgment is clearly *obiter dicta*.

It is a myth that mandamus can only be issued against natural persons. Mandamus, like any other prerogative writ, can be issued against natural, juristic or non-juristic persons, including tribunals, corporations, public bodies, and public officials identified by their official designations, provided the other requirements to issue mandamus are fulfilled.

I issue a writ of mandamus against the 10th respondent compelling him to make the divesting order as prayed for in paragraph (b) of the prayer to the petition. The 3rd respondent shall pay a sum of Rs. 100, 000/= as costs of the action to the petitioner.

Before I part with this Judgment, I might repeat that in terms of Rule 5(3):

No (writ) application shall be dismissed on account of any omission, defect or irregularity in regard to the name designation, description, or address of such respondent, if the Court is satisfied that such respondent has been sufficiently identified and described, and has not been misled or prejudiced by such omission, defect or irregularity. The Court may make such order as it thinks fit in the interest of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any such omission, defect or irregularity.

Hence, to minimise laws delays in pending mandamus applications where respondent public officers have been cited both by name and official designation, with the consent of the counsel for the opposite party, amended captions can be filed citing the said respondents by official designations only. If it is not done, the successors in office shall be substituted when the respondents cited both by name and designation cease to hold office.

Appeal allowed.

Editor's Note: The Attorney General did not appeal against this Judgment to the Supreme Court.

Judgment by: Mahinda Samayawardhena, J.

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