

SIVA KUMAR
v
DIRECTOR-GENERAL, SAMURDHI AUTHORITY
OF SRI LANKA AND ANOTHER

COURT OF APPEAL
EKANAYAKE, J.,
SRISKANDARAJAH, J.
CA 2119/2003

Writ of Mandamus – To evaluate and consider appointment to a permanent post – Duty bound to act fairly? Obligations arising out of a contract of employment – Private Right? Does writ lie?

The petitioner sought a *Writ of Mandamus* directing the respondent to take action to have an evaluation and consider the petitioner to be appointed for a permanent post.

The respondent contended that, the petitioner does not have the right to the performance of duty of a public nature.

Held :

- (1) The object of the application is to compel the performance by the respondents of certain obligations out of a contract of employment which existed between the petitioner and the respondents. His claim is merely a dispute about a private right and as such a *Writ of Mandamus* does not lie. Such matters arising out as to contracts of employment are solely matters within the purview of private law and not a matter for judicial review.

APPLICATION for a *Writ of Mandamus*.

Cases referred to:-

- (1) *Perera v Municipal Council of Colombo* – 48 NLR 66
- (2) *Rodrigo v Municipal Council of Galle* – 49 NLR 89
- (3) *Mendis v Sima Sahitha Panadura Janatha Santhaka Pravahana Sevaya and others* – 1995 – 2 Sri LR 184.

Srinath Perera PC for petitioner.

Ms. M. Fernando SSC for respondents.

January 25, 2007

CHANDRA EKANAYAKE, J.

The petitioner by his amended petition dated 20.10.2004 has sought *inter alia* a mandate in the nature of *writ of mandamus* directing the respondents to take action under clause 04 of the letter of appointment by which he was appointed as "Samurdhi Sanwardhana (Trainee) – [marked as P2] to have an evaluation and consider the petitioner for appointing to a permanent post with effect from March 2001. 01

It was the contention of the petitioner that in terms of the letter dated 16.8.2000 (P1) he was appointed a 'Samurdhi Niyamaka' and he assumed duties in the said post on 01. 09. 2000 in divisions of 1 and 2 of Rhywatta, Olugantota. Thereafter as averred in paragraph (3) of the petitioner a formal letter of appointment (P2) was issued as a 'Samurdhi Sanwardhana Niladhari' (trainee) by the 1st respondent and by paragraph (4) of the same though it was stated that he would be considered for confirmation as 'Samurdhi Sanwardhana Niladhari' (Grade II) after training period of 6 months after evaluation of service. However no action was taken by the respondents in terms of the said paragraph of P2 although he had completed the 6 months training period by March 2001 and as he was not appointed to the said permanent post even after a period of one year, he was compelled to request that he be appointed to the above permanent post and he did so by letters marked P3, P4 and P5. It was the position of the petitioner that although the respondents were duty bound to act fairly, they have failed and/ or neglected to fulfill that duty, and in the aforesaid premises he has sought the relief prayed in the present petition. 10 20

The respondents by their statement of objections whilst denying the position taken up by the petitioner moved for a dismissal of the petitioner's application more particularly on the grounds urged by paragraphs 6 and 7 of the same and further on the ground that petitioner's application was misconceived in law and there was no basis to issue a *writ of mandamus* against the respondents. 30

It is seen from the document marked 1R1 (Scheme of recruitment for the post of Samurdhi Sanwardhana Niladhari –

(Grade II) annexed to the statement of objections of the respondents, that the basic qualification of an applicant should be 5 passes at the G.C.E. (Ordinary Level) Examination, and at the time of evaluation for the permanent post of Samurdhi Sanwardena Niladari (Grade II) it was revealed that the petitioner only possessed passes in 4 subjects (2 simple passes and 2 credit passes) at the G. C. E. (Ordinary Level) Examination and the same was far below the required basic qualification as per 1R1 and therefore the petitioner was not confirmed in the said post. The above position is well established by the petitioner's application form for the said post (1R2 which being a Sinhala translation of the application form 1R1).

Further according to the minute appearing in the document marked 1R4 instructions had been sought in respect of the petitioner who was a Samurdhi Sanwardhana Niladhari (Trainee) as he did not possess the minimum educational qualifications in terms of 1R1. As per minute dated 23rd February appearing in 1R4 it has been suggested that it would be appropriate to take steps to terminate his services as he did not possess the required minimum educational qualifications for the post "Samurdhi Sanwardana Niladhari (Grade II)". Thereafter by the minute dated 25th February his services had been terminated and letter dated 08. 03. 2004 (1R5) had been sent to the petitioner communicating his termination. However, it is apparent from the petitioner's letter dated 22. 03. 2004 (1R6) that he had refused to accept 1R5. Now what the petitioner has sought is to compel the respondents by way of *writ of mandamus* to take action to appoint the petitioner to a post as per paragraph (4) of P2.

The position taken up by the petitioner had been that the respondents statutory bodies are duty bound to act fairly, but in the present instance they have failed and neglected to fulfill the said duties. Consideration of the material before Court reveals that the petitioner does not have the right to the performance of some duty of a public nature. In this context it would be pertinent to consider the decision of the Supreme Court in *Perera v Municipal Council of Colombo*⁽¹⁾ wherein it was held that; "*in an application for writ of mandamus the applicant must have the right to the performance of some duty of a public and not merely of a private character*". In the

said case the petitioner who was employed as a dispensary medical officer under the 1st respondent (The Colombo Municipal Council), sought a writ of mandamus on the Council and on the Local Government Service Commission (the 2nd respondent), to compel them to reinstate the petitioner in the post held by him from which he had been interdicted and to pay him arrears of salary from the date of his interdiction till reinstatement. In the course of the said judgment per Nagalingam. J. at 67 and 68; 80

“On these facts it would be manifest that the object of the application is to compel the performance by the respondents of certain obligations arising between the petitioner and the respondents out of the contract of service entered into by the petitioner with 1st respondent. That the petitioner is merely an employee or a servant of the 1st respondent there can be no doubt that there can be equally little doubt that the neglect or refusal on the part of the respondent Council to pay the petitioner his salary in full or to reinstate him in his office is a breach of a duty not of a public but of a private character.” 90

The petitioner in the present case undoubtedly has attempted to invoke the writ jurisdiction of this Court to secure a private remedy. Further the decision to terminate the petitioner’s service had been solely due to the fact that the he did not possess the minimum educational qualification required on terms of scheme of recruitment marked as 1R1. In those circumstances in my view no failure of justice too has been occasioned.

The decision in the case of *Rodrigo v Municipal Council of Galle*⁽²⁾ too would be of assistance here. It was a case where writ of mandamus was sought by the petitioner who was a Senior Revenue Inspector to give him work and to pay his salary when the respondent (Galle Municipal Council) refused to give him work and to pay his salary after 31. 10. 1947. It was held by the Supreme Court. 100

“**that a writ mandamus** did not lie because the petitioner’s office was not one which conferred on him a statutory right to the performance of his duties and functions and his claim to reinstatement was merely a dispute about a private right.”

I am unable to distinguish the above case from the case at hand for the reason that the object of the present application is also to compel the performance by the respondents of certain obligations arising out of employment (P2) which existed between the petitioner and the respondents and his claim to performance of clause 4 of P2 is merely a dispute about a private right, and as such not the subject for a writ of mandamus. Further disputes arising as to contracts of employment are solely a matter within the purview of private law and not matter for judicial review. In the case of *Mendis v Sima Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others* ⁽³⁾ per S. N. Silva, J. (P/CA) [as he was then] at 294;

“ The Writ of Mandamus prayed for in prayer (b) (reproduced at the beginning of this judgment) is entirely misconceived. It seeks an order from this Court restoring the Petitioner to the post of Managing Director with full pay. As noted above the Writ of mandamus lies only to compel the discharge of a statutory duty by a public authority. What is here sought to be done is the enforcement of a contract of employment.”

For the foregoing reason I am of the view that the present application of the petitioner has to fail and same is hereby dismissed without cost.

SRISKANDARAJAH - I agree.

Application dismissed.