

COURT OF APPEAL**Chandradasa****V.****Wijeratne***Certiorari C. A. Application No. 19/80*

Writ of Certiorari – Business Undertakings (Acquisition) Act – Dismissal of workman in exercise of private contractual right – No Writ of Certiorari available.

Petitioner joined Ceylon Oxygen Ltd. on 5.4.1957 and was a Foreman Grade II at the time of his dismissal.

By an Order published in the Gazette under Section 2 of Business Undertakings (Acquisition) Act No. 35 of 1971, the business undertaking of Ceylon Oxygen Ltd. vested in the Government on 5.11.76. Respondent is the Competent Authority appointed in terms of Section 3 of the above Act.

On 22.6.79 the Petitioner was served with a Show Cause Notice in respect of certain incidents alleged to have taken place on 15.6.79. On 6.7.79 an Inquiry was held into the alleged incidents at which evidence was led and the Petitioner himself gave evidence. On 29.9.79 the Respondent on the basis of the Report of the Inquiry Officer informed the Petitioner that he was dismissed from service.

The Petitioner seeks now to quash the order by Writ of Certiorari on the grounds of mala fides and bias and also on the ground of not being given a fair opportunity of being heard and total lack of evidence to support the charges brought against him.

Counsel for Respondent objected on the grounds that the impugned order of dismissal was made in pursuance of purely contractual rights and not in pursuance of a statutory duty.

Held that the employees of Ceylon Oxygen Ltd. continued in employment under ordinary contracts of service and the order of dismissal was in the exercise of a private contractual right and hence no writ would lie.

APPPLICATION for writ of certiorari: preliminary objection.

Before: Tambiah, J. & L. H. de Alwis J.

Counsel: A. A. de Silva for the Petitioner
S. Ratnapala, State Counsel, for the Respondent

Argued on: 30.3.1982

Cur. adv. vult.

Decided on: 17.5.1982

TAMBIAH J.

The petitioner joined the Ceylon Oxygen Limited on 5.4.1957 as a Plant Attendant (skilled worker grade) and was promoted as Assistant Shift Foreman on 1.12.1967 and later as Shift Foreman (Foreman Grade III) on 1.10.1969.

By Order made in terms of s. 2 of the Business Undertakings (Acquisition) Act, No.35 of 1971, and published in Gazette Extraordinary No. 237/8 of 5.11.76, the business undertaking of Ceylon Oxygen Limited was vested in the Government. The respondent is the Competent Authority appointed to manage and administer the affairs

of the business undertaking of Ceylon Oxygen Limited, in terms of s. 3 of the Act. The petitioner continued in employment, in the vested undertaking.

On 20.6.79, the petitioner was suspended from duty in connection with some incidents alleged to have taken place at the work place on 15.6.79. On 22.6.79 he was served with charges and was asked to show cause why he should not be dismissed. The charges alleged that on 15.6.79, in the night, the petitioner with 2 other employees, while on duty, had consumed liquor inside the work place and had been drunk while on duty; that the petitioner had permitted an employee to bring liquor into the premises and allowed him to consume the same and remain on duty, knowing that he was drunk, and had failed to bring this fact to the notice of the Administrator, and thereby brought disrepute to the Institution and betrayed the confidence placed on the petitioner by the Administrator. The petitioner denied the charges by his letter of 27.6.79.

An inquiry was held on 6.7.79 by an Inquiry Officer and the petitioner was represented. Evidence was led and the petitioner himself gave evidence. The Inquiry Officer submitted his report in which he found the petitioner guilty of the charges, and the respondent by his letter of 29.9.79 informed the petitioner that he had been found guilty of the charges and dismissed him from service.

The petitioner now seeks to quash on certiorari the order of dismissal. He alleges that the order of dismissal was made mala fide, in that, the respondent was pre-determined to get rid of him at any cost; that the Inquiry Officer was biased and that he had no fair opportunity of preparing his defence as the inquiry was conducted with undue haste. He also states that there is a total lack of evidence to support the charges brought against him. The respondent, however, has denied these allegations.

At the hearing, learned State Counsel raised an objection in limine. He submitted that the impugned order of dismissal was not made in the exercise of any statutory power but was one made in pursuance of purely contractual rights. Hence no certiorari will lie.

S. 4 (1) of Act No 35 of 1971 enacts that "..... where any business undertaking is acquired by or vested in the Government.

all the rights and liabilities under any contract or agreement which relates to the purposes of that undertaking and which subsists on the date of transfer or on the primary vesting date of that undertaking shall vest in the Government." In terms of this section all employment contracts and all rights and liabilities under them which were subsisting on the date of the vesting order, became vested in the Government.

In *R. v. Electricity Commissioners* ([1924], K.B. 171 at 204) the writ of certiorari was declared to be available against "any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially." In other words, certiorari lies only against persons or tribunals, the source of whose authority to make decisions or orders affecting the rights of subjects, is legal. De Smith (Judicial Review of Administrative Action, 4th Edn. p.385) commenting on the phrase "legal authority" says - "Legal authority generally means statutory authority". Lord Goddard, C.J. said (*R. v. National Joint Council for Dental Technicians, ex p. Neate* [1953,] 1 Q.B. 704 at 707 - "But the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction."

No doubt the competent authority was established by Statute and is a statutory body. But the question is, when the respondent as competent authority dismissed the petitioner, did he do so in the exercise of any statutory power?

As stated earlier, in terms of s.4 of the Act, when the business undertaking of Ceylon Oxygen Limited became vested in the Government, the employment contracts and the rights and liabilities under them which were subsisting on the date of vesting, also became vested in the Government. The relationship between the competent authority and the employees remained contractual; the employees continued in employment under ordinary contracts of service. As observed by Lord Norris of Borth-Y-Guest in *University Council of Vidyodaya University v. Linus Silva* (66 NER 505 at p.518) the mere fact that the University is established by Statute does not necessarily make its powers statutory; it may engage its employees under ordinary contracts of service.

The Act does not deal with the question of dismissal of employees at all. It does not specify when and how an employee can be dismissed from service - the grounds of dismissal or the procedure for dismissal. So that, when the respondent made his order of dismissal, he did so in the exercise of his contractual power of dismissal and not by virtue of any statutory power. "Certiorari is not available to review a disciplinary decision taken by a public authority against an employee with whom it has only a contractual relationship." (Smith, 4th Edn. at p.365). If the petitioner's dismissal was in breach of the terms of the employment contract, the proper remedy is an action for declaration or damages. The Court will not quash the decision on the ground that natural justice has not been observed.

Learned Counsel for the petitioner based an argument on Regulation 3 of the Regulations made by the Minister of Finance under s. 12 of the Act. The regulations were published on 5.11.76, the same date as the vesting order. It reads - "The competent authority may refuse to employ, or to continue in employment, in the vested undertaking any person who, in the opinion of the competent authority, is unsuitable for employment. He therefore argued that the power of dismissal was exercisable only if the petitioner was found unsuitable for employment. A decision that a person is unsuitable for employment must be a judicial decision; such a decision can only be reached by observing the principles of natural justice, he submitted.

The said regulation has no application to the present case. It relates to the stage of vesting in the Government of the business undertaking, and gives a discretion to the competent authority not to continue in employment an employee, in the vested undertaking, if found unsuitable for employment. The regulation has no application where the services of an employee had been retained by the competent authority, and he is subsequently dismissed from service.

I uphold the preliminary objection of learned State Counsel. The application is refused but there will be no order for costs.

L.H. DE ALWIS, J. — I agree.

Preliminary objection upheld.