WICKREMASINGHE
v.
THE MONETARY BOARD OF THE CENTRAL BANK OF SRI LANKA AND ANOTHER

COURT OF APPEAL
ANANDACOOMARASWAMY, J.
CA APPLICATION No. 786/88
JUNE 08 AND 15, 1989

Writ of Certiorari – Control of Finance Companies Act, No. 27 of 1979, section 21 A – Regulations under Public Security Ordinance – Finance Companies Act, No. 78 of 1988, sections 45(3) and (4) – Maintainability of application – Ouster or preclusive clause.

The petitioner sought a writ of certiorari to quash an order dated 7.7.1988 made by the Monetary Board of the Central Bank vesting in the Central Bank all the shares owned by him in Hideki Investments Limited of which he was Chairman. The respondents objected to the maintainability of the application relying on the immunity from civil or criminal actions conferred by sections 45(3) and 45(4) of the Finance Companies Act, No. 78 of 1988.

Held –

The writ is of a supervisory nature and the preliminary objection to the maintainability of the application is not sustainable.

Cases referred to -

1. *Government of Madras* v. *Vasappa* AIR 1965 SC 1873
2. *Re Goonesinhe* 44 NLR 75
3. *Silverline Bus Co. Ltd. et al.* v. *Kandy Omnibus Co. Ltd.* et al. 58 NLR 193, 197, 203, 206
4. *Kudakanpillai* v. *Mudanayake* 54 NLR 350
5. *H.E. Tennakoon* v. *P.K. Duraisamy* 59 NLR 481
6. *Colombo Apothecaries Ltd.* v. *Wijesuriya* 71 NLR 258
7. *Maliban Biscuits Manufactories Ltd.* v. *Subramaniam* 74 NLR 76. 78. 79.

APPLICATION for writ of certiorari to quash vesting order dated 7.7.1988 made by the Monetary Board of the Central Bank of Sri Lanka.

Faiz Musthapa, P.C., with *Mahanama de Silva* and *G.G. Arulpragasam* for petitioner.

Dr. H.W. Jayewardene, Q.C. with *H.L. de Silva, P.C.* and *M. Amarasekera* for respondents.

Cur. adv. vult.

August 23, 1989

ANANDACOOMARASWAMY, J.

This is an application for the issue of writs in the nature of writs of certiorari.

The Petitioner is the Chairman of Hideki Finance Investments Ltd. The Petitioner is also the Chairman and the Principal share – holder of Hideki Investments Ltd which is a Public Company duly incorporated under the Companies Act. The Petitioner is also a share holder of three other Companies namely Hideki Marines Limited, Hideki Group Limited, and Hideki Industries Limited which are private Companies.

The Petitioner is seeking to quash an order made by the Monetary Board of the Central Bank, that is the first Respondent, vesting in the Central Bank all the shares owned by him in Hideki Investments Limited. The order is dated 7.7.1988 produced marked "X".

The order purports to be made under Section 21(A) of the former Control of Finance Companies Act, No. 27 of 1979.

This Section 21(A) was introduced as an amendment to the Control of Finance Companies Act by Regulations framed under the Public Security Ordinance by the former President of the Democratic Socialist Republic of Sri Lanka.

The Petitioner filed this application on 21.7.1988. He seeks to impugn the Regulation as ultra vires the Constitution on two grounds. Article 155(2) of the Constitution empowers the President to make Regulations "over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution". The Petitioner's complaint is:.....

(a) that the power to vest shares is punitive in character and partakes of the judicial power and as such is violative of Article 4(c) of the Constitution which vests judicial power in the Courts;

(b) that it is cruel punishment and therefore violative of Article

11 of the Constitution.

As a preliminary matter the first Respondent by an amended statement of objections dated 24.2.1989 has taken objection to the maintainability of this application based on Section 45(4) of the Finance Companies Act No. 78 of 1988 which reads as follows:

> "No civil or criminal proceedings shall be instituted or maintained or continued, against the Board or any officer, servant or agent of the Board or any other person or Authority for any act, bona fide, done or omitted to be done by him during the period commencing June 16th, 1988 and ending on the date of commencement of this Act, in pursuance or supposed pursuance of the provisions of the Control of Finance Companies Act No. 27 of 1979 read with the Control of Finance Companies regulations made under the Public Security Ordinance."

It is submitted on behalf of the Petitioner that these provisions only confer indemnity from ordinary civil and criminal liability and do not affect writ applications for the following reasons:

> This is the traditional formula by which immunity from CIVIL AND CRIMINAL LIABILITY has been conferred from time immemorial. The following are some examples:-

(i) Section 33 of the Co-operative Employees Commission Act, No. 12 of 1972 is almost identical to the provision relied upon by the Respondent. This Section reads as follows:-

> "No action, prosecution or other proceeding, whether civil or criminal, shall be instituted or maintained against any individual member of the Commission in respect of any decision taken or act done or omitted to be done by him in his capacity as such member or by the Commission in its corporate capacity".

(ii) Section 18 of the Criminal Justice Commission Act, No. 14 of 1972 reads as follows:-

> "No civil or criminal proceedings shall be instituted against any member of a Commission in respect of any act bona fide done or omitted to be done by him as such member".

This is obviously not an ouster or preclusive clause barring writ applications as Section 25 of that very act contains such a clause worded in the customary manner as follows:-

"Any finding made, sentence imposed by a Commission under this Act shall be final and conclusive, and shall not be called in question in any court or tribunal, whether by way of action, application in revision, appeal, writ or otherwise".

(iii) Section 58(1) of the Land Reform Law, No. 1 of 1972 reads as follows:-

No suit or prosecution shall lie -

(a) against the Commission for any act which in good faith is done or purported to be done by the Commission under this Law; or

(b) against any member, officer, servant or agent of the Commission for any act which in good faith is done or purported to be done by him under this Law or on the direction of the Commission.

In order to exclude writ application, there is a well known formula introduced by the amendment effected to Section 22 of the Interpretation Ordinance by the Interpretation Amendment Act, No. 18 of 1972. Section 22 of the Interpretation Amendment Act reads as follows:-

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any Court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal".

Even here, the proviso specifically provides that the writ jurisdiction vested in the Court of Appeal or in the Supreme Court is not affected. For the proviso reads as follows:-

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court or the Court of Appeal, as the case may be, in the exercise of its powers under Article 140 of the Constitution of the Republic of Sri Lanka in respect of the following

matters, and the following matters only, that is to say:-

(a) Where such order, decision, determination, direction of finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b) Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or the Court of Appeal, as the case may be, is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law".

It cannot be, that the Legislature which is well acquainted with this formula should have chosen another wording which has traditionally being construed to mean immunity only from civil and criminal proceedings if it intended to exclude the writ jurisdiction. In fact, even where the writ jurisdiction is expressly excluded, the proviso to Section 22 referred to above has preserved the writ where the attack is on the ground of ultra vires or natural justice. In this instance, the attack is even more fundamental namely that the Regulations are ultra vires the Constitution.

An examination of the provisions of the Finance Companies Act, No. 79 of 1988 indicates that the Act itself does not regard Section 45(4) as an ouster clause. For Section 45(4) relates to the period from the 16th of June 1988 to the enactment of that Act. In respect of the acts done after the enactment of the Act, Section 44 of that Act excludes any suit or prosecution. It is identical to Section 45(4) except that it relates to the subsequent period. However Section 43(2)(a) assumes that notwithstanding Section 44 the writ jurisdiction exists and only states that such jurisdiction shall be exercised by the Supreme Court and not by the Court of Appeal. This shows that it is trite law that such provisions confer only civil and criminal indemnity and do not exclude the writ jurisdiction.

In India, the Supreme Court has clearly held that such provisions

only exclude suits for damages and compensation and do not shut out other remedies – *Government of Madras vs. Vaṣappa*(1).

The cases which dealt with the question as to whether a writ of certiorari falls within the ambit of the expression "civil suit or action" in Section 3 of the Appeals (Privy Council) Ordinance were cited only to show the inherent nature of a writ application and the decisions themselves have no bearing on the issue before this Court.

In *Re Goonesinha* (2) the Supreme Court in an application for conditional leave to appeal to the Privy Council held (Moseley S.P.J. with Soertsz, J. agreeing) that an application for a Writ of Certiorari being an application for relief or remedy obtainable through the Courts' power or authority, constitutes an action and comes within the ambit of Section 3 of the Appeals (Privy Council) Ordinance.

In *Silverline Bus Co. Ltd., et al.,* Petitioner, *Kandy Omnibus Co., Ltd., et al.,*(3) a Bench of five Judges considered this issue and overruled the cases of *In re Goonesinha*(2) and *Kudakanpillai vs. Mudanayake*(4). This was an application for conditional leave to appeal to the Privy Council from the judgment of the Supreme Court. The Supreme Court (Basnayake C.J., with Gunasekara, J., Pulle, J., de Silva, J., agreeing and Sansoni, J., dissenting) held that an appeal to the Privy Council does not lie from a decision of the Supreme Court in an application for writ of certiorari. Such an application does not fall within the ambit of the expression "civil suit or action" in Secton 3 of the Appeals (Privy Council) Ordinance, even when the application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction.

The words "civil suit or action" in Section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.

Basnayake, C.J., gave three reasons for his view:-

(a) Proceedings for certiorari are not suits or actions as in them the Court exercises its supervisory functions and is not called upon to pronounce judgments on the merits of the dispute between the parties before the inferior tribunal – page 197, 2nd paragraph;

(b) Such an application does not fall within the definition of action in section 6 of the Civil Procedure Code – page 203,

3rd paragraph;

(c) a "civil suit or action" must be construed to be a proceeding in which one party sues for and obtains something from another in regular civil proceedings and an application for certiorari therefore does not fall within that expression – page 206, 2nd paragraph.

In *H.E. Tennekoon (Commissioner for Registration of Indian and Pakistani Residents)* vs. *P.K. Duraisamy*(5) the Privy Council (Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Denning, and Mr. L.M.D. de Silva) held that the words "civil suits or action" in Section 3 of the Appeals (Privy Council) Ordinance are not limited to proceedings in which one party sues for or claims something from another in regular civil proceedings. The case of *Silverline Bus Co., Ltd., vs. Kandy Omnibus Co., Ltd.*,(3) was partly overruled. That was the case of an appeal to the Supreme Court from an order made under the Indian and Pakistani Citizenship Registration Act and not a writ application. The Court pointed out that Basnayake C.J. was wrong in holding that the term "action" in the Charter of Justice bore a different meaning from that in the Appeals to the Privy Council Ordinance – (Vide page 494, 2nd paragraph), but did not decide the point as to whether a writ application came within the definition of a "civil suit or action" within the meaning of the Appeals to the Privy Council Ordinance and left this question which had been decided in the *Silverline case* open – (vide page 494 last paragraph to 495).

In *Colombo Apothecaries Ltd., vs. Wijesuriya* (6) the Supreme Court in an application for conditional leave to appeal to the Privy Council held that an application for a writ of prohibition, or even an application for certiorari is a civil suit or action within the meaning of Section 3 of the Appeals (Privy Council) Ordinance. The decision of a Bench of five Judges to the contrary in *Silverline Bus Co., Ltd., vs. Kandy Omnibus Co., Ltd.*,(3) was overruled by the Privy Council in *Tennekoon vs. Duraisamy*(5) Tennekoon J (with Siva Supramaniam, J., agreeing) took the view that although the Privy Council did not expressly overrule the *Silverline case,* the reasoning had been rejected and that therefore it should be considered as overruled.

In *Maliban Biscuits Manufactories Ltd., vs. Subramaniam*(7) the Supreme Court (Samarawickreme, J., with Panditha Gunawardene, J. agreeing) held that an application to the Supreme Court for a writ of certiorari is not a civil suit or action. Accordingly, the Supreme Court

will not grant leave to appeal to Her Majesty-in-Council for an order refusing an application for Writs of Certiorari and Prohibition. *Colombo Apothecaries Co., Ltd., vs. Wijesuriya*(6) was not followed. That was the case of an application for conditional leave to appeal to the Privy Council. Samarawickrema J., pointed out at page 78 that Basnayake C.J., in the *Silverline case* had given three reasons for his view and that although the Privy Council in the *Tennekoon vs. Duraisamy case* had dissented from his view of the definition of "civil suit of action", the other two reasons given by him – (Vide paragraph 4 at page 6 above) were unaffected and as such that case could not be regarded as overruled (vide page 79).

However the Privy Council (Lord Morris of Borth-y-Gest, Lord Quest, Viscount Dilhorne, Lord Simon of Glais dale and Lord Cross of Chelsea) held that an application to the Supreme Court for a writ of certiorari in a civil matter is a "civil suit or action" within the meaning of Section 3 of the Appeals (Privy Council) Ordinance. The reasoning which was the basis of the decision of the Supreme Court in the *Silverline Bus Co., Ltd., vs. Kandy Omnibus Co., Ltd.*,(3) cannot stand. The decisions in *Tennekoon vs Duraisamy*(5) and *Colombo Apothecaries Co., Ltd., vs. Wijesuriya*(6) were approved.

The Privy Council took the view that the reasoning in the *Silverline Bus case* had been rejected in the *Tennekoon vs. Duraisamy case* and as such held that that decision should be considered overruled. Their Lordships based their reasoning on the footing that since in *Tennekoon's case* the Privy Council had held that the view of Basnayake CJ expressed in the *Silverline Bus Company case* that the words "Civil suit or action" in the Privy Council Appeals Ordinance bore a different meaning from the same words appearing in the Charter of Justice was wrong, that decision was overruled – vide 74 NLR 343 at paragraphs 1, 2, 3 and 4.

However, this decision has no bearing on the present matter inasmuch as:-

The Court was construing the particular words appearing in particular statutes, namely the Charter of Justice and Privy Council Ordinance and gave a wide definition having regard to the historical sequence. On the other hand in the present instance, these words have been traditionally used as conferring only civil and criminal immunity and not ousting the writ jurisdiction.

In any event, the other reason given by Basnayake CJ namely that

the writ is of a supervisory nature stands unaffected – (vide 74 NLR 78, 3rd paragraph to page 79).

The first Respondent not only relied on Section 45(4) of the Finance Companies Act but also Section 45(3) of the said Act. This sub-section reads as follows:-

> "Any action taken, order made or direction given under the Control of Finance Companies Act. No. 27 of 1979 read with the Control of Finance Companies regulations made under the Public Security Ordinance during the period commencing on June 16, 1988 and ending on the date of commencement of this Act shall be valid and effectual as if the Public Security Ordinance had authorised the making of those regulations".

This sub-section has no application. It purports to validate acts "as if the Public Security Ordinance had authorised the making of those regulations". It is intended to confer validity even if the Public Security Ordinance did not in fact confer such validity. The Petitioner does not contest the validity of the regulations from the stand point of the Public Security Ordinance but the Constitution. Even if Section 45(3) would render the regulations valid, even if they were originally invalid as being ultra vires the Public Security Ordinance, it would not validate the Regulations if they are ultra vires the Constitution and the Petitioner bases his case on the footing that they are ultra vires the Constitution.

The Petitioner bases his application on the ground that the regulations are ultra vires the Constitution for two reasons. They are violation of Article 4(c) and Article 11 of the Constitution. According to the Petitioner the power to impose a punishment is an exercise of judicial power. Article 4(c) of the Constitution vests judicial power in "Courts, Tribunals and Institutions".

The Petitioner alleges that the punishment inflicted is cruel or inhuman and therefore constitutes a violation of Article 11 of the Constitution. The first Respondent denies that the said order amounts to infliction of punishment on the Petitioner and that the punishment is cruel or inhuman. This question had not been canvassed before me and as such an order under Article 125 of the Constitution to refer this question to the Supreme Court does not arise now.

For the foregoing reasons I overrule the Preliminary Objection.

Preliminary objections overruled.