

JAYAWEERA
v.
WIJERATNE

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND JAMEEL, J.

C. A. APPLICATION No. 618/81.

JULY 24 AND AUGUST 07, 1985.

Certiorari and Mandamus – Termination of agency to distribute industrial gases – Natural justice – Do certiorari and mandamus lie for breach of contract of a commercial nature ?

Where the relationship between the parties is a purely contractual one of a commercial nature neither certiorari nor mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of natural justice even if one of the parties is a public authority.

Cases referred to :

- (1) *Mallock v. Aberdeen Corporation* [1971] 1 WLR 1578, 1594.
- (2) *University Council of Vidyodaya University v. Linus Silva* (1964) 66 NLR 505 P.C.
- (3) *Weligama Multi-purpose Co-operative Society Ltd. v. Chandradasa Daluwatte* [1984] 1 Sri L.R. 195.

APPLICATION for writs of certiorari and mandamus.

Dr. H. W. Jayewardene, Q.C. with *N. R. M. Daluwatte, P.C.* and *Miss J. Keenavinna* for the petitioner.

K. N. Choksy, P.C. with *Ronald Perera* and *Miss J. Rodrigo* for respondent.

October 07, 1985.

G. P. S. DE SILVA, J.

This is an application for writs of certiorari and mandamus to quash the decision of the respondent (Competent Authority, Government of Sri Lanka, Successor to the Business Undertaking of Ceylon Oxygen Co. Ltd.) terminating the agency of the petitioner and compelling the respondent to supply industrial gases to the petitioner in accordance with the agreement entered into. The case for the petitioner, as set out in his application, was that the Ceylon Oxygen Co. Ltd. appointed him as agent of the company for the distribution of industrial gases in the Negombo – Ja-Ela area on the terms and conditions set out in the letter dated 26.6.74 (P1) ; that after the Company was vested in the Government of Sri Lanka in terms of the Business Undertakings (Acquisition) Act No. 35 of 1971 the petitioner continued to function as agent in terms of P1 ; that the respondent cancelled the petitioner's agency by telegram dated 3.4.81 without prior warning and without notice or inquiry ; that the termination of the agency and the refusal of the respondent to supply industrial gases has affected his livelihood and the livelihood of his employees ; that the termination of his dealership was arbitrary, unreasonable, mala fide and contrary to the principles of natural justice ; that he has no other remedy except the remedy sought for in this application.

Dr. Jayewardene, Counsel for the petitioner, submitted that once the business undertaking of the Company vested in the Government in terms of the Business Undertakings (Acquisition) Act No. 35 of 1971, it became a governmental activity. The respondent was appointed in terms of section 3 of the said Act and was thus an officer of the State. The respondent therefore had all the characteristics of a public authority. Certiorari to quash the decision of the respondent to terminate the agency of the petitioner was sought on the basis that there was a clear violation of the audi alteram partem rule. In short, Dr. Jayewardene urged that the petitioner enjoyed a "franchise" and that he had a right to be heard before his agency was cancelled.

Mr. Choksy, for the respondent, did not contend that petitioner was given a hearing prior to the termination of the agency. He however, raised the objection that the averments in the petition disclosed that the relationship between the petitioner and the respondent was purely contractual in character and that the writ jurisdiction of this court

cannot be invoked by the petitioner in respect of an alleged breach of such contractual relationship. In brief, Mr. Choksy argued that the application was entirely misconceived in law.

As stated earlier, the petitioner has produced marked P1 his letter of appointment issued by the Company. P1 states inter alia :

“ we have pleasure in appointing you as our Distributing Agent for industrial gases to cover the Negombo and Ja-Ela areas We are agreeable to opening the Agency within the next two to three weeks We set out below the terms and conditions which we shall require you to abide by in accepting appointment as our Distributing Agent” On a reading of P1 it is clear that it sets out the terms and conditions upon which (a) the petitioner functioned as an agent of the respondent, (b) he could deal with the customers of the Agency area. P1 does not fix a period during which the agency will be operative. It appears to be an agency revocable at the will of the respondent. As submitted by Mr. Choksy, P1 constitutes the petitioner a commercial agent of the respondent. P1 read as a whole shows very clearly that the relationship between the petitioner and the respondent is a contractual relationship of a commercial nature. It is a purely contractual relationship of principal and agent.

It is true, as submitted by Dr. Jayewardene, that the respondent is the “Competent Authority” appointed in terms of section 3 of the Business Undertakings (Acquisition) Act No. 35 of 1971 to manage and administer the affairs of the business undertaking vested in the Government. In that sense it could be said that the respondent is a “public authority”. But the fact that one of the parties to the contract is a “public authority” is not a relevant consideration, since the decision sought to be quashed by way of certiorari is itself one made pursuant to a power derived from the *contract*. As pointed out by Mr. Choksy, the Sri Lanka Government Railway imports sleepers. The Commissioner of Food, acting on behalf of the State, imports items of food. If a dispute arises in regard to the termination of such a contract, can the aggrieved party seek relief by way of certiorari or mandamus? The answer is succinctly stated by Wade: “Powers derived from contract are matters of private law and outside the scope of prerogative remedies” – Administrative Law, 5th Edn. page 550. It is intensely relevant to note that the contractual relationship we are here concerned with, is not regulated by statute. While there is no statutory

obligation cast on the respondent to appoint "agents", there is no statutory right in the petitioner to be appointed as "agent". This is certainly not a case where a statute provides for the appointment of an "agent" and stipulates the grounds upon which the agency could be lawfully terminated. The petitioner is not the holder of an office; he has not been given a statutory status or protection. Nor could it be said that he holds "a public position fortified by statute", to use the words of Lord Wilberforce in *Malloch v. Aberdeen Corporation (1)*. He is no more than an ordinary contractual agent.

It is of the utmost significance that the decision sought to be quashed by certiorari is a decision founded purely on contract. The act or decision complained of arose from an alleged breach of contract. The fact that one of the parties to the contract is the "Competent Authority" appointed by statute cannot alter the intrinsic character of the decision sought to be quashed by certiorari. The decision is one taken wholly within the context of the contractual relationship and not in the exercise of the powers of a public authority as such. It invoked no administrative powers or authority. It is a decision made in the exercise of a power which springs from contract. In my view, it is a decision clearly within the area of private law and the remedies available are the private law remedies such as damages, declaration, or injunctive relief. On the other hand, Administrative Law is primarily, if not entirely, concerned with the exercise of powers and duties of governmental, statutory and public authorities. Contractual rights, devoid of a statutory flavour, are manifestly beyond the scope of certiorari.

Applying this principle, the Judicial Committee of the Privy Council in the *University Council of the Vidyodaya University v. Linus Silva (2)* dismissed the application made by a University teacher for a writ of certiorari to quash the decision of the Council of the University to terminate his appointment. Delivering the advice of the Judicial Committee, said Lord Morris :

"The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master rightfully ends the contract there can be no

complaint ; if the master wrongfully ends the contract then the servant can pursue a claim for damages (at page 507). In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and if the contract is terminated there are ordinarily no questions affecting status or involving property rights (at page 516)."

The case before us is one where there is an ordinary contractual relationship of principal and agent. I therefore hold that the remedy of certiorari is not available to the petitioner.

Mandamus too does not lie and the reason for this is pithily put by Wade :

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties" (Administrative Law, 5th Ed. page 635).

The petitioner before us is seeking mandamus to enforce a mere private duty arising from a contract. This clearly, is outside the scope of mandamus – vide *Weligama Multi-purpose Co-operative Society Ltd. v. Chandradasa Daluwatte* (3).

For the reasons I have endeavoured to set out above, the application for orders in the nature of writs of certiorari and mandamus fails and is dismissed with costs fixed at Rs. 210.

JAMEEL, J. – I agree.

Application dismissed.