GUNARATNE
v.
CHANDRANANDA DE SILVA

COURT OF APPEAL
YAPA, J.,
GUNAWARDENA, J.,
C.A. NO. 927/98
SEPTEMBER 16TH, 22ND, 29TH, 1998

Writ of Certiorari – Public officer sent on compulsory leave by Secretary, Ministry of Defence – Approval given by the Public Service Commission – Validity of such letter – who could issue same – Articles 55, 55 (5) Constitution – Preclusive clause – Could the court question the conduct of the Commission – Excess of jurisdiction/ nullity–ultra vires.

The petitioner a senior Deputy Inspector General of Police was sent on compulsory leave by letter dated 17. 8. 98 by the Secretary/Defence as The Commission of Inquiry (Batalanda Commission) had made adverse findings against the petitioner.

It was contended that, the decision to place the petitioner on compulsory leave is ultra vires and therefore is void in law for the reason that the said decision has not been taken by the proper authority – P.S.C.

Held:

1. It was very clear that it was the respondent who has decided to place the petitioner on compulsory leave and had thereafter recommended to the PSC that approval be granted to place the petitioner on compulsory leave.

   The powers given to the PSC regarding disciplinary control has not been delegated, therefore the decision to place the petitioner on compulsory leave has to be a personal decision of the PSC, the decision-making body should bring their minds to bear on the matter before them and take a collective decision and further there must be evidence to support that such a decision was in fact made.

2. On the question whether the court was precluded from inquiring into or questioning the conduct of the PSC in view of Article 55 (5); the decision made by the respondent who had no legal authority to make such a decision is in law a nullity and such a decision is void and therefore it is open to a court to declare such decision a nullity.

Per Gunawardena, J.

> "Decision takers should be keenly aware of their responsibilities, that would lead to a more considered exercise of the powers at their disposal. Proper observance of the law on their part should undoubtedly affect the quality of decision-making for the better thereby avoiding the need for intervention by court . . ."

Per Gunawardena, J.

> "the facts of this case afford a typical and characteristic example of the most direct and if I may say so, unproblematical application of the principle of ultra vires because the Secretary,/Defence had purported to place the petitioner on compulsory leave when he did not have the shadow of a power to do. The P.S.C. is not the after ego of the Secretary/Defence although it had acted as if it were.

Per Gunawardena, J.

> "it is an inflexible and deep rooted principle of law that no act or decision which is void at its inception can ever be ratified . . . further statutory power must be exercised only by the body or officer in whom it has been reposed or confided unless sub delegation of the power is authorised by express words or Necessary Implication . . . further one cannot act or decide on his own account when infact one is devoid of power to so act or decide and seek to validate that act or decision thereafter under the colour of the concept of ratification".

APPLICATION for Writs of Cetiorari/Prohibition.

Cases referred to:

1. *Cader and others v. Commissioner for Mosques and Muslim Charitable Trusts and others* – 66 NLR 16.
2. *Abeywickrema v. Pathirana and others* 1986 1 SLR 120.
3. *PG Ratnayake v. Secretary, Ministry of Public Administration and others* – SC 277/95 (FR) SCM 7.5.97.
4. *Anisminic Ltd. v. Foreign Compensation Commission* – 1969 2 AC 147.
5. *Brook v. Brook* 1871 Law Reports Exchequer 99.
6. *Keighley v. Maxstead* – 1901 AC 240 – 1937 AC 898.

K. N. Choksy PC with *Mohan Pieris* and *Ms. K. Wijetunga* for petitioner.

K. S. Kamalasabaysen PC, Addl S. G. with *U. Egalahewa*, SC, for respondent.

Cur. adv. vult.

November 26, 1998.

HECTOR YAPA, J.

In this application, the petitioner is seeking a Writ of Certiorari to quash the order of compulsory leave, contained in the letter of the respondent dated 17.08.98 marked P1, and a writ of Prohibition for the purpose of prohibiting the respondent from taking any further action consequent upon P1. The petitioner is Senior Deputy Inspector General of Police. The respondent who is the Secretary, Ministry of Defence, on 17th August, 1998, placed the petitioner on compulsory leave by the said letter P1. At the time the petitioner was sent on compulsory leave, he was in charge of Support Service, which included supervision and control of Sri Lanka Police Reserves, Field Force Headquarters, Transport Division, Welfare Division, Building and Supplies Divisions and the Physical Assets Management Division of Sri Lanka Police. The petitioner has 33 years, of continuous service in the Police Department. Having graduated from the University of Sri Lanka, Peradeniya in 1963, he joined the Police Department on 01. 02. 1965 as a Probationary Assistant Superintendent of Police and held responsible positions such as Director of National Intelligence Bureau, Director -General of Intelligence and Security in the Ministry of Defence, and Senior Deputy Inspector-General (Ranges), supervising the Police Ranges commanded by Deputy Inspectors-General, throughout the whole country.

It will be convenient at this stage to state briefly the circumstances leading to the issuance of a compulsory leave order against the petitioner. In the year 1995, Her Excellency the President under the Commissions of Inquiry Act, No. 17 of 1948, as amended, appointed a commission of inquiry comprising two judges of the High Court, Honourable D. Jayawickrama (now Judge of the Court of Appeal) and Nimal Dissanayake, to inquire into allegations relating to the establishment and maintenance of places of unlawful detention and torture chambers at the Batalanda Housing Scheme.

After the conclusion of the inquiry, the said commission forwarded to Her Excellency the President, the report which contained adverse findings against several persons including the petitioner. It would appear from the document marked R1 by the respondent, that the petitioner has been subject to adverse finding by the said commission, in relation to the following matters: In respect of the inquiry relating

to the disappearance of Sub Inspector Rohitha Priyadarshana of the Sapugaskanda Police Station on or about 20th February, 1990, the Commission report has stated that the petitioner along with certain other police officers had suppressed correct events relating to the disappearance of Rohitha Priyadarshana. This has been done during the period immediately following the disappearance of the said officer, and also during the course of the inquiry into the said disappearance by the commission. In addition, the commission report has stated that the petitioner and two other Senior Police Officers had failed to take appropriate action required by law, regarding the disappearance of Rohitha Priyadarshana. With regard to the establishment and maintenance of places of detention at Batalanda Housing Scheme, during the period commencing on the 1st of January, 1988 and ending on the 31st of Decembere 1990, where, persons were detained and were subject to inhuman or degrading treatment, the commission report has stated that the petitioner having assumed duties as Deputy Inspector-General of the Greater Colombo Range, became aware that police officers of the Kelaniya Police Division were occupying houses at the Batalanda Housing Scheme, procured contrary to the Police Department Regulations. However, he refrained from giving appropriate instructions to the relevant Police Officers to take necessary action in this regard, and the said failure on his part led to the continued occupation of the Batalanda Houses by certain police officers, resulting in certain houses being used to illegally detain and torture persons. It was further stated in the commission report, that the petitioner whilst knowing or having reasons to believe that the said illegal activity was taking place, refrained from taking appropriate steps to halt such illegal activity from continuing.

It is clear from P1, that having regard to the findings of the Batalanda commission against the petitioner, he has been placed on compulsory leave, to facilitate proper investigations and inquiries relating to the said findings. The letter P1 dated 17. 08. 98 produced below reads as follows:

CONFIDENTIAL August 17, 1998.

Mr. M. M. Gunaratne
Senior Deputy Inspector General of Police
Through : The inspector-General of Police,
Police Headquarters,
Colombo 1.

COMPULSORY LEAVE

The Secretary to Her Excellency the President has referred to me for necessary action, the Report of the Commission of inquiry appointed to inquire into the Establishment and Maintenance of places of Unlawful Detention and Torture Chambers at the Batalanda Housing Scheme.

02. I have noted that allegations made against you by several witnesses, your explanations to the Commission, and the findings arrived at by the Commission contained in the Report.

03. In order to facilitate proper investigations and inquiries into these relevant allegations and findings, you are hereby placed on compulsory leave with immediate effect until further notice, in terms of para 21.6 of chapter XII of the Establishments Code.

04. You are requested to hand over all the Government property under your charge to an Officer/Officers nominated by the IGP and to inform him the private address and the contact telephone number for further communication. You are not allowed to leave the island without my prior approval.

05. Please acknowledge receipt of this letter.

sgd.
(R. K. Chandrananda de Silva)
Secretary/Defence

It is this order contained in P1, placing the petitioner on compulsory leave that is being challenged in this application. It should also be noted that purported decision taken by the respondent is on a wrong legal basis as para 21.6 of chapter XII of the Establishments Code has no application.

At the hearing of this application Mr. Choksy, President's Counsel submitted on behalf of the petitioner, that the decision to place the petitioner on compulsory leave is ultra vires, or outside jurisdiction and therefore, void in law, for the reason that the said decision has not been taken by the proper authority, namely the Public Service Commission. He pointed out that according to the constitution of Sri Lanka, Public Service Commission is the proper authority to take such a decision. Learned counsel referred to Articles 55 and 56 of the constitution and contended that in terms of Article 55 (3) of the constitution, it is the Public Service Commission which has to take

the decision to place the petitioner on compulsory leave, since the appointment, transfer, dismissal and disciplinary control of Public Officers in the category of the petitioner, is a subject delegated to the Public Service Commission by the Cabinet of Ministers. Article 55 (3) of the constitution provides :

> *The Cabinet of Ministers may from time to time delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission : . . .*

Therefore, counsel argued that according to P1, the decision to place the petitioner on compulsory leave has been taken by the respondent, who was not the proper authority, it was submitted by counsel that lawful exercise of power meant that it should be exercised by the authority upon whom it is conferred, and that such power cannot be exercised by anyone else. In the present case, counsel contended that the Public Service Commission is the body empowered in terms of the constitution to take the decision to place the petitioner on compulsory leave and therefore that power cannot be exercised by the respondent, who is the Secretary, Ministry of Defence. It was further argued that in terms article 56 (8) of the constitution, three members of the Public Service Commission had to bring their own minds to bear upon the question of placing the petitioner on compulsory leave, and come to a finding by them. Therefore, it was not lawful for the respondent to decide this matter and place the petitioner on compulsory leave. Learned counsel submitted that, clearly the decision to place the petitioner on compulsory leave has been taken by the respondent and this position is made clear from the wording of P1 referred to above.

It is necessary to refer here to the document marked R2 by the respondent, which is a letter dated 17. 08. 98 written by the Secretary, Public Service Commission, to the respondent. The letter P2 produced below reads as follows.

17th August, 1998

Secretary
Ministry of Defence

Compulsory Leave – Officers of the Police Department

This refers to your letter dated 17. 08. 1998.

02. Public Service Commission has granted approval for placing the following officers on compulsory leave as recommended by you.

1.	Mr. M. M. Gunaratna	–	Senior DIG
2.	.....	–	ASP
3.	.....	–	ASP
4.	.....	–	ASP
5.	.....	–	Chief Inspector

Sgd.
SD Piyadasa
Secretary
Public Service Commission

It was submitted by counsel for the petitioner that this letter (R2) sent by the Secretary, Public Service Commission, to the respondent, does not in any way change the position that the decision to place the petitioner on compulsory leave has not been taken by the proper authority, for the reason that Public Service Commission has only granted approval for placing the petitioner along with four other Police Officers on compulsory leave, as recommended by the respondent. It was submitted by counsel that, when the exercise of statutory power is given to a particular body of persons, it is necessary that such body of persons should exercise such power and come to a decision, without allowing the decision to be made by anyone else. It was further submitted that, a person or the authority empowered to exercise a discretionary power, would not be acting lawfully, if a recommendation made by some other person or authority is granted approval. It was submitted that the reason for this requirement, was the need for the correct authority, to bring its mind to bear on the facts and circumstances of the case, before a valid exercise of discretion is made. In support of this contention learned counsel cited two cases. The first case he cited was *Cader and others v. Commissioner for Mosques and Muslim Charitable Trusts and others*[1]. In that case the power to appoint trustees was given by the statute to the members of the Wakfs Board. However, Wakfs Board appointed as trustees of the Mosque from a list given to them by a person (21st respondent) who happened to be a member of Parliament. It was held that *in selecting a person or persons for appointment as trustee or trustees of a mosque*

under section 14 of the Muslim Mosques and Charitable Trusts or Wakfs Act, the discretion of the Wakfs Board has to be exercised personally and cannot be abdicated by the Board in favour of anyone else, however competent, honourable or efficient that person may be as regards the matter. Any appointment made by the Board as the result of selection by someone else is only a colourable appointment and is not an appointment at all. In such a case, section 14 (1) (A) of Act No. 21 of 1962 is not a bar to compel the Board, by writ of mandamus, to appoint a trustee or trustees according to law. The second case cited by counsel was the case of *Abeywickrema v. Pathirana and others*[2]. In this case the question in issue was whether there was a valid termination of service, when the Regional Director accepted the resignation from the 1st respondent who was a grade III Principal of a school and relieved him from his duties. It was held that *the letter of resignation did not bring about a valid termination of the 1st respondent's contract of service because it was not addressed to nor accepted by the Appointing Authority that is the Educational Service Committee. The Regional Director, Galle, is not the proper authority to accept the resignation . . . In this case it was also held that the practice of regional directors accepting resignations is bad in law as it involves giving them power which they do not possess where there has been no delegation to them of the power of appointment, transfer or dismissal.*

As submitted by learned counsel for the petitioner it would appear from the contents of P1, that the decision to place the petitioner on compulsory leave has been taken by the respondent: It should be noted that in paragraph 3 of P1, the respondent has stated as follows: *"in order to facilitate proper investigations and inquiries into these relevant allegations and findings, you are hereby placed on Compulsory Leave with immediate effect until further notice, in terms of para 21.6 of chapter XII of the Establishments Code".* If the respondent was really conveying a decision made by the Public Service Commission, it would be reasonable to expect the respondent to mention in P1, that the Public Service Commission has decided to place the petitioner on compulsory leave. However, the wording of P1 does not have any reference to the Public Service Commission. In the circumstances, the reasonable inference to be drawn from the wording of P1, would be that the decision to place the petitioner on compulsory leave, has been taken by the respondent. On this matter it is useful to consider the other material furnished to court by the respondent. The respondent in this case has filed an affidavit with the two documents

referred to above marked R1 and R2. The document R1 is chapter IX of the commission report under the heading "findings" which refers to the allegations and findings against the petitioner and other persons. The document R2 is the letter dated 17.08.98 sent to the respondent by the Secretary of the Public Service Commission. According to R2 it is very clear that, what the Public Service Commission has done in this case, is to grant approval to place the petitioner on compulsory leave as recommended by the respondent. Therefore, it would appear that the decision to place the petitioner on compulsory leave has been taken by the respondent, who has made his recommendation to the Public Service Commission seeking their approval. This position is clear from the affidavit filed by the respondent. Paragraph 7 (D), (E) of the respondent's affidavit states as follows:

7 (D). "that in view of the directions received from Her Excellency the President and having considered the contents of the findings against the petitioner, I took steps to place the petitioner on compulsory leave and accordingly I took steps to serve the letter marked P1 on the petitioner through the Inspector-General of Police. I annex herewith a copy of chapter IX of the said report of the Commission marked R1 which contains the findings and recommendations of the said Commission;

7 (E). "that simultaneously I sought the approval of the Public Service Commission for placing the petitioner on compulsory leave which was granted on the same day as P1 viz 17th August, 1998. I annex herewith a copy of the said letter dated 17th August, 1998 marked R2.

Therefore, it is very clear, that, it was the respondent who has decided to place the petitioner on compulsory leave and had thereafter recommended to the Public Service Commission that the approval be granted for placing the petitioner on compulsory leave. The respondent has not filed in court, his letter dated 17.8.98 which is referred to in R2, seeking the approval of the Public Service Commission after placing the petitioner on compulsory leave. Even in the absence of this letter, it would appear from the paragraph 7 D and E of the affidavit of the respondent referred to above, that the respondent having taken steps to place the petitioner on compulsory leave, simultaneously sought the approval of the Public Service Commission, for placing the petitioner on compulsory leave, which was granted on the same day by R2.

In this case it was the function of the Public Service Commission as provided by law to consider the material available against the petitioner personally and arrive at a decision to place the petitioner on compulsory leave, if the material so warranted. However, it is to be observed that the respondent has taken the decision to place the petitioner on compulsory leave and has recommended to the Public Service Commission to grant their approval to the decision made by him. Even though the Public Service Commission has granted their approval to the recommendation made by the respondent, having regard to the speed at which all these things had happened, it is obvious that the Public Service Commission has not brought their minds to bear on the facts of this case and taken a decision. All that the Public Service Commission has done is to approve the recommendation made by the respondent. Therefore, obviously it is a decision made by the respondent and what the Public Service Commission has done is to rubber stamp the respondent's recommendation. A public body which merely rubber stamps some other officer's recommendation will therefore, be acting unlawfully. It is common ground that powers given to the Public Service Commission regarding the disciplinary control of the petitioner has not been delegated to the respondent and therefore, the decision to place the petitioner on compulsory leave has to be a personal decision of the Public Service Commission. What is necessary here for the Public Service Commission is to keep the decision in their own hands.

In a Fundamental Rights case, *P. G. Ratnayaka v. The Secretary, Ministry of Public Administration and 11 others*[3], the Supreme Court expressed the view that the decision taken by one of the members of the Public Service Commission to quash an inquiry held against the petitioner was arbitrary. One of the matters in issue in that case was the question of the validity of the order made by the Public Service Commission quashing or invalidating the 1st inquiry proceedings held and concluded against the petitioner. It was observed in that case that the 6th respondent as the Chairman of the Disciplinary Board of the Public Service Commission had decided on 30.05.1995 to quash the first inquiry held against the petitioner. On 02.06.1995 the other two members of the Disciplinary Board have minuted their agreement. It was observed by Shirani Bandaranayake, J. at page 9 that: "Although the 6th respondent had averred that as the Chairman of the Disciplinary Board of the Public Service Commission, he chaired the meeting of the board on 2nd June when the decision was taken to quash the inquiry proceedings and to order a fresh inquiry in respect of the

charges framed against the petitioner, there is no evidence to support this statement. According to the available material, I am of the view that the decision to quash the inquiry and to order a new inquiry was taken by the 6th respondent alone on the 30th May. The other 2 members had agreed to this decision on the 2nd of June. Taking into consideration the sequence of events and all the facts and circumstances, it is clear that the decision to quash the first inquiry is an arbitrary decision taken by the sixth respondent alone". This observation of the Supreme Court in that case makes it very clear that the decision-making body should bring their minds to bear on the matter before them and take a collective decision, and further there must be evidence to support that such a decision was in fact made.

In this case, one cannot deny the fact that the nature of the findings against the petitioner by the Batalanda Commission are serious allegations and require further investigations. It would be that, further investigations may require the petitioner to be placed on compulsory leave. However, the decision to place the petitioner on compulsory leave has to be made by the Public Service Commission alone and it is not open to the respondent to take this decision. Therefore, the decision taken by the respondent to place the petitioner on compulsory leave, and then seeking the approval of the Public Service Commission, which was granted, is not a decision that is lawful, for the reason that it was not a decision taken by the Public Service Commission after a proper evaluation of the available material.

Further, at the hearing of this application, the learned Additional Solicitor-General for the respondent sought to argue that the court was precluded from inquiring into or questioning the conduct of the Public Service Commission in view of Article 55 (5) of the constitution provides :

> *"Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer".*

This submission was based on the preclusive clause provided in this article of the constitution. However, it must be stated here that a decision made by the respondent who had no legal authority to make such a decision is in law a nullity and such a decision is void and therfore it is open to a court to declare such a decision a nullity. In the case *of Anisminic Ltd. v. Foreign Compensation Commission*[4] majority of judges held that the wrong decision of the commission on what they regarded as a "jurisdictional fact" vitiated the decision since the tribunal had exceeded its jurisdiction by this wrong decision. The ouster clause, therefore, was not applicable as there was no "true determination by the tribunal as required by the statute". In the same case at page 170 Lord Reid stated as follows: "If you seek to show that a determination is a nullity, you are not questioning the purported determination – you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist : it is quite another thing to say that there is nothing to be questioned".

Similarly in the case of *Abeywickrama v. Pathirana and others* (*Supra*) it was held that Article 55 (5) of the constitution does not protect orders or decisions of a Public Officer which are nullities or ultra vires from judicial review. Therefore, the ouster clauses do not prevent the court from inquiring or intervening in cases of excess of jurisdiction or where the order or decision made is a nullity.

In these circumstances therefore, the decision taken in this case, to place the petitioner on compulsory leave, is a nullity or ultra vires and has no legal effect. It is appropriate here to refer to the passage that was cited by learned President's counsel for the petitioner from Wade and Forsyth Administrative Law, 7th edition, page 43 "Any administrative act or order which is ultra vires or outside jurisdiction is void in law, ie deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The court will then quash it or declare it to be unlawful or prohibit any action to enforce it. The terminology here depends to some extent on the remedy granted. 'Quashing' is used in connection with the remedy of Certiorari. A declaratory judgment is an alternative remedy with similar effect : it declares the offending act to be a nullity in law. Prohibition of execution may be an order of prohibition (a prerogative remedy) or an injunction. But these technicalities made

no difference to the legal result: an act found to be outside jurisdiction (ultra vires) is void and a nullity, being destitute of the statutory authority without it is nothing.

Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing had happened. In this way the unlawful act or decision may be replaced by a lawful one. If a compulsory purchase order is quashed as being ultra vires, there is nothing to prevent another order being made in respect of the same land, provided that it is done lawfully. Thus a public authority or tribunal is often given *locus poenitentiae* and is able correct an error by starting a fresh – something which it might otherwise be unable to do".

For the above reasons, I hold that the order to place the petitioner on compulsory leave contained in P1 dated 17.08.98, made by the respondent has no legal effect. Accordingly I make order granting the Writ of Certiorari as prayed for by the petitioner quashing the said order contained in P1. Further, I make an order in the nature of a Writ of Prohibition, prohibiting the respondent from taking any further action in terms of said compulsory leave order contained in P1. I would make no order as to the costs of the application.

U. DE Z. GUNAWARDANA, J.

I agree with the order proposed by my brother the draft of which I read on the 18th inst. But in view of the significance of the issues that arise, I think, it is fitting that I should give my reasons in a separate judgment.

This is an application for certiorari and prohibition made by the Petitioner, who had been a Senior Deputy Inspector General of Police, seeking respectively to quash and prohibit the execution of the decision made by the respondent who is the Secretary, Ministry of Defence, placing the petitioner on compulsory leave by letter dated 17th August 1998 (P1) with effect from that date.

In deciding this application, in the circumstances of this case, the inquiry would centre on two crucial matters : (a) Did the respondent have the authority to make the impugned decision placing the petitioner on compulsory leave; (b) if, not, could the "granting of approval" subsequently, by the Public Service Commission, validate or give efficacy to the aforesaid decision in question made by the respondent.

It is as clear as clear can be that the respondent does not have any more right than any other public officer to place the petitioner on compulsory leave. The learned Additional Solicitor General who appeared for the respondent, unreservedly conceded that the Public Service Commission had not delegated to the respondent or any other authority its powers of appointment, transfer, dismissal or disciplinary control in respect of the petitioner or in respect of the category of public officers to which the petitioner belonged. So that the resulting position may aptly and pithily be put as follows: **Both the respondent (the secretary/defence) and the petitioner (The Deputy Inspector General of Police) being public servants the former had no more right to take disciplinary action against the petitioner than the latter had to initiate or take any such action against the former.** That is, perhaps, what one with discernment would have wanted to say; and that is how he would have said it. It is worth observing that the Public Service Commission may under Article 58(1) of the constitution delegate its powers in respect, be it noted, of any "category of Public Officers". But such delegation must necessarily be made suject to such conditions as may be prescribed by the cabinet - so that it is a moot-point which, of course, does not call for consideration in the factual matrix of this case, as to whether such a delegation can ever be made pursuant to Article 58(1) in respect of one or a particular officer or a few or several officers - because the article 58(1) in express terms contemplates a "category of public officers" which means a delegation in respect of a class - as opposed to a delegation in respect of an individual officer or a delegation ad hominem.

The arguments of both parties before us were rested on the footing that although under Article 55(1) of the constitution the appointment, transfer, dismissal and disciplinary control of public officers was vested in the cabinet of Ministers - yet there had been a delegation of such power, in respect of the category of officers to which the petitioner belonged, to the Public Service Commission. In this regard, it is pertinent to note that it was the Public Service Commission that had promoted the petitioner to the rank which he held as at the date that the respondent purported to place him on compulsory leave. (vide letter dated 23.12.1993 marked P3 whereby the petitioner was apprised of the decision of the Pubic Service Commission promoting him to the post of Deputy Inspector General of Police. The law, in its sagacity, perhaps, being conscious of the fact that it will lead to a dead-lock in matters, if it had been otherwise, had taken care, as is invariably

the rule in such matters, to repose powers of appointment, dismissal and disciplinary control and so on in one and the same body, in this instance, the Public Service Commission. The respondent does not, under the constitution of the Republic, have the semblance of a right or power to take any disciplinary action against the petitioner and his decision, which had been conveyed to the petitioner by letter dated 17.08.1998 under the hand of the respondent (Secretary / Defence), placing the petitioner on compulsory leave, is as void as void can conceivably be. The facts of this case afford a typical and characteristic example of the most direct and, if I may say so, unproblematical application of the principle of ultra vires because the Secretary/Defence had purported to place the petitioner on compulsory leave when the Secretary/Defence did not have the shadow of a power to do so.

It now remains to consider the point designated (b) above viz. whether the Public Service Commission could "grant approval" as, in fact, it had purported to do, and thereby impart efficacy or validity to the decision of the respondent placing the petitioner on compulsory leave. It is worth recapitulating the argument of the Learned Additional Solicitor-General, perhaps, the only argument that one could conceive of in the circumstances, rather perfunctorily made, he having not much of a choice or selection in the matter of arguments - the argument being that although the letter placing the petitioner on compulsory leave was dated the 17th August 1998 it was, in fact, handed over to the petitioner on the 19th that is, two days later, by which date the Public Service Commission had "granted approval" to the decision of the respondent. Assuming that the letter (R2) bears the correct date on which the Public service Commission had, in fact, "granted its approval", the date on R2 being the 17th (August) itself, that being the date of the letter under the hand of the respondent as well placing the petitioner on compulsory leave, then the Public Service Commission must be held to have purported to "grant approval" on 17.08.98. It is clear from the averments at paragraph 7(d) and (e) of the affidavit filed by the respondent (Secretary Defence), taking those averments at their face value, that the "steps" taken by the respondent to place the petitioner on compulsory leave by serving the letter marked P1 on the petitioner and seeking the approval of the Public Service Commission were "simultaneous", as stated in the respondent's own affidavit; so that, assuming that the Public Service Commission had granted its approval on 17.08.98 itself to the decision of the respondent - yet that approval would, of necessity, have been granted subsequent

to the "step" that the respondent took (as averred in his affidavit) "to place petitioner on compulsory leave..... and serve the letter marked P1 on the petitioner through the Inspector General of police" because it was the step that the respondent took to place the petitioner on compulsory leave and the step that he took to seek the approval of the Public Service Commission that were "simultaneous". And "granting approval", by the Public Service Commission therefore, must necessarily be subsequent (in point of time) to the seeking thereof.

The argument of the learned Additional Solicitor General is akin, if, in fact, it is not really and veritably so, to an argument that the Public Service Commission by granting its "approval" had ratified the impugned decision made by the respondent. His argument seems to be that the ratification had rendered the decision valid, if, in fact, the decision of the respondent to place the petitioner on compulsory leave, had been invalid at its inception.

The submissions made by the learned President's Counsel for the petitioner were, to say the least, sceptical of the veracity of the averments in the affidavit filed by the respondent in court which averments were as follows : 7(d) "that in view of the directions received from Her Excellency the President and having considered the findings against the petitioner, I took steps to place the petitioner on compulsory leave and accordingly I took steps to serve the letter marked P1 on the petitioner through the Inspector General of Police. I annex herewith a copy of chapter IX of the said report of the Commission marked R1 which contains the findings and recommendations of the said Commission;

(e) that Simultaneously I sought the approval of the Public Service Commission for placing the petitioner on compulsory leave which was granted on the same day as P1 viz. 17th August 1998. I annex herewith a copy of the said letter dated 17th August 1998 marked R2".

The learned President's Counsel for the petitioner made several pertinent observations with regard to the above factual averments in the affidavit of the respondent, of course, keeping within the limits of good taste, as is his wont. He impressed upon us the improbability of seeking and obtaining the approval of the Public Service Commission on the same day as the 17th of August 1998 - that being the date of P1, that is, the letter addressed to the Petitioner, under the

hand of the respondent (Secretary Defence) conveying to the Petitioner the decision to place him (the petitioner) on compulsory leave. The learned President's Counsel for the Petitioner also stressed the need for getting together of a quorum of the members of the Public Service Commission to make any decision, the convening of which would take time. Further, the learned President's Counsel for the petitioner made a point of the fact that although it was averred at paragraph 7(e) of the affidavit of the respondent that he (the Secretary Defence) sought the approval of the Public Service Commission on the 17th (August) itself-a copy of the letter whereby the respondent (Secretary Defence) stated that he sought such approval had not been produced in court making, as the learned President's Counsel argued, the said averments highly suspect-that is, those averments as to seeking and obtaining "the approval" of the Public Service Commission on the same date (17.08.98) as the date on which he (the respondent - Secretary Defence) "took steps to serve the letter marked P1 on the Petitioner". (It is to be recalled that P1 was the letter dated 17.08.98 under the hand of the Secretary Defence placing the petitioner on compulsory leave). Further, the learned President's Counsel for the petitioner submitted that the fact that the respondent (Secretary Defence) had nowhere in his letter P1 stated that he sought or would be seeking the approval or ratification of the Public Service Commission immeasurably aided one to discover on which side the truth lay. The point that the learned President's counsel made was that if, as stated in the respondent's affidavit filed in the Court of Appeal subsequently i.e. on 23.09.98, the respondent (Secretary Defence) had, in fact, "sought the approval of the Public Service Commission simultaneously with taking steps to place the petitioner on compulsory leave. . . by serving the letter marked P1 on the petitioner," the respondent would not have omitted to state that vital fact that he would be seeking or that he had sought the approval of the Public Service Commission, in letter P1 - as was also his duty to have done. But the above points made by the learned President's Counsel for the Petitioner although they have a telling force, yet fail to establish convincingly the proposition that the respondent (Secretary Defence) did not seek and obtain the approval of the Public Service Commision on 17.08.1998 itself which was the date of P1 above referred to - because, sometimes, the truth is stranger than fiction. As stated above, it is wholly irrelevant to consider as to when or how soon after the decision made by the respondent to place the petitioner on compulsory leave, that the Public Service Commission purported to "grant approval" or ratify the decision

of the respondent because the Public Service Commission was as wholly destitute of power to "grant approval" or ratify the decision of the respondent as the respondent was destitute of authority to make the decision to place the petitioner on compulsory leave - thereby resulting in the act of ratification on the part of the Public Service Commission being as blatant a nullity as the act or decision of the respondent was in placing the petitioner on compulsory leave - as the sequel would further serve to show.

The true and correct constitutional position, as at present, against the background or in the light of which the validity of the decisions or the acts of both the respondent and the Public Service Commission have to be tested is as follows: as explained above as well, in terms of article 55(1) of the constitution the appointment, transfer dismissal and disciplinary control of the Public officers is vested in the cabinet of ministers. However in terms of article 55(3) the cabinet of ministers may delegate its powers (referred to above) to the Public service Commission as had been admittedly done in respect of the petitioner or rather in respect of the category of public officers of whom the petitioner is one (such officer). The Public Service Commission pursuant to article 58(1) however, may delegate to a public oficer the aforesaid powers in respect of public officers reposed in it or delegated to it by the cabinet. But, admittedly the powers delegated to the Public Service Commission in respect of the petitioner, had not been sub-delegated (by the Public Service Commission) in turn to any officer or to the respondent. So that as at the relevant date i.e. 17th August 1998, that being the date on which the petitioner was placed on compulsory leave, the power to take disciplinary action by way of placing the petitioner on compulsory leave was solely and exclusively vested in the Public Service Commission and in no other body or person - thus making this case a straight - forward one: the decision of the respondent is void ab initio i.e. void from the beginning as if it never existed because the respondent (Secretary-Defence) had no legal authority to make the decision and therefore, in law, it does not exist; and legally it never had existed. Not only is the decision of the respondent a nullity but also the professed or ostensible ratification of the said decision by the Public Service Commission by purporting to "grant approval" is also a nullity. It is worth recalling the solitary argument put forward on behalf the respondent viz. that as the Public Service Commission had "granted its approval" to the decision made by the respondent by the date that the letter P1 was, in fact, served

on the petitioner - the Public Service Commission must be deemed, if not, held to have ratified the impugned decision made by the respondent. At any rate, the Public Service Commission could not, in law, "grant approval" and so ratify or impart validity and efficacy to the decision of the respondent, reasons being at least four-fold:

(i) it is an inflexible and deep-rooted principle of law, which is as elementary as it is well-known, that no act or decision which is void at its inception, as is the decision of the respondent, can ever be ratified vide Halsbury's Laws of England (4th edition-vol. 01) page 452. In Brook vs. Hook[5] Kelly C. B. said thus : "..... that although a voidable act may be ratified by matter subsequent it is otherwise when an act is originally and in its inception void",

(ii) another principle which is as basic as it is rudimentary is embedded in the maxim: *delegatus non potest delegare* which means that a statutory power must be exercised only by the body or officer in whom it has been reposed or confided-unless sub delegation of the power is authorized by express words or necessary implication. This principle has been recognized to some extent, if not wholly, in article 58(1) of our constitution in the following terms: "The Public Service Commission or any committee thereof may delegate to a public officer, subject to such conditions as may be prescribed by the cabinet of Ministers, its powers of appointment, transfer, dismissal or disciplinary control of any category of public officers".

In as much as the Public Service Commission can sub-delegate its powers only subject to such conditions ordanied or prescribed by the cabinet of Ministers it follows logically and by necessary implication that the Public Service Commission can approve or ratify also only subject to such conditions as may be prescribed by the cabinet because ratification by the delegate, in this instance, the Public Service Commission, may be said to be a concomitant of the power to sub-delegte. In other words, as admittedly, there is no sub-delegation of its powers by the Public Service Commission to the respondent in terms of Article 58(1) of the constitution in the manner contemplated thereby-the Public Service Commission must be held not to have been authorized by the constitution to ratify the decisions of the respondent

as the Public Service Commission could have ratified also only in regard to matters within the area of authority delegated to the respondent in terms of article 58(1) of the constitution, if, in fact, there had been such a sub-delegation (with the concurrence of the cabinet). But as there is, admittedly, no such express sub-delegation to the respondent of the powers of appointment and so on in respect of the petitioner in terms of article 58(1) of the constitution there cannot be any legal ratification by the Public Service Commission of the decision in question - as the power to ratify is subsumed in delegation or subdelegation of authority. Delegation or sub-delegation (of authority) means granting precedent authority or granting authority beforehand whereas ratification also means, in a way, granting authority subsequent to the event. Thus, ratification (being, so to say, a species of delegation) is subject to the same rule as delegation viz. delegatus non potest delegare and in the admitted absence of an express subdelegation in terms of article 58(1) of the constitution the Public Service Commission could not have legally approved the decision of the respondent with a view to conferring or in an attempt to confer validity thereon;

(iii) as a legal principle one cannot act or decide on his own account, as the respondent (Secretary Defence) had obviously done in this instance, when in fact, one is devoid of power to so act or decide and seek to validate that act or decision thereafter, under the colour of the concept of ratification. The respondent (Secretary/Defence) had not in his letter P1 (placing the petitioner on compulsory leave) indicated that he was acting on behalf of the Public Service Commission, nor had he even stated therein, that is in P1, that he would be seeking ratification or approval of his decision from the Public Service Commission. The respondent had clearly acted on his own responsibility. The terms of the letter P1 under the hand of the respondent place it beyond any controversy that he (the Secretary/Defence) had purported to act for himself and not professed to act on behalf the Public Service Commission. There is not the faintest reference to the Public Service Commission in P1 whereby the respondent purported to place the petitioner on compulsory leave. It is not possible to cite any judgments from the area of Public or Constitutional Law to illustrate the general proposition of law enunciated above because the concept of ratifi-

cation belongs almost exclusively (of course, not wholly) to the sphere of the law of contract and agency. As such, I consider, it not wholly inappropriate to refer to a case from the field of contracts to exemplify the rule that an act that a person or body had done on his own account without power to do so cannot be later ratified by the another person even if that person be the proper authority. Judicial bench - mark was set on this subject in Keighley vs. Maxsted[6] A corn merchant was authorized to buy wheat at a certain price on a joint account for himself and the appellants. Acting in excess of his authority he purchased wheat at a higher price from the respondents but in his own name. The appellants next day ratified the transaction but later failed to take delivery of the wheat. The respondent brought an action against them for breach.

The action failed. The corn merchant had contracted in his own name without mentioning that the appellants were his principals. Any purported ratification by them was therefore ineffective and they were, consequently, under no obligation to the respondents. It is worth repeating in this context that the letter, if there be one, whereby the respondent (Secretary/defence) claims to have sought the approval of the Public Service Commission had not been tendered to this court to this day. That the rule that it is not possible for an undisclosed principal, that is, a principal who is not disclosed by the agent to the third party at the relevant time to step in later and ratify the acts of the agent is a principle of universal application and therefore, is just as much a recognised principle in the field of Administrative Law as it, undoubtedly, is in the field of contracts;

(iv) in an any event the Public service Commission entrusted, as it was with powers of the cabinet in respect of the category of officers to which the petitioner belonged, could not have mechanically "granted approval" to place the petitioner on compulsory leave, to use the very words in the letter P1 signed by Secretary to the Public Service Commission: "on the recommendation" of the respondent. The Public Service Commission, as evidenced by its own letter "granting approval" to the decision of the respondent, had evidently acted under dictation of the respondent which it could not have done. To quote from Halsbury's Laws of England (4th edition) Vol 01 - page 33: "A body entrusted with a statutory discretion must address itself

independently to the matter for consideration. It cannot lawfully accept instructions from or mechanically adopt the view of another body as to the manner of exercising its jurisdiction in a particular case unless that other body has been expressly empowered to issue such directions or unless the deciding body or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue."

There is a wrongful failure on the part of the Public Service Commission to exercise its discretion and its own judgment because it had improperly parted with its own powers by accepting the "recommendation" or dictation from the respondent (Secretary/Defence). The Public Service Commission is not the alter ego of the Secretary/Defence although it had acted as if it were. And if there is one body from which the Public Service Commision could have lawfully accepted instructions or "recommendation" - perhaps, it was none other than the Cabinet of Ministers itself - for, in general, delegation of power does not imply parting with authority. The delegating body, in this instance, the Cabinet of Ministers will retain not only the power to revoke the grant or delegation but also the power to act concurrently on matters within the area of delegated authority.

In this context, it would be apposite to reproduce the relevant letter dated 17.08.1998 addressed by the Secretary Public Service Commission, to the respondent (Secretary/Defence) which is as follow:

Compulsory Leave - Officers of the Police Department

This refers to Your letter dated 17.08.1998

02. Public Service Commission has granted approval for placing the following officers on compulsory leave AS RECOMMENDED BY YOU. (emphasis is mine)

1. Mr. M. M. Gunaratne - Senior D.I.G.
2. ..... - A.S.P.
3. ..... - A.S.P.
4. ..... - A.S.P.
5. ..... - Chief Inspector

S. D. Piyadasa,

Secretary,

Public Service Commission

The above letter has been reproduced in extenso to show that the members of the Public Service Commission had not exercised their own (personal) judgment even in the matter of deciding whether to grant approval or not to the decision of the Secretary/Defence to place the petitioner on compulsory leave - let alone decide (by the exercise of their own judgment) whether the petitioner ought to be placed on compulsory leave or not for as amply manifested by the terms of its own letter the Public Service Commission had granted approval or had agreed, willynilly, to place the petitioner on compulsory leave "as recommended" by the Secretary/Defence. What does "granted approval as ..... recommended by you" mean? It means exactly what it says. "Approval had also been granted" on the "recommendation" of the respondent (Secretary/Defence). In a way, it is nothing short of the respondent "approving" his own decision because the one and only factor that had prompted the Public Service Commission to grant approval to the decision of the respondent to place the petitioner on compulsory leave was the respondent's own "recommendation". It is manifest that the Public Service Commission had resignedly substituted the respondent's recommendation for their own judgment thus ousting its own (judgment).

I think we have now arrived at almost the end of our discussion of the matters relevant to the issues arising for decision. The clock has to be put back to how things were before the void decision was made to place the petitioner on compulsory leave. Perhaps, the going back of the clock will be automatic-working of itself.

The facts above stated would show that decision of the respondent is as void as the purported ratification thereof by means of "granting approval" by the Public Service Commission and the decision of the respondent continues to be a nullity. The purported ratification by means of "granting approval" had not improved matters from the standpoint of the respondent. If there is anything that matches the decision of the respondent, to place the petitioner on compulsory leave, in point of nullity, it is the decision or act of the Public Service Commission

in "granting approval" to the former decision thereby seeking to validate it by ratification.

The decision of the respondent (Secretary/Defence) being vitiated, as it is by a jurisdictional error, that is, a decision that had been made in the exercise of a power or jurisdiction which the (Secretary/Defence) clearly did not possess- the decision had been legally void from the beginning. The impact and the relevance of jurisdictional and no-jurisdictional error had been explained in the Text Book on Adminis trative Law by Peter Leyland, Terry Woods, and Janetta Harden - all three writers being lecturers in the University of North London. To Quote from Page 309: "the distinction between jurisdictional and non-jurisdictional error is particularly relevant to the applicability of certiorari because it is a remedy which is retrospective in its effect. That is, it quashes a decision that has already been made and therefore will have markedly different impact for matters going to the Jurisdiction. When a jurisdictional error is deemed to have occured, it means that the decision has always been legally void: it is as if that decision had never been reached in the first place and never existed. A grant of Certiorari in these circumstances seeks to put the clock-back to how things were before the void decision was made. In contrast, for error made within the jurisdiction, an error on the face of the record does not result in a fundamental illegality and thus a challenge will only overturn the decision and take effect from the moment that certiorari is issued".

I have explained the above aspect viz. the effect of what, in law, is termed a jurisdictional error in order to point out and lay emphasis on the fact that the petitioner ought to be treated as one who had been in the service, without any interregnum or break, (notwithstanding the respondent's purporting to place him on compulsory leave as from 17.08.1998) - so far as his rights as a Public Officer are concerned - because the error that had affected the respondent's decision is patently a jurisdictional one.

As a final note, I wish to state that the decision takers should be keenly aware of their responsibilities. That would lead to a more considered exercise of the powers at their disposal. Proper observance of the law on their part should undoubtedly affect the quality of decision making for the better - thereby avoiding the need for intervention by the courts, however soothing and beneficial - in the generality of cases

- such wise and benevolent intervention would be. And, in this case, the court, has of necessity, to intervene, more so, because:

> "Thrice is he arm'd that hath his quarrel just;
> And be he naked, thought lock'd up in steel,
> whose conscience with injustice is corrupted."

I was not all that certain as to whether prohibition could be granted in the circumstances of this case. At first, I thought that granting a writ of prohibition at this stage would bear an analogy with locking the stable door after the horse is stolen. Because I felt that prohibition operates in a different fashion to certiorari the object of granting a prohibition, in my view, being to prevent the illegal action occuring in the first place. But upon further reflection I felt that the respondent could still persist in seeking to execute his decision although the decision was void - and, as such, I felt almost instinctively that prohibition could rightly be granted. Strangely enough, later I found an authority for this course of action in (1937) AC 898 which in this context would serve a dual purpose of not only showing that certiorarai and prohibition can keep their motion in one sphere and can go hand in hand but also that we decide rightly as un-wittingly as we do decide wrongly - for it is sheer chance that brought the above authority in my way to accord with my intuition. Wade points out that where prohibition was applied for to prevent the enforcement of an ultra-vires decision, as happened in the case cited above "the effect is the same as if certiorari had been granted to quash it; for the court necessarily declares its invalidity before prohibiting its enforcement."

For the aforesaid reasons I do hereby make order granting the Writ of Certiorari formally quashing the decision made by the respondent on 17.08.1998 purporting to place the petitioner on compulsory leave because the decision of the respondent represents or typifies an illustrative and vivid example of a "naked usurpation" of the power that only the Pubic Service Commission and/or perhaps, the Cabinet of Ministers alone could have lawfully exercised; in addition, prohibition is also granted forbidding the respondent from further execution of the impugned decision dated 17.08.1998 made by him.

Writ of Certiorari/Writ of Prohibition granted.