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DIGEST

WRIT OF CERTIORARI – Extensions of service granted to Medical Officer by the University Grants Commission (UGC) challenged - University Medical Officer not entitled to be treated as a teacher for the purposes of extension of service - Sections 2,34,35 and 36 of Ceylon University Ordinance 20 of 1942, Section 6 of General Act No. 1 of 1945, Section 99 of Higher Education Act 20 of 1966, Sections 81(1) and 81(7) of the University of Ceylon Act 1 of 1972 and Sections 71(1), 72(2), 73, 75, 79, 89m, 141 and 147 of the Universities Act 16 of 1978 - Futility - Laches - Acquiescence-Finality Clause in Section 87 of the University Act of 1978 - Quad approbo non reprobo - expression unius exclusion alterious.

CM 7227–2,500(2007/02)

UNIVERSITY OF PERADENIYA VS. JUSTICE D. G. JAYALATH, CHAIRMAN UNIVERSITY SERVICES APPEALS BOARD AND OTHERS

COURT OF APPEAL.
SALEEM MARSOOF. PC. J. (P/CA).
SRISKANDARAJAH. J.
CA NO. 796/2002.
JANUARY 13, 2005.

Writ of Certiorari-Extensions of service granted to Medical Officer by the University Grants Commission (UGC) challenged - University Medical Officer not entitled to be treated as a teacher for the purposes of extension of service - Sections 2,34,35 and 36 of Ceylon University Ordinance 20 of 1942, Section 6 of General Act No. 1 of 1945, Section 99 of Higher Education Act 20 of 1966, Sections 81(1) and 81(7) of the University of Ceylon Act 1 of 1972 and Sections 71(1), 72(2), 73, 75, 79, 89m, 141 and 147 of the Universities Act 16 of 1978 - Futility - Laches - Acquiescence-Finality Clause in Section 87 of the University Act of 1978 - Quad approbo non reprobo - expressio unius exclusio alterious.

The 4th respondent was appointed as a Medical Officer to be attached to the Health Centre of the University of Sri Lanka, Peradeniya in 1986 and elevated as Chief Medical Officer in 1989. In 1995, before reaching her 55th year, she applied for an extension of service until she completed the age of 65 years. The UGC recommended to the Council of the Petitioner University to grant the 4th respondent an en bloc extension until she reaches the age of 60 years. Thereafter, while the 4th respondent was only 56 years old the 6th respondent granted a further extension until she reached the age of 65 years "as in the case of teachers in terms of Section 141 of the Universities Act". The 5th respondent, a Senior Medical of the Petitioner University challenged the validity of these extensions before the University Services Appeals Board (USAB). The USAB refused to quash the extensions of service. The Petitioner University sought to quash the orders granting extension.

It was contended by the respondents that there was delay on the part of the petitioner to seek prerogative writ remedy.

It was further contended on behalf of the 1st - 3rd, 4th and 6th respondents, that the 4th respondent was entitled to continue in service until the age of 65, as if she was a teacher in terms of Section 6 of the General Act No. 1 of 1945. Preliminary objections were also raised by the

respondents on grounds of laches, acquiescence and in terms of the Finality Clause in Section 87 of the University Act of 1978.

Two days before the date fixed for judgment, a motion was filed by the Attorney-at-Law for the UGC, the 6th respondent stating that the 4th respondent had informed the UGC that she had resigned her post as Chief Medical Officer with effect from 1st September 2004, and therefore the matter will be rendered futile, by the acceptance of the resignation.

HELD: (1) It is the prolonged proceedings before the USAB and the two years that had lapsed since the institution of this case in the Court of Appeal that have prevented the issue being judicially determined. The decision of the Supreme Court in *Centre for Policy Alternatives and Others vs. Dayananda Dissanayake and Others*,[2] is relevant to this application and consequently the matter will not be rendered futile solely by the acceptance of the resignation.

(2) Section 6 of the General Act No. 1 of 1945 was a statute specific subsidiary legislation and ceased to be applicable with the repeal of the Ceylon University Ordinance. In any event, the said Act only provided for a maximum retirement age of 60 years and the 4th respondent was not entitled to continue in service until the age of 65.

S99 (1) of the Higher Education Act No. 20 of 1966 only gives employees of the University of Ceylon, Peradeniya the privilege of retaining their rights. As the 4th respondent was not an employee of the "old University" established by the 1942 Ordinance, she cannot have any claim to such rights.

S81(7) of the University of Ceylon Act of 1972 did not have the effect of preserving for posterity the provisions of Section 6 of the General Act No. 1 of 1945 or any other statute, ordinance or rule made under the Ceylon University Ordinance of 1942. Section 81(7) "preserved only those rules which were made under the provisions of Act No. 20 of 1966".

There is no doubt that the 4th respondent was clearly not a teacher and not entitled to be considered a teacher within the meaning of the University Act of 1978.

Per Saleem Marsoof. J (P/CA) :

"It is also important to note that the term 'teacher' is defined in Section 79, Section 89 of the Universities Act of 1978 to include Librarian, Deputy Librarian and Assistant Librarian. But there in no mention of Medical Officers, Senior Medical Officer or Chief Medical Officer in the definition. I think this is eminently a situation wherein the Maxim "expressio unius exclusio alterius" should apply".

(3) The legality of the purported extensions granted to the 4th respondent has to be determined in the context of Section 75 of the Universities Act of 1978, which provides that the holder of any post other than that of teacher shall continue in office until he completes his 55th year and shall thereafter be deemed to have voluntarily retired from service, unless, extensions of service are granted "for a period of one year at a time until he completes his 60th year, and shall thereafter deemed to have retired".

Per Saleem Marsoof. J (P/CA)

"The purported extensions of service granted by the 6th respondent, UGC, which were en bloc and until the age of 65 years, are *ultra vires* the powers of that Commission, and the decision of the University Services Appeals Board is erroneous"

Held further :

(4) Section 87 of the Universities Act of 1978 does not exclude or seek to exclude the jurisdiction of this Court, as it is not couched in the language of ouster clauses and signifies nothing more than finality within the University system, i. e. there is no further appeal to any other University body, or the UGC or the Minister. Even if it were not so, preclusive clauses are generally interpreted strictly, and in the absence of clear language in Section 87 manifesting an intention to deprive a Court of jurisdiction, the contrary will not be presumed, and the objection based on the finality clause had to be overruled.

Per Saleem Marsoof. J (P/CA)

"However having recommended the extensions of service in question and justified the same in the proceedings before the USAB, and having kept the 4th respondent in service without demur, the Petitioner University cannot now make a U-turn and seek the quashing of the extensions granted

to the 4th respondent and the refund of the emoluments paid. The conduct of the University violates the maxim ' quad approbo non reprobo'. In view of the acquiescence the Petitioner University is not entitled to any of the relief prayed for by it".

Held further :

(5) When no time limit is specified for seeking prerogative writ remedy, this Court has ample power to condone delays, where denial of a prerogative writ is likely to cause great injustice. As the impugned orders P4 and P5 were altogether ultra vires, the mere delay in invoking the jurisdiction of Court would not defeat the application for relief. Preliminary objection on delay overuled.

Cases referred to :

1. *Mendis, Fowzie and others vs. Goonawardena* and *G. P. A Silva* (1978-79) 2 Sri LR 322.
2. *Centre for Policy Alternatives and others vs. Dayananda Dissanayake and others* (2003) - 1 Sri LR 277.
3. *Punchi Singho vs. Perera* - 53 NLR 143
4. *Sudhakaran vs. Bharathi* (1989) - 1 Sri LR 46
5. *Watson vs. Winch* (1916) 1 K. S. 689
6. *Sannasgala vs. University of Kelaniya and Members of the University Senate* (1991) 2 Sri LR 193.
7. *Biso Menika vs. Cyril de Alwis* (1982) 1 Sri LR 368
8. *Wickramasinghe vs. Ceylon Electricity Board and Another* (1982) 2 Sri LR 608
9. *Viswalingam vs. Liyanage* (1983) 1 Sri LR 205
10. *B. Sirisena Cooray vs. Tissa Dias Bandaranayake* (1999) 1 Sri LR 1.

APPLICATION for a Writ of Certiorari.

Nirmalan Wigneswaran SC for Petitioner
Sajeewa Jayawardane with P.Gunaratne for 1st - 3rd respondents
Anil Silva for 4th respondent
S. S. Sahabandu PC with *A. P. Niles* and *I. R. Rajapakse* for 5th respondent.
A. C. S. Dewapura for 6th respondent.

Cuv. adv. vult.

January 13, 2005

SALEEM MARSOOF J. (P/CA)

The Petitioner in this case is the University of Peradeniya, which is the successor to the University of Ceylon, Peradeniya, the first ever university to be established in this country. The University of Ceylon, Peradeniya was incorporated by the Ceylon University Ordinance No. 20 of 1942, and the said University continued in existence even after

the repeal of the Ceylon University Ordinance in terms of transitional provisions included in subsequent legislation relating to universities enacted from time to time. The 4th and 5th Respondents were respectively the Chief Medical Officer and the Senior Medical Officer of the Petitioner University, and the bone of contention between them were the two extensions of service purported to be granted to the former by the 6th Respondent University Grants Commissions by its letters dated 15th February 1996(P4) and 4th July 1996(P5) the validity of which were challenged unsuccessfully by the 5th Respondent before the University Services Appeals Board. The Petitioner University filed this application on 18th April 2002 praying inter-alia for :-

(a) a mandate in the nature of certiorari quashing the decision of the University Services Appeals Board (consisting of the 1st, 2nd and 3rd respondents) made in USAB case No. 551 on 26th February 2002 (P9); and

(b) a mandate in the nature of certiorari quashing the two extensions of service purported to be granted to the 4th respondent by the 6th respondent University Grants Commission by its letters dated 15th February, 1996(P4) and 4th July, 1996 (P5) respectively.

Through prayer(e), the Petitioner also sought a consequential order directing the 4th respondent to return to it the salaries and allowances received by the 4th respondent since 26th February, 1995. The 5th respondent is the Senior University Medical Officer attached to the Petitioner University who lodged the appeal bearing No. 551 in the University Services Appeal Board against the decisions of the 6th respondent University Grants Commission to give the 4th respondent the aforesaid extension of service.

This case is connected to CA application No. 705/2002 filed by the 5th respondent on 4th April, 2002 seeking to have the aforesaid decision of the University Services Appeal Board quashed by certiorari and further seeking a writ of prohibition against the University of Peradeniya and the University Grants Commission restraining them from continuing the services of the 4th respondent as the Chief Medical Officer of the University of Peradeniya. The preliminary objections taken up in both cases were argued together and disposed of by the order of this Court dated 10th June, 2003, which dismissed the applications upholding some of the said preliminary objections taken up by some of the respondents. Applications were then filed in the Supreme Court by the

Petitioners in both cases seeking special leave to appeal against the said order of this Court, and by its order dated 24th September, 2003 the Supreme Court decided to send both cases back to the Court of Appeal for rehearing. The Supreme Court also observed that "it is prudent that these matters, namely CA Application 796/02 and 705/02 be dealt with separately. The connected case CA Application No. 705/2002 was therefore not taken up for argument along with this case, and will be heard separately.

Preliminary Objections

When this case was taken up for argument on 22nd July 2004, learned Counsel for the 1st to 3rd Respondents, the 4th respondent and the 6th respondent took up the following preliminary objections :

(1) Can the Petitioner maintain this application in view of the delay in invoking the jurisdiction of this Court for more than 6 1/2 years from the dates of P4 and P5?

(2) Can the Petitioner maintain this application in view of the acquiescence of the Petitioner of allowing the 4th respondent to work in the Petitioner University for more than 6 1/2 years.

(3) Can the Petitioner maintain this application having supported the validity of the appointment of the 4th respondent in the pleadings before the University Services Appeals board?

(4) Can the Petitioner maintain this application in view of the finality clause in Section 87 of Act No. 16 of 1978 read with Section 22 of the Interpretation Ordinance?

After hearing submissions of Counsel in respect of these preliminary objections, Court indicated that it was inclined to consider these objections along with the merits of the substantive application for the reason that these objections involved mixed questions of fact and law. Court then proceeded to hear submissions of Counsel in full on the preliminary objections as well as on the substantive questions arising in the case on that date as well as on 29th July, 2004, and having permitted Counsel to file written submissions, reserved judgment for 27th September, 2004. As the judgment was not ready on that date, the pronouncement of judgment was postponed for 15th October, 2004.

The Question of Futility

Two days prior to the date fixed for the delivery of the judgment, namely on 13th October, 2004, a motion was filed by the Attorney-at-Law for the 6th respondent (without notice to the other parties to the case) stating that the 4th respondent had informed the 6th respondent University Grants Commission in writing that she had resigned from her post as Chief Medical Officer of the Petitioner University with effect from 1st September, 2004. Along with the said motion, true copies of three letters were also produced, from which it appears that on 31st May, 2004 the 4th respondent has written to the Vice Chancellor of the Petitioner University stating that she wished to resign from the post of Chief Medical Officer with effect from 1st September, 2004, and that the said letter was considered by the University Council which decided at its 327th, meeting held on 24th July, 2004, to accept the said resignation without prejudice to the rights of parties in this case and subject to the recovery of outstanding dues, if any, with effect from 1st September, 2004. It also appears that the said decision of the University Council was conveyed to the 4th respondent by the Vice Chancellor of the Petitioner University by his letter dated 30th August, 2004, and these developments were notified to the 6th respondent University Grants Commission by the 4th respondent by her letter dated 4th October, 2004.

In view of these developments, judgment was not delivered on 15th October, 2004, but instead the case was mentioned in open Court. The parties were directed by Court to file Written Submissions on or before 4th November, 2004 in regard to the question whether the application filed by the Petitioner University has been rendered futile by the acceptance by the 6th respondent Commission of the resignation of the 4th respondent. When this case was mentioned on 4th November, 2004, the Petitioner University was not represented by Counsel, nor any written submissions filed on its behalf. learned President's Counsel for the 5th respondent informed court that he has already filed his written submissions relating to the question of futility in the Court Registry. Although learned Counsel for the 1st to 3rd respondents and the 4th respondent informed Court on the same occasion that their written submissions will be filed in the Court Registry in the course of the day, it does not appear that any written submissions have been so filed by them. in the circumstances, the issue of futility has to be considered in the light of the written submissions filed by the learned President's Counsel for the 5th respondent without the assistance of the other learned counsel representing the other parties to this case.

As pointed out by *Vythalingam J in Mendis, Fowzie and Others Vs. Goonawardena and G.P.A. Silva*[1] at 356, it is trite law that Certiorari is a discretionary remedy and the Court will not issue a writ if it would be futile to do so. However learned President's Counsel for the 5th respondent has submitted that the motion dated 13th October, 2004 has been filed by the 6th respondent without notice to the other parties as part of a strategy to prevent a judgment being delivered in this case, and in particular emphasized the fact that the resignation of the 4th respondent was accepted "without prejudice" to the rights of parties in this case. It is curious that although the 4th respondent has tendered her resignation from the post of Chief Medical Officer by the time this case was argued before this Court on 22nd July2004 and 29th July, 2004, this fact was not brought to the notice of court by the 4th respondent or the Petitioner University, and the belated intimation to Court of the fact that the 4th respondent had tendered her resignation from service lends credence to the submission of learned President's Counsel.

Be that as it may, it is now necessary to consider whether the acceptance of the resignation of the 4th respondent in fact renders these proceedings futile. Learned President's Counsel for the 5th respondent has submitted that the 4th respondent's resignation does not take away the need for a determination on prayer (e) as to whether Court should make an order directing the 4th respondent to return to it the emoluments received by her since 26th February, 1995, and has further submitted that a determination on prayer (e) cannot be made without first deciding whether the Petitioner is entitled to the quashing of decision of the University Services appeals Board marked P9 and the two purported extensions of service marked P4 and P5 as prayed for in prayers (b) and (c). He has submitted that the 4th respondent's belated resignation. tendered by her having enjoyed the fruits of nearly ten years of her impugned extensions of service, does not obviate the need for a decision on the legality of those extensions. Learned President's Counsel for the 5th respondent further submitted that as the Petitioner University has placed before court evidence that it was facing queries from the Auditor-General regarding the said extensions and the consequential payment of emoluments, the mere belated resignation of the 4th respondent does not dispose of the legal consequences of the said two extensions.

Learned President's Counsel for the 5th respondent also emphasized that this Court is called upon to exercise a supervisory jurisdiction over statutory bodies such as the Petitioner University, the 6th respondent University Grants Commission and the University Services Appeals Board comprising of the 1st to 3rd respondents. He has submitted that the basis on which the 4th respondent sought to justify her claim to be allowed to be in service until she completed the age of sixty-five was that University Medical Officers are entitled in law to be treated as if they are teachers;. which the Petitioner University and the 5th respondent claims to be a position which is inconsistent with the provisions of the Universities Act of 1978 and even prior legislation in this regard. He further contends that the 4th respondent has claimed that she should be treated as a teacher as persons who had served as University Medical Officers in the past had been so treated and allowed to continue until the age of Sixty-five, and that the University Services Appeals Board had upheld her claim on the basis of these past precedents. He submitted that if the decision of the Appeals Board marked P9 is allowed to stand, other University Medical Officers, and certainly those appointed under the 1972 Act, may use P9 as a precedent to remain in service until they complete the age of Sixty-five, which could have serious consequences for all the Universities governed by the Universities Act. He has submitted that as the 4th respondent had not resigned at the time of delivery of the order of the University Services Appeals Board marked P9 is allowed to stand, other University Medical Officers, and certainly those appointed under the 1972 Act, may use P9 as a precedent to remain in service until they complete the age of sixty-five, which could have serious consequences for all the Universities governed by the Universities Act. He has submitted that as the 4th respondent has not resigned at the time of delivery of the order of the University Services Appeals Board marked P9, it would be a grave injustice to prevent the parties aggrieved by the said order from having the matter reviewed by this court as they are entitled to do in law. He submits that if the impugned decision of the University Services Appeals Board is allowed to stand, it will have far-reaching consequences on the cardre position and finances of all the universities as well as the promotional prospects of university Medical officers. He submits that the question whether a University Medical Officer ought to be treated as if he or she is a teacher is a matter of public importance, and if this question is determined with certainty, the judgment of this Court will not be in vain. In my view, there is great force in these submissions.

Learned President's Counsel for the 5th respondent has also placed reliance on the decision of the Supreme Court *in Center for Policy Alternatives and Others vs. Dayananda Dissanayake and Others* [2]. The decision involved certain Provincial Chief Ministers whose appointments were challenged on the basis that their nominations were not valid insofar as their names were not included in the nomination papers put forward by their respective parties or groups for the provincial Council Elections in question. The Chief Ministers had ceased to hold office even prior to the granting of special leave to appeal, but leave had been granted on the basis that the matter was of great public importance. The cases on appeal involved the interpretation of the Provincial Councils Elections Act in respect of the question whether a person whose name was not on the nomination list for the relevant Provincial Council Election could be nominated to fill a vacancy in the membership of the Council that occurred subsequently. The Court of Appeal had held that such a person could be so nominated. The Supreme Court disagreed, and noted that if the futility argument was upheld, the Court of Appeal judgment would be regarded as authoritative and binding in respect of all future vacancies in Provincial Councils and the Commissioner of Elections would be bound to act on the basis of the said judgment. Hence the Supreme Court held that it would not be acting in vain in setting aside the judgment of the Court of Appeal and that it was in the public interest that the procedure for the filling of such vacancies should be laid down with certainty. The Supreme Court distinguished the decision in *Punchi Singho vs. Perera*[3] as a case where the impugned decision or declaration had ceased to be operative before the litigation commenced. The Court also stated that the argument of futility would not be upheld where it was the law's delays that had caused the apparent futility, in the licensing case of *Sundarkaran vs. Bharathi*[4]. In the present case it should be noted that it was the prolonged proceedings before the University Services Appeals Board and the two years that has lapsed since the institution of this case in the Court of Appeal that has prevented the issue being judicially determined, in fact, in the instant case when setting aside the decision of another Bench of this court dated 10th June, 2003 which upheld the preliminary objections that had been taken by some of the respondents, the Supreme Court has directed that this matter should be "dealt with and disposed of expeditiously. " I am of the opinion that the decision of the Supreme Court in *Centre for Policy Alternatives and Others Vs. Dayananda Dissanayake and Others* (*supra*) is relevant to this case, and accordingly hold that the determination of this matter

would not be rendered futile by reason only of the acceptance of the resignation of the 4th respondent.

Factual Matrix

Before considering the preliminary objections, it is necessary to advert to the factual matrix as the facts of this case and the applicable law have some relevance to a few of the preliminary objections raised in the case. The substantive dispute that has given rise to this case revolves around two extensions of service granted to the 4th respondent (Dr. S. P. Amarasiri) by the 6th respondent University Grants Commission, which itself is a statutory body established by the Universities Act, No. 16 of 1978. The 4th respondent was appointed as a Medical Officer to be attached to the Health Center of the University of Sri Lanka, Peradeniya with effect from 25th October 1986 by the letter dated 23rd February, 1987 (P2), and was elevated to the office of Chief Medical Officer with effect from 2nd May, 1989 by the letter dated 17th April, 1989 (P3). It is important to note that the said letters dated 23rd February, 1987 (P2) and 17th April, 1989 (P3) were issued by the 6th respondent University Grants Commission in terms of Section 71(2) of the Universities Act, No. 16 of 1978. Section 71(2) of the Universities Act empowers the Commission to make appointments of staff to Higher Educational Institutions such as the Petitioner University, and expressly provides that the Commission shall, in accordance with the schemes of recruitment and the procedures for appointment prescribed by Ordinance, make the following appointment to the staff of a Higher Educational Institution–

(i) appointment to a post of officer, except where together provision has been specifically made under this Act in respect of that post ;

(ii) appointment to a post *other than that of teacher*, carrying an initial salary of not less than rupees nine thousand per annum or such other higher initial salary as the Commissioner may from time to time determine by Ordinance ; and

(iii) appointment to such posts as may be prescribed by Ordinance, *other than posts of teacher*, involving the promotion of the appointee from one grade or class of post to another." (Emphasis added).

It is relevant to note that as expressly provided in section 71(1) of the Universities Act of 1978, all appointments to the staff of a Higher Educational Institution other than those set out in Section 71(2) have to be made by the governing authority of such institution, in accordance with the schemes of recruitment and the procedures for appointment prescribed by Ordinance. It is clear from the aforesaid provisions that the 6th respondent University Grant Commission does not enjoy any power to appoint teachers to a Higher Educational Institution, which power is specifically vested in the governing body of the particular institution. The terms "teacher" is defined in Section 79 and 89 of the Act "to include Librarian, Deputy Librarian and Assistant Librarian", but there is no mention of the Medical Officer, Senior Medical Officer or Chief Medical Officer in this definition. Furthermore, if the posts of Senior Medical Officer or Chief Medical Officer to which the 4th respondent was appointed by the 6th respondent, were posts of teacher or had to be deemed to be posts of teacher, it would follow that her appointment by the 6th respondent University Grants Commission to these posts would be *ultra vires* the powers of the said Commission as such appointments could only have been made by the governing authority of the relevant University.

It is also significant to note that it is expressly provided in section 73 of the Universities Act that "the holder of a *post of teacher*, who has been confirmed in his post, shall continue in that post until he has completed his Sixty-fifth year or if he completes his Sixty-fifth year in the course of an academic year, until the last day of such academic year, and shall thereafter be deemed to have retired from service". However, in regard to categories of persons who are not teachers, section 75 of the Act provides for a different age of retirement, in the following terms :

> "The holder of any post, *other than that of teacher*, shall continue in office until he completes his Fifty-fifth year, and shall thereafter be deemed to have voluntarily retired from service :
>
> Provided, however, that the holder of any such post may upon a written request made by him, be given by the commission or by the governing authority of the Higher Educational Institution to which he is attached, extension of service for a period of one year at a time until he completes his Fifth year, and shall thereafter be deemed to have retired."

From the above-mentioned provisions of the universities Act it is clear that had the 4th respondent been a teacher or had to be deemed to be a teacher, she need not have applied for an extension of service beyond the age of Fifty-five as a teacher would continue to hold office till the completion of the Sixty-fifty year. The 4th respondent who would have completed the age of Fifty-five on 26th February, 1995 by her letter dated 13th December, 1994 (4R2) addressed to the Secretary of the 6th respondent Commission though the Vice Chancellor of the Petitioner University requested an extension of service until she completes the age of Sixty-five. The 6th respondent by the letter dated 15th February, 1995(P4) addressed to the registrar of the Petitioner University informed him that the Commission at its 435 th meeting held on 27th January, 1995 decided to recommend to the Council of the Petitioner University to permit the 4th respondent to continue in the post of Chief Medical Officer "Until she reaches the compulsory age of retirement of Sixty years without her requesting for extension of service annually on completion of Fifty-five years". It is indeed surprising that this extension was granted en bloc for 5 years instead of the annual extension contemplated by the Section 75 of the Universities Act, No. 16 of 1978.

Thereafter, when the 4th respondent was still only 56 years old, by his letter dated 4th July, 1996(P5) the Acting Secretary to the 6th respondent Commission informed the Vice Chancellor of the Petitioner University that the Commission at its 469th meeting decided to permit the 4th respondent "to continue in service until she completes the age of Sixty five years as in the case of teachers in terms of Section 141 of the Universities Act, No. 16 of 1978". In this application, the Petitioner University seeks to challenge the legality of the extensions of service thus granted to the 4th respondent by the said letters marked P4 and P5, which the Petitioner University seeks to have quashed by way of certiorari along with the decision of the University Services Appeals Board dated 26th February, 2002 marked P9 purporting to affirm the aforesaid extension of service. The main issue in the case is whether the 4th respondent is entitled to be treated as a 'teacher' for the purposes of determining the date of her compulsory retirement from the Petitioner University.

Is a University Medical Officer a Teacher ?

It is relevant to note that the 6th respondent University Grants Commission as well as the University Services Appeals Board consisting

of the1st, 2nd and 3rd respondents have taken the view that the 4th respondent is entitled to continue in service until she completes the age of Sixty-five years as in the case of University Teachers in terms of Section 141 of the Universities Act, No. 16 of 1978. This Section is a transitional provision contained in the Universities Act of 1978, and sub-sections (1) and (2) of this Section are of some relevance when considering the case of the 4th respondent whose original appointment as a Medical Officer to the Health Centre of the University of Sri Lanka, Peradeniya Campus was made by the letter dated 11th February, 1975 (P1) prior to the coming into force of the Universities Act, No. 16 of 1978. I therefore quote below sub-Sections (1) and (2) of Section 141 of the Universities Act of 1978.

"Subject to the provisions of this Act and of any appropriate Instrument, the following provisions shall apply as from the date of coming into operation of this Act.

(1) All Teachers, Officers and Other Employees in the service of the old University on the day immediately preceding the date of coming into operation of this Part of this Act, who have not reached their respective ages of retirement shall be deemed to be Teachers, Officers and Other Employees in the service of such Higher Educational Institution as the Commission may determine and shall hold their offices with as nearly as may be the same status and on the same terms, including terms relating to salaries of wages, the termination of employment allowances or other benefits as they had or enjoyed in the service of the old University.

(2) The Commission may within one year of the date of coming into operation of this Part of this Act, review the appointments held by Teachers, Officers and Other Employees of the old University who were in the service of that University on the day immediately preceding the date of coming into operation of this Part of this Act, and order the abolition of such posts which are found to be superfluous or the termination of service of such persons as had been appointed to their respective post in contravention of the schemes of recruitment which were in force at the time when such appointments were made, with due notice given to them."

Section 147 of the Universities Act of 1978 has defined the phrase "old University" as used in the above quoted provisions to mean the

University of Ceylon, established under the University of Ceylon Act, No. 1 of 1972 and renamed as the 'University of Sri Lanka' in consequence of the enactment of the Constitution of Sri Lanka, 1972. It is, however, significant, that this definition did not extend to any University established under the Higher Education Act, No. 20 of 1966 or any previous legislation.

It has been strenuously contended by the learned Counsel for the 4th and 6th respondents that insofar as the 4th respondent was an employee in the service of the 'old University (that is, the University of Ceylon (after 1972 Sri Lanka), Peradeniya Campus), on the day immediately preceding the date of coming into operation of the Universities Act of 1978, she should be deemed to be a "teacher, officer or other employee" in the service of the Petitioner University of Peradeniya as admittedly determined by the 6th respondent University Grants Commission in terms of Section 141(1) of the said Act, and should be deemed to be holding office "with as nearly as may be the same status and on the same terms, including terms relating to salaries or wages, the termination of employment allowances or other benefits" as she had or enjoyed in the service of the old University. It is further submitted on behalf of these respondents that prior to the coming into operation of the Universities Act of 1978, the 4th respondent enjoyed parity of status with "teachers" attached to the University of Sri Lanka, Peradeniya Campus. For appreciating this submission, it is necessary to refer to the Ceylon University Ordinance No. 20 of 1942 and subsequent legislation relating to Universities and institutions of higher education as well as subsidiary legislation made in terms of the said legislation.

As noted at the very outset of this judgment, the Petitioner University is the successor to the University of Ceylon, which was established in Peradeniya under the Ceylon University Ordinance No. 20 of 1942 as amended by Ordinance No. 26 of 1943. Part VIII of the Ceylon University Ordinance dealt with the appointment of teachers and other staff, and Section 2 of this Ordinance defined "teacher" as including Professor, Reader, Lecturer and any other person "imparting instruction". and obviously did not catch up Medical Officers, whose functions did not include teaching or "imparting instruction" to students. Section 34 of the Ordinance provided for the appointment of Professor, Reader or Lecturer to be made by the University Council after considering the recommendation of a board of selection constituted as provided in that Section. Section 35 of the Ordinance provided for the appointment

of teachers who were not Professors, Readers or Lecturers by the University Council after considering the recommendation of a Selection Committee constituted in such a manner as may be prescribed by Statute. Section 36(1) provided that every appointment of a teacher made under Section 34 or Section 35, or of a Registrar or Librarian shall be by "agreement". Section 36(2) expressly provided that any agreement entered into with a person who was not an "experienced person" shall be entered into on the basis that "any renewal thereof upon the expiration of the probationary period shall be expressed to be and remain in force, ... until the Teacher, Registrar or Librarian appointed thereby has completed his Fifty-fifth year, or if he completes his Fifty-fifty year in the course of an academic year, until the last day of such academic year, and in any such agreement there shall be expressly reserved ..... an option for the University to renew the agreement so that it may continue and remain in force until the Teacher, Registrar or Librarian has completed his sixtieth year ....." None of these provisions expressly dealt with Medical Officers of the University.

Learned Counsel for the 4th and 6th respondents invited the attention of Court to Section 6 of the General Act No. 1 of 1945 (6R3), which is a subsidiary legislation enacted under the Ceylon University Ordinance, which provides as follows-

> "Section 34 and 36 of the Ordinance (the Ceylon University Ordinance No. 20 of 1942) shall apply to the appointment of Health Officers as if they were teachers of the University provided that in place of paragraphs (ii) in Section 34 there shall be substituted 'the Dean of the Faculty of Medicine".

Learned Counsel for the 4th and 6th respondents also invited the attention of Court to Section 1 of the General Act No. 1 of 1945 which defined the phrase 'Health Officer' to mean "The Director of Physical Education, an Assistant Director of Physical Education, or a University Medical Officer". Although at best the effect of these provisions was to allow a Medical Officer to continue in service till the completion of his sixtieth year, learned Counsel placed reliance on these provisions to show that Medical Officers were treated on par with teachers with respect to their tenure of office in the University.

The Ceylon University Ordinance of 1942 was repealed and replaced by the Higher Education Act No. 20 of 1966, in terms of which the

University established under the 1942 Ordinance was deemed to continue as a "transferred" university along with the Vidyodaya and Vidyalankara Universities which were established in 1958 under the purview of the National Council of Higher Education. It was the contention of the Learned Counsel for the 4th and 6th respondents that the Higher Education Act No. 20 of 1966 preserved the rights and benefits of all employees of the University of Ceylon, Peradeniya, acquired under the 1942 Ordinance in terms of Section 99(1) of the Higher Education Act of 1966. It was contended further on behalf of these respondents that Sections 81(1) and 81(7) of the University of Ceylon Act No. 1 of 1972 similarly preserved the rights and benefits of all employees of 'old University', and further kept alive all Statutes, Ordinances and Rules made previously. Learned Counsel for the 4th and 6th respondents contended that Section 141 of the Universities Act No. 16 of1978 also provided for employees of the 'old University' to retain the same rights and benefits. Accordingly, it was submitted on behalf of these respondents that the 4th respondent is entitled to be treated on par with a 'teacher' for purposes of retirement. It was further contended that as Section 6 of the General Act No. 1 of 1945(6R3) was a 'deeming provision' which has been thus preserved by the successive legislation on universities and higher educational Institutions, it would not be repugnant to Section 74 of the University Act of 1978 which permit employees who are not teachers to be employed only until a maximum age of Sixty years.

Learned State Counsel appearing for the Petitioner University has submitted that the contentions of the 4th and 6th respondents are fundamentally flawed since Section 6 of the General Act No. 1 of 1945 is "statute specific" and as such will not survive the repeal of the 1942 Ordinance under which it was made; that in any event, the said General Act contemplated a maximum age of retirement of Sixty years; that the 1966 Act which repealed the 1942 Ordinance including Section 6 of the General Act No. 1 of 1945; and that in any event, the 1966 Act did not provide for any by laws passed under the 1942 Ordinance to be preserved and that Section 6 of the General Act No. 1 of 1945 therefore has not survived the legislative interventions since 1966.

I have no difficulty with the submission that Section 6 of the General Act No. 1 of 1945 was statute specific. This by law, on which so much reliance is placed by the 4th and 6th respondents merely provided that-

1"Section 34 and 36 of the Ordinance (1942 Ordinance) shall apply to the appointment of Health Officers as if they were teachers....."

Thus the moment the parent legislation the Ceylon University Ordinance of 1942 was repealed, the above quoted by law became nugatory as it specifically related to two Sections found in the parent legislation which were repealed. As Maxwell on The Interpretation of Statues, 10th Edition at Page 406 affirms-

"When a by law is made under an Act, the repeal of the Act abrogates the by law unless the by law is preserved by the repealing Act (*Watson Vs. Winch* [5])".

It is significant to note that there is no provision in the Higher Education Act No. 20 of 1966 which repealed and replaced the Ceylon University Ordinance of 1942. As pointed out by the learned State Counsel, Section 99(1) of the 1966 Act only gives the employees of the 'Old University' (that is, the University of Ceylon, Peradeniya) the privilege of retaining their rights. As the 4th respondent was not an employee of the 'Old University' established by the 1942 Ordinance she cannot have any claim to such rights and privileges. Section 6(3) (b) of the Interpretation Ordinance No. 21 of 1901, as subsequently amended, only protects rights already acquired under the repealed Act. As the 4th respondent was not in service in 1966 at the time the repeal took place, she cannot avail herself of this provision. Furthermore, Section 36 of the 1942 Ordinance, which is specifically referred to in Section 6 of the General Act No. 1 of 1945, provided for a maximum retirement age of sixty years, and as such even had the 4th respondent been an employee of the University established under the 1942 Ordinance, she would not have any right to continue in service after completing sixty years.

Learned Counsel for the 4th and 6th respondents however rely on certain transitional provisions contained in the University of Ceylon Act No. 1 of 1972, and in particular Section 81(7) of the said Act, which provides that-

"All statutes, ordinances and rules made by the Authorities of the Old Universities and the National Council of Higher Education shall be deemed to be statutes, Ordinances and rules made by the University."

However, it is noteworthy that the phrase 'Old University' is defined in Section 87 of the 1972 Act to signify "any University established or deemed to be established under the Higher Education Act No. 20 of 1966" and does not include a reference to the University of Ceylon, Peradeniya, which was established under the Ceylon University Ordinance of 1942. **It cannot therefore be said that Section 81(7) of the University of Ceylon Act of 1972 had the effect of preserving to posterity the provisions of Section 6 of the General Act No. 1 of 1945 or any other statute, ordinance or rule made under the Ceylon University Ordinance of 1942.** In fact, Section 81(7) of the 1972 Act was considered by the Supreme Court in *Sannasagala Vs. University of Kelaniya and Members of the University Senate*[6] where it was conclusively held that the said section only kept alive those by laws made under the1966 Act. Kulatunga J made the following pertinent observation at page 200 of his judgment in that case-

> " On the question of the interpretation of Section 81(7) of Act, No. 1 of 1972, I agree with the opinion of the Court below that it only contemplates rules made after the coming into operation of Act, No. 20 of 1966. That interpretation is in accord with the plain meaning of words used in the enactment. If as submitted by Counsel Parliament intended to resuscitate the rules made even prior to the enactment of Act No. 20 of 1966 Parliament would have employed words which are clear and unambiguous. In the absence of such language I hold that Section 81(7) preserved only those rules which were under the provisions of Act, No. 20 of 1966....."

I am in respectful agreement with the view expressed by the Supreme Court in this case, and hold that Section 6 of the General Act No. 1 of 1945 is no more in force.

The legality of the purported extensions granted to the 4th respondent has to be determined in the context of Section 75 of the Universities Act of 1978 which, as noted earlier in this judgment, expressly provides that the holder of any post, other than that of teacher, shall continue in office until he completes his Fifty-fifth year, and shall thereafter be deemed to have voluntarily retired from service, unless the 6th Respondent University Grants Commission or the governing authority of the Higher Educational Institution to which he is attached, grants extensions of service "for a period of one year at a time until he completes

his Sixtieth year, and shall thereafter be deemed to have retired." As already noted. the fact that after the enactment of the Universities Act of 1978, the 4th respondent was appointed to the posts of Senior Medical Officer and Chief Medical Officer by the 6th Respondent University Grants Commission and not by the governing authority of the Petitioner University is significant in the context of Section 71 in terms of which the 6th Respondent University Grants Commission does not enjoy any power to appoint teachers to a higher educational institution, which power is specifically vested in the governing body of the particular institution. Accordingly, if the posts of Senior Medical Officer or Chief Medical Officer, were posts of teacher or had to be deemed to be posts of teacher, it would follow that her appointment by the 6th Respondent University Grants Commission to these posts would be ultra vires the powers of the said Commission.

It is also important to note that the term teacher' is defined in Sections 79 and 89 of the Universities Act of 1978 "to include Librarian, Deputy Librarian and Assistant Librarian", but there is no mention of Medical Officer, Senior Medical Officer of Chief Medical Officer in this definition. I think this is eminently a situation wherein the maxim *expressio unius est exclusio alterius should* apply. This means that expression or mention of one thing means the exclusion of the other or others not mentioned. The fact that in the definition of 'teacher' Librarian, Deputy Librarian and Assistant Librarian are expressly mentioned but Medical Officer, Senior Medical Officer and Chief Medical Officer are nor mentioned would militate in favour of the argument that a Medical Officer is not a teacher. In any event, on a functional basis it is not possible to regard a Medical Officer, Senior Medical Officer or Chief Medical Officers as a 'teacher' since such an officer is attached, as the4th respondent was, to a Health Centre or similar unit of a Higher Educational Institution which plays no part in the process of teaching. I have therefore no doubt in my mind that the 4th respondent was clearly not a teacher and not entitled to be considered a teacher within the meaning of the Universities Act of 1978. It will follow that the en block extensions purported to be granted by the 6th Respondent Commission to the 4th Respondent by P4 and P5 are clearly *ultra vires* the provisions of the Universities Act of 1978, and the decision of the University Services Appeals Board marked P9 is not correct.

The Question of Delay

Learned Counsel appearing for the 1st to 3rd Respondents, the 4th Respondent and the 6th Respondent have submitted that the Petitioner

University is not entitled to maintain this application in view of the delay in invoking the jurisdiction of this Court for more than 61/2 years from the dates of P4 and P5. While the Petitioner has filed the application on or about 18th April, 2002, the two extensions of service granted to the 4th Respondent by P4 and P5, which the Petitioner seeks to challenge by way of *certiorari* in these proceedings, are dated respectively 15th February 1995 and 4th July 1996. In the circumstances it has been stressed that delay defeats equity, and *certiorari* being equitable relief which is granted at the discretion of Court, the Petitioner in not entitled to relief by reason of its delay. While several decisions of our Courts were cited by Counsel in support of this submission, special emphasis was placed on the following *dictum* of Sharvananda J (as he then was) in *Biso Menika Vs. Cyril de Alwis* [7] at 378.

> "The proposition that the application for Writ must be sought as soon as inquiry 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 chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay".

Learned State Counsel appearing for the Petitioner has contended that the Petitioner University has not been guilty of undue and unexplained delay. He has emphasized that by P4, the 6th Respondent Commission purported to grant the 4th Respondent an extension of service till she completes sixty years of age, viz till 26th February, 2000, and by P5 the 6th Respondent purported to give the 4th Respondent a further extension till she completes Sixty-five years of age, viz till 26th February 2005, but these purported extensions were challenged by the 5th Respondent in USAB Appeal No. 551 filed in the University Services Appeals Board on 2nd January, 2000. He has further pointed out that the preliminary objection raised before the Appeals Board on the basis that the appeal was time barred were overruled by the Appeals Board which by its order dated 26th February, 2002 marked P9, affirmed the extensions purported to be granted by P4 and P5 on the basis that the 4th Respondent ought to be treated as if she was a teacher, the Petitioner University filed this application in the Court of Appeal on or about 18th April, 2002 little more than one month after the said order marked P9. In the circumstances, he has submitted that there is no undue delay, and that the alleged delay with regard to

P4 and P5 on the basis that the 4th respondent ought to be treated as if she was a teacher, the Petitioner University filed this application in the Court of Appeal on or about 18th April, 2002 little more than one month after the said order marked P9 decided to exercise its discretion under Rule 6 of the USAB Rules and entertained the appeal despite it being lodged after the expiry of three months from the date of the impugned decisions P4 and P5 as required by Rule 3. Learned State Counsel has submitted that the University Services Appeal Board, by its order dated 26th February, 2002 marked P9, affirm the extensions purported to be granted by P4 and P5 on the basis that the 4th respondent ought to be treated as if she was a teacher, the Petitioner - University filed this application in the Court of Appeal on or about 18th April, 2002 little more than one month after the said order marked P9. In the circumstances, he has submitted that there is no undue delay, and that the alleged delay with regard to P4 and P5 was considered by the University Services Appeal Board, which decided to entertain the appeal having considered the importance of the issue involved. Learned State Counsel further submitted that while the period of service contemplated by the extension purported to be granted by P4 came to an end on 26th February, 2000, the period of extended service contemplated by P5 would commence only on 27th February, 2000, and thus the appeal filed in the University Services Appeals Board on 2nd January, 2000 cannot be said to be belated. He further submitted that as the said appeal was determined only on 26th February, 2002(P), there was no undue delay in invoking the jurisdiction of this Court.

One consideration that militates against the Petitioner University in regard to the question of delay is that the appeal before the University Services Appeals Board was lodged by the 5th respondent and not by the Petitioner. In fact, the Petitioner University did not initially support the 5th respondent in her crusade against the 4th respondent. In those circumstances, how far the Petitioner University can rely on the challenge initiated by the 5th respondent is questionable. However, as a matter of law, learned State Counsel has invited our attention to certain dicta in the *Biso Menika* Judgment which have sought to explain the underlying principles with regard to delay most succinctly. He places considerable reliance on the following dictum of Sharvananda J at 379-

> "When the Court has examined the record and is satisfied that the Order complained of is manifestly erroneous or

without jurisdiction the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically." (Emphasis added)

There does not exist in Sri Lanka any statutory provision or rule of Court that sets out a time limit within which a petition for the issue of a prerogative writ must be filed. However, a rule of practice has grown which insists upon such petition being made without undue delay. When no time limits is specified for seeking such remedy, the Court has ample power to condone delays, where denial of a prerogative writ to the petitioner is likely to cause great injustice. As Sharvananda J observed in the *Bisomenika case*, the Court may in its discretion entertain the application for writ in spite of the fact that a petitioner comes to Court late, especially where the order challenged is a nullity. While I am in agreement with the submission of learned State Counsel that where the impugned orders are altogether ultra vires, as P4 and P5 are in this case, the mere delay in invoking the jurisdiction of Court would not defeat the application for relief, I am inclined to the view that as observed by Sharvananda J in the above quoted dictum, the conduct of the Petitioner University should also be taken into consideration. I note that as far as P9 is concerned, there is absolutely no delay as the Petitioner has come to Court less that two months from the date of P9. Indeed had the Petitioner sought to invoke the jurisdiction of this Court prior to the conclusion of the proceedings before the University Services Appeals Board, this Court may have refused notice on the ground that the said appeal was pending despite the fact that the appellate proceedings had been initiated by the 5th respondent and not the Petitioner University. Having carefully weighed the submissions made on behalf of all the parties in regard to the question of delay, I am inclined to overrule the preliminary objection taken up on behalf of the 1st to 3rd respondents, the 4th respondent and the 6th respondent on the ground of undue delay, subject to the other issue of acquiescence which the second and third preliminary objections give rise to.

The Question of Acquiescence

The second and the third preliminary objections take up by the learned Counsel appearing for the 1st to 3rd respondents, the 4th respondent and the 6th respondent raise the question of acquiescence on the part of the Petitioner University. The second preliminary objection is that the Petitioner University is not entitled to maintain this application on account of its own conduct of allowing the 4th respondent to work in the Petitioner University after she completed Fifty-five years of age on 26th February, 1995. Indeed, the 4th respondent has continued to be in the service of the Petitioner University even after that date on purported extensions of service recommended by the University Council, and had been paid all salaries and allowances and provided with all perquisites and benefits until 1st September, 2004, which was the effective date from which the University Council decided at its 327th meeting held on 24th July, 2004, to accept her resignation from service without prejudice to the rights of the parties in this case. Having so voluntarily kept the 4th respondent in service beyond her Fifty-fifth birthday, the Petitioner University in a remarkable turn of events has now filed this application seeking to have the purported extensions of service granted to her quashed, and has expressly prayed for the refund to the said University of all emoluments paid to the 4th respondent since 26th February, 1995. The later prayer is unconscionable to say the least, considering the fact that the 4th respondent had in fact served the Petitioner University for nearly ten years beyond her age of voluntary retirement to the apparent satisfaction of the University. To grant the relief prayed for by the Petitioner University and compel the refund of all emoluments paid to the4th respondent after she completed fifty-five years of age, would violate the rule against unjust enrichment, as the Petitioner University is obviously not in a position to return to the 4th respondent the service rendered by her. Indeed, it is trite law that Court will not exercise its discretion to grant prerogative relief such as certiorari to an applicant who has conducted himself in such a manner as to disentitle him or it to relief. As L. H. de Alwis J observed in *Wickramasinghe Vs. Ceylon Electricity Board and Another*[8] 613 "..... certiorari is a discretionary remedy and this Court has the power to withhold it if it thinks fit. This Court will do so in the case of an unmeritorious petitioner ....." There is no merit in the Petitioner's contention that the extensions of service granted to the 4th respondent should be quashed and the status quo ante restored, when the extensions in question were granted on the recommendation of the Council of the Petitioner University.

The third preliminary objection raised by the learned Counsel for the 1st to 3rd respondents, the 4th respondent and the 6th respondent is that the Petitioner University, having supported the validity of the appointment of the 4th respondent in the pleadings before the University Appeals Board, is precluded thereby from challenging the validity of P4 and P5 which purported to grant the impugned extensions in service, and the finding of the Appeals Board contained P9 to the effect that the 4th respondent "is legally entitled to be in service as a teacher until the retirement age of 65". This objection stems from the fact that the Petitioner University did not appeal against the extension granted to the 4th respondent by P4 and P5 and that when it was appealed against by the 5th respondent, the Petitioner tendered a written statement under the hand of the Vice Chancellor of the Petitioner University dated 16th July, 2000 (included in the document marked P6) in which submissions were made justifying the extension of services of the 4th respondent up to her Sixty-fifth year. In this letter the Vice Chancellor of the Petitioner University stated as follows:

> "However, it is particularly relevant to note that an anomalous situation exists whereby a section of the Medical Officers in the University service are permitted to work till they reach the age of 65 years while another section retire at the age of Sixty years. This would undoubtedly give rise to a sense of grievance and a perception of absence of fair play among those who have to retire at an earlier age. If all University Medical Officers without exception were to be allowed to continue in service till they complete 65 years of age as in the case of teachers, it would rectify anomalies in the present situation and remove grievances arising from what is clearly being perceived as unfair treatment."

Learned State Counsel has stressed that the Vice Chancellor of the Petitioner University is distinct from the Petitioner University itself, which has its separate legal identity, and emphasized that utmost caution should be exercised in the determination of the rights of a Public Authority such as the Petitioner University, which should not be jeopardized by an erroneous evaluation of the law by its officers or perhaps even by collusion between officers and others. While appreciating these sentiments in the context of favoritism and discrimination which has now become the order of the day, it is not possible to condone the objective conduct of the Petitioner University which should take the blame for the actions of its officers. The Petitioner

University cannot have it both ways. Having recommended the extensions of service in question and justified the same in the proceedings before the University Services Appeals Board, and having kept the 4th respondent in service without demur, the Petitioner University cannot now make a U-turn and seek the quashing of the extensions granted to the 4th respondent and the refund of the emoluments paid other. The conduct of the University violates the maxim *quad approbo non reprobo* (no person can accept and reject the same thing). As Sharvananda J (as he then was) explained in *Visvalingam Vs. Liyanage*[9] 231-

> A person cannot adopt two inconsistent positions, he cannot affirm and disaffirm, he is presumed to waive one right and elect to adopt the other. This doctrine of waiver looks chiefly to the conduct and position of the person who is said to have waived in order to see whether he has "approbated", so as to prevent him from reprobating-whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny-him a later election to the contrary."

Clearly, the Petitioner University has sought to rectify the alleged "anomaly" of having two categories of Medical Officers in the same University, one retiring at sixty and the other at Sixty-five, ende avouring to persuade the University Services Appeals Board that all University Medical Officers should be treated on par with University Teachers, and had availed itself of the services of the 4th respondent beyond her voluntary as well as the compulsory ages of retirement, and having elected to take these advantages the Petitioner University cannot now seek to put the clock back and turn a new leaf on a purely legalistic basis. The second and third preliminary objections have therefore to the upheld.

The Finality Clause

The fourth preliminary objection take up in this case was based on the finality clause in Section 87 of the University Act No.16 of 1978 read with Section 22 of the interpretation Ordinance No. 21 of 1901 as amended by act No.18 of 1972. Section 87 of the University Act reads as follows-

> "A decision made by the Appeals Board in the exercise, performance and discharge of its powers, duties and functions

under Section 86 shall be final, and where remedial action has to be taken in consequence of such a decision, the Chairman of the Commission or the governing authority of the Higher Education Institutional concerned, as the case may be, shall implement such decision."

Section 22 of the Interpretation Ordinance which provides *inter alia* as follows:-

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal....."

Learned Counsel appearing for the 1st to 3rd respondents, the 4th respondent and the 6th respondent have objected to this Court exercising jurisdiction in this case on the ground that the jurisdiction of Court has been shut out by Section 87 of the Universities Act of 1978 read with Section 22 of the Interpretation Ordinance. Learned State Counsel has submitted that judicial review in terms of Article 40 of the Constitution is not precluded by the aforesaid provisions for two reasons. Firstly, he argues that Section 87 of the Universities Act is not worded in the language of an ouster clause, and that is merely states that the decision of the University Services Appeals Board shall be "final". Learned State Counsel points out that Section 87 does not contain any language to the effect that the decision of the University Services Appeals Board "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise". He contends that the word "final" in Section 87 therefore signifies nothing more than finality within the University system, *i.e.* there is no further appeal to any other University body, or the University Grants Commission or the Minister. Secondly, he submits that the powers of this Court are derived from Article 140 of the Constitution and cites the decision of the

Supreme Court in *B. Sirisena Cooray Vs. Tissa Dias Bandaranayake*[10] for the proposition that the din proposition that the jurisdiction of this Court, insofar as it is derived from the Constitution, cannot be restricted by provisions of ordinary legislation such as Section 22 of the Interpretation Ordinance.

In my view, it is not necessary for this Court to deal with the second submission of learned State Counsel as the Court has no difficulty in accepting his first submission that Section 87 does not exclude or seek to exclude the supervisory jurisdiction of this Court.

Even if it was not so, preclusive clauses are generally interpreted strictly, and in the absence of clear language in Section 87 manifesting an intention to deprive Court of jurisdiction, the contrary will not be presumed. In the circumstances the preliminary objection based on the finality clause has to be overruled.

Conclusions :

For the foregoing reasons, I hold that the purported extensions of service granted to the 6th respondent Commission by P4 and P5 are *ultra vires* the powers of that Commission, and that the decision of the University Services Appeals Board marked P9 is erroneous. However, in view of the acquiescence of the Petitioner University I hold that it is not entitled to any of the relief prayed for by it, and upholding the second and third preliminary objections, dismiss the application filed by the Petitioner without costs.

SRISKANDARAJAH, J. — *I agree*

Extensions granted ultra vires and erroneous.