

TRADE EXCHANGE (CEYLON) LTD.

v.

ASIAN HOTELS CORPORATION LTD.

SUPREME COURT.

SAMARAKOON, C. J., SAMERAWICKRAME, J. AND SHARVANANDA, J.
S.C. APPEAL 10 OF 1980—C.A. APPLICATION 1539/79.
FEBRUARY 9 AND 10, 1981.

Writ of certiorari—Application under Article 140 of the Constitution—Whether Public Company incorporated under the Companies Ordinance can be a public body—Whether decision of such a body amenable to certiorari.

The petitioner had since April, 1975, been carrying on business at Hotel Lanka Oberoi owned by the respondent. For this purpose it had been granted a licence, the last licence expiring on 15th July, 1979. Thereafter the petitioner was refused a licence to run its shop. The respondent was a company incorporated under the Companies Ordinance. The petitioner applied to the Court of Appeal for a writ of certiorari to quash the decision of the respondent refusing to grant it a licence on the grounds, *inter alia*, that this decision was reached in violation of the principles of natural justice and that the respondent had failed to act fairly and was actuated by *mala fides* and bias. The Court of Appeal dismissed the petitioner's application. The petitioner appealed to the Supreme Court.

It was submitted on behalf of the petitioner that the respondent-company was in fact a body performing functions of public nature, inasmuch as, *inter alia*, the majority of the issued share capital was drawn from public funds; the majority of the directors were nominated by the Minister of Trade; and the respondent-company was designated as a "department or statutory institution" under the purview of the Minister of Trade. It was accordingly submitted that the respondent-company had all the requisite characteristics of a Public body so as to make it amenable to the writ.

Held

The respondent was a public commercial company incorporated under the Companies Ordinance and the fact that most of the capital was contributed by the Government or that shares were controlled by the Government did not make it an agent of the Government. The incorporated Company was recognized by the law as a juristic person separate and distinct from its members and was an independent body-corporate carrying on commercial activities. Its decisions, made in the course of its business, cannot be reviewed by a superior court by way of writ and the petitioner's application must therefore fail.

Cases referred to

- (1) *R. v. Fulham Rent Tribunal, 1951 (1) All E.R. 482.*
- (2) *R. v. National Joint Councils for Dental Technicians ex p. Neate, (1953) 1 Q.B. 704; (1953) 2 W.L.R. 342; (1953) 1 All E.R. 327.*

- (3) *R. v. Criminal Injuries Commission ex p. Lain*, (1967) 2 All E.R. 770; (1967) 2 Q.B. 864; (1967) 3 W.L.R. 348.
- (4) *R. v. Electricity Commissioners*, (1924) 1 K.B. 171; 130 L.T. 164; 93 L.J.K.B. 390.
- (5) *Ridge v. Baldwin*, (1963) 2 All E.R. 66; (1963) 1 Q.B. 539; (1963) 2 W.L.R. 935; (1964) A.C. 40.
- (6) *Saloman v. Saloman & Co.*, (1897) A.C. 22; (1895-9) All E.R. Rep. 33; 75 L.T. 426; 13 T.L.R. 46.
- (7) *Macaura v. Northern Assurance Co.*, (1925) A.C. 619; (1925) All E.R. Rep. 51.
- (8) *Short v. Treasury Commissioners*, (1947) 1 K.B. 116; (1947) 2 All E.R. 298.

APPEAL from a judgment of the Court of Appeal.

H. L. de Silva, with *E. D. Wickremanayake* and *D. S. Wijesinghe*, for the petitioner-appellant.

K. N. Choksy, with *Ronald Perera*, for the respondent-respondent.

Cur. adv. vult.

February 26, 1981.

SHARVANANDA, J.

This is an appeal from the order of the Court of Appeal dismissing with costs the petitioner's application for the issue of a writ of certiorari.

The petitioner is a company registered under the Companies Ordinance carrying on business, *inter alia*, in the production, sale and export of batiks, handlooms and other textiles and was also engaged in the business of tailoring garments.

The respondent is a public company incorporated under the provisions of the Companies Law with an issued share-capital of 1,400,000 shares, each of Rs. 10 value, of which 1,325,314 shares is held by the Co-operative Wholesale Establishment, a wholly state-owned undertaking incorporated by statute (Cap. 126), 600 shares by the Treasury and 74,086 shares held by members of the public, the total number of shareholders on 10.3.79 being 502. The main object for which the respondent company was established is to carry on hotel business and other business connected therewith.

The respondent is the owner of the Hotel Lanka Oberoi which is one of the largest luxury hotels in the country. Pursuant to its objects, the respondent provides on rent rooms and accommodation in the Hotel Lanka Oberoi for shops catering to residents

and visitors to the said hotel. Since the commencement of the hotel in about April 1975, the petitioner has been granted by the respondent the privilege and licence to carry on a shop for the sale of batiks for a period of one year at a time at shop No. 8 situated at and forming part of the hotel, on a monthly rental of Rs. 8,064. Likewise, seven other shops which did business in the sale of batik were granted similar licences. The petitioner's licence had been renewed annually by the respondent. According to clause 24 of the agreement between the parties, the option to renew the licence was reserved to the respondent. The last licence granted to the petitioner which was due to expire on 15.4.79 was extended by the respondent from 15.4.79 to 15.7.79. On 14.6.79, the respondent called for applications for the issue of licences to operate the said shops, stating however that it reserved the right to accept or reject the applications received by it without assigning any reasons. Although the petitioner duly tendered an application for shop space at the specified rates and complied with the other preliminary conditions stipulated by the respondent, the respondent, without assigning any reason whatsoever, rejected the petitioner's application, but accepted similar applications of the other licence-holders for batik shops in the hotel premises. The petitioner in its application for writ complains that it had been arbitrarily refused a licence to run a shop for the sale of batiks in the respondent's premises because of political discrimination, as three of its Directors have been supporters of the Sri Lanka Freedom Party, and also because of personal hostility towards its Managing-Director by a director of the respondent-company. The petitioner contends that the decision of the respondent not to grant a new licence and/or renew the existing licence to it is null and void for the reasons that the decision was reached in violation of the principles of natural justice, in that the petitioner was not given any opportunity of being heard prior to such decision and that the respondent had failed to act fairly towards the petitioner and was actuated by *mala-fides* and bias against the petitioner.

The respondent, while denying the allegations of *mala-fides* and unfairness made by the petitioner, pleaded in limine against the maintainability of this application for the issue of a writ of certiorari against it on the ground that it is not a 'public authority'. It submits that the question of renewal of the grant of a licence to run a shop at Hotel Lanka Oberoi, of which it is the proprietor, is a matter for the sole decision of its Board of Directors and that such a decision is entirely within the discretion

of the Board and cannot be reviewed by a writ of certiorari. The respondent contended that in declining to grant the tenancy of its shop to the petitioner, it was not deciding on the legal rights of the petitioner.

An important aspect of prerogative remedies is that they belong exclusively to public law, their primary object being to make the machinery of Government work properly rather than to enforce private rights. An application for the prerogative remedy of a writ of certiorari is a proceeding calling some public authority to show legal justification for its action and to account for exceeding or abusing its power. "A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit."—Halsbury's Laws of England, 4th Edition, Vol. 1, paragraph 6 at p. 9. As Lord Devlin said in *R. v. Fulham Rent Tribunal* (1) at 488 :

"Orders of certiorari and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior Courts confine themselves to their own limited sphere".

Lord Goddard, C.J. in *R. v. National Joint Councils for Dental Technicians ex p. Neate* (2) at 707 defined the ambits of the writs as follows :

"The bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of the subjects who may have to submit to their jurisdiction".

As Professor Wade in his book on *Administrative Law*, 4th Edition, at p. 529 stated: "Consequently the existence of statutory power may be treated as the touchstone, though the Court has recently admitted one exception in *R. v. Criminal Injuries Compensation Board ex p. Lain...*" (3) and summed up the law as at p. 540: "Certiorari and prohibition are designed to prevent the excess and abuse of power by public authorities. The powers of public authorities are conferred by statute in almost all cases. So that it is usually safe to assume that statutory power is in question." Originally, certiorari and prohibition lay to control the functions of inferior courts, namely, judicial functions. But the notion of

what is 'a Court' and a 'judicial function' has undergone great revolution, so that today these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts. They have developed to be recognized today as general remedies for the control of administrative decisions affecting rights.

The classic definition of these orders is that of Atkin, L.J. in *R. v. Electricity Commissioners* (4) at 205, when he said:

"They lie wherever any body of persons having legal authority to determine questions affecting the rights of the subjects, and having the duty to act judicially, acts in excess of their legal authority".

This definition has been authoritatively interpreted and applied by the House of Lords in the leading case of *Ridge v. Baldwin* (5). The duty to act judicially, referred to by Atkin, L.J. need not be some requirement additional to the authority to determine the dispute; if the judicial element may be inferred from the nature of the power conferred over citizens, then that is enough to make certiorari available. Lord Parker, C.J. in *R. v. Criminal Injuries Commission ex. p. Lain* (3), at 777 and 778 clarified the present scope of the remedy.

"The exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time, being extended to meet varying conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis inter-partes*. Later, again, it extended to cases where there was no *lis* in the strict sense of the word, but where immediate or subsequent rights of citizens were affected. The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private and domestic tribunals have always been outside the scope of certiorari, since their authority is derived solely from contract, that is from the agreement of the parties concerned. Finally it is to be observed that the remedy by order of certiorari has now been extended to cases in which the decision of an administrative officer is arrived at only if the inquiry or process is of a judicial or quasi-judicial character. In such a case, this Court has jurisdiction to supervise that process... We have, as it seems to me, reached the position

when the ambit of certiorari can be said to cover every case in which a body of persons of a public, as opposed to a purely private or domestic character, has to determine matters affecting subjects, provided always that it has a duty to act judicially."

In *Lain's* case, the Compensation Board was established for the purpose of awarding compensation to victims of criminal injury out of monies voted by Parliament. The basic feature of the Board was that it was wholly non-statutory: it was set up administratively and made what in law were *ex gratia* payments out of the funds put at its disposal by Parliament. But the published scheme contained rules for the Board's determination of claims, and these rules were debated in Parliament and amended by the Home Secretary. The rules were therefore administrative instructions from the Home Secretary to the Board, made in the exercise of the prerogative and not under any statutory authority. Lord Parker, C.J. justified the issue of the writ against the Board on the ground:

"Moreover, the Board, though set up under the prerogative and not by statute, had in fact the recognition of Parliament in debate and Parliament provided the money to satisfy the Board's awards... The Board are, as counsel for the Board said—

'a servant of the Crown charged by the Crown by executive instructions with the duty of distributing the bounty of the Crown'.

The Board are clearly therefore performing public duties."

It is thus clear law that the orders of certiorari and prohibition will issue to a tribunal only if its functions are of a public and not merely of a private nature.

Confronted with the indisputable fact that the respondent is a company incorporated under the Companies Act established to carry on hotel business for the benefit of its shareholders and not a statutory corporation, counsel for the petitioner made valiant efforts to approximate the company to a body created by statute and submitted that the respondent is in fact a body performing functions of a public nature. He pointed to the following facts and features in the administration of the respondent Company in support of his submission:

Out of a total issued share-capital of Rs. 14 million, only 5.35% is held by private individuals, and the balance 94.65% is drawn from public funds. The majority of the Directors are nominees of the Co-operative Wholesale Establishment, a public corporation, and are nominated by the Minister of Trade. The Hotel Lanka Oberoi is a medium for the development of the tourist industry, which is a function of the Government. In the allocation of subjects and functions under the Constitution of the Democratic Socialist Republic of Sri Lanka (1978), His Excellency the President has assigned to the Minister of State as a "Department or statutory institution" under his purview the Asian Hotels Corporation Ltd. and as one of his subjects and functions the construction and management of Lanka Oberoi Hotel. Supplementary estimates for the construction of additional rooms to the hotel at a cost of Rs. 23.3 million have been tabled by the Minister of Finance in Parliament. A further Supplementary Estimate for Rs. 9.9 million for completing extensions to the hotel in time for the Conference of Non-Aligned Nations held in Colombo had been the subject of a debate in Parliament, as evidenced by the Hansards of 6.4.76 and 22.4.76. The sum of Rs. 36,200,000 voted for expenditure by the respondent-company on Hotel Lanka Oberoi extensions appears in the Estimates of Government expenditure on development projects (P. 26). The Auditor General in his report for the year 1976 (P. 27) has commented that "Contributions made by the Government towards the capital of the various Government-sponsored Corporations as at December 31, 1976, amounted to Rs. 5,993,752,384 as compared with Rs. 4,593,633,841 as at December 31, 1975, showing an increase of Rs. 1,400,118,543; the major increase was observed in respect of the following Corporations: River Valleys Development Board, the Ceylon Cement Corporation, Ceylon Petroleum Corporation, Ceylon Electricity Board, Asian Hotels Corporation Ltd. (in respect of which the increase was Rs. 80,112,000) and a number of other corporations. Approximately 95% of the share-capital of the respondent-company was held by the Co-operative Wholesale Establishment, which was a Government Corporation incorporated by Statute.

Counsel for the petitioner invited the Court to hold that, having regard to the foregoing facts and circumstances, the respondent had all the requisite characteristics of a public body as to make it amenable to the writ. The Court of Appeal has held that "this formidable catalogue of features could leave no room for doubt

that the Asian Hotels Corporation Ltd. is a public body". In my view, this conclusion is not tenable in law.

The fundamental attribute of an incorporated company is that the company is a legal entity distinct from its shareholders. The constitution, powers and functions of a company incorporated under the Companies Ordinance are provided for and regulated by its Memorandum and Articles of Association. An incorporated company has a separate existence and the law recognizes it as a juristic person, separate and distinct from its members. This new personality emerges from the moment of its incorporation, and from that date the persons subscribing to its Memorandum of Association and others joining it as members are regarded as a body incorporate or a corporation aggregate when the new person begins to function as an entity. *Saloman v. Saloman* (6). Its rights and obligations are different from those of its shareholders. Action taken against it does not directly effect its shareholders. The company in holding its property and carrying on its business is not an agent or trustee of its shareholders. It is the beneficial owner of its own property. A shareholder has no legal or equitable interest in the company's property such as can be insured. *Macaurea v. Northern Assurance Co.* (7)—as the property of the company is not in law the property of its shareholders. The mere fact that 95% of its share-capital was contributed by the Government or the fact that 95% of shares were held by a Government corporation like the Co-operative Wholesale Establishment does not make any difference. The company and its shareholders being as aforesaid, distinct entities, that the fact that the Government or a Government corporation holds all its shares or 95% of its shares does not make the respondent-company an agent of the Government. As Lord MacNaghten stated in *Saloman v. Saloman* (6) at 51 :

"The company is at law a different person altogether from the subscriber. . . ; and though it may be that after incorporation the business is precisely the same as it was before and some persons are Managers, and the same hands receive the payments, the company is in law not the agent of the subscribers or trustees for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Companies Act."

"Shareholders are not in the eyes of the law part owners of the

undertaking. The undertaking is something different from the totality of the shareholdings."—per Evershed, L.J. in *Short v. Treasury Commissioners* (8) at 122. Thus, an incorporated company is not the *alias*, agent, trustee or nominee of its members.

It is true that in this case, the Government, through the Co-operative Wholesale Establishment, having contributed a major portion of the share-capital, enjoys extensive powers in the conduct of the company. But these powers are derived from the fact of majority-share-holding and the operation of the rule of the majority which governs corporate membership rights and not by reason of the company being the agent of the Government. The company is not in law subject to any Ministerial directions. The presence of private shareholders, though they constitute a minority only, militates against the company being identified with the Government. The minority shareholders too have a voice in the administration of the company's enterprise and are entitled to elect directors, and if the majority shareholders, viz. the Co-operative Wholesale Establishment, act in oppression of the minority, the latter may petition the Court to wind up the company on the ground that it is just and equitable to do so. The company is a commercial corporation geared to make profits. If it should make losses and is unable to pay its debts, its property is liable to execution and liable to be wound up at the suit of a creditor. In the eye of the law, the respondent is its own master and is answerable as fully as any other person or company incorporated under the provisions of the Companies Ordinance. The burden of Mr. de Silva's submission was that the respondent-company was subordinate and subservient to the Government by reason of the C. W. E.'s shareholding and by reason of the large loans granted by the Government to the company and that it was a mere instrument of the Government and was therefore identified with it. The opposing argument was that the circumstance that the Government as main shareholder and creditor is interested in the solvency and administration of the respondent-company does not have the effect of changing its fundamental character of being a business organization with an independent juristic personality, standing outside the ordinary framework of the Central or Local Government.

Counsel for the petitioner sought to found his submission that the respondent is a 'public authority' amenable to the supervisory jurisdiction of this Court, on the ground that His Excellency the

President had assigned the Asian Hotels Corporation Ltd. (i.e. the respondent) as a department, subject and function of the Minister of State. The fact that His Excellency had done so cannot transmute the business concern of the nature of Asian Hotels Corporation Ltd. into a department or organ of the State. Since the State had invested in the respondent-company large amounts of money, it has an interest and say in the affairs of the respondent-company, but that is an interest and say *qua* shareholder and creditor and not referable to those of the Executive Government over its agent. The assignment of the Asian Hotels Corporation Ltd. to the Minister of State as one of his subjects and functions signifies only that the particular Minister was to overlook such interest on behalf of the State and not that the Corporation has become a department of the State, or that the property of the company is the property of the State, or the Co-operative Wholesale Establishment.

In my view, Mr. de Silva's contentions cannot be sustained. The respondent is an independent body-corporate carrying on commercial activities. It is not performing any Government functions and is not an agent, department or organ of the Executive Government. Hence, the writ jurisdiction of a superior Court cannot be availed to question the respondent's decision as to how it is to conduct its business, with whom it should have business relationship, and who should be its tenants or licencees of its premises.

The activities of private persons, whether natural or juristic, are outside the bounds of administrative law. A public commercial company like the respondent, incorporated under the Companies Ordinance in which the Government or a Government-sponsored Corporation holds shares, controlling or otherwise, is not a public body whose decisions, made in the course of its business, can be reviewed by this Court by way of writ.

For the above reasons, the preliminary objection of the respondent is upheld. In view of this conclusion, it is not necessary to examine the other objections raised by Mr. Choksy.

The order of the Court of Appeal refusing the petitioner's application for writ is affirmed and the appeal is dismissed with costs.

SAMARAKOON, C. J.—I agree.

SAMERAWICKRAME, J.—I agree.

Appeal dismissed.