AIR VICE MARSHALL ELMO PERERA
v.
LIYANAGE AND OTHERS

COURT OF APPEAL
JAYASINGHE, J. (P/CA) AND
EDIRISURIYA, J.
CA 850/98
OCTOBER 29 AND
NOVEMBER 23, 2001 AND
FEBRUARY 06,
MARCH 7, AND
APRIL 4, 2002

Constitution, Articles 30(1) and 35 – Air Force Act, No. 41 of 1949 – Inquirer appointed to determine whether petitioner is a fit and proper person to hold a Commission by HE the President – Legality of appointment – Does certiorari lie ? – Pleasure principle.

The Secretary to the President informed the petitioner (by P1), that Her Excellency the President has appointed the 1st respondent to inquire into and report on matters set out in P1, in order to determine whether the petitioner is a fit and proper person to hold a Commission in the Sri Lanka Air Force. The petitioner contended before the 1st respondent that his appointment is an act of nullity as he could not be legally appointed to inquire into and report on matters set out in P1. The 1st respondent overruled the preliminary objection. The petitioner sought to quash the said order overruling the objection.

Held:

(1) The petitioner cannot attack P1 on the basis that it is *ultra vires* for the reason that the President was not obliged to institute a fact finding inquiry because it was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President.

(2) The 1st respondent was merely carrying out a fact finding inquiry and the findings or recommendations of the respondent would not be binding on the President. The essential requirement for the grant of *certiorari* is that rights of subjects should be affected.

(3) Writ would not lie if the final relief sought is a futile remedy.

APPLICATION for a writ of certiorari.

Cases referred to:

1. *The Attorney-General* v *Kodeswaran* - 70 NLR 121
2. *Silver* v *Louiseville* N.R. Co. Ltd. 213 US Reports at 191
3. *Rex* v *Electricity Commissioner* - (1924) 1 KB 171
4. *Perera* v *Attorney General* - (1985) 1 Sri LR 156
5. *Ridge* v *Baldwin* - (1962) 2 All ER 66
6. *Dias* v *Abeywardena* - 68 NLR 409
7. *Bandara* v *Premachandra* - (1994) 1 Sri LR 301
8. *Bandula* v *Almeida* - (1995) 1 Sri LR 309
9. *Admiral V.K.Dissanayake* v *Chandrananda de Silva* - (2000) 1 Sri LR 234
10. *Liyanage* v *Chandrananda de Silva* - (2000) 1 Sri LR 21
11. *Silva* v *Shirani Bandaranayake* - (1997) Sri LR 92
12. *Victor Ivan* v *Hon. Sarath N Silva and others* - (1998) L Sri LR 340
13. *Karunathilaka* v *Dissanayake* - (1988) Sri LR 37
14. *Vishvalingam* v *Liyanage* - (1988) Sri LR 203
15. *P.S.Bus Co* v *Mendis, Secretary of Ceylon Transport Board* -61 NLR 491

Mahinda Ralapanawa for petitioner.

Saleem Marsoof, P.C., Additional Solicitor General with *M. R. Ameen*, State Counsel for respondents.

Cur.adv.vult

September 5, 2002

JAYASINGHE, J. (P/CA)

This is an application for a writ of *certiorari* to quash "P1" and "P10", the findings by the 1st Respondent.

Petitioner states that the Secretary to the President by his letter "P1" dated 27.03.1998 informed the petitioner that Her Excellency the President Mrs. Chandrika Bandaranaike Kumaratunga by virtue of the powers vested in her in terms of Article 30 (1) of the Constitution and Section 10 of the Air Force Act,

No. 41 of 1949 has appointed Mr. I.M. Liyanage former High Court Judge to inquire into and report on matters set out "P1" in order to determine whether the petitioner is a fit and proper person to hold a Commission in the Sri Lanka Air Force, *viz,*

1). Whether the petitioner did during the period 02.08.1996 to 11.07.1997 grant preferential treatment to an unregistered supplier named Mohamed Farook Salih while failing to acknowledge the offers made by other suppliers in the years 1996 and 1997 and more specifically the offers made by Wing Commander Bandula Tennakone and Mohan Kariyawasam.

2). Whether the petitioner did on or about the months of March and April 1997 and in the course of the same transaction knowingly reveal to an unregistered supplier named Mohamed Farook Salih confidential information regarding immediate and future requirements of attack helicopter gunships for the Sri Lanka Air Force.

The inquiry commenced on 14.05.1998 and after the 1st witness H.H.M.R. Premaratna had testified the petitioner commenced his cross examination and on the next date informed the 1st respondent that the petitioner is not competent to proceed with the inquiry and sought to retain counsel. This application was allowed. When the matter came up for inquiry on 14.08.1998 counsel for the petitioner took up a preliminary objection that the 1st respondent could not be legally appointed by the appointing authority and for that reason the appointment of the 1st respondent is an act of nullity and therefore without jurisdiction. The 1st respondent after hearing submissions held that from the terms of reference it was clear that the appointment of the 1st respondent is fact finding in nature and that the letter of appointment does not require the Commissioner to determine whether the petitioner is a fit and proper person to hold a Commission in the Sri Lanka Air Force, but inquire and report to determine the suitability/eligibility of the petitioner. That the 1st respondent was not required to meet out punishment as contended but merely empowered to ascertain the existence or non-existence of the factual position itemized under (1) and (2) of "P1".

The 1st respondent overruled the objection.

The present application is to set aside "P1" and "P10" the findings of the 1st respondent. When this matter was taken up for hearing Mr. Saleem Marsoof, P.C., Additional Solicitor General took up two preliminary objections;

i).That *certiorari* is not available to the petitioner in the circumstances of this case.

ii).That in any event, this application cannot be maintained in view of Article 35 of the Constitution.

The learned Additional Solicitor General submitted that it would be unnecessary to determine whether this application can be maintained in view of Article 35 of the Constitution if this application can be disposed of in the light of the preliminary objection that writ of *certiorari* is not available to the petitioner in the circumstances of this case. He relied on *Attorney -General* v. *Kodeswaran*(1) where the Supreme Court cited with approval the *dicta* in *Silver* v. *Louiseville* N.R.Co. Ltd.,(2) where it was stated that;

"if a case could be decided on one of two grounds, one involving a constitutional question and the other of statutory construction or general law, the court will decide only the latter".

This argument was necessitated by the fact that the 2nd objection questioned the maintainability of the petitioner's application in view of Article 35 of the Constitution which was a constitutional issue, jurisdiction being with the Supreme Court.

The petitioner came before this Court alleging "P1" is illegal and that it is an act done in excess of jurisdiction which is also *ultra vires* and *mala fide* in a broader sense.

It is the submission of learned Additional Solicitor General that writ does not lie for the reason that the finding or findings the 1st respondent may arrive at upon the conclusion of the inquiry would not be amenable to *certiorari* as they would not be a determination affecting rights of persons within the formula enunciated

by Lord Atkin in *Rex* v. *Electricity Commissioner*[3] and that the petitioner is not entitled to prerogative relief in view of his conduct in particular his acquiescence and the premature nature of the application for intervention by this Court. The Additional Solicitor General then submitted that in terms of section 10 of the Air Force Act the petitioner holds office during the pleasure of the President. G.P.S. de Silva, J. in *Perera* v. *Attorney General* [4] quoted with approval the *dicta* of Lord Reid in *Ridge* v. *Baldwin*[5]

> ".....that an officer holding office during pleasure has no right to be heard before he is dismissed and the reason is clear as a person having the power of dismissal need not have anything against the officer, he need not give any reason. I fully accept that where office is simply held at pleasure the person having the power of dismissal cannot be bound to disclose the reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him.....".

Relying on *Ridge* v. *Baldwin* (*supra*) the learned Additional Solicitor General argued vigorously that the petitioner's commission may be withdrawn by the President without an inquiry and without adducing any reasons. He further submitted that the petitioner cannot complain and writ would not lie if the President grants him an opportunity to explain his conduct. He submitted that the findings the 1st respondent would reach at the conclusion of the inquiry would not be determinations affecting the rights of any person, but would rather be conclusions of a fact finding nature on matters set out in "P1". The Additional Solicitor General further submitted that for the prerogative writ of *certiorari* to be available certain requirements will have to be satisfied as explained by Lord Atkin in *Rex* v. *Electricity Commissioner* (*supra*).

> "Whenever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division".

Mr. Marsoof argued that an essential requirement for the grant of *certiorari* in terms of the above formula is that rights of subjects should be affected. That the 1st respondent was merely carrying out a fact finding inquiry and that the findings or recommendations of the 1st Respondent would not be binding on the President. In *Dias* v. *Abeywardena*(6) it was held that *certiorari* will be refused against a body exercising a merely advisory deliberative or non binding recommendatory power as such a body is distinct from a tribunal having legal authority for jurisdiction to determine rights of subjects.

Mr. Ralapanawa, counsel for the petitioner submitted that the circumstances of this case falls within the ambit of *Rex* v. *Electricity Commissioner (supra)* in that *certiorari* would issue to any body of persons having legal authority to determine questions affecting rights of subjects and having a duty to act judicially. He argued that in the final analysis Her Excellency the President may or may not determine whether the petitioner is a fit and proper person to hold a commission and he submitted that it is plain on authorities "the Tribunal need not be one whose determinations give rise to any legally enforceable right or liability. Its determinations may be subject to *certiorari* notwithstanding it is purely a step in the process...." as per Lord Diplock. His submission is that "P1" is a step in the process.

Counsel for the petitioner submitted that he has come before this Court not to quash the findings which the 1st respondent may arrive at and therefore the application is not against the conclusions which the 1st respondent may arrive at after the inquiry. The petitioner states that the application before Court is to quash by way of writ findings or order which the 1st respondent has made holding that he has jurisdiction to hold an inquiry vide "P1" and to quash "P1" issued under the hand of the 2nd respondent as its issuance is bad in law.

It is in my view however the petitioner cannot attack "P1" on the basis that it is *ultra vires* for the reason that the President was not obliged to institute a fact finding inquiry because it was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President. The petitioner cannot be heard to complain as a beneficiary of a concession which has been allowed to him. It is also necessary to note at this point that the petitioner assumes that there might be a finding against him by the 1st respondent. That may or may not be so. Once the 1st respondent comes to a finding in terms of "P1" the President may make a determination whether the petitioner is a fit and proper person to hold a commission. Here again the President may or may not make that determination. To that extent the learned Additional Solicitor General's submission that there is no determination affecting rights of persons within the formula enunciated by Lord Atkin in *Rex* vs. *Electricity Commissioner* is not unfounded. I accordingly hold that *certiorari* is not available to the petitioner in the circumstances of this case.

Learned counsel for the petitioner also submitted that the pleasure principle as found in section 10 of the Air Force Act is not unfettered in that the President does not enjoy unlimited power. Immunity of the President in terms of Article 35 and the pleasure principle as found in Article 55(1) are two distinct issues. The learned counsel for the petitioner sought to attack the immunity of the President on the basis that it is not unfettered. However *Bandara* vs. *Premachchandra*(7) relied upon by him to support his contention that the immunity of the President is not unlimited in fact dealt with the pleasure principle in Article 55(1). To that extent *Bandara* vs. *Premachandra* (*supra*) relied upon by counsel has no application. Court held that the pleasure principle in Article 55(1) of the Constitution is subject to the equality provision of Article 12 and mandates fairness and excludes arbitrariness. Clearly that does not give expression to the powers exercised by the President. *Bandula* v. *Almeida*(8) relied upon by counsel for the petitioner sought to quash the order made by the President under section 2 of the Urban Development Authority (Special Provisions) Law. Here the challenge was in respect of acts covered by Article 35(3) of the Constitution that the President was acting in a capacity *qua*

Minister and the findings have no application to the issue before Court. In *Rear Admiral V.K. Dissanayaka* v. *Chandrananda de Silva*(9) the petitioner sought relief under Article 12(1) of the Constitution with regard to the failure of the respondents to submit his redress of grievance to the President. Clearly the petitioner cannot draw support from the reasoning of this case.

In *Liyanage* v. *Chandrananda de Silva*(10) it was held that the failure to implement the recommendations of the Army Commander was violative of Article 12 (1) of the Constitution. However when the Secretary submitted the recommendation of the Army Commander to the President, the President refused to act and the Court was unable to grant any further relief.

In *Silva* v. *Shirani Bandaranayake*(11) Court held that the President has sole discretion of appointing Supreme Court Judges; the power is discretionary and not absolute. It is neither untrammeled or unrestrained and ought to be exercised within limits. The counsel sought to rely on this phrase to demonstrate, that the pleasure principle is diluted. However what the Supreme Court observed was that the limits are in - built in Article 107. The Supreme Court observed that if for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed and that in such a situation Article 125 would then require Court in appropriate proceedings to exercise its judicial power in order to determine those questions. The Supreme Court however did not elaborate. Obviously what was in contemplation of the Supreme Court was a situation where the appointment was patently irregular. In *Victor Ivan* v. *Hon. Sarath N. Silva & Others*(12) Wadugodapitiya. J. held;

> "..... the Constitution itself gives the President immunity under Article 35(1) thereof and therefore she cannot be brought before Court to answer for her actions....."
>
> ".....under the law as it stands we shall never know why and wherefore of this appointment because it is only the President herself who knows the answer to that question....." until that is known, one cannot fault the President in anyway for the simple reason that she may well be possessed of good and ample reasons....."

Even though the Additional Solicitor General did not press the second preliminary objection he however contended that this Court is fettered from questioning an act of the President in view of Article 35(1) which stands in the way of embarking upon an inquiry why the President has done the impugned act. It must also be mentioned that *Karunathilaka* v. *Dissanayake*(13) and *Vishvalingam* v. *Liyanage*(14) relied upon by the petitioner has no application in the present context. Karunathilaka(*supra*) has no application in that Court held that Article 35 only prohibits the institution of legal proceedings against the President while in office. It does not exclude judicial review of an impugned act or omission against some other person who does not enjoy immunity from suit but relies on an act done by the President in order to justify his conduct. The 2nd respondent in this case was only the medium of communcation of a presidential directive. In *Vishvalingam* (*supra*) Court held that though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law.

Mr. Ralapanawa submitted that "P1" is liable to be quashed on the basis that it had been issued by the 2nd respondent. This submission is not tenable. All that "P1" does is to inform the petitioner that Her Excellency the President has appointed Mr. I.M. Liyanage, former High Court Judge to inquire into and report on matters set out in "P1" in order to determine whether the petitioner is a fit and proper person to hold a commission in the Sri Lanka Air Force. However the exercise of the powers vested in the President in terms of Article 30(1) and section 10 of the Air Force Act has in fact been exercised by the President and conveyed to the 1st respondent as found in 2R1. The 2nd respondent has nothing to do with it. The instrument creating the commission is however not before Court. Even if this Court is to set aside "P1" the original act of appointment by the President and conveyed to the 1st respondent by "2R1" still survives. In *P.S. Bus Co.* v *Members & Secretary of the Ceylon Transport Board* (15) Court held that writ would not lie if the final relief sought is a futile remedy. If the appontment of the 1st respondent is not set aside it would be futile to attack "P10". In view of the fact that there is no challenge to the

appointment of the 1st respondent it is unnecessary to come to a finding on the second preliminary objection.

The application for writ is accordingly refused. We make no order for costs.

EDIRISURIYA, J. – I agree.

Application refused.