PRADESHIYA SABAWA, HINGURAKGODA, AND OTHERS

vs

KARUNARATNE AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CA (PHC) 76/96.
WRIT PHC(APN) 8/96.
H. C. ANURADHAPURA 19/95.

Writ of Certiorari/Mandamus - List of selection of lessees–Selection Contrary to law?–Pradeshiya Saba Act 15 of 1987 - Delay - is it fatal? What are the grounds of issue of Writ of Certiorari?–Could the Court take into consideration the consequences which the writ will entail?– Locus standi.

The 1st and 2nd petitioners - respondents filed an application for writs of Certiorari and Mandamus in the High Court pleading the Hingurakgoda Pradeshiya Sabha acted contrary to law in selecting

lessees for the shops at Hingurakgoda. The High Court issued a writ quashing the selections and issued Writ of Mandamus compelling the Pradeshiya Saba to make the selections according to the tender procedure (P18). The respondent - petitioners seek to quash the said orders on the basis that, the High Court erred in granting a Writ of Mandamus to select through another procedure (P18) without quashing the method of selection already adopted when the method of selection itself is not challenged by the respondent-petitioners in their application to the High court. further that, the petitioner respondents in coming to the High Court. It was further contended that, the petitioner-Respondents did not have Locus standi.

HELD:

(1) The petitioner - respondents admit that they made an application and participated at the interview but were not selected, then the petitioner- respondents having accepted the selection criteria are not entitled to claim that the method of selection is invalid. They cannot challenge the method of selection by way of Writ of Mandamus directing a new method of selection.

Per Somawansa. J,

The High Court Judge unfortunately did not realize that these reliefs (Certiorari and Mandamus) in the present case are inconsistent to each other and even if a Writ of Certiorari was granted he could not have granted the Writ of Madamus as prayed for".

(2) The method of selection was published in April 1995, the interviews were held in July 1995, the agreements were signed with the selectees and keys handed over in August 1995. The

application to the High Court was filed in September 1995. Their own conduct would show that they acquiesce in the method of selection.

(3) This is not case where the petitioner - respondents state that they received the highest marks at the interview but were not selected, there is no guarantee that the petitioner - respondents will be selected even on a fresh selection. The petitoner respondents have no status or right to maintain the application for writ.

Per Somawansa. J (P/CA),

"The High Court judge had erred in going through the correctness of the allegations of the petitioner - respondents and imposing his decision over the decision of the interview Panel without understanding the limited scope of the inquiry in a writ application"

(4) One should keep in mind the consequences that would flow if the order of the High court judge is not set aside for the selection list will stand quashed when selected 36 are already carrying on business in shops from August, 1995. They have entered into valid agreements, rents have been paid and the 36 selectees are in occupation of the aforesaid 36 shops. Thus not setting aside of the order of the High Court Judge would bring disastrous consequences.

A Court before issuing a Writ of Mandamus, is entitled to take into consideration the consequences which the issue of the writ will entail.

Appeal from an order of the High Court of Anuradhapura.

Cases referred to :

(1) *Jayaweera vs Assistant Commissioner of Agrarian Service* 1996-2sri LR 70

(2) *Sarath Hulangamuwa vs Siriwardena, Principle, Vishaka Vidyalaya, Colombo 05 and Others*- 1987 1 Sri LR 275, 278

(3) *Bisomenika vs G. R. De Alwis* 1982- SRI LR 368 (DB)

(4) *Abdul Rahuman vs The Mayor of Colombo* -69 NLR 211

(b) *Inasitamby vs Government Agent, Nothern Province* 34NLR 33

(6) *King vs Parry* - 2.6 Ad and E 810

Ananda Kasturiarchchi with Ms. A. Weerasekera for 1st - 17th, 19th, 20th petitioners respondents - petitioners.

A. A. de Silva PC with Sarath Weerakoon for 1st, 2nd petitioner - respondents.

Cur. adv. vult.

17th March, 2006.

ANDREW SOMAWANSA. J. (P/CA) :

The appeal bearing no. CA/(PHC) 76/96 and the revision application bearing No. CA(PHC) 08/96 arises out of an order made by the learned High court judge of the Provincial High Court of the North Central Province holden at Anuradhapura dated 16.01.1996 issuing writ of certiorari quashing the list of selections marked Pe 5 and a writ of mandamus compeling the 1st and 2nd appellant to select the lessees according to tender procedure marked P18.

When this matter was taken up for argument both counsel invited Court to decide the matter on the written submissions already tendered. They also agreed that the Judgment delivered in final

appeal bearing no. CA(PHC) 76/96 would be binding on the revision application bearing no. CA(PHC) APN 08/96.

The relevant facts are : the 1st and 2nd petitioners-respondents field an application for writ of certiorari and mandamus pleading that Hingurakgoda Pradeshiya Sabha constructed a shopping complex with 36 shops at Hingurakoda and published a notice calling for applications to lease the aforesaid 36 shops, interviews were held to consider the aforesaid applications, that the list of selections declared by the 2nd appellant marked pe 5 consist of several persons who are not eligible to be selected on the ground pleaded therein and in any event, selections as contained in document marked Pe5 is contrary to law as the selections of some lessees referred to therein is contrary to the provisions in the Pradeshiya Sabha Act and to the Local Government Commissioner's instructions dated 18.03.1995 and also to the Pe5 notice. Further, the said selections are bad in law as the 2nd appellant has acted in excess and or abuse of power based on political consideration and also the applications of the petitioners-respondents were not considered due to malice and political reasons. In the circumstances they prayed for a writ of certiorari to quash the selections as contained in document Pe5 and a writ of mandamus to compel the 1st and 2nd appellants to make the selections according to the instructions of the Local Government Commissioner by a proper interview.

At the conclusion of the inquiry into the application made by the 1st and 2nd petitioners- respondents the learned High Court judge by his order dated 16.01.1996 held with the 1st and 2nd petitioners-respondents. It is from this order that the appellants have preferred the instant final appeal as well as the application for revision.

Counsel for the 1st to 17th, and 19th and 20th respondents contends that the learned High court Judge erred in granting a writ

of mandamus to select through another procedure viz: according to tender procedure marked P18 without quashing the method of selection already adopted marked pe1 when the method of selection Pe1 itself is not challenged by the petitioners in their application to the High Court. The petitioners had only prayed to issue a writ of certiorari to quash the list of selectees Pe-5. However they did not seek to quash the method of selection. The selection procedure adopted by the Pradeshiya Sabha is in accordance with Pe - 1, which had been published in the newspapers in April 1995. It is on the said method of selection the stall holders were selected and the petitioners-respondents were not selected. the petitioners-respondents claim that some of the respondents - respondents or successful tenants did not have the necessary qualifications to fall within the criteria laid down in Pe.1. At the same time they pleaded that they are qualified under Pe. 1. In other words they admit the method of selection. Their grievance was that no proper marks were given under the said procedure. Thus they do not challenge the method of selection Pe1..

it is to be seen that the petitioners - respondents admit that they made an application in terms of Pe 1 and participated at the interview but were not selected thus the petitioners-respondents having accepted the selection criteria is not entitled to claim that the method of selection in invalid. They could obtain relief by way of writ of certiorari quashing the list of selection on grounds alleged (ie. on the criteria that selectees were not qualified), if that was true but certainly cannot challenge the method of selection (for which they have not pleaded any grounds) and to ask the Court by way of writ of mandamus directing a new method of selection.

The learned High Court judge unfortunately did not realize that these reliefs (ie. Certiorari and mandamus) in the present case are inconsistent to each other and even if a writ of certiorari was granted he could not have granted the writ of mandamus as prayed for.

As contended by counsel for the 1st to 17th, 19th and 20th respondents there is undue delay on the part of the petitioner-respondents in coming to Court. It is to be seen that the method of selection was published in newspapers in April 1995 and the petitioners-respondents participated at the interviews held in July 1995. The selections were formally done and the agreements with the successful tenants too were signed in the month of August 1995 and the opening ceremony was held on 01.08.1995 and keys of the shops were handed over and it was on 05 September 1995 that the respondents petitioners made the instant application to the High Court. Their own conduct would show that they have acquiesced to the method of selection and was quite content to allow 4 months to pass by from the time the entire selection process was over. Our Courts have constantly refused relief of certiorari or mandamus when there is undue delay and the term undue delay does not mean that there should be a long delay but depends on the facts and circumstances of each case.

In the case of *Jayaweera vs. Asst. Commissioner of Agrarian Services per Ratnapura*[1] Jayasuriya, J:

> "A petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief".

In the case of *Sarath Hulangamuwa vs. Siriwardena, Principal, Visak Vidyalaaya, Colombo 5 and others* [2] at 278 per Silva selliah, J "It must be mentioned that aperson cannot sleep over his rights

but must seek his legal remedy with expedition-particularly where he seeks a writ which is an extraordinary remedy granted under exceptional circumstances"

In the case of *Bisomenike vs. C. R. de Alwis Sharvananda*,[3] J(as he then was) stated :

> "A Writ of Certiorari is issued at the discretion of the court. it cannot be held to be a writ of right or one issued as a matter of course. The exercise of this discretion by court is governed by certain well accepted principles. The court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver... The proposition that the application for writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in writ application dwindles and the court may reject a writ application on the ground of unexplained delay... An application for a writ of certiorari should be filed within a reasonable time."

in *Abdul Rahuman vs. the Mayor of Colombo*[4] the facts were:

In an application for a writ of mandamus on the ground that the Municipal Council of Colombo did not comply with the statutory requirements of section 7(2) of the Butchers Ordinance-

HELD :

> "That in view of the delay on the part of the petitioner in asking for mandamus and the consequences of such delay the application should be refused".

Another matter that is raised by the appellants is that the petitioners respondents have no locus standi to maintain this application for writ for even if the 1st and 2nd petitioners-respondents are within the minimum requirements laid down in the notice marked Pe-1, that per se will not entitle them to be selected. Altogether there were more than 500 applicants and only those who received the highest marks at the interview were eligible to be selected. Marks were given according to the scheme laid down in X21. An independent interview panel consisting of senior public officers of the area, Assistant Director of Education, Assistant Director of Planning, Administrative Officer, Education office held the interviews. The details of the marks received by each application in annexed (X23). Therefore, there is no guarantee that the petitioners respondents will be selected even on a fresh selection. This is not a case where the petitioners-respondents state that they received the highest marks at the interview panel but was not selected. Therefore the petitioners- respondents have not status or right to maintain the application for writ.

On the other hand, the allegation of the petitioner-respondents is that four (4) persons named in paragraph 10 of the petition are not eligible. But it is not alleged that petitioners- respondents had obtained the next highest marks/score and therefore they are eligible if the four (4) were not selected. Thus, it is to be seen that the petitioners respondents have no right to maintain the applications for writs.

Futhermore, the learned High Court judge had erred in going through the correctness of the allegations of the petitioners-respondents and imposing his decision over the decision of the Interview Panel without understanding the limited scope of the inquiry in a writ application. The grounds of issue of writs of certiorari are :

(a) acting in excess of jurisdiction or ultra vires;
(b) breach of a mandatory provision or rule;
(c) breach of rules of natural justice;
(d) error of law on the face of the record ;

The learned High Court judge had not found that the list of selection had been made in violation of any of the above principles to justify the grant of writ of certiorari.

In passing I would say one should keep in mind the consequences that would flow if the order of the learned Hight Court judge is not set aside for the selection list will stand quashed when selected 36 tenants are already carrying on business in the aforesaid shops from August 1995. They have entered into valid agreements, rents have been paid and the 36 selectees are in occupation of the aforesaid 36 shops thus not setting aside of the order of the learned High Court Judge would bring disastrous consequences.

In this respect I would refer to the decision in *Inasitamby vs. Government Agent Northern Province*[5] it was held :

"A Court before issuing a writ of mandamus, is entitled to take into consideration the consequences which the issue of the writ will entail".

As referred to by Jayawardene, AJ in the aforesaid case the observation of Lord Denman CJ in the *King v. Parry*[6] are worthy of note:

"The difficulties that might attend the reconstruction of corporations once dissolved, and the important functions now vested in municipal bodies, would induce increased circumspection in our proceedings. The inferior officers ought, indeed, to conform with care to the provisions if the law; The willful departure from them this Court will visit with severity; and even negligence may not always escape animad - version; but our discretion as to the issuing of quo warranto informations must be regulated by a regard to all the circumstances which attend the application and all the consequences likely to follow. Upon the whole, for the reasons stated, we think we act most in accordance with the current of authorities, with the Statute, and with the public interest, in refusing the permission".

For the foregoing reasons, I would allow the appeal and set aside the order of the learned High Court Judge with costs. 1st and 2nd petitioner -respondents will pay a sum of Rs.10,000 to the appellants. This judgment to be binding on the revision application no. 08/96.

WIMALACHANDARA, J. — I agree.

Application allowed.