PIYASENA DE SILVA AND OTHERS

VS.

VEN. WIMALAWANSA THERO AND ANOTHER

SUPREME COURT
BANDARANAYAKE, J.
FERNANDO, J AND
AMARATUNGA, J.
SC APPEAL No. 58/2005
SC SPLA.188/2005
CA No. 78/2004
9TH AND 19TH SEPTEMBER, 2005

Writ of mandamus – Application to intervene – Refusal in chambers without hearing appellants – Contravention of Article 106(1) of the Constitution directing public sittings – Legitimate expectation of hearing – Fair procedure.

Four appellants applied to the Court of Appeal to intervene and object to an application by the first respondent against the second respondent for a writ of mandamus to compel the issue of a driving licence to the first respondent monk.

When the application was submitted to a judge in chambers, the judge without hearing the applicant – appellants or counsel and without giving reasons summarily refused the application.

HELD:

(1) The failure of a single judge to hear parties infringed Article 106 (1) of the Constitution which requires "public sittings" save in exceptional cases. Further the President, Court of Appeal had fixed the matter to be heard by two judges as required by Article 146(2)(iii) of the Constitution. The order made by a single judge was invalid in the circumstances.

(2) The respondent's counsel conceded that it was appropriate to have heard parties before the impugned order was made, subject to the

respondent's right to object to the appellants' standing to intervene. For this reason and for the reason that the failure to hear the parties was contrary to natural justice constituted a failure of a fair hearing for which the appellant had a legitimate expectation, the order made in chambers was invalid.

(3) Although natural justice does not require the giving of reasons for an administrative decision, there is a strong case for giving reasons particularly to assist the aggrieved party to pursue the remedy of an appeal.

(4) It is unnecessary to decide on the question of standing of the appellants as that question would be a matter for the Court of Appeal to decide.

Cases referred to :

1. *Madan Mohan vs Carson Cumberbatch and Co.* (1988)2 Sri LR 75
2. *R vs University of Cambridge* (1723)1 STR 557
3. *Schmidt vs Secretary of State for Home Affairs* (1969)2 Ch 149
4. *Pure Spring Co. Ltd. vs Minister of National Resources* (1947)1 DLR 501

APPEAL against the order of the Court of Appeal.

U. Egalahewa for appellants.

Saliya Peiris with *Asthika Devendra* for petitioner – respondents.

Cur.adv. vult

14th October 2005

SHIRANI BANDARANAYAKE, J.

This is an appeal from the order of the Court of Appeal dated 04.08.2005. By that order the Court of Appeal refused an application made by the 1st to 4th intervenient-petitioners-petitioners-appellants (hereinafter referred to as the appellants) for listing for intervention in the Court of Appeal (Writ)

Application No. 1978/2004 without being heard and allowing the appellants to support their application. The appellants came before this Court where Special Leave to Appeal was granted on the following questions :

"1. Did the Court of Appeal err in law when the said Court decided to dismiss the application without hearing the petitioners ?

2. Did the Court of Appeal err in law for not listing an application for intervention for support?"

The facts of this appeal are as follows :

The appellants are Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya where the petitioner – respondent-respondent (hereinafter referred to as the 1st respondent) is the chief incumbent Thero. The appellants submitted that they had become aware through various means that the 1st respondent had filed an application against the respondent – respondent-respondent (hereinafter referred to as the 2nd respondent), being the Commissioner of Motor Traffic for not issuing a driving license to him in the Court of Appeal (C. A. (Writ) No. 1978/2004) and that a mandamus had been sought for the issuance of a valid driving license (A1). The aforementioned application was supported by the learned Counsel for the 1st respondent on 22.10.2004 and notice was issued on the 2nd respondent. The 2nd respondent had filed papers objecting to the grant of the writ of mandamus stating *inter-alia* that the Members of the Dayaka Sabha as well as the Commissioner General of Buddhist Affairs had objected to the granting of the said driving license (A2). The case was thereafter fixed for hearing for 14.09.2005.

Learned Counsel for the appellants submitted that the appellants, being devoted Buddhists as well as Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya, who have been actively involved in affairs of the temple where the 1st respondent is the chief incumbent thero, have a sufficient interest in the matter where the 1st respondent has sought a mandamus directing the 2nd respondent to issue a valid driving license. It was also contended that the grant of a valid license to a Buddhist monk is against the Dhamma and Vinaya as claimed, not only by the Members of the Dayaka Sabha and the villagers, but also by the public in general. Accordingly the appellants had moved to intervene in the case pending before the Court of Appeal and to allow them to file objections (A3). The

appellants had claimed that, being Members of the Dayaka Sabha that maintains the said temple of the village they have sufficient interest to intervene. The relevant documents had been filed in the Court of Appeal on 26.07.2005.

On 04.08.2005, without being heard and without allowing the appellants to support their application, the Court of Appeal had refused the appellants' application for intervention (A4). The said refusal had been made not in open Court, but in chambers by a single Judge.

Learned Counsel for the appellants contended that the said order of the Court of Appeal is contrary to law and is arbitrary and is in violation of the rules of natural justice as the appellants were not given a hearing before the decision to reject the application for intervention in the Court of Appeal (Writ) No. 1978/2004.

Learned Counsel for the 1st respondent conceded that it would have been more appropriate in the interests of natural justice for the Court of Appeal to have heard the appellants' Counsel in support of their application. He further submitted that the 1st respondent has no objection to the appellants being heard in open Court on their application. While conceding the appellants' right to support their application in open Court for intervention, learned Counsel for the 1st respondent submitted that the appellants do not possess any legitimate interest or legal ground whatsoever to intervene in the writ application in the Court of Appeal. He further submitted that whilst reiterating the fact that he is not objecting to the appellants being heard in support of their application to intervene, the 1st respondent has a right to object to that application, which right he wished to reserve for the proceedings in the Court of Appeal.

Having stated the factual position of this appeal, let me now turn to consider the submissions on the questions of law.

The appellants had filed their application for intervention on 26.07.2005 in the Registry of the Court of Appeal. The Journal Entry dated 04.08.2005 indicates that the Registrar of the Court of Appeal had submitted it to a

Judge in chambers for directions. The said Journal Entry dated 04.08.2005 was in the following terms :

"04.08.2005

Hon . .....J.,

AAL for the Intervenient petitioner files motion petition, affidavit and documents and moves that Court be pleased to call this case on 23rd, 26th, 29th August, 2005. Submitted for Your Lordsihp's direction please.

Sgd.

R/CA

04.08.2005"

On the same day this application was refused without hearing the appellants and without giving any reasons. The said action by the Court of Appeal, according to the learned counsel for the appellants, raises several fundamental issues, which could be broadly categorized into two segments. They are as follows:

(a) the impugned order given by the Court of Appeal on 04.08.2005 is in contravention of the provisions of the Constitution of the Republic;

(b) The manner in which the said impugned order was given is in breach of the rules of natural justice.

It is pertinent to note that the refusal to call the case in open Court for the appellants to support their motion, was decided in the Chambers by a single judge without giving the parties an opportunity for a hearing. Article 106 of the Constitution refers to the sittings of all Courts and the manner in which it should be carried out. The said Article is in the following terms :

"106(1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

Article 106(2) refers to the exception to the rule referred to in Article 106(1), which included :

(a) proceedings relating to family relations,

(b) proceedings relating to sexual matters,

(c) in the interests of national security or public safety, or

(d) in the interests of order and security within the precincts of such court, tribunal or other institution.

Article 106(1) of the Constitution deals with 'Public sittings' and the meaning of the limb 'shall ..... be held in public' means that the sittings of the Court should be open Court sittings. In fact, in *Madan Mohan* vs *Carsons Cumberbatch and Co.*[1] Seneviratne, J. in his dissenting judgment, considering the effect and applicability of article 106(2) of the Constitution had stated that.

> "Article 106 of the Constitution deals with 'public sittings' . All authorities, both local and foreign show that the meaning of the limb 'shall ..... be held in public' means that the sittings of the court should be open court sittings, so that any member of the public can attend a court sitting. The next limb 'and all persons shall be entitled freely to attend such sittings', further emphasizes the requirements that the sitting of a court 'shall be held in public'. 'Shall be held in Public' further means that any person constituting the public whether he has a particular or special interest in the case or not, or not directly interested in the case, can attend court when the court is sitting. 'shall be entitled to freely attend such sittings' further means that there can be no restriction or impediments to any person attending a court sitting except factors such as the accommodation available in the court, or when due to factors set out in Article 106(2) of the Constitution the court excludes people not directly interested in the proceedings."

The exceptions to this position specified in Article 106 of the Constitution are the instances referred to in Article 106 of the Constitution.

In the present instance, on a consideration of the facts of the case, it is apparent that the appellants' application does not fall within the scope described in Article 106(2) of the Constitution. If a case does not come within the aforesaid exceptions referred to in Article 106(2), the sittings of such matter will have to be held in public in terms of Article 106 (1) of the Constitution. It is not in dispute that in the instant case, the motion filed by the appellants was to intervene in the writ application instituted by the 1st respondent, and that the order refusing the said motion was decided not in open Court, but in chambers. In the circumstances, the impugned order of the judge of the Court of Appeal is contrary to the provision contained in Article 106(1) of the Constitution and accordingly the said order becomes illegal.

Learned Counsel for the appellants submitted that the application of the 1st respondent in the main matter in case No. CA 1978/2004, was made in terms of Article 140 of the Constitution. His contention was that, in terms of Article 146(2)(iii) of the Constitution, the jurisdiction of the Court of Appeal in respect of its powers as contained in Articles 140, 141, 142 and 143 should be exercised by not less than 2 judges of the Court, unless the President of the Court of Appeal by general or special order otherwise directs. On a consideration of Article 146(2)(iii) it is apparent that unless there was a general or a special order made by the President of the Court of Appeal, directing otherwise, the case in question should have been heard by 2 judges of the Court of Appeal. As borne out by the Journal Entry of 04.08.2005 (A4), the impugned order refusing the application for intervention was made by a single judge in chambers. No material was produced before this Court to indicate that the President of the Court of Appeal had given a general or a special order that the case in question should be heard by a single judge and according to the submissions of the learned Counsel for the appellants, the President of the Court of Appeal has appointed 2 judges to hear matters in the nature of writs. In such circumstances, the decision given by a single judge is contrary to the provisions of the Constitution of the Republic and therefore becomes illegal.

The next matter that has to be examined, relates to the breach of the rules of natural justice in the process in which the impugned order in question was given. It is not in dispute that the decision to refuse the application of the appellants to intervene in the main matter was taken in chambers and such decision was taken without hearing the parties. A

question thus arises at to whether such a procedure would be in breach of the rules of natural justice which requires consideration and let me now examine whether there had been any such breach of the rules of natural justice.

A fair administrative procedure, which would be comparable to 'due process of law' embedded in the Constitution of the United States, is based on the principles of granting a fair hearing to both sides. The Courts therefore are bound to exercise the rules of natural justice, as the decisions would not be valid if ordered without first hearing the party who was going to suffer owing to the decision of the Court. Although the applicability and thereby the interest in the development of the well known rule *"audi alteram partem"* to a wider category succeeded recently, giving a hearing to an aggrieved party had begun arguably at the beginning of the human kind. As pointed out by Fortescue, J. In *R v University of Cambridge*[2], the first hearing in human history was given in the Garden of Eden. In his words :

> "I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

Citing the aforementioned, referring to the principle in question as a 'picturesque judicial dictum', Professor Wade, describes it is a 'nice example of the old conception of natural justice as divine and eternal law'.

Since the decision in *R v University of Cambridge (Supra)* several developments have taken place in the sphere of the rules of natural justice and in the present day context, the said rules apply not only to those who are carrying out judicial functions, but also to officers in certain instances, exercising administrative power. Lord Denning M. R., in *Schmidt v Secretary of State for Home Affairs*[3] stated that,

> "..... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say."

Thus it is abundantly clear that the legal concepts pertaining to rules of natural justice with specific reference to the need to grant a hearing to parties have developed to such great lengths extending the applicability of such rules even to inquires carried out by administrative bodies.

In such circumstances, when there is constitutional provision to the effect that 'the sittings of every Court, tribunal and other institutions shall be held in public, that would necessarily encapsulate the need for the parties before Court to present their case. As pointed out by S. A. de Smith, (Judicial Review of Administrative Action, 4th Edition 1980, pg. 200) what the *audi alteram partem* rule guarantees is an adequate opportunity to appear and to be heard.

Justice Amerasinghe, in his Treatise on Judicial Conduct, Ethics and Responsibilities (Vishva Lekha, 2002, pg. 782) refers to the right to be heard and is of the view that a judge cannot decide a matter without hearing the parties. In Justice Amerasinghe's words:

> "In general, however a judge cannot decide a matter without hearing the parties; nor may a judge decide a matter before hearing both parties to a dispute, for, it is 'an indispensable' requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."

If the position is so clear and unambiguous could it be said that a hearing should be restricted to the two sides which are opposing to each other, and in a situation where a third party is attempting to intervene that such a party should not be given an opportunity to present his case? I am of the firm view that the rules of natural justice and especially the rule relating to a fair hearing, necessitates that all parties should be given an opportunity to present their case and thereby a fair hearing. According to Justice Amerasinghe, a Judge is expected, not only to arrive at an accurate decision, but also to ensure that it has been fairly reached (Supra). For that purpose it would be essential to hear all parties, which would clearly include an intervenient.

Although the law is quite clear on the general rule pertaining to the duty to state reasons for judicial or administrative decisions, I am of the view that mention should be made of the usefulness in giving reasons as it could create a 'sound system of judicial review'.

The order dated 04.08.2005 made by the judge of the Court of Appeal refusing the intervention does not give any reasons for the refusal and the order merely states 'refused'. When such an application is refused, the applicants may endeavour to file an appeal in the Supreme Court and for such purpose it would be necessary for them to know the reasons for the refusal of their motion. Without knowing the reasons for the decision of the Court, it would be difficult for the petitioners to know whether the decision is even reviewable. Thus without knowing the reasons a litigant may be deprived of obtaining judicial redress and thereby protection of the law. As S. A. de Smith (Supra, at pg. 149) has correctly pointed out, there is an implied duty to state the reasons or grounds for a decision. This theory is generally applicable in situations where there is provision to appeal to a higher Court against the impugned decision. It is an accepted principle that in the field of natural justice, a right to a hearing would include the right to have a reasoned decision (Administrative Justice, Diane Longley and Rhoda James, Cavendish Publishing Ltd., 1999. pp. 208-209).

Notwithstanding the aforementioned, it is to be borne in mind that the principles of natural justice do not at present recognize a general duty to give reasons for judicial or administrative decisions (*Pure Spring Co. Ltd. v. Minister of National Resources*[4]). Considering this position, Prof. Wade is of the view that there is a strong case to be made for the giving of reasons as an essential element of administrative justice (Prof. William Wade, Administrative Law, 9th Edition, Pg. 522). Prof. Wade (Supra) further states that,

> "The need for it has been sharply exposed by the expanding law of judicial review, not that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice.** It is also a healthy discipline for all who exercise power over others. No single factor has inhibited the development of English Administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions (emphasis added)".

It is common ground that the order of the Court of Appeal dated 04.08.2005 was given without indicating any reasons. It is also not disputed that there was provision for the appellants to appeal to the Supreme Court against the impugned decision. Considering the duty to give reasons for decisions, S. A. de Smith (Supra, at Pg. 156) is of the view that, 'whilst concern for the quality of administrative justice does not require that all tribunals in all circumstances comply with some universally applicable standard, it is, nevertheless, essential that the Courts do not allow the duty to give reasons to atrophy'.

Be that as it may, what the rules of natural justice require relates to a fair hearing which in the instant case had not been extended to the appellants. In such circumstances it is abundantly clear that there had been a breach of the rules of natural justice.

There is one other matter I wish to deal with, based on a submission made by the learned Counsel for the appellants. Learned Counsel for the appellants submitted that the appellants had sufficient standing in law to be entitled for intervention and it was illegal and wrong on the part of the Hon. Judge of the Court of Appeal to refuse such intervention.

The appellants filed the Special Leave to Appeal Application against the order of the Court of Appeal dated 04.08.2005(A4) and prayed that the said order be set aside. This Court granted Special Leave to Appeal on that basis and had heard both parties on that limited issue. In fact learned Counsel for the 1st respondent had no objection to granting Special Leave to Appeal in order to consider the grant of relief to the appellants by setting aside the order of the Court of Appeal of 04.08.2005 for the appellants to support their application to intervene in the Court of Appeal in the interest of natural justice.

In the circumstances, the submissions pertaining to the question as to whether there was sufficient standing in law for the appellants to intervene in the application is not taken into consideration in these proceedings since this question has to be examined by the Court of Appeal.

For the reasons aforementioned, I answer questions No. 1 and 2, referred to earlier, in the affirmative. This appeal is allowed and the order of the Court of Appeal dated 04.08.2005(A4) is therefore set aside.

In all the circumstances of this case there will be no costs.

RAJA FERNANDO, J. — I agree.

AMARATUNGA, J. — I agree.

Appeal allowed.