

ABAYADEERA AND 162 OTHERS
v.
**DR. STANLEY WIJESUNDERA, VICE CHANCELLOR,
UNIVERSITY OF COLOMBO AND ANOTHER**

COURT OF APPEAL

ATUKORALE, J. (P/C. A) TAMBIAH, J. AND MOONEMALLE, J.

C. A. APPLICATION NO. 817/83

OCTOBER 10, 11, 12, 13 and 14, 1983.

Writ of Mandamus — Universities Act, No. 16 of 1979 — University Grants Commission — The College of General Practitioners of Sri Lanka (Incorporation) Law, No. 26 of 1974 as amended by Act, No. 51 of 1980 — Colombo North Medical College — University of Colombo — Necessary parties.

The petitioners sought a writ of mandamus to issue on the respondents to compel them to hold the 2nd MBBS only for students of the University of Colombo.

Held —

- (1) A mandamus can be issued to a Corporation.
- (2) The proper body to be directed by a mandamus is the University of Colombo and not the respondents to this application. The University of Colombo is a necessary party and ought to have been made a party to the proceedings. The failure to do so is fatal to the Petitioner's application.
- (3) The joinder of the 45 students of the University of Colombo who have not joined the petitioner was not necessary as the relief asked for will not affect them adversely.
- (4) The whole petition is directed against the 115 students of the North Colombo Medical College and their exclusion from the 2nd MBBS examination. If a mandamus is issued they will be adversely affected. The 115 students of the North Colombo Medical College are necessary parties and the failure to make them respondents is fatal to the petitioner's application.

Cases referred to :

1. *Haniffa v. Chairman, Urban Council, Nawalapitiya* 66 NLR 48
2. *Jayalingam v. The University of Colombo* — C. A. Application No. 415/81 — C. A. Minutes of 14.8.81.

3. *Pathirana v. Goonesekera* 66 NLR 464, 467
4. *Jamal Mohideen Co. v. Meera Saibo* 22 NLR 268, 272
5. *Silva v. Fernando* 15 NLR 499, 500
6. *Ponnamma v. Arumugum* 8 NLR 223, 226
7. *Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali and another* S.C. Appeal No. 6/81 — S.C. Minutes of 20.11.81.
8. *John Neill Keith v. G. A. Western Province* 3 SCC 12
9. *Carron v. Government Agent, Western Province* 46 NLR 237
10. *Goonetilleke v. Government Agent Galle* 47 NLR 549
11. *James Perera v. Godwin Perera* 48 NLR 190

PRELIMINARY OBJECTIONS to application for writ of mandamus.

Dr. Colvin R. de Silva with *Batty Weerakoon, S. Rudiramorthy* and *Miss Saumya de Silva* for petitioners.

H. W. Jayewardene, Q.C. with *I. S. de Silva* and *Rohan de Alwis* for respondents.

Cur. adv. vult

14 November, 1983

Atukorale, J. (P/C.A.) read the following Order of the Court

This application for the issue of a Mandamus is made by 163 students of the Faculty of Medicine of the University of Colombo. The respondents to this application are the Vice Chancellor and the Dean of the Faculty of Medicine, both of the University of Colombo.

In their petition, they state that they were preparing to sit the 2nd MBBS examination of the University of Colombo ; this examination is more fully known as the 2nd examination for the Degree of Bachelor of Medicine and Bachelor of Surgery ; that in the normal course of her duties, the 2nd respondent announced to them that the said examination would commence on 11.7.83 and further announced a change in the said examination, in that, 126 (in fact 115) 2nd year students studying for the 2nd MBBS examination in the North Colombo Medical College will also be admitted to the said examination.

The petition goes on to state that the 115 students are of a different institution and of a different Faculty ; that the petitioners were selected to study medicine on the results of a competitive examination and in order of merit determined by the results of the said examination, a criteria different from those that were applied to the 115 students of the North Colombo Medical College ; that the 115 students had 91 weeks of preparation for the examination as against a shorter period of 77 weeks which the petitioners have had and therefore the former had an undue advantage over them ; that continuous assessment tests are held during the period of preparation for the examination and the marks obtained at such tests are taken into account for the 2nd MBBS examination ; that while the petitioners were tested together at the same continuous assessment tests, the 115 students obtained their continuous tests marks in a body separate from the petitioners ; that the aforementioned matters will result in a change in the character of the examination in that it ceases to be an examination for the students of the Faculty of Medicine and will affect the petitioners in the results they obtain at the 2nd MBBS examination and also affect their career when they pass out as doctors.

The petition goes on further to state that the petitioners, as students of the Faculty of Medicine of the University of Colombo, are entitled to require the University to hold the 2nd MBBS examination separately for them, for others of their batch and for those repeating the said examination, and that the University admit no outsiders to the said examination ; that the University of

Colombo is obliged to provide for the petitioners such an examination and that the duty of carrying out such an obligation is cast on the respondents to the petition ; that the respondents have refused to do so, though demanded of them by the petitioners.

The prayer asked for in the petition are in these terms —

- (a) Issue on the respondents a writ of mandamus requiring them to hold for the students of the Faculty of Medicine of the University of Colombo now preparing to sit the 2nd MBBS examination in July 1983 an examination which, as in previous years, is meant only for students of the said Faculty.
- (b) Issue on the respondents an interim order restraining them from holding the 2nd MBBS examination scheduled for the 11th of July, 1983, till such time as this matter is disposed of by this Court, except where the said examination is confined to the students of the Faculty of Medicine of the University of Colombo.

This Court, on 8.7.83, directed the respondents to stay the holding of the said 2nd MBBS examination until the disposal of the application made by the petitioners.

The main application came up for hearing before us on 10.10.83 and on subsequent days. At the outset, learned Queen's Counsel for the respondents referred us to the statement of objections filed by the respondents and sought to argue certain matters by way of preliminary objections to the maintainability of the petitioners' application. These matters are set out in paragraphs 22, 23 and 24 of the statement of objections. We shall summarise them—

- (1) The University Grants Commission, the University of Colombo, the College of the General Practitioners of Sri Lanka, the 115 students of the North Colombo Medical College, and the balance 45 students of the University of Colombo who are due to sit the 2nd

MBBS examination, are all bodies and persons who will be materially affected by the decision in the case and should have been made respondents to the petitioners' application.

- (2) The Student Assembly of the University of Colombo set up under para (XIV) of the University Act, No. 16 of 1978 and the Student Assembly Ordinance No. 1 of 1979 ought to have been the petitioners or in any event should have been made respondents. The non-joinder of these persons and bodies as respondents or petitioners to this application, is fatal to the application.
- (3) The several matters raised in the petition come within the purview of the University of Colombo and the University Grants Commission, and are not justifiable by the Courts.
- (4) The petition does not disclose any right in the petitioners to ask for a Writ of Mandamus inasmuch as there is no public duty or any duty at all owed to the petitioners by the respondents.

After hearing both learned Counsel, we decided that the only matters that could be taken up as objections in limine are those set out in (1) and (2) above, and that the other matters raised by learned Queen's Counsel could be taken up by him when the merits of the application are gone into.

It is necessary to set out the provisions of the law that are relevant to the matters raised in limine.

The University Grants Commission is a body corporate established in terms of s. 2(2) of the Universities Act, No. 16 of 1978. The powers of the Commission are, inter alia, to determine in consultation with the governing authority of each Higher Educational Institution, the Courses which shall be provided therein, the degrees, diplomas and other academic distinctions which shall be awarded (s. 15 (v)), the total number of students

which shall be admitted annually to each Higher Educational Institution and the apportionment of that number to the different courses of study therein (s. 15 (vi)) and the external examinations which it shall conduct for enabling those who are not students of the University or of any recognised institution, to obtain degrees, diplomas and the other academic distinctions of the University (s. 15 (viii)). The Commission also has the power, in consultation with an Admissions Committee to select students for admission to each Higher Educational Institution (s.15 (vii)). The University of Colombo is a Higher Educational Institution and its governing authority is the Council (s. 147). The Commission also has the power to make ordinances to enable it to exercise its powers and functions under the Act (s.18) and with the concurrence of the Minister, to recognise institutions for the purpose of providing courses of study approved for the examinations of a Higher Educational Institution. (s.25). Acting under s.18, the Commission made the Ordinance called the Recognition of Institutions Ordinance No. 4 of 1980 and published in Government Gazette No. 110/7 of 15.10.1980.

The College of General Practitioners of Sri Lanka (Incorporation) Law, No. 26 of 1974, was amended by Act No. 51 of 1980 to enable the said College, inter alia, to establish, maintain, manage and administer any institution for the purpose of providing or promoting courses of study and facilities for the education, instruction and training of, inter alia, medical practitioners and students preparing to qualify as medical practitioners.

The North Colombo Medical College was set up by the College of General Practitioners in the exercise of its powers under Law No. 26 of 1974, as amended. In terms of Ordinance No. 4 of 1980, an application was made on 19.12.80 on behalf of the North Colombo Medical College to the Secretary of the University Grants Commission for the recognition of the North Colombo Medical College as a recognised institution, for the purpose of providing courses of study approved for the 2nd MBBS examination of the University of Colombo in terms of s. 25 of the University Act. That the North Colombo Medical College

was granted such recognition by the University Grants Commission, in terms of s. 25 of the University Act. Is not a matter that is in dispute between the parties.

Paragraph 9 (1) of Ordinance No. 4 of 1980 states that a recognised institution shall admit, for the purpose of following courses of study approved for the examinations of any Higher Educational Institution, only such students as have satisfied the minimum requirements specified by the Grants Commission from time to time for admission to a University. Every eligible student of a recognised institution shall take the appropriate examinations of the Higher Educational Institution in respect of which recognition has been granted, and such examinations shall be conducted in accordance with any appropriate instrument providing for the same (para 14). The same paragraph defines an "eligible student" as one who has been duly admitted to such institution under para 9(1), and has been registered as a student of such institution and thereafter followed at such institution the approved courses of study which he proposes to take during a period not less than the period specified for the examination by the Higher Educational Institution concerned. The University Act defines "appropriate Instrument" as any Order, Ordinance, Statute, By-law, Regulation or Rule made in accordance with the provisions of the Act.

The University of Colombo is a body corporate established in terms of ss. 21 and 139 (1) of the Universities Act No. 16 of 1978. The power to hold examinations is reposed in the University (s. 29 (b)). The University also has the power, inter alia, to grant and confer degrees, diplomas and other academic distinctions to and on persons who have pursued approved courses of study in the University or in any recognised institution and who have passed the examinations of the University prescribed by By-law (s.29(e)).

The officers of the University are, inter alia, the Vice Chancellor and the Dean of each Faculty (s. 33). The Vice Chancellor is appointed by the Chancellor and is a full time officer of the University and the principal executive officer and the principal

academic officer thereof. He is the ex-officio member of the Court, the Council and the Senate and the Chairman of both the Council and the Senate. He is required, in accordance with such directions as may from time to time be lawfully issued to him by the Council, to ensure that the provisions of the Act and of any appropriate instrument are duly observed and he has and can exercise all such powers as are necessary for the purpose. He is also required to give effect to the decisions of the Council and of the Senate (s. 34).

The authorities of the University are, inter alia, the Court, the Council, the Senate and the Faculties (s.10). The ex-officio members of the Court are, inter alia, the Vice Chancellor and the Dean of each Faculty (s.41). The Court has powers to make Statutes and to elect the Vice Chancellor and to recommend his removal to the Chancellor (s. 43).

The Council is the executive body and governing authority of the University and consists of inter alia, the Vice Chancellor and the Dean of each Faculty (s.44). The Council can exercise the powers and perform the duties conferred or imposed on the University. In particular, it has powers to regulate and determine all matters concerning the University in accordance with the provisions of the Act and of any appropriate instrument, to draft statutes, to make by-laws and regulations and to appoint examiners in consultation with the Senate (s.45).

The Senate consists, Inter alia, of the Vice Chancellor and the Dean of each Faculty and it has control and general direction of instruction, education, research and examinations in the University (s. 46).

Among others, the Faculty of the University consists of two students elected by the students of the Faculty from among their number but the two students are excluded from the proceedings of any meeting of the Faculty relating to examinations. Subject to control of the Senate, the Faculty has powers to regulate matters

connected with teaching, examinations and research in the Departments of Study in the Faculty (s. 48). The Dean of each Faculty is a full time officer of the University and the academic and administrative Head of that Faculty (s. 49).

S. 112 (1) of the Universities Act provides for the establishment of a Student Assembly consisting of student representatives elected from among persons who are students of a Higher Educational Institution. The University Grants Commission has, by the Student Assembly Ordinance made under s. 117 of the University Act, prescribed the duties and functions of the Student Assembly. Para 18 of the said Ordinance states that the duties and functions of the Assembly shall be, inter alia, to promote and safeguard the interests of the Higher Educational Institution to which such Assembly belongs and the student community of such institution.

On the question whether the University of Colombo is a necessary party and ought to have been joined as a respondent to the petition, learned Counsel for the petitioners submitted as follows :—

- (1) The Vice Chancellor is a full time and principal executive and academic officer of the University. He is the Chairman of the Council which is the executive body and governing authority of the University and he is required to ensure that the provisions of the University Act and of any appropriate instrument are duly observed, and to give effect to the decisions of the Council and the Senate. He is also the Chairman of the Senate which has control and general direction of instruction, education, research and examinations in the University. The Council and the Senate function through the Vice Chancellor. The Vice Chancellor is the person through whom the University is run. The petitioners have come to this Court and have asked for the issue of a Mandamus on the correct person, namely, the Vice Chancellor.
- (2) S. 3 (1) of the Ceylon University Ordinance (Vol. 7, Ch. 186) established the University of Ceylon and

proceeded to state who constituted the incorporated body — the Chancellor, the Pro-Chancellor, the Vice Chancellor and the members of the Court, the Council and the Senate of the University. Similarly s. 2 (1) of the University of Ceylon Act No. 1 of 1972 established the University of Ceylon and stated who constituted the incorporated body — the Chancellor, the Pro-Chancellor, the Vice Chancellor and the members of the Board of Governors and the Senate.

S. 7 of the Higher Education Act, No. 20 of 1966, established the National Council of Higher Education, a corporate body, which shall consist of persons who are members of the Council. S. 34 empowered the Minister, on the recommendation of the National Council to establish a Higher Educational Institution having the status of a University and in s. 35 (1) stated who are the members of the incorporated body — Chancellor, Pro-Chancellor, the Vice Chancellor and the members of the Board of Regents and the Senate.

Under these three statutes, it was possible to identify the persons who constituted the incorporated body, the University. The Universities Act No. 16 of 1978, by contrast, contains no such similar provision. S. 21 empowers the Minister to establish a University but is silent as to who will constitute the body corporate. The Act gives the Vice Chancellor an exalted status. He is the proper person to be directed by a Mandamus.

- (3) A Mandamus can only issue against a natural person who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court (*Haniffa v. Chairman, Urban Council, Nawalapitiya*, (1)).
- (4) The Emergency (Universities) Regulations No. 1 of 1983, made on 21.7.83 by the President of the Republic

of Sri Lanka, and published in Gazette Extraordinary N^o. 254/24 of 21.7.83 are still in force. In terms of Regulation 2, inter alia, the Vice Chancellor and the Dean of the Faculty shall cease to hold office. The Minister, on the recommendation of the Commission, is empowered to appoint the Vice Chancellor and to remove him. (Reg. 3 (2) (a)). The Vice Chancellor is given the power to appoint and to remove the Dean of a Faculty (Reg. 3 (3)). So long as the Regulations are in force, every power, duty, or function conferred or imposed on or assigned to, the Council of a University under the Universities Act shall be deemed to be conferred or imposed on, or assigned, to the Vice Chancellor of that University, and accordingly, any such power, duty or function may be exercised, performed or discharged by that Vice Chancellor (Reg. 4).

Under s. 7 of the Public Security Ordinance, Emergency Regulations are to prevail over other law and they shall not be called in question in any Court (s.8).

In terms of s. 45 (1) of the University Act, the Council exercises the powers and performs the functions conferred and imposed on the University. The powers of the University are found in s. 29, namely, to admit students, to hold examinations and confer degrees etc. These powers are now vested in the Vice Chancellor. If a Mandamus is to be issued, it must go against the Vice Chancellor, who has now absorbed in himself all the powers and duties conferred and imposed on the University.

It was the contention of learned Queen's Counsel, on the other hand, that assuming this Court has power to issue a Mandamus, this Court can only direct the body which has the power to hold examinations, namely, the University, the Vice Chancellor and the Dean are only officers who must carry out the directions of the corporate body; a Mandamus can be directed to a Corporation. In regard to the Emergency Regulations cited by

learned Counsel for the petitioners, it was learned Queen's Counsel's submission that the regulations were made on 21.7.83 after the petitioners filed their application, and that the rights of the petitioners are their rights at the date of the filing of the application; the Emergency Regulations have no application.

The law has been stated as follows in paragraph 112, page 127, Vol. 1., of Halsbury's "Laws of England", 4th Edn.

"The Order of Mandamus will not be granted against one who is an inferior or ministerial officer bound to obey the orders of a competent authority to compel him to do something which is part of his duty in that capacity."

The Vice Chancellor and the Dean of the Faculty of Medicine are officers of the University. The Council is the executive body and governing authority of the University and can exercise and discharge the powers and functions of the University, including the power to hold examinations. The Senate has control and general direction of, inter alia, education and examinations. The Vice Chancellor is subject to the directions issued by the Council and it is his duty to give effect to the decisions of the Council and the Senate. The Dean is the Head of a Faculty, and the Faculty which has powers over matters relating to examinations, is subject to the control of the Senate. It seems to us that the respondents are officers within the intendment of the above quotation from Halsbury.

In terms of s. 29 (b) of the Universities Act, the University has the sole power to hold examinations, including the 2nd MBBS examination. The power is reposed in the University. In their own petition, the petitioners state that they are entitled to require the University that it holds the 2nd MBBS examinations for them and others of their batch and those repeating the said examination, and that the University has the obligation to provide such an examination. The petitioners want this obligation of the University enforced through its officers or agents. It appears to us, assuming that the Writ of Mandamus can issue, it must be directed to someone in whom is lodged the power to do the act

ordered to be done. What if the University of Colombo takes up the position that it has not been made a party to the application and has not been heard and therefore not bound in any way by these proceedings? In *Jayalingam v. The University of Colombo* (2), we find that the petitioner in that case, who was an external student, asked for a Writ of Mandamus on the University of Colombo to accept his application and permit him to sit the Final Examination in Laws, on the basis that it was the University that had the power to conduct external examinations for enabling those who are not students of the University, to obtain degrees of the University.

Learned Counsel for the petitioners relied on the decision in *Haniffa v. The Chairman, U.C., Nawalapitiya* (supra). In this case, the petitioner made the Chairman, U.C., Nawalapitiya, the respondent to his petition. He was not named. Tambiah, J. pointed out that the Chairman was not a juristic person; that even if the Chairman was a juristic person, since disobedience to Writs of Mandamus is punishable as contempt of Court, a person who asks for a Mandamus to compel a public officer to perform a duty should name the public officer who holds the office. It is in this context, that Tambiah, J. said, "I fail to see how we can issue a Mandamus on a juristic person."

A Mandamus can be directed to a Corporation.

"The Order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

(Halsbury's "Laws of England", 4th Edn. Vol. 1, p. 111, para. 89).

In *Pathirana v. Goonesekera* (3), Weerasooriya, S.P.J. observed

“Where officials having a public duty to perform, refuse to perform it, mandamus will lie on the application of a person interested to compel them to do so. The rule would also apply where a public body fails to perform a public duty with which it is charged.”

The petition in this case was filed on 30.6.83. The Emergency (Universities) Regulations No. 1 of 1983, cited by learned Counsel for the petitioners, and on which he founded an argument, were made on 21.7.83. In our view these regulations have no application, for, rights of parties are their rights at the date the petitioners' application was made (*Jamal Mohideen & Co. v. Meera Saibo* (4) *Silva v. Fernando* (5) and must be decided according to the law as it existed when the application was made (10 NLR 44 at 51) ; *Ponnamma v. Arumugam* (6).

Apart from this, the petitioners presented their petition on the basis that the respondents are the persons who are entrusted with the duty of carrying out the obligation which was reposed in the University, to hold the 2nd MBBS examination for them only. At the time they were made respondents, the 1st respondent held the office of Vice Chancellor by virtue of an appointment made by the Chancellor, and the 2nd respondent held the office of Dean of the Faculty of Medicine, by virtue of her election by the Faculty (ss. 34 (1) and 49 (1) of the University Act). Under the Emergency Regulation, they cease to hold their respective office. The 1st respondent now holds the office of Vice Chancellor on an appointment made by the Minister (Reg. 3(2) ; the 2nd respondent now holds office as Dean on an appointment made by the Vice Chancellor. It is now sought to compel the 1st respondent to perform a duty on the basis that he has, by reason of Regulation 4 (a), absorbed in himself all the powers and duties of the University. Would not all these result in a change in the character of the petition and in the conversion of the original petition into a petition of another kind ? What if the regulations

are withdrawn tomorrow ? Then the argument of learned Counsel for the petitioners, based on the Emergency Regulations, loses its validity.

In our view the proper body to be directed by a Mandamus, assuring that a writ can go, is the University of Colombo and not the respondents to this application. The University of Colombo therefore is a necessary party and ought to have been made a party to these proceedings. The failure to do so is fatal to the petitioners' application.

In regard to the 45 students of the University of Colombo who have not joined the petitioners, and the 115 students of the North Colombo Medical College, learned Queen's Counsel contended that if this Court were to give the relief prayed for, these students will be prejudicially affected. They should have been made respondents to the application for Mandamus and they must be heard ; the failure to join them as respondents to the application is fatal to the petition.

Learned Counsel for the petitioners, on the other hand, contended that the 115 students of the North Colombo Medical College have no legal right to sit for the 2nd MBBS examination and therefore no right to be heard ; only persons whose existing rights will be taken away by the decision of this Court need be made parties and be heard.

The petitioners have prayed for the issue of a Mandamus directing the respondents to hold the 2nd MBBS examination for the students of the Faculty of Medicine of the University of Colombo, only. If this Court were to issue the Writ, we fail to see how the 45 students of the same Faculty will be affected. The relief asked for will not adversely affect them. In our view, their joinder as respondents was not necessary.

As regards the 115 students of the North Colombo Medical College, learned Counsel for the petitioners placed his arguments in this way :

- (1) S. 29 (e) of the University Act, No. 16 of 1978, empowered the University to grant and confer degrees etc. on persons who have pursued approved courses of study in the University or in any recognised institution and who have passed the examinations of University prescribed by By-law. It is common ground there is no such By-law. Previous to Act No. 16 of 1978, the 2nd MBBS examination was held in accordance with an instrument appearing in the Calendar of the University of Ceylon (Calendar P3 was appended to the counter affidavit of the petitioners).

Paragraph 6 of P3 states —

“The course for the 2nd examination for Medical Degrees shall be of 5 terms’ duration, and a student shall not be competent to enter that course unless and until he has been admitted as a medical student of the University:”

There is no other By-law to have resort to. The 2nd MBBS is an examination confined only to medical students of the University of Colombo. The 115 students of the North Colombo Medical College have no right to sit for the 2nd MBBS examination and therefore no right to be heard.

- (2) The University Grants Commission is empowered to recognise institutions for the purpose of providing courses of study approved for the examinations of a Higher Educational Institution (s.25). It also has the power, inter alia, to determine the Courses which shall be provided at a Higher Educational Institution and the degrees, diplomas etc. to be awarded, the total number of students to be admitted to each Higher Educational Institution and the apportionment of that number to the different courses of study, the external examinations it shall conduct and to select students for admission to each Higher Educational Institution (s. 15 (v) — (viii)). It has the power to make ordinances to enable it to exercise and discharge its powers and functions under the Act (s. 18 (1)). The Commission made the Recognition of

Institutions Ordinance No. 4 of 1980 (R4), and in paragraph 14 provided for examinations and granted every eligible student of a recognised institution the right to sit the appropriate examination of the Higher Educational Institution. The Commission has no power over the question of examinations and cannot by an Ordinance give a right to a person to sit an examination which it has not the power to do under the Act. Paragraph 14 is ultra vires the powers of the Commission. Nor has any appropriate Instrument been made in terms of paragraph 14. The students of the North Colombo Medical College have no right to sit the 2nd MBBS examination and therefore need not be joined as respondents.

- (3) Recognition was granted to the North Colombo Medical College only in June 1982, in terms of s. 25 of the Act. According to the affidavit of Dr. Ratnavale, courses of study commenced for the students of the North Colombo Medical College on or about 29.9.81. "Eligible student" has been defined in para 14 of the Ordinance as one who has followed at a recognised institution the approved courses of study during a period not less than the period specified for that examination by the Higher Educational Institution concerned. The 2nd MBBS examination is held at the end of 5 terms, which is 50 weeks. The 115 students of the North Colombo Medical College have not followed the approved courses of study during the requisite period for the reason that their course commenced prior to the granting of recognition. They are not eligible students and have no right to sit the 2nd MBBS examination and therefore need not be joined as respondents.

The petitioners initially filed only a bare petition and affidavit. They did not place before Court, along with their petition all documents material to the case, as required by Rule 46 of the Supreme Court Rules, 1978.

The petition averred that the admission of the 115 students of the North Colombo Medical College to the 2nd MBBS examination will result in a change in the character of the said examination. In the relief prayed for, the petitioners prayed that the respondents be ordered to hold for the students of the Faculty of Medicine of the University of Colombo, an examination which, as in previous years, is meant only for students of the said Faculty. On what basis this relief was asked for, was not stated in the petition.

The respondents, in their statement of objections, stated that there is no change in the character of the 2nd MBBS examination, and it is in reply to this position that the petitioners in their counter affidavit referred to the instrument appearing in the Calendar of the University of Ceylon (which was appended to the counter affidavit as P3) and said that it is not open to the respondents to admit to the 2nd MBBS examination any others than those who would come within the ambit of the instrument appearing in the Calendar.

We fail to see how the instrument (P3) can help the petitioners. Learned Counsel for the petitioners told us that the instrument appears in the Calendar of the University of Ceylon which was established under the Ceylon University Ordinance of 1942 and (P3) is the only By-law that is alive and kicking today.

The Ceylon University Ordinance was repealed by the Higher Education Act No. 20 of 1966 (s. 96) and by s. 97 provided that the University of Ceylon established under the repealed Ordinance shall be deemed, for all purposes to be a University which has been established under the repealing Act, and to continue in existence as such. It was learned Counsel's submission that s. 97 kept alive ordinances, statutes and by-laws made by the University of Ceylon.

The University of Ceylon Act, No. 1 of 1972, repealed the Act of 1966, and by s. 80 provided that a University established under the repealed Act shall be deemed for all purposes to be a section of the University which has been established under the repealing Act and to continue in existence. By s. 81 (7), all statutes.

ordinances and rules made by the authorities of the old Universities and the National Council of Higher Education were deemed to be statutes, ordinances and rules made by the University.

The Universities Act, No. 16 of 1978, repealed the Act of 1972 (s. 138). By s. 139 (1), the Colombo Campus was deemed to be a University under the repealing Act and having the name University of Colombo, Sri Lanka. There is nothing in the language of s. 139 (1) to say that past by-laws, statutes etc. have been kept alive ; nor does the Act of 1978 contain provisions similar to s. 81 (7) of the Act of 1972. On the contrary, the Act of 1978, by s.140, provided that the Institutes established under the Act of 1972 will be deemed to be established under the Act of 1978 and that only the statutes made under the Act of 1972 in relation to each Institute shall be deemed to be ordinances made by the University Grants Commission. So it seems to us that s. 139 (1) which was relied upon by learned Counsel for the petitioners for his submission that the 2nd MBBS examinations, even after the Act No. 16 of 1978, have been held in accordance with the instrument "P3", does not help the petitioners.

As regards the contention of learned Counsel for the petitioners that paragraph 14 of Ordinance No. 4 of 1980 (R1) is ultra vires the powers of the Universities Grants Commission, learned Queen's Counsel asked this Court to disregard this contention as it was not a position taken up by the petitioners in their petition nor in their counter affidavit and was a new position taken by learned Counsel, in this Court and while on his feet. He further submitted that the document (R4) was not appended to the petition and therefore the petitioners' Counsel cannot rely on this document. It was also the respondents' Counsel's submission that in the petition, the petitioners did not aver that the 115 students were not "eligible students of a recognised institution" as defined in paragraph 14 of the Ordinance (R4).

In *Jayalingam v. The University of Colombo and others* (2), the petitioner sought to quash by way of Certiorari the decision of the Faculty of Law to reject his application to sit, as an external

candidate, the Final Examination in Laws which was due to be held in the year 1981. The petitioner also asked for a Mandamus directing the University of Colombo to accept his application to sit the said examination and to permit him to sit the said examination to be held in 1981. The Senior Assistant Registrar informed the petitioner that he was not eligible to sit the said examination in 1981, in view of the provisions of paragraph 32. of the rules made by the University. The petitioners alleged that paragraph 32 is ultra vires the powers of the University and that in any event, the petitioner has complied with the requirements of paragraphs 33 and 34 of the Rules and was therefore entitled to sit the examination in 1981.

The petition in the above case was founded on the basis that all Rules except paragraph 32 are valid and operative ; the petitioner's entitlement to sit the examination was his due compliance with paragraphs 33 and 34 of the Rules ; the duty the petitioner sought to compel by a Mandamus was also cast upon by the Rules.

At the hearing, petitioner's Counsel sought to argue matters which raised questions touching the validity of the entirety of the Rules and the right of the respondents to hold the examination on the basis of the Rules. Objection was raised by the respondents' Counsel that these matters were not set out in the petition and that the petition was founded on the basis of the validity of the Rules, except paragraph 32. Ranasinghe, J. (with Atukorale, J. agreeing) stated —

"The petitioner supported his application before this Court and obtained notice from this Court on the basis of averments set out in the said petition which was supported by an affidavit on the same basis from the petitioner. Copies of the said petition and affidavit were served on the respondents and the respondents have filed their objections to the position set out in the petition, and it was to meet that position that the respondents have appeared before this Court. It was only in the course of his submissions that learned Counsel for the petitioner set forth the aforementioned arguments.....As writs

are all discretionary remedies, if a petitioner has not averred any ground, which, in the opinion of the Court, he should have so averred before he obtained an order for the issue of notice, the Court has a discretion as to whether or not such a petitioner should be permitted to raise any such matter at the hearing of the petition. . . . I am of opinion that, having regard to the relevant circumstances, the petitioner should not now be permitted to put forward the aforesaid grounds, which were not set out in the petition but which have been raised for the first time only by learned Counsel appearing for the petitioner, in the course of his argument."

In *Mohamed Haniffa Rasheed Ali v. Khan Mohamed Ali and another* (7), the respondents took the objection in limine that the petitioner had not complied with Rule 46 of the Supreme Court Rules, 1978, in that, he had failed to annex to the petition all "documents material to the case". The Supreme Court affirmed the view taken by this Court that a party should comply with the requirements of Rule 46 unless where circumstances beyond the party's control prevent compliance in this manner ; but the party should yet comply with it as soon as possible. As an excuse for the appellant not complying with Rule 46 even at a late stage, it was stated that the respondent had filed a statement annexing a number of documents so as to present an adequate picture of the dispute between the parties and that the appellant was absolved from complying with the Rule, even at a later stage. By a majority decision, this contention was rejected by the Supreme Court. Wanasundera, J. said—

"The material filed by the respondent is in support of his own case and is in no way intended to supplement the appellant's case or to make good any omissions on the part of the appellant. I am having in mind not mere formal documents, but material that have a direct bearing on the issues in a case."

The petitioners in their petition conceded that the North Colombo Medical College is a recognised Institution under s. 25 of the University Act. Their main complaint in the petition appears to be that the 115 students of the North Colombo Medical College had a longer period of preparation before sitting the 2nd MBBS examination and will therefore have an undue advantage over them. It was not their position that they were not "eligible students". They therefore asked that the 2nd MBBS examination be held separately for them and that no outsiders be admitted.

The document (R4) was annexed to the statement of objections filed by the respondents to show that the North Colombo Medical College sought recognition as a recognised institution in terms of the Ordinance. It was in their counter affidavit that the petitioners, for the first time, took up the position that the 115 students are not "eligible students" as they have not followed the courses of study during the requisite period. So it seems to us that the petitioners should not be permitted to found an argument on a document (R4) which is not theirs, and to take up a position which runs contrary to the position initially put forward by them in their petition.

As regards paragraph 14 of the Ordinance (R4) being outside the powers of the Commission, this is a new position, not in the petition or in the counter affidavit, of which the respondents had no notice, and was for the first time taken by learned Counsel in the course of his oral submissions to this Court. The petitioners obtained notice on the averments pleaded in their petition. They should not be permitted to supplement their case by relying on matters not contained in their pleadings.

What is the law regarding joinder of necessary parties and what is the consequence, if parties who ought to be joined, are not made parties to an application for Mandamus.

In the matter of the application of *John Neill Keith* for a Writ of Mandamus on the *Government Agent, Western Province* (8) the applicant applied for the issue of a Mandamus on the

Government Agent, Western Province, requiring him to recognise the due election of Mr. Leechman as Councillor for the Slave Island Ward of the Colombo Municipality, and to permit him to exercise the said office. Neither Mr. Leechman nor the rival candidate were made parties to the writ proceedings. Cayley, C.J. said —

“Now, before considering the nature and object of the mandamus applied for, it appears to us that there is at the outset a fatal objection to granting it. In effect we are asked to pronounce an opinion upon a disputed election, and to compel the Government Agent to espouse the side of a particular candidate, without either of the candidates themselves being parties to the proceedings or having had any notice of them.

This we cannot do. Even if we granted the mandamus, neither of the candidates would be bound in any way by these proceedings or prevented from hereafter taking such steps, as may be lawful, either for the ratification of his election or the annulment of the election of his rival.”

In *Carron v. Government Agent, Western Province* (9) Mr. Carron, the unsuccessful candidate, applied for a Writ of Mandamus to set aside the election of the successful candidate alleging irregularities committed by the Returning Officer with regard to the nomination of candidates and to the permission granted to one candidate to withdraw from the election. It was admitted that Mr. Jayasinghe had accepted and acted in the office of a member of the Urban Council. He was not made a party to the proceedings. Wijeyewardene, J. said (p.239) —

“Even if a Writ of Mandamus could issue in the present case there is a serious objection to the present application. The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner’s Counsel did not at any stage move to have him added as a party. The application must fail on that ground also.”

In *Goonetilleke v. Government Agent, Galle* (10), a writ of Certiorari or Mandamus was applied for to set aside an election in connection with a Village Committee, and for holding of a fresh election in respect of the Ward. The successful candidate was not made a party. Keuneman, S.P.J. said (p. 550)—

“The objection has been taken in the first instance that no order such as is claimed by the petitioner can be made when the successful candidate has not been made a party. This was held in the case of *Carron v. Government Agent, W.P.* (1945, 46 NLR 237), I think the objection on the part of the Government Agent is a good one.”

In *James Perera v. Godwin Perera* (11), the petitioner applied for a Writ of Mandamus on the Chairman of a Village Committee for the issue of a bakery licence in his favour. The petitioner stated in his petition that the Chairman issued the licence to one Jayasinghe and has failed to issue it to him. The respondent's Counsel submitted that the issue of the writ would affect prejudicially the rights of Jayasinghe who is not before the Court. Nagalingam, A.J. said (pgs. 191, 192)—

“I find that in two earlier cases a similar objection was sustained. In the case of *Carron v. The Government Agent, Western Province*, (1945, 46 NLR 237), Wijeyewardene, J. expressed himself as follows :— “The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner's counsel did not at any stage move to have him added as a party. The application must fail on that ground also”. In the case of *Goonetilleke v. The Government Agent, Galle* (1946, 47 NLR 549), Keuneman J. followed this authority in like circumstances.

Counsel for the petitioner contends that that principle should be limited to election cases and should not be extended to cases where an application is made to compel the issue of a trade licence by a local authority. If

the principle underlying election cases is that where an order would affect adversely a party who is not before the Court that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application, it must apply equally even in regard to an application for a licence as applied for in these present proceedings.

It would manifestly be unsatisfactory to have two persons licensed to run the business of a baker at one and the same place of business where the two parties are at arm's length. The issue of a licence to the petitioner must necessarily involve the cancellation of the licence issued in favour of Jayasinghe. I am therefore of the view that the objection is sound and that the failure to make Jayasinghe a party respondent must be held to be fatal irregularity."

It appears to us that the principle to be discerned from these cases is what was stated by Nagalingam, A.J. where an order would affect adversely a party who is not before Court, that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application.

The whole petition is directed against the 115 students of the North Colombo Medical College. Both the final relief and the interim order asked for by petitioners are intended to achieve one object, namely, the exclusion of the 115 students from the 2nd MBBS examination. According to the affidavit of Dr. Ratnavale, who is the Director of the North Colombo Medical College, the 115 students have followed the approved courses of study, have applied to the University of Colombo to sit the 2nd MBBS examination, have paid the requisite examination fees, and have received their admission cards from the University of Colombo for the said examination. There is no doubt then, that if this Court were to issue a Mandamus as prayed for by the petitioners, the 115 students would be adversely affected. If as contended by

learned Counsel for the petitioners, the 115 students have no legal right to sit the 2nd MBBS examination, this is all the more reason we should have them before us and hear them, before we make an order against them. To use the words of Cayley, C.J. in effect we are asked by the petitioners to pronounce an opinion upon a disputed examination, without a large section of the students, who propose to sit the examination, being parties to the proceedings or having had any notice on them. This we cannot do.

We hold that the 115 students of the North Colombo Medical College are necessary parties and the failure to make them respondents is fatal to the petitioners' application.

It is unnecessary for us to consider and decide whether the University Grants Commission, the College of the General Practitioners of Sri Lanka, and the Student Assembly of the University of Colombo are necessary parties and should have been made respondents in the petitioners' application.

For reasons given by us, the application is dismissed, but we make no order in regard to costs.

Application dismissed.