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DIGEST

constructed in the said land regarding which there was no objection by the Defendants. There was also evidence that the 2nd Defendant had visited the Plaintiff from time to time to collect interest in respect of the loan given by him. It is in these circumstances that the Learned District Judge had come to the conclusion that there had been no absolute transfer of the property in question by the Plaintiff.

In the present case there are two Transfer Deeds which have to be considered as to whether they have been absolute transfers or conveyances creating constructive trusts. It would be apparent from the evidence that the first transaction was not an absolute transfer as seen from the evidence but the question arises as to what was conveyed by the transferee on the first transaction to the transferee on the second transaction since the first transferee that is Dharmalatha did not have absolute title to the property. What she could convey to the 2nd defendant was only the right she had in respect of the said property which was not absolute title. In these circumstances it would be necessary to conclude that both transfers did not convey absolute title to the transferees and that they held the property in trust for the transferor as the transferor in both instances had not intended to convey the beneficial interest in respect of the property. This is in line with the principle laid down in Section 83 of the Trusts Ordinance which states that –

"Where the owner of property transfer or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

In *Muttamma v. Thiagaraja*[1] Basnayake CJ held referring to Section 83 of the Trusts Ordinance that, "The section is designed to prevent transfers of property which on the face of the Instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances. Neither the declaration of the transferor at the time of the execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far or removed in point of time to be regarded as attendant which expression in this context may be understood as "accompanying" or "connected with". Whether a circumstance is attendant or not would depend on the facts of each case."

The above principle has been illustrated in the case of *Dayawathie v. Gunasekera*[2] where similar circumstances were dealt with by the Court and where Dheeraratne J held that if the relevant "attendant circumstances" were sufficient to demonstrate that the Plaintiff hardly intended to dispose of his beneficial interest then it would be logical to elucidate that the beneficial interest of the property was not parted with by the Plaintiff. Most of the attendant circumstances referred to in the Dayawathie case are very similar to the present case which the Learned District Judge had adequately considered.

The Civil Appellate High Court was in error in concluding that the Plaintiff had failed to establish that he reserved the beneficial interest when effecting the conveyances, where as the Learned District Judge had arrived at the conclusion

on the abundance of evidence placed before Court that the transactions effected by the Plaintiff had been loan transactions.

The Civil Appellate High Court in the course of its judgment had stated that the Defendant had inspected the title relating to the land prior to the transaction and that was the correct procedure to be followed prior to the transfer of a property and that thereafter the deed had been executed and registered in the Land Registry inclined that following such a procedure would tantamount to a transfer which would confer absolute title to the transferee. This by itself would not confer title to a transferee as it would be prudent to check the title by inspecting the Land Registry before entering in to a loan transaction. Therefore the above conclusion of the Civil Appellate High Court does not appear to be sound.

The Civil Appellate High Court went on to state further that the Plaintiff should have deposited the money that he claimed to have borrowed with the interest due thereon when instituting his action in order to show his bona fides. The case that was filed by the Plaintiff was on the basis of creation of a constructive trust although there was a transfer of the property on the face of the deed that was executed in favour of the 1st Defendant. It is usual to deposit the money in a matter relating to specific performance of a sales agreement, it is necessary to deposit the money agreed upon for the purchase by the buyer in Court when instituting action. It would appear that the High Court was drawing a parallel to such a transaction in stating that the Plaintiff should have deposited the money in Court as aforesaid. The mere fact that the Plaintiff has sought in his prayer in his Plaint for execution

of a deed in favour of the Plaintiff after cancelling the Deeds that are in favour of the Defendants does not necessitate the depositing of such monies when he initiated the action. The High Court has therefore erred in that respect.

In the above circumstances the judgment of the Civil Appellate High Court is set aside and the questions of law set out above are answered in favour of the Plaintiff.

It is a matter of general observation that this case is yet another demonstration of a practice prevalent in many parts of the country where unofficial money lenders lend money to persons who seek the assistance when in need of money and the borrowers have very often no option but to agree to very high rates of interest for which no document is given and further they are compelled to effect transfers of the property in order to obtain such loans. In addition they resort to obtaining signed blank cheques from the borrower, post dated cheques, promissory notes, powers of attorney and sometimes rental agreements or lease agreements to give the impression that the borrower is permitted to be in possession regarding such properties. Very often such borrowers have no choice in the matter but to agree to such terms and sign documents which are detrimental to them. However in most of these instances the borrower remains in possession of the property throughout. When the borrower is unable to settle the loan and the interest during the agreed period of time (which is generally not specified in any document) disputes arise between them as the lenders thereupon seek to claim title to the property which is really kept as security on the strength of the Deed of Conveyance which on the face of it would appear to be an outright transfer. Such lenders dislike the execution

of mortgage bonds or entering into agreements to reconvey as they would have to resort to litigation to recover their monies and also they would not be in a position to put down in writing the exorbitant rate of interest that they would charge. This trend appears to have evolved over the years as it is not easy to obtain loans from recognised financial institutions and banks. Banks generally impose stringent conditions for borrowers and also require satisfactory credit worthiness of the borrowers, a regulated income, the requirement of being tax payers, and the capacity to repay etc. in addition to the formal procedures that have to be followed which is not sometimes affordable and also the delay in going through such processes. If such institutions adopt much more flexible measures in respect of granting loans it would have the impact of preventing the occurrence of the type of transactions which take place which benefit unofficial money lenders. Further if such financial institutions and banks carry out awareness measures among specially the rural folk about the facilities that can be made available to them by reaching out to them it would help such persons from being victims at the hands of unofficial money lenders.

The Plaintiff in the prayer to his Plaint which was filed on 22nd June 1993 prayed that he be allowed to deposit the sum of Rs. 75,000 that he borrowed together with the interest at 36% per annum to the Defendants and obtain a conveyance in his favour. The Deed in favour of the 1st Defendant No. 581 had been executed on 16.12.1987 and the action had been filed in 1993 in the District Court of Panadura. The District Court proceedings were concluded with the entering of the judgment dated 07.07.2001 in favour of the Plaintiff. The Appellate procedure has taken a further 10 years and

now reached the culmination point in 2011. 24 years have lapsed since the execution of Deed No. 581 inflation rates have varied and are very much on the rise in the present era. The District Court had given judgment in favour of the Plaintiff as prayed for in his Plaint this would mean that he would have to pay Rs. 75,000 together with interest at 36%. It would not appear to be reasonable in these circumstances of this case to subject the Plaintiff to pay the interest of 36% to cover the entire period that the matter was under litigation which would come to a period of 18 years. It would be reasonable to subject him to pay the said sum of Rs. 75,000 together with interest at 36% per annum for a period of 10 years in order to get the Deed executed in his favour.

The appeal of the Plaintiff Appellants is allowed and the judgment of the District Court of Panadura is affirmed subject to the aforesaid variation.

J.A.N DE SILVA CJ – I agree.

AMARATUNGA. J. – I agree.

Appeal allowed.

ASRIN VS. UNIVERSITY GRANTS COMMISSION AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC. J. [P/CA]
GOONERATNE, J.
CA 1013/08
CA 1014/08
CA 1015/08
APRIL 1, 29, 30, 2009
MAY 21, 25, 2009
JUNE 12, 2009

Writ of Certiorari – Students of Eastern University – Temporary registration at the Faculty of Medical Services, Sri Jayewardenepura University – Decision to cancel the temporary registration – Legality – Judicial review – Who could effect the transfer?

The petitioners – all Muslim students were originally selected by the University Grants Commission [U.G.C] to a course of study in Medicine in the Eastern University and registered themselves with the University. Before the commencement of the scheduled academic year to Colombo Universities, they were transferred by the U.G.C. to Universities in Colombo.

The petitioners complain that they were informed by the Sri Jayewardenepura University, that the transfers were canceled on the basis that the permanent residence of the petitioners is in the Eastern Province – this act of retransfer of the petitioners, it was contended that, was arbitrary and illegal; further, that the only body who could effect the transfers [if any] is the U.G.C.

The respondent contended that the Sri Jayewardenepura University cancelled the temporary transfers as a step in the executory process of re-transfer and was deliberated before the UGC – University Grants Commission.

Held

(1) The decision to temporarily transfer the petitioners was taken by the UGC and whether it is a temporary or permanent transfer of

students the decision affects the students academic rights thereby a legal right or interest appears to have accrued to the petitioners to be at the respective Universities to which they were assigned in terms of the law.

(2) According to Section 15 of the University Admissions Hand Book inter-university transfers of students can be made only by the UGC.

Per Sathya Hettige PC, J [P/CA]

"I am of the view that the only authority to make such decision to re-transfer the petitioners is the UGC . . . . the reasons given when cancelling the registration of the petitioners, which is a critical issue in these applications, on the basis that their permanent residence is in the Eastern/Northern Province and requiring the petitioners to report to the Universities is unacceptable to this Court.

APPLICATION for a Writ of Certiorari/Mandamus.

Sanjeewa Jayawardene with *Abdul Najeem* and *Senani Dayaratne* for petitioners.

Priyantha Nawana SSC with *Hajaz Hisbullah SC* for respondents.

Nimal Weerakkody for intervenient petitioner

August 07th 2009

SATHYA HETTIGE P.C. J. P/CA

The petitioners in Application No. 1013/08 and the Intervenient – Petitioner, the petitioners in application No. 1014/08 and the petitioner in application No. 1015/08 are seeking Writs of Certiorari to quash the decisions contained in documents marked P5 dated 05/11/2008 and the document marked P3 dated 04/11/08.

The petitioners are also seeking Writs of Mandamus directing the 1st to 10th respondents to permit the petitioners

to engage in studies at the Faculty of Medicine of the 6th respondent's University.

In order to determine the issues involved in these applications it is necessary to consider the facts of each case which are of similar nature.

These applications were taken up together on 27/02/2009, 19/03/2009, 01/04/2009, 30/04/2009, 21/05/2009, 25/05/2009 and 12/06/2009 for hearing and all parties agreed to combine all three applications and one judgment would bind the parties in all three applications.

The petitioners in all three applications are Muslim students originally selected by the 1st respondent Commission to a course of study in medicine for the academic year 2007/2008 in the Faculty of Health Care Sciences of the 3rd Respondent namely the Eastern University of Sri Lanka by the letter dated 12/06/2008. The petitioners and the Intervenient petitioner further state that they registered themselves with the 3rd respondent university by sending their applications before 28/07/2008.

It is stated that before commencement of the scheduled academic activities in the 3rd respondent University, the 1st respondent Commission transferred 195 students including one Sinhala student and 27 Muslim students from the Faculty of Health Care Sciences of the 3rd respondent due to the security situation in the Eastern University of Sri Lanka that existed in August 2008.

It was further submitted that the petitioners and the intervenient petitioner were transferred out of the 3rd University to Universities of Colombo, Sri Jayawardanapura and Kelaniya.

The petitioners in CA application 1013/08 were transferred to University of Colombo, the petitioners in CA application No. 1014/08 were transferred to University of Sri Jayawardanepura and the petitioners in CA application no. 1015/08 were transferred to University of Kelaniya by the 1st Respondent Commission.

The learned counsel for the petitioner submitted that the transfers were effected by formal letters dated 27/08/2008 individually addressed to each petitioner. It was strongly submitted that the said letters were issued by the 1st respondent Commission in its capacity as the supreme governing authority under the provisions of the University Act.

It was further submitted that the said transfer was subject to certain conditions and the said transfer letters were marked 4 (a) to 4(e).

The learned counsel drew the attention of court to the conditions and the entire contents of the said letter marked P4 (a) transferring the petitioners which reads as follows.

"As already informed you have been selected to follow a course of study in medicine at the University at the Eastern University, Sri Lanka for the academic year 2007/2008.

I wish to inform, you that the University Grants Commission has decided to transfer you to the Faculty of Medicine University of Sri Jayawardanapura with the concurrence of Vice Chancellors of the University of Sri Jayawardanapura and the Eastern University Sri Lanka considering existing situation in the Eastern University Sri Lanka. . . . .

(5) The UGC shall be at liberty to send you back to the University which you have been originally assigned when situation in the Eastern University, Sri Lanka becomes normal. . . .”

On perusal of the condition no. 5 above mentioned, it appears that the UGC had reserved the right and power to send the students back to the Eastern University once the situation becomes normal and the UGC had taken the decision to transfer the petitioners and the intervenient petitioner with the concurrence of the relevant Vice Chancellors of the Universities.

The petitioners complain that on 31.10.2008 the petitioners were informed by the 9th respondent who is the Senior Assistant Registrar of Sri Jayawardanapura University stating that the Senate at the meeting held at the 257th meeting on 30.10.2008 decided to cancel the temporary registration of the Faculty of Medical Sciences of the University of Sri Jayawardanapura with effect from 31st October 2008 on the basis that the permanent residence of the petitioner is in the Eastern/Northern province and informing them to report to Vice Chancellor of the Eastern University. The petitioners state that similar letters were received by each petitioner from the Senior Assistant Registrar of the respective University. The petitioners have annexed to the petition a copy of the letter dated 31/1/2008 marked P5.

The petitioners and the Intervenient Petitioner in these applications are seeking a Writ of Certiorari to quash the unlawful decision of the 6th respondent University to cancel the registration of the petitioners contained in the said letter dated 31/10/2008 marked P5 on the basis that the decision

of the 6th respondent is unlawful, arbitrary, *ultra vires* and of discriminatory nature. The petitioners further state that they are entitled in law to engage in their academic activities in the Faculty of Medical Sciences of the 6th respondent University and other respective Universities where they are currently studying until the decision of respondent cancelling the registration is reviewed by the 1st respondent Commission.

The issue to be determined by this court is whether the 6th respondent had power or authority to make inter-university transfers of students whereas the temporary transfer of the petitioners had already been done by the 1st respondent Commission which reserved the right to re-transfer them by the UGC.

The learned counsel for the petitioner strenuously argued that the 6th respondent and the 9th respondent had no power or authority to cancel the registration of the petitioners and direct them to back to the 3rd respondent University in terms of the Universities Act. And if at all, the power of transferring the petitioners are only with the 1st respondent Commission. Therefore the decision of the 6th respondent to cancel the registration of the petitioners is unlawful and without jurisdiction.

The learned counsel submitted that the decision to cancel and transfer the petitioners back to the 3rd respondent university had not been taken with the concurrence of the 1st respondent and the copy of the letter transferring the petitioners has not even been sent to the 1st respondent Commission. It was submitted that the highly pernicious and precipitous decision of the Senate of the 6th and 9th respondent to re-transfer the petitioners has completely over-ridden

the authority, power, jurisdiction and sole prerogative of the University Grants Commission.

It was the contention of the learned counsel for the petitioners that the case of the petitioners is not that they must be permanently at their new universities but only that they are entitled in law to remain in the new universities if and until the UGC makes an informed decision in accordance with the due process and the law.

I have considered carefully the submissions of the learned counsel for the petitioner and agree with him that the Senate of the 6th University is obviously subordinate to the Council and at the very apex is the Council and the Council shall be the *exclusive body and governing authority* of the University and the decision to re-transfer could only have been taken by the University Grants Commission on the basis that this is clearly an **"Inter University Transfer"** which is common ground of the parties.

The learned Senior State Counsel for the respondents objecting to the application and relief sought by the petitioners, admitted in the course of his submissions that the Faculty of Medicine of Sri Jayawardanapura cancelled the temporary transfers of the petitioners as a step in the executor process of re-transfer which was deliberated before the 1st respondent Commission.

It was further submitted that all other students except the petitioners and the Intervenient petitioner went back and commenced their studies at their originally assigned Eastern University consequent to the cancellation of the temporary transfers.

The learned SSC submitted that, for the purpose of judicial review of a decision the issue of *ultra vires* should not be considered on the basis of superficial perusal of two documents in relation to the sources of origin. The court must consider the amenability of the impugned decision to a prerogative writ and the petitioners do not have a legal right or interest to remain in the Universities they were temporarily transferred because there is no legal provisions in the law governing the temporary transfers of students.

I do not agree with the submissions of the learned SSC on the above position.

The decision to temporarily transfer the petitioners was taken by the 1st respondent Commission and whether it is temporary or permanent transfer of students that decision affects the students' academic rights thereby a legal right or interest appears to have accrued to the petitioners to be at the respective Universities to which they were assigned in terms of the law. The learned counsel for the petitioners vehemently opposed the contention of the 6th respondent that the reason given for the retransfer of the petitioners was the petitioners' permanent residence was in a district in the Eastern/Northern province. The UGC as the supreme authority had transferred the petitioners out of the Eastern university on the basis of security situation in the 3rd respondent's University. The petitioner's counsel contend that the Senate which is a subordinate authority within the university structure had completely ignored condition 5 in the document marked P5 and the jurisdiction of the UGC under the provisions of the University Act in relation to inter-University transfers.

It should be noted that the 2nd respondent in his affidavit (Statement of objections) dated 6th February 2009 in paragraph 18 unambiguously states as follows.

". . . . I state that I am not aware of such communications being addressed to the 5th respondent. The respondents state further that, as the universities have no authority to effect inter-university transfers of the students the 1st respondent decided to convene a meeting to discuss the above matter to take appropriate action with regard to the re transfer these students. . . ."

I take the above position of the 2nd respondent as an admission on the part of the UGC that universities had no authority to effect inter-university transfers of the students.

The learned Senior State Counsel strongly argued with emphasis and submitted that the University Act does not provide for and or contain provisions empowering the UGC to transfer students from one university to another.

I do not agree with the above contention of the Learned Senior State Counsel that the UGC too had no power to effect transfers of students.

It should be further noted that in paragraph 28 of the 2nd respondent's affidavit (statement of Objections) it is stated that according to section 15 of the University Admissions Hand book that inter-University transfers of students can be made only by the 1st respondent Commission. In fact it can thus be seen that the correct position has been stated to court by the 2nd respondent **under oath**.

It is the argument of the learned counsel for the petitioners that due to decision of the 6th respondent to retransfer the

petitioners having cancelled the registration, the petitioners have been deprived of their university education in respect of medical faculties from the time the application was filed for the last 8 months and unable to sit for the future examinations.

It is the view of court that the petitioners and the intervenient petitioner have been deprived of the academic activities as a result of the action of the 6th respondent in canceling their temporary registration in the respective universities to which they were transferred by the 1st respondent Commission. I agree with the submissions of the learned counsel for petitioners that the 6th respondent (Senate) in application no. CA 1013/08 and 9th respondent who decided to cancel the registration of the petitioners in application Nos. CA 1014/08 and CA 1015/08 had no legal power or authority to take that decision to cancel the registration and issue letter marked P5.

I am of the view that the only authority to make such decision to re-transfer the petitioners is the University Grants Commission in terms of the provisions in the Universities Act and the University Admissions Hand book.

Even though the learned Senior State Counsel demonstrated to court that the petitioners are not entitled to the benefit of the discretionary relief in the form of a prerogative writ to be exercised by this court I hold that the petitioners are entitled to the relief in the circumstances of these cases.

I further hold that the reasons given in P5 by the 6th respondent when cancelling the registration of the petitioners, which is a critical issue in these applications, on the basis

that their permanent residence is in the Eastern/Northern province and requiring the petitioners to report to the 3rd respondent university is unacceptable to this court.

In the circumstances of these applications I hold that the discretionary remedy vested in this court should be determined in favour of the petitioners and the intervenient petitioner in granting relief as per paragraphs (a), (b) and (c) of the prayers of the petition.

However, the judgment of this court will not affect the rights of the University Grant Commission to take steps in accordance with due process and law regarding inter-university transfers of the students. The judgment is also not applicable to those petitioners if any, who have already commenced academic activities in the 3rd Respondent University.

Accordingly I allow the application of the petitioners as per paragraphs (a) (b) and (c) as above of the petition. I order no costs in the circumstances.

GOONARATNE J. – I agree.

Application allowed.

INTERNATIONAL DRESSES PVT. LTD VS. MINISTER OF LABOUR AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH J.
CA 417/2007
JUNE 6, 2008
JULY 2, 2008
AUGUST 25, 2008

Section 4 [1] Industrial Disputes Act – Settlement by way of arbitration – Termination of services of twenty two employees – One workman dies during arbitration – Could the arbitrator give the benefit that would have accrued to the workman at the time of his death to his heir? – Just and equitable order – Remedy by way of Writ of Certiorari – Availability – Judicial Review

Held:

(1) It is just and equitable in the given circumstances to give the benefit that would have accrued to the workman at the time of his death to his heir – as if his services were not terminated.

(2) Remedy by way of Certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order – Judicial review is radically different from appeals.

Cases referred to:-

(1) *Municipal Council of Colombo vs. Munasinghe* 71 NLR 223 at 225

(2) *R. vs. Deputy Industrial Inquiries Commissioner ex parte Moore* – 1965 – 1 All ER 81 at 84.

(3) *Best Footwear (pvt) Ltd., and Two Others v. Aboosally, former Minister of Labour & Vocational Training and Others* – 1997 2 Sri. L.R. 137

S.L. Gunasekera for petitioner.

Kanishka Witharana for 6 – 27 respondents.

(1-4 respondents discharged from the proceedings)

June 28th 2010

SRISKANDARAJAH J.

The Petitioner in this application has sought a writ of certiorari to quash the Award made by the 5th Respondent the Arbitrator dated 10th January 2007. The arbitrator in his award decided after an inquiry that the termination of the services of the 6th to 20th Respondents by the Petitioner was unjustified and the 21st to 26th Respondents had not vacated their posts as contended by the Petitioner. Arbitrator after coming to this conclusion in his award has directed the Petitioner to reinstate the said 6th to 26th Respondents with back wages.

It is common ground that the Petitioner terminated the service of the 6th to 20th Respondents and served vacation of post notice on the 21st to 26th Respondents.

The Petitioner submitted that around 4.14 p.m. on 23rd April 1999 the 13th Respondent an executive of the Petitioner Company and the Manager of the Cutting Section entered the office of the Accountant and demanded his salary advance. He was under the influence of liquor and he turned abusive when the Accountant informed him that the salary advance cannot be paid on that day. At that time the Personal Manager entered the office of the Accountant and requested the 13th Respondent to leave the office. He refused to leave and continued to use abusive language. The Accountant, in an attempt to defuse the tense situation, paid the salary advance due to the 13th Respondent out of his own funds. Having left the office of the Accountant the 13th Respondent abused the Personal Manager and this compelled the security officers to escort him out of the factory premises. The 13th Respondent

was interdicted in view of his conduct by letter dated 26th April 1999.

Thereafter 6th to 12th and 14th to 20th Respondents were interdicted as they were involved in threatening the management and creating disturbances on 26th April 1999 requesting the reinstatement of the 13th Respondent. The 6th to 12th and 14th to 20th Respondents and the 13th Respondent were served with charge sheets and disciplinary inquiries into the charges were conducted by an inquirer. Separate inquiries were held by Mr. F. N. D. Silva Retired President of the Labour Tribunal into the charges against 6th to 12th and 14th to 20th Respondents and the 13th Respondent. The inquiring officer found the 13th Respondent quilty to the charge against him and his service were terminated by letter dated 29.07.1999. The 6th to 12th and 14th to 20th Respondents were also found guilty by the inquiring officer and their services were also terminated by letters dated 29.07.1999.

On the issue of interdiction of the 6th to 12th and 14th to 20th Respondents the employees of the Petitioner went on strike. On a discussion held at the Department of Labour a settlement was reached and the employees other than the employees those who were interdicted were requested to report for work. As the 22nd to the 26th Respondents failed to report for work they were served with vacation of post.

Consequent upon the afore said termination of services of the 6th to 26th Respondents and one other employee now dead, the 1st Respondent made a reference under Section 4(1) of the Industrial Dispute Act to the 5th Respondent for settlement of dispute by way of arbitration.

The reference is as follows:

"Whether the termination of the services by the management of International Dresses (Private) Limited of the following twenty two (22) employees of its factory including the branch union officers of the All Ceylon Commercial & Industrial Workers Union is justified and to what relief each of them is entitled".

After an inquiry the arbitrator delivered his award and it was published in Government Gazette No 1487/21 dated 7th March 2007. The arbitrator has observed that both parties exaggerated facts in favour of them. After making this observation he has come to the conclusion that while money for the payment of advance on the 24th April has been brought to the factory on the 23rd the Accountant did not pay the advance to the 13th Respondent on the 23rd despite the General Manager having ordered him to do so. This payment was made only after a problem arose and there was an exchange of words between Darmasundara and the 13th Respondent. The 13th Respondent who was an executive was more popular among the workmen than the other executives. On 26.04.1999 a group of workmen including the 6th to 12th and 14th to 20th Respondents had a heated discussion inside the Board Room about the suspension of the 13th Respondent consequent to which they were taken to the Moratuwa Police and MC Moratuwa Case No. 22887 was instituted against them, thereafter they were discharged by court. The services of these 15 workmen were terminated after a domestic inquiry conducted by Mr. F.N.D. Silva.

The arbitrator after analyzing the facts relevant to the issues ordered that the workmen numbered 1 to 15 (6th to the

20th Respondent be re-instated in service with back wages and other allowances from the date of termination because their services had been terminated unfairly.

The Petitioner's contention is that the arbitrator did not determine the issues and or considered the evidence led in respect of whether the 13th Respondent came into the Accountant's office under the influence of liquor or after consuming alcohol and whether he abused the Personal Manager or the General Manager and the 13th Respondent behaved in a manner unbecoming of an executive. The Petitioner further contended that the arbitrator has failed to consider whether the workmen who entered the Board Room on the 26th threatened the management.

The arbitrator in considering the evidence has observed that it appears that the parties have presented facts after exaggerating them in their favour. This shows that the arbitrator has considered the concerns of the Petitioner mentioned above and rejected that those allegations are not serious enough to terminate the services of the employment of the employees.

The arbitrator in his award has also made order to reinstate the 22nd to 26th Respondents on the basis that the termination of their service were on the basis that they had vacated post but that there is no evidence to show that they had the required mental element to vacate their post. The evidence revealed that there was a strike consequent to the interdictions of the 6th to 12th and 14th to 20th Respondents. Thereafter the matter was settled consequent to discussions at the Department of Labour. In terms of the said settlement the Union agreed to end the strike on 24.05.1999

and the Petitioner agreed to let the workmen return to work and to take them back in batches over a period of one week. This arrangement caused confusion on the date of reporting. The Petitioner claimed that it requested certain employees to report on a particular date but the relevant employees claim that they were requested to report on a different date and they reported on the date but they were told that they have vacated post as they have not reported for work on the date that they should have reported for work. In these circumstances the arbitrator has correctly concluded that the said employees had no mental element to vacate post and ordered reinstatement.

The Petitioner contended that the order of the arbitrator that the heir of the workmen Karunadasa who died during the arbitration should be paid the benefit due to him after examining the death certificate, marriage certificate and other relevant documents is erroneous in law as the arbitrator has no jurisdiction to make such an order. The arbitrator under the Industrial Disputes Act has the power to make an award which is just and equitable; *Municipal Council of Colombo v. Munasinghe*[1] at 225. It is just and equitable in the given circumstances to give the benefit that would have been accrued to the workmen at the time of his death to the heir of the said workman as if his services were not terminated.

In *R. v. Deputy Industrial Injuries Commissioner ex parte Moore* [2] at 84 Diplock, L.J. held:

"The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the

issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his."

The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In judicial review the court is concerned with its legality, on appeal the question is right or wrong. On review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not; *Best Footwear (pvt) Ltd., and Two Others v. Aboosally, former Minister of Labour & Vocational Training and Others*[3].

The arbitrator after giving due consideration to the evidence placed before him has arrived at the conclusions mentioned in the said award. The Petitioner has failed to establish any ground on which this court could issue a writ of certiorari to quash the said award. Hence this court dismisses this application without costs.

Application dismissed.

EDIRISOORIYA AND OTHERS VS. NATIONAL SALARIES AND CADRE COMMISSION AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE, PC J. [P/CA]
GOONERATNE, J.
CA 417/2008
FEBRUARY 19, 2009
OCTOBER 16, 2009

Writ of Certiorari – Placement in a segment of a Technical grade – Unreasonable, arbitrary – Legitimate expectation? – Locus standi – Central Principles of Administrative Law – Ultra Vires – Could a writ of certiorari be issued as a matter of course? – Wage Policy.

The petitioners challenged their placement in Grade MT/1/2006 as wrongful on the basis that the appropriate categorization is Grade MT-2-2006 as per the circulars.

Held:

(1) Wage policy of public officers can be decided by the Cabinet under the provisions of the Constitution and the Court cannot interfere with the policy decision in relation to restructure of salaries of public officers unless it can be established that the policy decision is *ultra vires*.

Per Sathya Hettige PC P/CA:

> "It can be seen that the National Salaries and Cadre Commission [NS and CS] has recommended to restructure and re-categorize and or to regroup the public officers having considered all the relevant facts and the policy decision of the government and therefore I do not think that this Court should interfere with the recommendations of the NS and CS and or the decision taken in the Circular".

(2) A prerogative writ is not issued as a matter of course and it is in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal.

(3) While legitimate expectation gives an applicant *locus standi* to ask for judicial review it differs from wrongful or *ultra vires* action. It is wrongful or *ultra vires action* which justifies the granting of judicial review and that too only if all the circumstances point to an exercise of the Courts discretion that way.

(4) The Central principle of Administrative Law, - *ultra vires* - simply means acting beyond one's power or authority.

APPLICATION for a Writ of Certiorari.

Cases referred to:-

1. *Sudhakaran vs. Barathi* 1987 2 Sri LR 243
2. *P. S. Bus Company vs. Ceylon Transort Board* 61 NLR 491.

Manohara de Silva PC with *Nimal Hippola* for the petitioner

Milinda Gunatilaka SSC with *Ruwanthi Herath Gooneratne* SC for respondent.

June 21st 2011

SATHYA HETTIGE PC. J (P/CA)

1st to 3rd petitioners are Technical Education Demonstrators attached to the Department of Technical Education and Training headed by the 16th respondent.

1st and 2nd petitioners are Grade 1 and the 3rd petitioner is in Grade 11. The petitioners state that the technical Education Demonstrators are members of the academic staff in Technical colleges located in different districts in the country and their function is to teach /instruct the practical aspects of studying to the students who are engaged in courses in the fields of

(a) Masonry

(b) Carpentry

(c) Motor Mechanism

(d) Metal Craft

(e) Electrical/ Electronic Technology

The petitioners were appointed as Technical Education Demonstrators on different dates prior to the year 2000 and in the year 2000 the Ministry of Vocational Training and Rural Industries with concurrence of the Department of Management Services of the Ministry of Finance and Planning presented to Cabinet a Memorandum for Revision of salaries and and granting a graded promotion scheme for demonstrators serving in the Technical Colleges and the Cabinet approval was granted on 14/06.2000 to create two grades in the post of Technical Education Demonstrators namely Demonstrator class 1 and Demonstrator class 11 as per the Cabinet decision marked P4.

It is stated in the petition that consequent to the said Cabinet decision an amended scheme of recruitment came in to effect and interviews were held at different intervals and eligible candidates were absorbed accordingly. The 1st and 2nd petitioners were absorbed to grade 1 and 3rd petitioner to Grade II which is supported by the promotion letters marked P6(1) and P6(2)

It was submitted that in addition to the educational qualifications stated in the scheme of recruitment marked P5, as per paragraph 5 (ii) there is a prerequisite qualification to possess at least a two year certificate from a Technical College.

It was also submitted that in addition to the OL and AL qualifications, paragraph 3.2.2.2 of the circular marked P8 wherein the employees have been classified according to their qualification, the officers who have a certificate or diploma in proof of undergoing a course of vocational or professional Training of 13 to 24 months would fall in to segment 2 of the Management Assistant Technical Grade. The said paragraph is as follows:-

The petitioners complain that by the letter dated 05.05.2006 marked P10 the 15th respondent informed the 16th respondent to adopt the salary structure MT-1-2006 enumerated in Public Administration Circular 6/2006 marked P8 for the petitioners. It was further submitted that the 15th respondent has no power or authority to categorize the petitioners under category MT-1-2006

Petitioners also submit that by the letter dated 19-11-2007 the 15th respondent informed the 16th respondent that the salary scale MT-1-2006 allocated to the petitioners cannot be changed and by the letter dated 29-11-2007 marked P13 that information was communicated to the principals of all Technical Colleges.

By P13 which was addressed to all the Technical College principals, instructions had been given to prepare the salaries of the petitioners according to paragraph 8 of the Circular No. 6/2006 (11) by placing the officers who are in Grade 11 in Grade 111 and officers in Grade 1 in Grade 11 deduct the salaries that had been overpaid.

The grievance of the petitioners is that the placement of the petitioners in MR-1-2006 is wrongful on the basis that