1969 *Present:* G. P. A. Silva, A.C.J., and Siva Supramaniam, J.

A. G. FERNANDO, Petitioner, *and* W. W. D. DHARMASIRI (Chairman, Urban Council, Wattegama), Respondent

S.C. 116/69—Application for Writ of Mandamus in D.C. Kandy, 7547/L.

Mandamus—*Whether it lies when a specific statutory remedy is available—Erection of a building in an Urban Council area—Certificate of conformity—Refusal of Chairman of Council to issue it despite order of tribunal of appeal—Remedy then of person who erected the building—Housing and Town Improvement Ordinance (Cap. 268), ss. 15, 16, 88, 95.*

Mandamus does not lie where there is a specific statutory remedy available providing for a mode of enforcement.

The Chairman of an Urban Council refused to issue a proper certificate of conformity to the petitioner in respect of a building although he had been ordered to issue one by the District Court upon an appeal preferred to it by the petitioner in terms of section 16 of the Housing and Town Improvement Ordinance. Thereupon the petitioner made the present application for a writ of *mandamus* on the Chairman directing him to issue the certificate of conformity.

Held, that *mandamus* was not available to the petitioner inasmuch as section 95 of the Housing and Town Improvement Ordinance provided a special statutory remedy whereby it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree.

APPLICATION for a writ of *mandamus* on the Chairman, Urban Council, Wattegama.

Nimal Senanayake, with *Sam Silva*, for the petitioner.

H. Wanigatunga, with *J. Weerasekera* and *N. Tiruchelvam*, for the respondent.

Cur. adv. vult.

July 26, 1969. G. P. A. SILVA, A.C.J.—

The petitioner in this application is the owner of certain premises at Wattegama which is within the area of authority of the Wattegama Urban Council and the respondent is the Chairman of the Urban Council. On the 26th December, 1962 the petitioner submitted a plan of a proposed building consisting of a row of five tenements for approval by the respondent as the competent authority under the Housing and Town Improvement Ordinance (Ch. 268 of the New Legislative Enactments). After giving due notice on 2nd June 1963 in terms of section 10 (*a*) of the

said Ordinance, the petitioner commenced building operations and completed the building in February, 1964. On 24th February, 1964, in terms of section 15 (2) of the said Ordinance, the petitioner applied to the Chairman for a Certificate of Conformity to enable him to occupy the said buildings. As there was no response to this application the petitioner preferred an appeal to the District Court, which was constituted the tribunal of appeal for the purpose by section 88 of the said Ordinance with a view to obtaining an order from the District Court requiring the Respondent to issue the said Certificate of Conformity. On the 23rd November 1968 the parties appear to have arrived at a settlement and the District Judge made the following order. "By consent it is now agreed that the Chairman of the Defendant-Council will issue a certificate of conformity to the Plaintiff in respect of the building which is the subject matter of this application on or before 30.11.68.....

In view of the above I allow the appeal of the plaintiff as aforesaid and direct the Chairman of the Defendant-Council to issue the certificate of conformity as stated above.

This, however, is without prejudice to the rights of parties in respect of the land."

On the 30th November 1968 the respondent issued in terms of the order of the tribunal a document which purported to be a Certificate of Conformity which permitted him to occupy the house but in which certificate the words, "conforms with the requirements of the Urban Council" were deleted by the respondent. As the words which were deleted were themselves the most material words which the petitioner required if the Certificate was to have the effect of the Certificate of Conformity, the petitioner wrote to the respondent a letter informing him that he should issue a Certificate of Conformity in terms of section 15 of the Housing and Town Improvement Ordinance which was the only Certificate contemplated by the tribunal of appeal. To this letter the respondent did not reply. These were the facts that led up to the application made to this Court for a Writ of Mandamus on the respondent directing him to issue a Certificate of Conformity in accordance with the provisions of section 15 (1) (*sic*) of the Housing and Town Improvement Ordinance in respect of the building referred to.

Generally speaking the remedy by way of mandamus, which in any event is a discretionary remedy granted by this Court, would be available where there is a specific legal remedy without a mode of enforcing it. In such an instance the absence of a mode of enforcement would be a defect in the law and the procedure by way of Writ would step in to supply that defect. Counsel for the petitioner has submitted that this remedy would be available not only in cases where there is no provision for the enforcement of a public right but also where the remedy provided by law is not equally effective. In other words he argues that in order

to exclude the remedy by way of a Writ of Mandamus there must be an alternative and effective remedy. In the case of *Sirisena v. Kotawera-Udagama Co-operative Stores Ltd.*,[1] it was held by Gratiaen J. that even though an alternative remedy was also available a Writ of Certiorari would lie to quash the proceedings of a tribunal which flagrantly exceeded the limited statutory powers conferred on it. This case has only a very remote bearing on the principle involved in the present application. Gratiaen J. was considering in that case the legality of a purported award made by an arbitrator under the Co-operative Societies Ordinance. The award was challenged by the petitioner on the ground that he had ceased to be an officer of the Society at the relevant date and that the purported reference to arbitration was *ultra vires* the powers of the Registrar of Co-operative Societies under Rule 29. As Rule 29 did not empower the compulsory reference to arbitration of a dispute between a registered Co-operative Society and a person who had ceased before the purported reference to be an officer of the Society, it was clear that the award which was challenged by the petitioner was one which was made in excess of the statutory jurisdiction which the second respondent purported to possess. Gratiaen J. in deciding that case appears to have been guided by the observations made by Caldecote L.J. and Humphreys J. in the case of *Rex v. Wandsworth Justices, ex parte Reid* [2] in regard to the availability of an order of Certiorari even where an appeal lay. In allowing the application Gratiaen J. observed : " It is not in dispute that a public officer and an extra judicial tribunal, acting no doubt, through ignorance, have flagrantly exceeded the limited statutory powers conferred on them by the provisions of the Co-operative Societies Ordinance.....I consider that there is no compelling principle of law which fetters this Court's discretion to quash the illegal award....."

From a close examination of the judgment of Gratiaen J. and the observations of Caldecote L.J. and Humphreys J. it would appear that the principle that they intended to enunciate was that a Writ of Certiorari was an appropriate remedy in cases where there was a clear excess of jurisdiction by an inferior tribunal. This is a special remedy intended to grant relief to a person who has suffered by reason of the decision of a tribunal which had no jurisdiction to make any order at all. What the superior court in fact does in that situation is not to set aside or revise the actual finding of the inferior tribunal but to declare the order made to be null and void. Although it has been customary for appellate courts to deal with excesses of jurisdiction, a careful analysis of the provisions of the Courts Ordinance relating to the exercise of appellate jurisdiction may well justify the view that Courts of Appeal can properly correct only errors in fact or in law committed by an inferior court in the lawful exercise of its powers and that, where there is no lawful exercise of such powers, that is, where it acts without jurisdiction, the appropriate remedy is by way of a Writ of Certiorari. For, there is a clear distinction

[1] *(1949) 51 N. L. R. 262.* [2] *(1942) 1 A. E. R. 56.*

between an error committed by a Court in assuming a jurisdiction which it does not possess, resulting in subsequent proceedings being a nullity, and an error committed by a Court in matters of law or of fact after a proper assumption of jurisdiction. According to what I have referred to as a justifiable view the correction of the former would fall within the scope of a Writ of Certiorari and the latter within the scope of the appellate court. It does not appear from the judgments of Caldecote L.J. or Humphreys J. or that of Gratiaen J. that any argument on the basis of such a distinction was advanced for consideration by them. In that event they may well have reached the same conclusion they did but through a different approach. Thus no right of appeal being available to revise a nullity committed by a tribunal acting in excess of jurisdiction, that is, without jurisdiction, the decision would have been in favour of Certiorari on the basis of the general principle that was expressed in their judgments, namely, that as a rule Certiorari lay only where the remedy of appeal was not available. A consideration of the converse case would also support the view I have taken. For, in the cases referred to, if the application for Certiorari was against an error of law committed by the tribunal after a proper assumption of jurisdiction, I should imagine that such application would have been refused on the ground that the applicant should have sought his appropriate remedy by way of appeal. If the view that I have expressed is correct, it seems to me that the general principle that Certiorari will not lie where there is an alternative remedy would still prevail because an appeal proper will not lie where there is an excess of jurisdiction. A further reason that inclines me to treat that as the more reasonable view is because it is generally accepted that remedies by way of Writs are extraordinary remedies which have been evolved from their inception to meet situations where no other remedy was available and it is very doubtful whether that remedy would have been extended to cases where there was an alternate remedy.

It is to be noted that even while coming to the conclusion he did in that case Gratiaen J. conceded the general principle that a superior court will not as a rule make an order of Mandamus or Certiorari where there is an alternative and equally convenient remedy. Even if the question adverted to earlier is a matter of doubt, such doubt can arise only in respect of a Writ of Certiorari but not in respect of a Writ of Mandamus, the issue of which is governed by the general principle that the applicant must be without any other remedy. Where such other remedy is not merely one at common law but is one prescribed by the statute itself which created the right, there is no escape for an aggrieved party from pursuing the remedy laid down in the statute.

In the present application there are some further difficulties, even assuming that the existence of an alternative remedy does not preclude the remedy of Mandamus. For, it has been made to this Court not in the first instance but after proceeding half way and obtaining an order from the appropriate tribunal which granted the petitioner's prayer. As

counsel for the respondent has submitted with justification, I think, the application is in effect for the execution or enforcement of the order obtained from the tribunal of appeal. I am not aware of, nor has counsel for the petitioner brought to the notice of this Court, any decision which supports the view that a Writ of Mandamus is available for this purpose. Document A which contains the order of the tribunal and Document B which is the purported Certificate of Conformity issued in compliance with that order demonstrate that the petitioner has sought the Writ of Mandamus only because the certificate issued is not the certificate contemplated by section 15 of the Housing and Town Improvement Ordinance or, as it is submitted by counsel, because the respondent has refused to comply with the Order.

Section 95 of the Ordinance provides that any award of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court. In view of this provision, it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree. He should therefore follow that procedure in the first instance with a view to enforcing an award made by the tribunal of appeal. It was sought to be argued that that procedure was inapplicable to an order of the type that the petitioner had to enforce. It would, I think, be premature and undesirable for this Court to decide that question at this stage. If for any reason the petitioner exhausted this procedure and, having failed to achieve his object owing to a hiatus in the procedure provided, thereafter approached this Court the problem of course would be different. The petitioner has admittedly not sought the aid of these provisions but instead has come to this Court applying for a Writ of Mandamus for enforcement of an order which should be executed as a decree of the District Court. Not only is this procedure unknown to law but the procedure is being resorted to in the teeth of specific provision for the enforcement of an order by the tribunal having been made by the statute which created the rights and obligations involved. Counsel for the respondent cited to us the case of *The Queen v. The Victoria Park Company* [1] in which this precise question was considered. In the course of the judgment Lord Denman C.J. observed :— "But, assuming the judgment to be correctly entered up in that form, and we think it does not lie in the mouth of the plaintiff to contend that it is not, it seems to us to form a decisive answer to the first part at least of the application : because the plaintiff then has the ordinary legal remedy of an execution ; and we cannot direct a Mandamus to go ordering the payment to be made, merely because, under the circumstances the execution may produce no fruits." The answer which Lord Denman considered to be decisive on the question raised in that case would apply with greater force to the present case in view of the special statutory provision making it obligatory on the District Court to enforce an award of the tribunal as if it had been its own order or decree. By necessary implication, this provision also directs the holder of the award to seek the assistance of the District Court for its enforcement.

[1] *(1841) 1 Q. B. 288.*

Counsel for the petitioner has submitted to us a number of other decisions in support of his contention. On an examination of these decisions it would appear that they lend some support to his contention only in a limited way and in relation to certain special situations. They do not however support a general proposition that Mandamus will also lie despite the presence of other remedies. It is hardly necessary to embark on a detailed consideration of these decisions as they do not persuade me to take a view contrary to what I have already expressed.

The application is accordingly dismissed with costs.

SIVA SUPRAMANIAM, J.—

I agree to the order proposed by My Lord the Acting Chief Justice. The facts are fully set out in his judgment.

The right which the petitioner seeks to enforce in this case and the corresponding duty imposed on the respondent arise, not under the common law, but under S. 15 of the Housing and Town Improvement Ordinance (Cap. 268). The same statute prescribes the remedy for default or breach of that duty. It provides as follows under S. 16 :— "Any person aggrieved.....by any refusal of a certificate of the Chairman....., or by any delay of the Chairman.....in complying with the provisions under S. 15, may appeal to the tribunal of appeal, and the tribunal on any such appeal (subject always to the provisions of this Ordinance or any other enactment) may make such order as it may deem just." S. 95 provides that "any award or order of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court."

When the respondent failed to issue the certificate of conformity, the petitioner proceeded under the statute and appealed to the District Court of Kandy which, in terms of S. 88 (1) of the Ordinance, is the tribunal of appeal for the area in question. He obtained an order from that Court directing the respondent to issue a certificate of conformity in terms of S. 15 of the said Ordinance. His substantial complaint is that the respondent has not complied with that order.

In paragraphs 17 and 18 of his petition he has averred as follows:—

"17. The petitioner respectfully submits that the respondent is under a statutory duty to issue a certificate of conformity in accordance with the provisions of S. 15 of the Housing and Town Improvement Ordinance and is under a duty to comply with the order made by the tribunal of appeal in D.C. Kandy No. 7547/Land. 18. The petitioner respectfully submits that it is illegal and unlawful for the respondent to fail to carry out the order of the tribunal of appeal."

The petitioner, however, failed to take the further steps available to him under the statute to have the order of the tribunal of appeal enforced. He has, instead, applied to this Court for a mandate "directing the

respondent to issue the certificate of conformity in accordance with the provisions of S. 15 (1) of the Housing and Town Improvement Ordinance".

The learned counsel for the petitioner conceded that he is not entitled to apply to this Court for a writ of mandamus to compel the respondent to carry out the order of the District Court. He submitted, however, that it was open to the petitioner to have applied to this Court in the first instance for a mandate when the respondent failed to comply with his statutory duty under S. 15 of the said Ordinance and the fact that he followed the procedure under S. 16 up to a certain stage is no bar to his present application.

The question, however, is whether the petitioner could have applied to this Court in the first instance for a mandate. In the case of *The Wolverhampton New Waterworks Co. v. Hawkesford*[1] Willes J. said :—

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action of common law. But there is a third class, *viz.* where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

The present case falls within the third class referred to by Willes J.

The case of *Pasmore et al. v. The Oswaldtwistle Urban District Council*[2] is in point. By S. 15 of the Public Health Act 1875, "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purpose of this Act". By S. 299, "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers.....the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order....." The plaintiff who was not satisfied with the adequacy of the sewers to carry the liquids proceeding from his factories made no complaint to the Local Government Board but claimed a mandamus commanding the local

[1] *6 Common Bench Reports (N.S.) 336 at p. 356.* [2] *(1898) Appeal Cases 387.*

authority to cause to be made such sewers as may be necessary for effectually draining their district. Charles J. allowed the writ on the ground that S. 299 had no application to a case where the question was whether the defendants were bound to provide sewers for liquids flowing from the plaintiff's factories at all, and that, unless excluded expressly the plaintiff had a right to the judgment of a court of law upon the matter. He also held that the section introduced by the words " Where complaint is made " did not make it imperative on the plaintiff to make a complaint to the Local Government Board and to submit to their interpretations of the statute [1]. The Court of Appeal, however, reversed the decision and dismissed the application for mandamus on the ground that the plaintiffs' only remedy was under S. 299 of the Act [2]. The decision of the Court of Appeal was affirmed by the House of Lords. In the course of his speech [3] Lord Halsbury said :—

> " The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* [4]. He says : ' where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner '."

In the case of *Wilkinson v. Barking Corporation* [5] Asquith L.J. observed :

> " It is undoubtedly good law that where a statute creates a right and, in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others."

The principle laid down in the aforesaid cases was adopted by this Court in the case of *Hendrick Appuhamy v. John Appuhamy* [6].

In the present case, as stated already, the same statute which creates the right in favour of the petitioner and the correlative obligation on the part of the respondent has prescribed the remedy to which the petitioner is entitled on a breach of the obligation by the respondent. The rule of law enunciated above provides a sufficient answer to the petitioner's claim for mandamus. The application fails and must be dismissed with costs.

Application dismissed.

[1] *(1897) Appeal Cases 384.*
[2] *Ibid. p. 625.*
[3] *(1898) Appeal Cases p. 394.*
[4] *(1831) 1B. & Ad. 847, 859.*
[5] *(1948) 1 K. B. 721.*
[6] *(1966) 69 N. L. R. 29.*