MENDIS
v.
SEEMA SAHITHA PANADURA JANATHA SANTHAKA PRAVAHANA SEVAYA AND OTHERS

COURT OF APPEAL
S. N. SILVA, J. (P/CA)
C.A. 57/95
JUNE 28, 1995.

Company Law - Companies Act No. 17 of 1982 – S. 15(1), S. 141(2), (3), S. 22(1), S. 185(1), (2), S. 194(1), (2) – Conversion of Public Corporations of Government Owned Public Undertakings into Public Companies Act No. 23 of 1987 S. 2(1) – Panadura Depot of the Colombo South Regional Transport Board converted to a Public Company – Managing Director removed – Public Law – Private Law Remedies – Prerogative remedies – Writs of Certiorari – Prohibition.

The 1st Respondent was registered as a Public Company in terms of S. 15(1) of the Companies Act pursuant to the conversion of the Panadura Depot of the Colombo South Regional Transport Board on a decision of the Cabinet. The Petitioner was appointed at the Second Annual General Meeting of the Company held on 25.4.94 as the Managing Director. The Secretary to the Treasury on 24.11.94 removed the Petitioner from the office of the Managing Director.

It was submitted that the 3rd Respondent (Secretary to the Treasury) is a Public Officer and holds shares on behalf of the Government, and therefore his action is subject to review by way of a writ of certiorari as coming within the purview of Administrative Law.

The Petitioner claimed that he could be removed only upon an ordinary resolution as required by S. 185(1) of the Companies Act and therefore sought a writ of Certiorari to quash the decision made by the Secretary to the Treasury and a writ of Mandamus to direct that the Petitioner be designated back once again as the Managing Director.

Held:

***Per* S. N. Silva, J.**

"Writs of certiorari and prohibition are instruments of Public Law to quash and restrain illegal governmental and administrative action, similarly the writ of mandamus lies to enforce the performance of a statutory duty by a Public Authority. They are instruments of judicial review of administrative action."

(i) The appointment and removal of Directors of the Company is regulated by its articles of association. There are no statutory provisions that apply in relation to this matter except the Companies Act which applies generally to all Companies.

(ii) The Petitioner has based his case for judicial review on the alleged breach/Non compliance by the 3rd Respondent of the provisions of the Articles of Association and of S. 185(1) of the Companies Act.

(iii) The legal force and the binding effect of the Articles of Association in relation to members of a Company is contractual.

Hence if the 3rd Respondent, as a Member of the company has acted contrary to the Articles of Association he is in breach of a covenant signed and sealed by him. It is a matter of Private Law and it cannot be subject to judicial review in any application for a prerogative writ.

(iv) What is here sought to be done is the enforcement of a Contract of employment, contracts of employment are enforceable by ordinary action and not by judicial review. In the circumstances the dispute as to the contract of employment is solely a matter within the purview of Private Law and not a matter for judicial review.

***Per* Silva, J.**

"The trend of Authority is thus one way. Learned Counsel for the Petitioner has not been able to cite any authority in support of his claim that matters pertaining to a company registered under the Company Act or matters pertaining to a contract of employment could be the subject of judicial review."

APPLICATION for Writ of Certiorari/Mandamus.

Cases referred to:

1. *R. v. National Joint Council for Dental Technicians* (1953) 1 QB Pg. 704 at 707.
2. *Trade Exchange (Cey. Ltd.) v. Asian Hotels Corporation Ltd.,* 1981 – 1 SLR 67 (SC).
3. *Jayaweera v. Wijeratne* – 1985 2 SLR 413.
4. *Piyasiri v. Peoples Bank* – 1989 2 SLR 47.

Ranjit de Silva with *Gamini Perera* for the Petitioner.
Faiz Musthapha P.C., with *T. M. S. Nanayakkara* for 2nd Respondent.
A. S. M. Perera, D.S.G., for 3rd Respondent.

August 25, 1995.
S. N. SILVA, J.

The Petitioner claiming to have been the Managing Director of the 1st Respondent Company has filed the above application for Writs of Certiorari and Mandamus. The Writ of Certiorari is to quash the determination made by the Secretary to the Treasury. (3rd Respondent) as contained in letter dated 24.11.94 (P13), removing the Petitioner and three others as Directors of the 1st Respondent

company. The Writ of Mandamus is to direct "that the Petitioner be effectively, lawfully and legally be designated back once again to the office he held as Managing Director with full pay with immediate effect." (Prayer (b) of the petition) The other two are interim reliefs and have not been pursued.

The Petitioner has filed this application on the basis that the 1st Respondent is a Limited Liability Company incorporated under the Companies Act No. 17 of 1982 (Certificate of Incorporation marked P1); regulated by the Memorandum and Articles of Association (P2) and of which 50 per cent of the shares are held by the employees and balance 50 per cent by the 3rd Respondent. The foregoing matters are accepted by all parties and are set out in paragraphs 6, 7, 8 and 9 of the petition.

The 1st Respondent was registered as a Public Company in terms of section 15(1) of the Companies Act No. 17 of 1982 pursuant to the conversion of the Panadura Depot of the Colombo South Regional Transport Board, on a decision of the Cabinet of Ministers made in terms of section 2(1) of the Conversion of Public Corporations or Government Owned Public Undertakings into Public Companies Act No. 23 of 1987. The Scheme of the conversion is that upon incorporation, the 3rd Respondent to whom all the shares of the Company are allotted in terms of section 2(3) of the Act transferred 50 per cent of the shares to the employees of the Depot by way of a gift (Article 2(a) of the Articles of Association). The balance 50 per centum of the shares remain with the 3rd Respondent and may be dealt with as provided in the Articles.

The appointment and removal of Directors of the 1st Respondent Company is regulated by its Articles of Association. Article 9 provides that the Company shall have not less than 3 and not more than 10 Directors until otherwise determined by a special resolution of the Company at a general meeting. Article 10 provides that 4 Directors of the Company shall be Working Directors described as Executive Directors who shall be in charge of the overall management and functioning of the company. They are the Managing Director, Director Operations, Director Finance and Director Engineering. Acording to the Article the first Executive Directors of the Company shall be appointed by the 3rd Respondent

on the recommendation of the Secretary to the Ministry of Transport and all subsequent appointments shall be by the Board of Directors. It further provides that such first Executive Directors may be removed by the 3rd Respondent or the Board of Directors for any reason whatsoever without prejudice to any claim they may have for damages, for breach of any contract of service with the company.

The appointment of Directors is regulated by Articles 11 to 15 of the Articles of Association. According to the scheme of these Articles, the employee-shareholders are entitled to nominate two Directors, provided they collectively own more than 25 per cent of the shares and may nominate one Director if they collectively own more than 10 per cent of the shares (Article 11). The Directors thus appointed may be removed by the employee share-holders provided they have the requisite share holding (Article 12). Similarly, the 3rd Respondent may appoint two Directors or one Director, as the case may be, if he owns more than the stated percentage of shares and such nominees and may be removed and replaced by the 3rd Respondent (Article 12 and 13). The other share-holders may nominate up to four Directors at the rate of one for every block of 10 per cent of the shares held by them (Article 15). Article 15 (b) empowers the Board of Directors to remove the Managing Director and any Executive Director subject to any claim for damages for breach of contract. It is seen from the foregoing analysis that the Articles of Association contain comprehensive provisions for the appointment and removal of Directors, Managing Director and Executive Directors. There are no statutory provisions that apply in relation to this matter except the Companies Act which applies generally to all companies.

The Petitioner has pleaded that at the second Annual General Meeting (A.G.M.) held on 25.4.94 he was appointed as Managing Director (paragraph 24 of the petition). The minutes of the second A.G.M. have not been produced in support of this claim. According to section 141 (2) and (3) of the Companies Act such minutes would be evidence of the proceedings at the meeting and of the appointment of any Directors at such meeting. The Petitioner has also not produced an extract from the Register of Directors and Secretaries that is maintained in terms of section 194(1) of the Companies Act. He has not produced a copy of the return that has to

be sent to the Registrar of Companies within 14 days of any change amongst the Directors, in compliance with section 194(2) of the Act. On the other hand, the Petitioner has produced the annual report for the year 1.4.92 to 31.3.93 (P3). According to the annual report the Petitioner has signed the balance sheet and issued a message as the Managing Director. This shows that the Petitioner was functioning as Managing Director prior to the second A.G.M.

The Petitioner has produced the minutes of the meeting of the Board of Directors held on 30.6.93 (P4). According to the minutes the Managing Director D. R. F. Peiris resigned at that meeting "on the advise of the Ministry of Transport". (paragraph III) and the Petitioner was appointed as Director and Managing Director in his place. (paragraph IV). It is seen from the Articles of Association referred above that the Board of Directors cannot appoint a Director. The Articles contain comprehensive provisions as to the Directors appointed by the different classes of share holders. Therefore, on the Petitioner's own documents, a question looms large as to the source of his claimed appointment as Director and Managing Director.

The Petitioner's case is that he was not one of the first Executive Directors of the company appointed by the 3rd Respondent in terms of Article 10 and as such he cannot be validly removed by the 3rd Respondent as provided in that Article. Learned counsel for the Petitioner submitted that the Petitioner could be removed only upon an ordinary resolution as required by section 185(1) of the Companies Act. It was on this basis that the Petitioner supported his plea that his removal was illegal and should be quashed by a Writ of Certiorari.

I have to note that section 185(1) of the Companies Act referred by learned counsel for the Petitioner contains a general procedural mechanism for the removal of a Director in any Company at an extraordinary general meeting. A special notice is required of such meeting in terms of section 185(2) and 138 of the Act. These are general provisions applicable to all companies regulated by the Companies Act No. 17 of 1982. They are procedural requirements. But, the question whether a Director is removable or not has to be decided in terms of the Articles of Association of the company. In the

case of the 1st Respondent, the Articles have specific provisions for appointment and removal of Directors who represent different classes of share-holders. They are the substantive provisions that have to be considered in deciding on the validity of a purported removal of any Director. Hence, the question whether the 3rd Respondent has validly removed the Petitioner as a Director has to be considered in terms of Articles of Association.

It is in the context stated above that learned President's Counsel for the 2nd Respondent and Learned Deputy Solicitor General for the 3rd Respondent raised preliminary objections to this application on the ground that on the basis of the facts pleaded by the Petitioner, the decision in issue cannot be reviewed by this Court in an application for prerogative Writs. Learned President's Counsel for the 2nd Respondent submitted that the 1st Respondent is an ordinary company, at common with all companies, registered under the Companies Act. The 3rd Respondent is a share holder who owns 50 per cent of the shares and who has specific powers in terms of the Articles of Association for the appointment and removal of Directors. Therefore, the 3rd Respondent although a public officer, in this instance, acts as a share holder in terms of the Articles of Association. He is not exercising governmental or statutory power of a public nature but is exercising private rights as a share-holder of a company. On that basis it was submitted that the action of the 3rd Respondent does not come within the purview of administrative law and the remedies by way of prerogative Writs. The 3rd Respondent's action could be the subject of a private suit that may be instituted by any one having a cause of action, in a regular civil court.

Learned Deputy Solicitor General submitted that the Articles of Association derive authority not from statute but from the fact that it is a contract binding on the members of the company. Therefore its authority is contractual and not statutory. It was also submitted that the Petitioner as Managing Director has a contractual relationship with the company as seen from the Articles of Association itself. On that basis it was submitted that contractual rights cannot be enforced by a Writ of Certiorari or Mandamus.

Learned counsel for the Petitioner submitted that the 3rd Respondent is a public officer and holds shares on behalf of the

Government of Sri Lanka. On that basis he submitted that his action should be subject to review by way of a Writ of Certiorari as coming within the purview of administrative law. He also submitted that the 3rd Respondent has acted contrary to the Articles of Association and section 185(1) of the Companies Act. On that basis it was submitted that the decision P13 should be quashed by a Writ of Certiorari.

The objection raised by learned President's Counsel and learned Deputy Solicitor General relate to a fundamental question as to the areas in which Writs of Certiorari and Mandamus, being Public Law remedies, would lie. It is clear these Writs come within the purview of administrative law which is a branch of law that has been developed by courts for the control of the exercise of governmental or statutory powers by mainly public authorities. The distinction between the Public Law and Private Law, which is a concept of recent origin in English law but, which has been a basic concept of Roman Law should be borne in mind in considering this matter. The distinction between Public Law and Private Law in Roman Law (being the genus of our Common Law) Jus *Publicum* and *Jus Privatum* – is clearly stated in his Institutes (1.1.4) by Justinian – R. W. Lee in his work on the Elements of Roman Law (4th Edition page 35) states as follows with regard to the division of Roman Law to branches as Public Law and Private Law:–

> "This is the division which the Roman lawyers take as the primary line of cleavage in the legal system. "Public Law has regard to the Constitution of the Roman State. Private Law is concerned with the interest of individuals." The classification is intelligible and convenient, though there are points at which the two overlap. The first included constitutional law, administrative law, criminal law and procedure and the jus sacrum. The second comprises those branches of law which regulate the relations of citizens to one another, family law, property, obligations and succession. The institute is mainly concerned with private law. It ends with one Title on criminal law. which belongs to the *jus publicum.*"

Writs of Certiorari and Prohibition are instruments of Public Law to quash and restrain illegal governmental and administrative action.

Similarly the Writ of Mandamus lies to enforce the performance of a statutory duty by a public authority. They are instruments of judicial review of administrative action.

In Administrative Law by H. W. R. Wade and Forsyth (1994) 7th Edition at page 627 it is stated as follows:

> "But both certiorari and prohibition in their modern applications for the control of administrative decisions, lie primarily only to statutory authorities. The reason for this is that nearly all public administrative power is statutory. Powers derived from contract are matters of private law and outside the scope of prerogative remedies."

The authors cite the dictum of Lord Goddard CJ in the case of *R v. National Joint Council for Dental Technicians* [1]. The citation is thus:

> "But the bodies to which in modern times the remedies of these prerogative Writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction."

It is thus seen that prerogative remedies such as Certiorari and Prohibition lie in situations where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the Public. The essential ingredient is that a member of the public who is affected by such a decision has to submit to the jurisdiction of the authority whose action is subject to review. In other words, there is an unequal relationship between the authority wielding power and the individual who has to submit to the jurisdiction of that authority. The principles of Administrative Law that have evolved such as the doctrine of *ultra vires,* error on the face of the record, rules of natural justice, requirement of procedural fairness and the reasonableness of decisions, coupled with the remedies by way of prerogative Writs, lie to correct any illegality or injustice that may emanate from this unequal relationship. It is in this context that the view has been firmly held that relationships that are based on contract, without any statutory underpinning and actions of companies and private individuals and bodies, are not subject to judicial review by way of the Writs of Certiorari and Prohibition.

In the case of *Trade Exchange (Cey. Ltd.) v. Asian Hotels Corporation Ltd.* [2] the Supreme Court held that the action of a public commercial company incorporated under the Companies Ordinance, although its capital was mostly contributed by the Government and was controlled by the Government, is a separate juristic person and its actions are not subject to review in an application for a Writ of Certiorari. At p76 Sharvananda, J. (As he then was) stated as follows:

> "The activities of private persons, whether natural or juristic, are outside the bounds of administrative law. A public commercial company like the Respondent, incorporated under the Companies Ordinance in which the Government or a Government sponsored Corporation holds shares, controlling or otherwise, is not a public body whose decisions, made in the course of its business, can be reviewed by this court by way of Writ."

In the case of *Jayaweera v. Wijeratne* [3] a Writ of Certiorari and Mandamus were sought to quash the decision of a competent authority of a business undertaking vested in the government, terminating the agency of the Petitioner. G. P. S. de Silva, J. (as he then was) held (at page 47)

> "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."

Similarly, he held, that the Petitioner cannot seek a Writ of Mandamus "to enforce a mere private duty arising from a contract ... this clearly is outside the scope of mandamus."

A similar decision was made by this court in the case of *Piyasiri v. Peoples Bank* [4]. It was held that a Writ of Mandamus did not lie to compel the Board of the Peoples Bank to call the Petitioner for an interview with a view to a promotion in terms of circular that had been issued by the Bank. The decision was made on the following three grounds:

(1) that the Bank though subject to ministerial control is not a public body but basically a commercial bank;

(2) that the circular, drawn in issue, does not have statutory force;

(3) that in any event implementation of the circular was a private and internal matter.

The trend of authority is thus one-way. Learned counsel for the petitioner has not been able to cite any authority in support of his claim that matters pertaining to a company registered under the Companies Act or matters pertaining to a contract of employment could be the subject of judicial review in an application for prerogative writs.

Learned counsel for the Petitioner bases his case for judicial review by way of Writs of Certiorari and Mandamus on the alleged breach/non compliance, by the 3rd respondent of the provisions of the Articles of Association and of section 185(1) of the Companies Act.

The legal force and the binding affect of the Articles of Association in relation to members of a Company, is contractual. This is clearly demonstrated by the provisions of section 22(1) of the Companies Act which reads thus:

> "Subject to the provisions of this Act the memorandum and articles shall, when registered, bind the company and the members thereof to the extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

Hence, if the 3rd Respondent, as a member of the company has acted contrary to the Articles of Association, he is in breach of a covenant signed and sealed by him. It is a matter of Private Law and it cannot be the subject of judicial review in an application for a prerogative Writ. Wade & Forsyth states thus (at p690):

> "Private law also regulates associations and bodies whose relations with their members are governed by contract, however powerful their licensing and disciplinary powers may in fact be."

The Writ of Mandamus prayed for in prayer (b) (reproduced at the beginning of this judgment) is entirely misconceived. It seeks an order from this Court restoring the Petitioner to the post of Managing Director with full pay. As noted above the Writ of Mandamus lies only to compel the discharge of a statutory duty by a public authority. What is here sought to be done is the enforcement of a contract of employment. The provisions of article 10 (3rd paragraph) and of 15(c), clearly show that the Managing Director holds a contract of service with the company. Wade & Forsyth (at page 689) states as follows:

> "Contracts of employment are enforceable by ordinary action and not by judicial review".

The only exception appears to be situations where the employment has a statutory "underpinning" such as statutory restrictions on dismissal which would support a claim of *ultra vires* or a statutory duty to incorporate certain conditions in the terms of employment, which could be enforced by mandamus (Wade & Forsyth at p 690). In this instance there is no statutory provision, whatever relevant to the post of Managing Director of the 1st Respondent company or for that matter with regard to any post in that company. In the circumstances, the dispute as to the contract of employment is solely a matter within the purview of Private Law and not a matter for judicial review by way of Public Law remedy such as the Writ of Mandamus.

For the reasons stated above I uphold the preliminary objection raised by learned President"s Counsel for the 2nd Respondent and learned Deputy Solicitor General for the 3rd Respondent. The application is accordingly dismissed. The Petitioner will pay a sum of Rs. 2500/- each as costs to the 2nd and 3rd Respondents.

There are several other cases in which the same objection arises for consideration. It was agreed by learned counsel for the petitioner (who appears in all these cases) and counsel for the Respondents (who also appear in all these cases) that the judgment in this case would be binding in the other cases. Order will be made accordingly in the said cases.

Application dismissed.