

RATNAYAKE AND OTHERS

v.

C.D. PERERA AND OTHERS

SUPREME COURT

SHARVANANDA, J., VICTOR PERERA, J., AND COLIN-THOMÉ, J.

S.C. 32/81 - CA No.2332/80

MAY 3 AND 4, 1982. 1982.

Trade Union Ordinance, Section 52 - Interpretation Ordinance, Section 2(gg) - Writ of Mandamus - Availability to enforce performance of public duty - No private contractual right

The appellants and the 3 respondents are teachers and are also members of the Lanka Guru Sangamaya. A is a member of the General Committee of the Sangamaya for the year 1980/81, 1st respondent is the Secretary, 2nd respondent is the President and 3rd respondent is the Treasurer.

The appellants 43 in number alleged that as duly elected members of the General Committee they requisitioned a meeting of the Central Committee in terms of their Constitution but that the respondents acting in concert refused to convene the meeting and had committed various other breaches of their duties in violation of the Constitution.

The appellants therefore prayed for a Writ of Mandamus directing the respondents to do various things besides convening the meeting.

The respondents filed objections stating that the Writ of Mandamus was not available to appellants.

Held -

Neither the Lanka Guru Sangamaya nor the respondents, its officials are public bodies performing duties of a public nature; the duties that the petitioners want the respondents to be compelled to perform by Writ of Mandamus are not duties of a public nature for which a Writ will lie. They are contractual duties outside the ambit of Mandamus.

Cases referred to:

- (1) *Bonsor v. Musicians Union* (1956) A.C. 104; (1955) A.E.R. 518.
- (2) *Perera v. Municipal Council, Colombo* (1947) 48 NLR 66.
- (3) *Perera v. Ceylon Government Railway Union Staff Benevolent Fund* (1963) 67 NLR 191.
- (4) *De Alwis v. Silva* (1967) 71 NLR 108.
- (5) *Siriwardene v. Fernando* (1973) 77 NLR 469.
- (6) *Ex-parte Napier* (1852) 18 Q.B. 692.
- (7) *King v. Governor & Co., Bank of England* 2, B and Ald. 620, 622.
- (8) *Farasmus v. Film Artists Association* (1963) 1 AER 636.
- (9) *Trade Exchange Ceylon Ltd. v. Asia Hotels Corporation Ltd.* (1981) 1 Sri LR 67.

APPEAL from Judgement of the Court of Appeal

Nimal Senanayake, S.A. with (Mrs.) A.B. Disanayake and Arunatilake de Silva for the petitioners - appellants.

D.S. Wijesinghe with Pērcy Dharmawardena for the respondents respondents.
Cur.adv.vult.

June 1st, 1982

SHARVANANDA, J.

The petitioners-appellants and the three respondents belong to the teaching profession. They are members of the trade union called and known as 'Lanka Teachers Union' (Lanka Guru Sangamaya). The petitioners-appellants are elected members of the General Committee of the Sangamaya for the year 1980/81 and came to function as such from 27.7.1980. The 1st respondent is the elected General Secretary; and 2nd respondent is the elected President; and the 3rd respondent is the elected Treasurer of the said union for the year 1980/81 and have functioned as such from 27th June 1980.

Under the provisions of the Constitution of the Union the first respondent is charged with the performance of the administrative duties of the union under the supervision of the General Committee and with the duty of convening meetings of the Central Committee and General Meetings of the Union in accordance with the Constitution of the Union; the second respondent is under a duty to preside at meetings and ensure the observance of the Rules of the Constitution

at meetings; and the third respondent is charged with the duty of keeping proper accounts of the union and ensuring that union funds are used for purposes authorised by the Central Committee and to prevent utilisation of the funds of the union without the sanction of the Central Committee in accordance with the rules of the union.

The petitioners who numbered 43 in the Court of Appeal alleged inter alia that they were all duly elected members of the Central Committee of the union and that despite the requisition dated 20th August 1980 signed by the 38 members to convene the meeting of the Central Committee; the 1st and 2nd respondents acting in concert with the 3rd respondent have inter alia refused to convene a meeting of the Central Committee and had committed various breaches of their duties in violation of the provisions of the union Constitution. The petitioners therefore prayed for the issue of a Writ of Mandamus-

- (a) directing the 1st, 2nd and 3rd respondents to convene a meeting of the Central Committee of the Lanka Guru Sangamaya, for the purpose of submitting a statement of claims of expenditure and income and consideration of such statement;
- (b) for the appointment of a date of meeting of the Central Committee.
- (c) for an injunction restraining any expenditure by the 1st, 2nd and 3rd respondents of the money of the union other than expenses necessary for the convening of the Central Committee meeting.
- (d) directing the respondents to place on the Agenda of meeting;
 - (i) the consideration of returns and declarations made by the respondents under the provisions of the Trade Union Ordinance and the issuing of directions by the Central Committee in respect thereof,
 - (ii) directions by the Central Committee in respect of all financial matters and legal actions pending in Court."

The respondents filed objections to the application. While denying the allegations of the petitioners, they took the objection in limine, that the application of the petitioners for the grant of Writ of Mandamus was misconceived and that such a Writ was not available to the petitioners.

The Court of Appeal upheld the objection and held that the duty cast on the Secretary of the Lanka Guru Sangamaya to summon a

meeting of the Central Committee on a requisition made by 1/3 of the members of the Central Committee was not a duty of a public nature and hence the Writ of Mandamus did not lie to compel its performance. The petitioners have preferred this appeal against the order of dismissal of their application.

The main contention of the petitioners-appellants is that the duty to summon the meeting is a statutory duty and that the duty is of a public nature. Reference was made to the provisions of the Trade Union Ordinance and regulations made thereunder, and it was contended that the Constitution of the Lanka Guru Sangamaya had statutory orientation being "Written Law" within the meaning of section 2(gg) of the Interpretation Ordinance.

The Interpretation Ordinance section 2(gg) (Chap.2) states that "In this Ordinance and in every written law "Written Law" shall mean and include "all Ordinances and Acts of Parliament and all Orders, Rules, Bye-Laws, Regulations made by any body of persons under the authority of the statute."

It was submitted that the sole question posed by this section was whether the Rules of the Union have been made under the authority of a statute and if so, they constituted "Written Law". Counsel urged that these rules have been made under the authority of the Trade Union Ordinance and the Regulations made thereunder. Section 52 of the Trade Union Ordinance authorises the making of regulations by the Minister. It provides that the Minister may make Regulations for the purpose of carrying out or giving effect to the principles and provisions of the Ordinance. There is no provision in the Trade Union Ordinance or in the Regulations made thereunder empowering any private person or group of private persons to frame any statutory Rules or Constitution for any trade union. It is not claimed that the Constitution of the Lanka Guru Sangamaya was made by the Minister or any other public authority in the exercise of the regulation making power under section 52.

It was however submitted by Counsel that as section 8 of the Ordinance makes registration of a trade union compulsory and as section 10 makes satisfaction of the Registrar, that the objects, rules and Constitution of the union do not conflict with any of such provisions and are not unlawful, condition precedent to registration of such union, and as section 38 makes it mandatory that Rules of every registered trade union should provide for all the matters

specified in the First Schedule and as part VI of the Ordinance makes provision for certain matters of the Constitution of the union, that the Rules or Constitution of the union constituted "Written Law" as defined in the Interpretation Ordinance and hence had statutory force.

The fundamental flaw in the argument relating to the applicability of section 2(gg) of the Interpretation Ordinance is that it overlooks the fact that the statutory definition of the words contained in section 2 of the Interpretation Ordinance applies only when such words are part of any enactment and are to be interpreted. That definition cannot be applied in a non-statutory context. Our attention has not been drawn to the words "Written Law", in the text of the Ordinance and hence that definition of "Written Law" cannot be invoked in support of the argument that the Rules of the Union constituted Law of the land.

Regulation 3 of the Trade Union Regulations of 1935 made under section 52 of the Ordinance provides that every application made under section 9(1) of the Ordinance for the registration of a Trade Union should be substantially in form "B" of the Regulation and form "B" requires a copy of the Rules of the union to be attached to the application for registration. For a trade union to be registered under section 8, it is essential that it should have a Constitution or Rules. Section 38 mandates that the Rules of the union should provide for the matters specified in the first schedule. One of the matters so specified is the appointment or election and removal of any Executive and of Trustees, Secretary, Treasurer and other Officers of the Trade Union. According to item 8 of the form "B" referred to in Regulation 3 provision has to be made in the Rules of the union, inter alia for the manner in which the meeting of the union should be held, minutes of the meetings should be recorded and confirmed and meetings of the Board should take place and the manner in which the executives, the officers of the union, the auditor or trustee shall be appointed and removed. Compliance with the requirement that the trade union should have a constitution and that the constitution should provide for all matters referred to above, is a sine qua non to secure registration of the union. It is however to be noted that the contents of the Rules are left to the free determination of the members of the union. Section 15 empowers the Registrar to cancel the registration if the trade union rescinds any Rules providing for any matter for which provision is required by section 38. The fallacy in counsel's argument lies in his assumption that registration of the union in conformity with the requirements of the Trade Union

Ordinance operates to stamp the union's constitution with statutory character. Registration does not impart any statutory quality to the Rules of the union. Trade unions are not the creation of statute, they are the creations of contract and their rules are consensual in nature.

The registered trade union is not a corporation, nor an individual, nor a partnership. A union becomes on registration a legal entity distinct from an unregistered trade union. A registered trade union is recognised by the law as a body distinct from the individuals who from time to time compose it. *Bonsor Vs. Musicians Union*. (1)

A trade union thus possesses some sort of entity apart from its members. However a trade union is basically a voluntary association and contract is the foundation or basis for its Rules. The union has no statutory constitution - the rights of its members stem from the contract of membership. The fundamental concept that the relationship between the members and the trade union is the product of contract has to be borne in mind in determining the question of law raised in the appeal, namely, whether it is a private or public body.

The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command issued by the superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character - that is to say for the enforcement of a mere private right, stemming from a contract of the parties -

"The duty to be performed must be of a public nature. A Mandamus will not lie to order admission or restoration to an office essentially of a private character, nor in general, will it lie to secure the due performance of the obligations owed by a company towards its members, or to resolve any other private dispute, such as a claim to reinstatement to membership of a trade union, nor will it issue to a private arbitral tribunal" de Smith - *Judicial Review* 4th Ed. page 540.

It is settled law that for Mandamus to lie the applicant must have a legal right to the performance of some duty, of a public and not of a private character - *Perera Vs. Municipal Council, Colombo*. (2) Even a duty arising under a statute may be a duty of a private kind.

It was held in *Perera Vs. Ceylon Government Railway Union Staff Benevolent Fund* (3) that the duty under section 17 of the Railway Union Staff Benevolent Fund Ordinance, of the Secretary and Treasurer to summon a General Meeting is neither a public duty nor a duty to be performed in the interests or for the benefit of the people, and that hence a Writ of Mandamus will not lie to compel its performance. It was again held in *De Alwis Vs. Silva*, (4) that the administrative regulations laid down in the Ceylon Government Manual of Procedure did not have the status of "Law" and that non-compliance with them could not be enforced by Mandamus. Thus it is fundamental for the invocation of the remedy of a Writ of Mandamus that there must be refusal to perform some duty of a public nature and not of a private character.

Counsel for the appellants referred to the case of *Siriwardena Vs. Fernando* (5), as pointing out the criteria for identifying what was "Office of public nature" for the purpose of the issue of a Writ of Quo Warranto. In that case it was held that offices of President and Vice President created by bye-laws of a Co-operative Society registered under section 6 of the Co-operative Societies Ordinance were offices of a public nature. The judgment in that case is based on the admission of Counsel for both petitioner and the respondents that the office in question was one "which had been created under a statute" and on the assumption that a bye-law of the Nattandiya Coconut Producers Co-operative Society Ltd., Lunuwila, was "written law", within the meaning of section 2(gg) of the Interpretation Ordinance. The correctness of this admission and assumption is open to question and this conclusion may have to be reviewed in an appropriate case. It is not necessary for the purpose of this case to go into the question of the correctness of the above conclusion; it is sufficient to state that it is not legitimate to apply the indicia for identifying an "office of a public nature" to determine what is a "duty of a public nature" for the enforcement of which a Writ of Mandamus will lie.

"The right of the applicant may arise from and the duty which he seeks to enforce may be imposed by either (1) statute (2) charter or (3) the common law or custom as e.g. the right of burial in the parish church yard" - Short on Mandamus 228. However today the chief function of the Writ is to compel the performance of public duties prescribed by statute though it lies as well for the enforcement of a common law public duty. Lord Campbell C.J., in *Ex-Parte Napier* (6) at 695 stated that - "a legal obligation which is the proper

substratum of a Mandamus can arise only from common law, statute or some contract.”

Professor Wade in his book 'Administrative Law' 4th Edition, page 603 correctly characterised this statement as a loose dictum which need not necessarily mean that Lord Campbell thought that Mandamus was a remedy for a breach of contract. “Rights flowing merely from a contract of membership should not be within the scope of Mandamus”. The Court does not issue a Writ of Mandamus in a case in which the right which the petitioner wants to enforce is based on a contract. Contractual duties are enforceable as matter of private law by the ordinary contractual remedies, such as damages, injunctions and specific performance. Duties enforceable by Mandamus are those imposed by law. “This is an application at the instance of several partners in a trading company to compel its co-partners in a trading company to compel its co-partners to divide the profits, but that is merely a private purpose and present a fit subject for inquiry on the other side of the Hall. There is no instance in which the Courts have granted a Mandamus to a trading corporation” - per Bayley. J. in *King Vs. Governor & Co., Bank of England.* (7)

The prerogative remedies of Certiorari, Prohibition, and Mandamus cover the field of governmental powers and duties. Modern Government is founded almost exclusively on statutory powers and duties vested in public bodies and the regular method of enforcement of those duties is by way of Mandamus. If a public official refuses to perform his duties Mandamus is the proper remedy. But if an official of a body such as a trade union vested with no statutory power conducts himself in the same way this remedy is inapplicable. The rights of its members are spent by their contract of membership and are secured by the ordinary remedies of private law.

The Rules of a trade union are not statutory Rules and cannot be equated to the regulations framed under section 52 of the ordinance. They are the terms of the contract of association between the members of the union. In the course of his judgment in *Bonsor Vs Musicians union*, (1) Denning L.J. said of Trade Union rules - “They are more like bye-laws than a contract.” Diplock L.J., and Upjohn L.J., in *Farasmus Vs Film Artists Association* (8) dissented from this view and stated that there was no true analogy between the rules of a trade union and the bye-laws of a public corporation and that the principle of ultra vires was not applicable to the rules of trade unions, as it would apply in the case of bye-laws. On appeal The House of Lords (1964 - 1 A. E. R. page 25) approved this statement of the law.

In the relationship between union and members, or among the members including the officials of a trade union, the constitution of the union occupies a position of primary legal importance. The rights and obligations of the union are demarcated by the Rules. It is a reflection of the fact that the trade union is a voluntary association that the general principle governing its constitution is that of freedom of contract. The union rules are all framed freely according to the will of the members and their enforceability is governed by general principles of the law of contract, a transgression of the rules is wrongful for the reason that it is a breach of the contract of association, it is therefore open to an aggrieved member to seek his remedy in private law; but since the rules do not involve performance of a duty of public nature the remedy of Mandamus will not be available to him.

Counsel for the petitioners referred to the powerful position of trade unions in the operations of the welfare society of today and to the momentous impact of their actions on the public at large. On this score Counsel contended that the public are interested in the performance by the officials of the union of their duties and that hence those duties are of public nature. The fallacy in the argument is manifest. The measure of a body's potentiality to affect the public at large cannot be the criterion for determining the legal status of the body whether it is a public or private body.

Lord Denning's observations on the inadequacy of present legal remedies to counter the mischief resulting from group action is apposite here:

"In the 19th century the individual was predominant in our affairs, in the 20th century it is a group. The industrial scene is dominated by groups - of employers on the one hand and employees on the other. The nationalised undertakings of large companies control the destinies of thousands and spend millions of money. The associations of workmen - organised officially and unofficially - exert enormous power over working men and women and have great impact on the daily lives of the people. Like the powers of government, these powers of the groups are capable of misuse and abuse.... The trade unions and employers' associations are all voluntary associations.....they wield tremendous power over every man and woman in the land. They can give or take away his or her right to work. They can put him or her on the dole. They can call strikes or other lock-outs. By so doing they can inflict widespread

damage The question at once arises: if these groups of people abuse or misuse their power, can the Court of Law do anything to restrain them? It is the most important question affecting society today. *None of the old machinery of Certiorari, Mandamus or Prohibition is available against these groups because they are not public authorities.* If there is to be machinery it has to be newly designed and newly made" Lord Denning *The Discipline of Law* at page 147 at 148.

In my view neither the "Lanka Guru Sangamaya" nor the respondents its officials, are public bodies performing duties of a public nature. The duties that the petitioners want the three respondents to be compelled to perform by a Writ of Mandamus are not duties of a public nature for which such a Writ will lie. They are contractual duties outside the ambit of Mandamus.

The activities of private persons, whether natural or juristic, are outside the bounds of Administrative Law. *Trade Exchange Ceylon Ltd., Vs. Asia Hotels Corporation Ltd.* (9).

I agree with the Court of Appeal that the petitioners have misconceived their remedy. I affirm the judgment of that Court and dismiss the appeal with costs.

VICTOR PERERA, J., - I agree.

COLIN THOME, J., - I agree.

Appeal dismissed.