

JAYADEVA
VS
PRINCIPAL, VISAKA VIDYALAYA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH.J.
CA 2421/2004
JUNE 5, 2006.

Writ of Certiorari - Admission of a child to a National School- "Non Chief occupant category" - Non tendering of the final list/waiting list, - Non tendering of the relevant Circular? - Necessary parties not named?- Maintainability of the application - Court of Appeal (Appellate Procedure) Rules 1990, 3(1).

The petitioner (Non Chief Occupant Category) - complained that his child was not admitted to Visaka Vidyalaya and sought to quash the decisions of the Board of Visaka Vidyalaya and the School Admission Committee, and further sought a Mandamus directing them to include the name of the Petitioner's child in the waiting list.

The respondents contended that (1) as the waiting list/final list has not been annexed to the petition (2) that as all necessary parties are not before Court and (3) that as the Circular relied upon by the petitioner has not been annexed the application should be dismissed *in limine*.

HELD :

- (1) The waiting list/temporary list is published on the Notice Board. These notices are not sent to the persons who make application for admission and therefore they are not available to the petitioner, and it is not a document for which the petitioner is entitled to obtain a copy.

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- (2) The petitioner is seeking to include his child in the list of admitted children or in the waiting list. This would not necessarily deprive admission of another child and if at all it would deprive the children who are less qualified than the petitioner's child. The children who are less qualified than the petitioner's child are made parties and therefore their interests will be looked after by the respondents.;
- (3) The consequence of non compliance by reason of impossibility or for any other reason, is a matter falling within the discretion of Court. The respondents who are familiar with school admissions would not have been prejudiced by the petitioner's failure to produce the Circular relating to school admissions.

APPLICATION for a Writ of Certiorari/Mandamus on preliminary objections being raised.

Cases referred to:-

1. *John Neil Keith vs. G. A. Western Province* 46NLR 237
2. *Gunetilleke vs. G. A. Galle* 47 NLR 549
3. *James Perera vs. Godwin Perera* - 48 NLR 190
4. *Abeywardane and 162 others vs. Stanley, Wijesundara, Vice Chancellor, University of Colombo and Another* 1983 2 Sri LR 267 at 291
5. *Kiriwanthe and another vs. Navaratne and Another* 1990 2 Sri LR 393

Nalinda Indatissa for Petitioner.

A. Navaratne DSG for respondents.

Cur. adv. vult.

July 5, 2006

SRISKANDARAJAH J.

The Petitioner submitted that he is a resident of No.41, Haig Road, Bambalapitiya and had applied for admission to Visakha Vidyalaya in terms of Circular bearing No.18/2004 dated 31.05.2005 under "the Non chief Occupant Category". However his child was not admitted to Visakha Vidyalaya in the year 2005 for year 1. The Petitioner in this application is seeking a writ of Certiorari to quash the decision of the objection board of Visakha Vidyalaya dated 16.11.2004 and the decision of the School Admission Committee of Visakha Vidyalaya dated 21st September 2004 i. e. not to include the name of the petitioner's child to the final list and/or to waiting list of the students to be admitted to the year 1 class for the year 2005. He has also sought a mandamus on the 1st, 2nd, 3rd and 4th Respondents directing them to include the name of the Petitioner's child in the waiting list and/or the final list prepared for the year 1 admission to Visakha Vidyalaya for the year 2005 and to admit the child for the said class.

The Respondents raised the following Preliminary objections. :

- 1 The Order which the Petitioner is seeking to quash in terms of prayer "C" and "F" is not annexed to the petition and it is not before this court.
- 2 The necessary parties are not before Court.
- 3 The petitioner is seeking a mandamus relying on a circular but has not annexed the circular bearing No.18/2004 as part and parcel of the Petition.
- 4 Granting the relief of writ of mandamus will be futile.

The first Preliminary objection is that the Petitioner has failed to annex to the Petition the decision of the objection board of Visakha

Vidyalaya dated 16.11.2004 and the decision of the school Admission Committee of Visakha Vidyalaya dated 21st September 2004 i.e. not to include the name of the Petitioner's child to the final list and/or to waiting list of the students to be admitted to the year 1 class for the year 2005. The position of the Respondents is that even though the Petitioner has sought an order of this court to call for the said temporary list and the final list the Petitioner has failed to obtain those reliefs before the date of argument, without these documents this court cannot grant relief to the Petitioner.

The Petitioner submitted that the decision sought to be quashed is the decision not to include the petitioner's child to the temporary list and or to the waiting list to the year 1 class for the year 2005. These lists were published in the notice board. The temporary list and the waiting list were published on 21.09.2004 and the final list was published on 16.11.2004. These notices are not sent to the persons who make application for admission and therefore they are not available to the petitioner. As it is not a document for which the Petitioner is entitled to obtain a copy this court overrules the objection that the failure to annex the said documents would vitiate the application.

The second objection of the respondents is that the necessary parties are not before court :

The Respondents contend that the Petitioner's application to this court is on the basis that the petitioner's child is eligible to be admitted to Visaka Vidyalaya in terms of Circular No.18/2004 and according to the said circular the Petitioner's child is more eligible than the children of the 6th, 7th, 8th, 9th and 10th Respondents who were admitted to Visaka Vidyalaya. If the relief is granted to the Petitioner the Petitioner's child will be included in the temporary list, final list or waiting list according to her eligibility, in that event one of the children in the temporary list, final list and the waiting list will be deprived of admission and therefore the rights of the children who are named in the waiting list, temporary list and final list will be affected.

The Petitioner admitted that the Petitioner has only chosen to name the 6th, 7th, 8th, 9th, and 10th Respondents as their children are less qualified than the Petitioner's child and not to name all the persons who have gained entry under the non chief occupant category. If any one of the children of the Respondent from 6th to 10th are found to be less qualified than the Petitioner's child then that child of the Respondent become ineligible and the names of the child of the said Respondents (6th to 10th) could be deleted and the Petitioners name could be substituted in that place.

In *John Neil Keith V. G. A. Western Province*⁽¹⁾, *Gunathilaka v G. A. Galle*⁽²⁾, *Jams Perera v Godwin Perera*⁽³⁾ the Court held : " that where an order would affect adversely, a party who is not before Court that party must be deemed to be necessary party and consequently the failure to make them as parties must be regarded as fatal to the Application. In the case of *Abayadeera and 162 others V. Stanley Wijesundara, Vice Chancellor University of Colombo and Another*⁽⁴⁾ at 291 Atukorale, J. (P/C. A) Tambiah, J. and Moonemalle, J. held :

"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".

In the above mentioned case the Petitioners are seeking to exclude the students from sitting the examination and the exclusion will affect the rights of those students but in the present case the Petitioner is seeking to include his child in the list of admitted children or in the waiting list. This would not necessarily deprive admission of another child and if at all it would deprive the children who are less qualified than the Petitioner's child. The children who are less qualified than the Petitioner's child are made parties by making their parents as Respondents (6th, 7th, 8th, 9th and 10th Respondents) and therefore their interests will be looked after by the said Respondents. For the above reasons I overrule the second preliminary objection of the Respondents that the necessary parties are not made parties to this application.

The third Preliminary objection is that the petitioner is relying on a circular bearing No. 18/2004 but he has failed to annex the same. The Petitioner submitted that the writs of certiorari and mandamus is sought to challenge the exercise of power derived from a circular. As the Circular being a public document could be submitted to court at the time of argument and it need not be filed with the Petition. Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990 requires the filing of documents material to the application. The circulars can not be considered as Acts of Parliament, Regulations Rules for the court to take Judicial notice therefore the Petitioner should have annexed the said circular to the Petition. In *Kiriwanthe and Another v Navaratne and Another*⁽⁵⁾ Fernando J. observed : "The weight of authority thus favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non compliance (by reason of impossibility or for any other reason") is a matter falling

within the discretion of the Court, to be exercised after considering the nature of the default as well as the excuse and explanation therefore, in the context of the object of the particular rule”.

In this instant case the Respondents who are familiar with School Admissions would not have been prejudiced by the Petitioner's failure to produce the circular relating to School Admission. Therefore the failure to annex the said circular would not warrant a dismissal in the given circumstances. Therefore I overrule the third Preliminary objection of the respondents.

The fourth Preliminary objection of the Respondents is that the issue of a mandamus will be futile. This objection has to be dealt with the facts of the case after considering the merits of the application; therefore the Court will decide on this objection at the conclusion of the argument of this case on its merits.

*Preliminary objection overruled.
Matter set down for argument.*
