

JAYAWARDENA
v.
THE PEOPLE'S BANK

COURT OF APPEAL
JAYASINGHE, J. AND
EDIRISURIYA, J.
CA NO. 1503/2000
AUGUST 31, AND
OCTOBER 22, 2001

Writ of certiorari and writ of mandamus – Quash decision of People's Bank refusing a transfer – Public and contractual duties – Public Law and Private Law – Judicial review.

The petitioner sought a writ of *certiorari* to quash the decision of the Bank refusing to transfer the petitioner to a congenial station in terms of a Bank Circular and a writ of *mandamus* to compel the respondent Bank to transfer him forthwith.

Held:

- (1) There is a distinction between public duties arising from statutes which are enforceable by *mandamus* and contractual duties enforceable as matters of private law by ordinary contractual remedies such as damages, injunctions, etc.
- (2) Since *mandamus* now belongs essentially to public law, its applicability cannot be extended to an area where relief is available under private law.

Per Jayasinghe, J.

“I am unable to accept the submission that the Circular issued by the Bank regulating the transfer of personnel from one station to another can be equated to an exercise of statutory power or discharge of a public duty to attract the writ jurisdiction of this Court.”

- (3) Contract of employment is solely a matter within the purview of private law and not a matter for judicial review.

APPLICATION for writs in the nature of *certiorari* and *mandamus*.

Cases referred to :

1. *Weligama Multipurpose Co-operative Society v. Daluwatte* – (1984) 1 Sri LR 195 at 199.
2. *Mendis v. Seemasahitha Panadura Janatha Santhaka Pravahana Sevaya and Others* – (1995) 2 Sri LR 284.
3. *L. P. Perera v. Ceylon Government Railway Uniform Staff Benevolent Fund* – 67 NLR 191.
4. *J. W de Alwis v. V. C. de Silva* – 71 NLR 108.
5. *Wickremasinghe v. Ceylon Electricity Board* – (1997) 2 SLR 377.
6. *Piyasiri v. People's Bank* – (1989) 2 Sri LR 47.
7. *Ratnayake and Others v. Perera* – (1982) 2 Sri LR 451.
8. *Ex parte Napier* – (1852) 18 QB 695 at 695.
9. *W. K. C. Perera v. Professor Daya Edirisinghe and Others* – (1995) 1 Sri LR 148.

S. C. B. Walgampaya with *W. A. N. Jayanath* for petitioner.

Wijayadasa Rajapakse, PC with *Dhammika Abeygunwardena* for respondent.

Cur. adv. vult.

April 04, 2002

JAYASINGHE, J.

This is an application for a writ of *certiorari* to quash the decision⁰¹ of the respondent Bank to refusing to transfer the petitioner to a congenial station in terms of Circular No. 248/91 marked "I" and for a writ of *mandamus* to compel the respondent Bank to transfer the petitioner forthwith to a congenial station. The petitioner states that he was transferred to Uda Walawe Branch as Manager as from 13. 10. 1998 and that Uda Walawe Branch has been classified as an uncongenial station in terms of Circular No. 248/91 and that an officer

could be retained in such an uncongenial station for a maximum period of two years and that he has become entitled to a transfer to a congenial station as from 14. 11. 2000. That, in order to give the respondent Bank reasonable time to make arrangements for a replacement, the petitioner before the expiry of the said two-year period applied for a transfer indicating his preferred stations. Since there has been no response to his application and the subsequent reminders, the petitioner has assumed that the bank has impliedly refused his application. The present application is for a writ of *certiorari* to quash the decision of the respondent Bank refusing to transfer the petitioner to a congenial station and for a *mandamus* in terms of prayer (b) to the petition. 10

The respondent Bank filed objections. Averred that the petitioner has been serving the Corporate 'I' Branch since 01. 08. 1971, till he was posted to Uda Walawe as Branch Manager and is now seeking a transfer to his home town branch or Head Office or Corporate 'I' Branch. The respondent states that there are no vacancies in any of those stations to enable the respondent Bank to accommodate the petitioner as requested. The respondent Bank also objected to the petitioner's application on the basis that there has been no order that has been made in respect of the petitioner to be quashed by way of *certiorari*. I hold that there is merit in the objections of the respondent Bank. *Certiorari* is accordingly refused. 20 30

Mr. Walgampaya submitted that a writ of *mandamus* was originally used to enforce the performance of public duties imposed by statute upon public authorities and that its scope has widened over the years and that writ can be made use of to compel that the performance of non-statutory duties including duties imposed by rules, regulations and circulars. Mr. Walgampaya then referred to a passage from Wade 8th edition at 607 where it has been observed that :

"Within the field of public law the scope of *mandamus* is still wide and the Court may use it freely to prevent breach of duty and injustice : 40

Instead of being astute to discover reasons for not applying this greater constitutional remedy for error and misgovernment we think it is our duty to be vigilant to apply it in every case to which by any reasonable construction it can be made applicable.”

There can never be any doubt regarding the application of the above formula. Courts will always be ready and willing to apply the constitutional remedy of *mandamus* in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty. In the absence of public duty an intrusion by this Court by way of *mandamus* into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ. The words *error and misgovernment* referred to above must be understood in the context of a prerogative remedy. *Error and misgovernment* must necessarily stem from public duty. As Wade observed “*mandamus now belongs essentially to public law.*” (607) Counsel also referred Court to a passage from Wade at page 627 where it is observed :

“The law has been driven from these familiar moorings by the impetus of expanding judicial review, which has been extended to two kinds of non-statutory action. One is where bodies which are unquestionably governmental do things for which no statutory power is necessary, such as issuing circulars or other forms of information” . . .

“The other category is where judicial review is extended to bodies which by traditional test would not be subject to judicial review and which in some cases fall outside the sphere of government altogether.”

In the traditional sense :

“Judicial review is designed to prevent the excess and abuse of power and neglect of duty by public authorities. In the past

there was a clear test for determining the limits of Court's jurisdiction : "power" meant legal power confirmed by Act of Parliament. Subject to the special rules governing individual remedies it was only necessary to ascertain that the power was statutory before invoking the aid of the Court. Nor was it difficult to distinguish public authorities from other recipients of statutory powers such as commercial companies and trustees. If the power was granted for governmental purposes its exercise was controllable by the remedies of Administrative Law. The same could likewise be said of duties." (626)

80

It is also necessary to have in mind the distinction between public duties arising from, statutes which are enforceable by *mandamus* and contractual duties enforceable as matters of private law by ordinary contractual remedies such as damages injunctions, etc. "*Since mandamus now belongs essentially to public law*" as observed by Wade its applicability cannot be extended to an area where relief is available under private law. Sharvananda, J. in *Weligama Multipurpose Co-operative Society v. Daluwatte*⁽¹⁾ at 199 observed that writ will not issue for private purpose, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by the ordinary contractual remedies such as damages, specific performance or injunctions. They are not enforceable by *mandamus* which is confined to public duties and is not granted where there are other adequate remedies.

90

I am unable to accept the submission that the circular issued by the respondent Bank regulating the transfer of personnel from one station to another can be equated to an exercise of statutory power or discharge of a public duty to attract the writ jurisdiction of this Court.

In *Weligama Multipurpose Co-operative Societies Limited v. Daluwatte* (*supra*) it was held that :

100

"*Mandamus* lies to secure the performance of public duty, in the performance of which an applicant has sufficient legal interest to be enforceable by *mandamus*; the duty to be performed must be of a public nature and not of a merely a private character. A public duty may be imposed by statute, charter or the common law or custom."

It was further held that :

“Duty prescribed by . . . circular. . . is not in the nature of a public duty such as to attract the grant of writ of *mandamus* for its enforcement.”

110

In *Mendis v. Seemasahitha Panadura Janatha Santhaka Pravahana Sevaya and Others*⁽²⁾ S. N. Silva, J. had held :

“Writs of *certiorari* and prohibition are instruments of public law to quash and restrain illegal governmental and administrative action; similarly the writ of *mandamus* lies to enforce the performance of a statutory duty by a public authority. They are instruments of judicial review of administrative action.”

His Lordship went on to observe that what is sought to be done is an enforcement of a contract of employment, contracts of employment are enforceable by ordinary action and not by judicial review . . . contract of employment is solely a matter within the purview of private law and not a matter for judicial review.

120

In *L. P. Perera v. The Ceylon Government Railway Uniform Staff Benevolent Fund*⁽³⁾ H. N. G Fernando, J. held that :

“The duty . . . of the secretary and treasurer to summon a general meeting is neither a public duty nor a duty to be performed in the interests of or for the benefit of the public. Accordingly, the writ of *mandamus* will not lie to compel its performance.”

In *J. W. De Alwis v. V. C. de Silva*⁽⁴⁾ it was held that :

“A writ of *mandamus* could not be issued because no statutory duty of a public nature was owed by the respondent to the petitioner to forward the aforesaid petition to their respective addresses. Moreover, *mandamus* was not available to the petitioner for the reason that the duty which arose under the regulation was not owed to him but to the Crown.”

130

In *Wickremasinghe v. Ceylon Electricity Board*⁽⁵⁾ Ranaraja, J. held that :

"The general rules of *mandamus* is that its function is to compel a public authority to do its duty. It is a command issued by a superior court for the performance of a public legal duty. It is only granted to compel the performance of duties of a public nature and not merely of a private character that is to say for the enforcement of a private right stemming from contract of the parties."

In *Piyasiri v. People's Bank*⁽⁶⁾ Court held that :

"*Mandamus* did not lie to compel the Board to call the petitioner, a bank clerk for an interview with a view to promotion in terms of the circular as –

- (1) the bank though subject to ministerial control is not a public body but basically a commercial bank;
- (2) the said circular does not have statutory force;
- (3) in any event, in the implementation of the circular which was a private and internal matter, the bank has a discretion to call for recommendations from a superior officer."

I have carefully considered the submissions of Counsel. Mr. Walgampaya is seeking relief from this Court relying on a circular which spells out the criteria for transfer of the bank staff from one station to another. Admittedly, the circular applies to officers who have a contractual relationship with the bank. In a sense the violation the petitioner is complaining of is to remedy a breach of contract by way of writ of *mandamus*.

In *Ratnayake and Others v. Perera*⁽⁷⁾ Sharvananda, J. observed :

". . . today the chief function of the writ is to compel the performance of public duties prescribed by statute though it lies as well for the enforcement of a common law public duty."

Lord Campbell, CJ. in *Ex parte Napier*⁽⁸⁾ at 695 stated that :

“A legal obligation which is the proper substratum of a *mandamus* can arise only from common law, statute or some contract.”

His Lordship referring to Professor Wade in his book *Administrative Law* 4th edition at page 603 where he has observed that :

170

“Professor Wade has correctly characterised this statement as a loose dictum which need not necessarily mean that Lord Campbell thought that *mandamus* was a remedy for a breach of contract. “Rights flowing merely from a contract of membership should not be within the scope of *mandamus*.” The Court does not issue a writ of *mandamus* in a case in which the right which the petitioner wants to enforce is based on a contract. Contractual duties are enforceable as a matter of private law by ordinary contractual remedies such as damages, injunction and specific performance. Duties enforceable by *mandamus* are those imposed by law.”

180

Mr. Walgampaya also referred to *W. K. C. Perera v. Professor Daya Edirisinghe and Others*⁽⁹⁾ where the Supreme Court held that a writ of *mandamus* would lie to compel the University of Kelaniya to award a degree to the petitioner who has satisfied the rules and examination criteria. In issuing the writ the Supreme Court was influenced by the fact that the failure of the University to award the degree was a violation of a fundamental right of the petitioner. This case has no application in the present circumstances as there has been no allegation of a violation of a fundamental right.

I am of the view that this is not a matter in which *mandamus* would lie. Application for writ of *mandamus* is accordingly refused with costs fixed at Rs. 5,250.

190

EDIRISURIYA, J. – I agree.

Application refused.