

SEEMITHA ATHUGALPURA PUDGALIKA BUS
SANGAMAYA AND ANOTHER
VS
NORTH WESTERN PROVINCIAL COUNCIL ROAD
PASSENGER TRANSPORT AUTHORITY AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
C. A. WRIT APP 249/2003,
JULY 15, 22, 2004

Writ of Quo Warranto - Lacks basic qualifications De facto holder of a public Office—should it be a substantive office - Availability in what circumstances - Can a writ be issued if the post is non-existent? - locus standi - Public Office.— Road Passenger Carriage Services Statute - 4 of 1995 North-Western Provincial Council.

The 2nd Respondent claims to hold the office of Assistant Director (Operations) in the 1st Respondent Authority. The Petitioner sought a writ of quo warranto on

the 2nd Respondent- Assistant Director (Operations) as he lacks the basic qualifications necessary to lawfully hold the said office.

It was also contended by the Petitioners that the post of Assistant Director (Operations) is non - existence in the 1st Respondent Authority : The Respondent - contended that the office of the 2nd Respondent is not an office which is amenable to the relief claimed and that the Petitioner lacks locus standi.

HELD:

- (i) To succeed in this application for a writ of quo warranto the Petitioner must first establish that there is an office of a public nature and the 2nd Respondent is functioning in that office without proper qualifications or Authority.
- (ii) As the position of the Petitioner is that the post of Assistant Director (Operations) does not exist, the question whether the post is of a public nature does not arise.
- (iii) As the post of Assistant Director (Operations) is non-existent in the 1st Respondent Authority, there cannot be a usurpation of the office of Assistant Director (Operations)

"The test to be applied whether a writ of Quo Warranto is available -is whether there has been a usurpation of an office of a public nature and an office of substantive character, that is an office independent in title and not merely the function or employment of a deputy or a servant held at the will and pleasure of others"

Application for a Writ of Quo Warranto.

Cases referred to :

1. *Deen vs Rajakulendram* - 40 NLR 25
2. *Siriwardana vs Fernando* - 77 NLR 469

Sunil Cooray with G. Rodrigo for Petitioner

Navin Marapana for Respondents.

March 21, 2005

SRISKANDARAJAH J.

The 1st Petitioner is a limited liability company limited by guarantee, and incorporated under the Companies Act No. 17 of 1982 having perpetual succession and common seal, and operating under the name and style of "(Apayen) Seemitha Athugalpura Paudgalika Bus Samagama". The 2nd Petitioner is the Chairman of the said company. The 1st Respondent is the Authority established under the Road Passenger Carriage Services Statute No.: 4 of 1995 of the North Western Provincial Council. The Petitioners submitted that the 2nd Respondent at present claims to hold the office of Assistant Director (Operations) of the above authority, and he has accepted and commenced to exercise the powers and functions of the said office. The Petitioner further submits that the 2nd Respondent lacks the basic qualification necessary to lawfully hold the office of the Assistant Director of the 1st Respondent Authority and has sought a writ of *quo warranto*.

When this case was taken up for argument on 28.05.2004, the Respondents raised preliminary objections and the parties agreed to file written submission. The Respondents raised the following preliminary objection to this application.

1. The Petitioners are not entitled to the relief prayed for in their petition as what has been prayed for are certain declarations and directory relief which can only be granted by the District Court and there is no prayer for a mandate in the nature of the Writ of Quo Warranto as set out in the caption to the petition.
2. The office of the 2nd Respondent is not an office which is amenable to the remedy of Quo Warranto as it is not a public office.
3. The Petitioner has no *locus standi* to pursue this application.
4. The Petitioner's application is belated and therefore the Petitioner is not entitled to the relief claimed.

The Respondents and the Petitioners have filed their written submission to these preliminary objections.

Firstly, I will deal with the merits of the second objection. The Respondents submitted that it is established law that the remedy of Quo Warranto lies only with regard to the de facto holder of a public office. In the instant case the 2nd Respondent has been appointed to office as the Regional Director of the 1st Respondent Authority. The 2nd Respondent's letter of appointment marked 'H' and annexed to the petition clearly shows that the 2nd Respondent's office is one clearly held at the will and pleasure of the 1st Respondent and this letter of appointment includes a probationary period of three months therefore the respondents submitted that these facts clearly bring to light that the 2nd Respondent is a mere contracted employee of the 1st Respondent Authority, and the office he is holding is not a public office for the purpose of being amenable to a writ of Quo Warranto. In support of his contention the Respondents relied on *Deen V. Rajakulendaram*¹ where His Lordship Poyser J, observed :

"Under Section 47 of Ordinance No.11 of 1920 an Urban Council possesses large powers to appoint all its necessary officers, to remove any such officers so appointed to fix their salaries etc, subject to certain restrictions. Assuming such a writ is granted, then it must necessarily be available even against a coolly working under and Urban District Council. No doubt, such officers and servants are not holding public offices."

" the writ is limited or restricted and therefore cannot be applied universally such a writ lies for usurping any office of a public nature. It must be a substantive office and not one, which is held at the will and pleasure of others"

The Respondents submitted that in the light of the above, it is clear from documents marked G and H produced with the petition that the office of the second respondent is clearly not one that falls within the definition of a public office for the purpose of the writ of Quo Warranto.

In reply to this objection, the Petitioners submitted that a broader view has been taken in the case of *Siriwardana vs. Fernando*². The Court laid down certain guidelines to identify the "office of a public nature" : where the office is one which was created by statute and (a) the public have an interest and that, (b) Exercise of them materially affects a great body of them, (c) execution of the officers secures a proper distribution of funds which the body of the public have an interest.

The Petitioner submitted that in the present case the 1st Respondent is created by statute and the public have a great interest in the same and are greatly affected by the acts and deeds of the same and that the second respondent is not just another employee of the first respondent but a responsible top officer, having a decision making capacity which effect the public at large, and as such it would no doubt necessary to move for writ of Quo Warranto to declare that the 2nd Respondent is not in law entitled to hold this office on the basis of not having the minimum qualifications for this office as required by the statute.

The Petitioner's position according to their petition is that the 2nd Respondent was originally appointed to the post of Regional Director in the service of the 1st Respondent authority on 13.10.1998. The Petitioner states that according to the recruitment procedure of the 1st Respondent Authority certain basic qualifications for the eligibility for appointment to the post of Regional Director are stipulated. The recruitment procedure and the letter of appointment are marked as 'G' and 'H'.

The Petitioners also have pleaded in their petition that the 2nd Respondent was promoted to the present post as Assistant Director (Operations) and he holds this post at present. According to the prayer, the Petitioners have sought declarations that the 2nd Respondent lacks necessary qualifications to lawfully hold the office of Assistant Director of the 1st Respondent. In the written submissions of the Petitioners, it was stated that their application before this court is in fact a writ of Quo Warranto as very clearly stated in the caption of the application. The caption of the application reads as follows "In the matter of application for a writ of Quo Warranto against the Assistant Director (Operations) of the North Western Provincial Council Road Passenger Transport Authority". The availability of the writ of Quo Warranto is discussed by Pathirana J in *Siriwardena v Fernando* (supra) at 473 that :

"The test therefore to be applied whether a writ is available is whether there has been a usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title and not merely the function or employment of a deputy or a servant held at the will and pleasure of others."

The Petitioners contention in the petition and in their written submission is that the post of Assistant Director (Operations) is non - existent in the

first Respondent Authority. In other words, that there is no post called as Assistant Director (Operations) in the 1st Respondent Authority. To succeed in this application for a writ of Quo Warranto the Petitioner should first establish that there is an office of a public nature and the 2nd Respondent is functioning in that office without proper qualifications or authority. The position of the Petitioners is that the post of Assistant Director (Operations) does not exist; therefore, the question whether that post is of a public nature does not arise. In these circumstances there cannot be an usurpation of the office of Assistant Director (Operations) which is non-existent. For this reason, alone the Petitioners cannot have and maintain this application. Therefore the Court has not considered the other preliminary objections raised by the respondents. The Petitioners application is dismissed without cost.

Application dismissed.
