THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2008] 1 SRI L.R. – PART 1

PAGES 01-28

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at Sarvodaya Vishva Lekha, Ratmalana

Price : Rs. 40.00

DIGEST

SRI LANKA TRANSPORT BOARD
v
COLOMBO METROPOLITAN BUS COMPANY AND OTHERS

SUPREME COURT
SHIRANI BANDARANAYAKE, J.
FERNANDO, J.
SOMAWANSA, J.
SC SPL. LA 77/2007
CA 143/2003
JULY 10, 2007
SEPTEMBER 4, 2007
MARCH 11, 2008

Sri Lanka Transport Board Act 27 of 2005 – S2-S3-S11 (1) a – S17 (1) – S18(1). Is the Sri Lanka Transport Board a body corporate? – Characteristic of a Corporation – Ceylon Tourist Boards Act 10 of 1966 – S31 Ceylon Broadcasting Corporation Act – S2 (2). S4 (1) Public Records Ordinance – Shipping Corporation Act S2 (2) – Gem Corporation Act S2 (2) – Common Amenities Board Law 10 of 1973 – S2 Public Trustee Ordinance S3.

Held:

(1) The common characteristics of a corporation are a distinctive name, a common seal and perpetuity of existence. As a Rule the contracts of a corporation must be under seal of the corporation.

Per Shiranee Bandaranayake, J.
"It is evident that for the establishment of an institution as a body corporate clear provision to that effect should be provided in the enactment".

(2) In the absence of any direct provision or any intent to incorporate, it is evident that the Sri Lanka Transport Board under the present Act cannot be registered as a body Corporate.

APPLICATION for Special Leave to Appeal – preliminary objection.

Case referred to:

(1) *The Land Commissioner* v *Ladamuthu Pillai* – 62 NLR 182

Dulindra Weerasuriya with *Amila Vithana* for petitioner.
Murudu Fernando DSG for 1st and 2nd respondents
Manohara de Silva PC for 3rd respondent.
Percy Wickremaratne with *Shanthi Silva* for 4th, 5th and 6th respondents.

Cur.adv.vult

July 2, 2008

SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal dated 12.02.2007. By that judgment the application of the cluster Companies for a mandate in the nature of a *writ of certiorari* to quash the order made by the 1st respondent by his letter dated 03.09.2002 informing the cluster Companies that they will have to calculate the gratuity payable to the retiring employees, taking into account the entire period in which such employees were in service, including the period that they have served at the Regional Transport Boards prior to the cluster Companies being formed (for which period gratuity had already been paid by such Regional Transport Boards), subject to the deduction of the amounts that may have been paid by such Regional Transport Boards prior to such employees joining the cluster Companies, was dismissed. The petitioner, namely the Sri Lanka Transport Board, filed an application before this Court against that judgment. When this matter was taken for support for special leave to appeal, learned President's Counsel for the 3rd respondent took up a preliminary objection that the petitioner, described as the Sri Lanka Transport Board, was not a legal persona and therefore lacked capacity to institute and maintain this application.

All parties were accordingly heard on the preliminary objection.

Learned President's Counsel for the 3rd respondent contended that the petitioner in its application to this Court had stated that at the time, the application before the Court of Appeal

was proceeding, the Sri Lanka Transport Board, Act No. 27 of 2005 was enacted and thereby the petitioner was established as the lawful successor to the 11 cluster Companies, which instituted the application in the Court of Appeal. Accordingly, the petitioner had come before this Court in the capacity of being the successor to the 11 cluster Companies that instituted action in the Court of Appeal. The contention of the learned President's Counsel for the 3rd respondent was that the said Sri Lanka Transport Board Act, No. 27 of 2005, does not contain any provision incorporating the 'Sri Lanka Transport Board' and therefore the said Board has no corporate personality.

Learned Counsel for the petitioner contended that the objection raised by the learned President's Counsel for the 3rd respondent is based on the fact that the Sri Lanka Transport Board Act, No. 27 of 2005 does not contain any provision, which expressly states that the 'said Board shall be a body-corporate with perpetual succession and a common seal and may by its name sue and be sued' and therefore the petitioner is not a body corporate.

Accordingly, the contention of the learned Counsel for the petitioner was that when examining or interpreting a statute, it should be considered as a whole and an interpretation should be given to that statute preserving the spirit and the object for what it was enacted. Further, it was submitted that when one examines the Preamble of the statute in question there is reference that the present Act was enacted to achieve similar objectives of the previous enactments and as the earlier Acts had specific reference of those Boards being body corporates, that position should apply to the present Act as well. Learned Counsel for the petitioner also made reference to Sections 11(1)a, 17(1) and 18(1) of the Act to stress the point that the Board has the legal status of a body corporate. His contention with regard to the aforementioned sections were as follows:

1. Section 11(1) makes provision for the Board to acquire, hold, give on lease, mortgage, pledge and sell etc. of immovable property;

2. Section 17(1) states that where any land is required for the purpose of the business of the Board, such land can

be acquired under the Land Acquisition Act and be transferred to the Board; and

3. Section 18(1) makes provision that where any immovable property of the State is required for the purpose of the business of the Board, such land can be given to the Board by a special grant or lease.

Accordingly, learned Counsel for the petitioner took up the position that for the implementation of the aforementioned provisions, the Board has to have the legal status of a body corporate and therefore the statute in question has by implication recognized the said Board as a body corporate.

Considering the contentions of the learned President's Counsel for the 3rd respondent and the learned Counsel for the petitioner, it is evident that, the question that has to be examined is whether a Board such as the Sri Lanka Transport Board established in terms of Act, No. 27 of 2005 would have the status of a body corporate even if there is no specific provision to that effect, under the said Act.

The common characteristics of a Corporation, as generally known, are a distinctive name, a common seal and perpetuity of existence. Almost all enactments dealing with Public Corporations contain similar provisions, which provide for the establishment of the institutions as bodies corporate, having perpetual succession and a common seal. Referring to the basic features of a Public Corporation, Dr. A.R.B. Amerasinghe (Public Corporations, pgs. 22-23) has stated that,

> "Every Public Corporation in Ceylon is a separate legal person. **Substantially similar provisions in all the Acts provide for the establishment of the institutions as bodies corporate**,having perpetual succession and a common seal. (emphasis added)"

In his discussion, on the common characteristics of a Corporation, Dr. Amerasinghe had referred to several enactments, which had clearly made provision to state that they are bodies corporate, having perpetual succession and a common seal (Section 3 of the Tourist Board Act, Section 2(2) of Ceylon

Broadcasting Corporation Act, Section 4(1) of the Rubber Research Ordinance, Section 2(2) of the Shipping Corporation Act, Section 2(2) of the Gem Corporation Act).

The salient features of a body corporate was considered by Professor C.G. Weeramantry (The Law of Contracts, Vol.I, pg. 517-518), where he had clearly made reference to the necessity of the existence of common characteristics for that to be incorporated. Professor Weeramantry had stated thus:

> "The common characteristics of a corporation are a distinctive name, a common seal and perpetuity of existence ..... As a rule the contracts of a corporation must be under the seal of a corporation. So important is a seal in the existence of a body corporate that the non-existence of a seal in the case of a body alleged to be a corporation, though not conclusive, is cogent evidence against corporation."

It is therefore evident that for the establishment of an institution as a body corporate, clear provision to that effect should be provided in the enactment. The provisions specified in the Universities Act, No. 16 of 1978, as correctly submitted by the learned President's Counsel for the 3rd respondent, clearly demonstrate the necessity for specific provisions to be contained in the statute in order to establish legal personality. Section 2(2) of the Universities Act, No. 16 of 1978 refers to the University Grants Commission and states as follows:

> "The Commission shall by the name assigned to it by subsection (1) be a **body corporate, with perpetual succession and a common seal and with full power and authority to**
>
> **(a) in such name to sue and be sued in all courts;**
>
> (b) to alter the seal at its pleasure ...." (emphasis added).

Section 24(a) of the Universities Act, also confers legal personality on the University College and this section reads as follows:

"....establish a University College, which shall be a body corporate with perpetual succession and a common seal for the purpose of providing, promoting ...."

However, although the University Grants Commission and the University Colleges are incorporated with perpetual succession and a common seal in such name to sue and to be sued in terms of Sections 40 to 51 of the Universities Act, the University Court, Council, the Senate, the Campus or Boards, or the Faculties are not conferred with any legal personality on them. Accordingly, in terms of the Universities Act only the University Grants Commission and the University Colleges would be regarded as bodies corporate and the University Council, the Senate or the Faculties of the Universities would not have such status under the said Act.

Learned Counsel for the petitioner submitted that there are statutes, which are similar to the Sri Lanka Transport Board Act, No. 27 of 2005. He referred to Section 2 of the Ceylon Tourist Board Act, No. 10 of 1906, Section 2 of the Common Amenities Board Law, No. 10 of 1973 and Section 2(1) of the Ceylon Electricity Board Act, No. 17 of 1969 and stated that they have established the Ceylon Tourist Board, Common Amenities Board and the Ceylon Electricity Board, respectively. Learned Counsel for the petitioner accordingly submitted that Section 2(1) of the statute in question, similarly established the Sri Lanka Transport Board and as the structure of the aforementioned Boards are almost similar to the structure of the Sri Lanka Transport Board and as those three Boards under their respective statutes are bodies corporate, the Sri Lanka Transport Board also should be considered as a body corporate.

Section 2 of the Sri Lanka Transport Board Act refers to the establishment of the Sri Lanka Transport Board and Section 3 of the said Act deals with the quorum for and procedure at the meetings of the Board. However, the Ceylon Transport Board Act and the Common Amenities Board Law are evidently quite different.

Sections 2 and 3 of the Ceylon Tourist Board Act, read as follows:

"2. There shall be established a public authority which shall be called the Ceylon Tourist Board, and which

shall consist of the persons who are for the time being members of that Board under Section 6.

3. The Board shall, by the name assigned to it by Section 2, be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in that name."

Sections 2 and 3 of the Common Amenities Board Law, too contain similar provisions which are reproduced below.

"2. There shall be established a public authority which shall be called the Common Amenities Board (hereinafter referred to as 'the Board') and which shall consist of the persons who are for the time being members of the Board under Section 8.

3. The Board shall by the name assigned to it by Section 2 be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in such name."

The Ceylon Electricity Board Act also contains similar provisions as in the Ceylon Tourist Board Act and the Common Amenities Board Law.

Accordingly it is apparent that unlike the Sri Lanka Transport Board Act, the other enactments have specific provisions, which had created the respective Boards, as bodies corporate and therefore it is evident that a Corporation and / or a Board cannot be regarded as a legal personality, if it is not expressly created by law.

Considering the basic principles which deals with bodies corporate, it is thus apparent that, for the purpose of incorporation, there should be express provisions, which would reveal such desire for incorporation. This position was specifically stated by Lord Morris in the Privy Council decision in *The Land Commissioner* v *Ladamuttu Pillai*[1], where the Privy Council had considered the Land Commissioner's liability to be sued and had held that,

"In the interpretation section (Section 2) it is laid down that 'Land Commissioner means' the officer appointed

by the Governor under Section 3 of this Ordinance and includes any officer of this Department authorized by him in writing in respect of any particular matter or provision of this Ordinance." **The Land Commissioner is not expressly created a Corporation Sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name. Futhermore no legislative enactment seems to reveal any intention to incorporate .... If there had been a desire to incorporate the Land Commissioner there could have been express words of incorporation. Thus in the case of the Public Trustee it is enacted by Section 3 of the Public Trustee Ordinance of 1930 as follows:**

"The Public Trustee shall be a Corporation sole under that name with perpetual succession and an official seal and may sue and be sued under the above name like any other Corporation sole."

All these considerations including the absence of any evident intent to incorporate lead their Lordships to regret the submission that the Land Commissioner can be regarded as a Corporation sole." (emphasis added)

The contention of the learned Counsel for the petitioner regarding the objection raised by the learned President's Counsel for the 3rd respondent was that under the present Sri Lanka Transport Board Act, a Board was established and the said Board should have the legal status of a body corporate in order to achieve the objects and purpose of the Act and that this objective could be achieved, on a consideration of the provisions contained in the previous enactments dealing with the Sri Lanka Transport Board. It is however not disputed that the learned Counsel for the petitioner made no reference to any direct provisions or to any other provisions, which reveal the intention of the Sri Lanka Transport Board to be a body corporate under the present Act. In the absence of any direct provisions or any intent to incorporate, it is evident that the Sri Lanka Transport Board, under the present Act cannot be regarded as a body corporate.

Accordingly for the reasons aforementioned, I uphold the preliminary objection raised by the learned President's Counsel for the 3rd respondent and dismiss this application for special leave to appeal.

I make no order as to costs.

RAJA FERNANDO, J. – I agree.

ANDREW SOMAWANSA, J. – I agree.

Preliminary Objection upheld.
Application dismissed.

SOMASEKARAM
v
LANKA BELL (PVT.) LTD.

SUPREME COURT
NIHAL JAYASINGHE, J.
NIMAL DISSANAYAKE, J.
GAMINI AMARATUNGA, J.
SC (CHC) 16/2000
HC CIVIL 28/97 (3)
MAY 17, 21, 2007
AUGUST 5, 2007

Code of Intellectual Property Act 52 of 1979 – Permission granted by Surveyor General to produce A-Z Street Guide Map – Copyright acquired? Ownership of the copyright with the Surveyor General?

The appellant made an application to the Surveyor General for permission to produce a A-Z street guide map for selected cities/Greater Colombo.

The defendant-respondent caused to be published in several newspapers a reproduction of several parts of the map in the form of advertisement without the consent/permission of the appellant.

Action was instituted by the appellant, alleging that the respondent has violated his rights under Act 52 of 1979, and contended that the appellant had made several modifications and alterations to the map of the Surveyor General that conferred originally to his work.

The High Court dismissed the application holding that the work is a mere alteration of the Surveyor General's Plan without any creativity that defies originality.

On appeal to the Supreme Court.

Held:

The ownership of the copyright in the map remained with the Surveyor General.

APPEAL from the judgment of the Commercial High Court.

M.A. Sumanthiran with *A. Vamadeva* for plaintiff-appellant.

Romesh de Silva PC with *Dina Phillips* for defendant-respondent.

Cur-adv-vult.

February 26, 2008

JAYASINGHE, J.

In or around 1993 the appellant made an application to the Surveyor General for permission to produce an A-Z street guide map of Greater Colombo and selected cities. The grant of permission was conditional upon payment of Royalties to the Surveyor General as per guidelines set out in a Gazette Notification. In or about 1994 the appellant produced an A-Z street guide map for which approval has been obtained. The appellant submitted that in view of the unique and distinct features in the said work, the said A-Z guide map is an original creation and acquired copyright; that in or about December 1996 and January 1997 the defendant-respondent caused to be published in several newspapers a reproduction of several parts of the said A-Z map in the form of an advertisement without the consent or permission of the appellant. The respondent then sought to settle the dispute that ensued and upon the failure to reach any compromise the appellant dispatched a letter of demand claiming damages for the unauthorized publication of the appellant's work and consequently instituted proceedings in the Commercial High Court alleging that the respondent company has violated his rights under the Code of Intellectual Property Act No. 52 of 1979. The main thrust of the

appellant's argument is that the appellant had made several modifications and alterations to the map of the Surveyor General that conferred originality to his work and therefore is protected under the Code of Intellectual Property Act No. 52 of 1979 where all rights were reserved for the appellant.

The Commercial High Court came to a finding that the key issue for determination is whether the A-Z street guide map published by the appellant is an original work and held that the work of the appellant is a mere alteration of the Surveyor General's Plan without any creativity that defies originality. The Commercial High Court accordingly dismissed the application of the appellant.

The present appeal is against the judgment of the Commercial High Court. It is the submission of the defendant-respondent that the Surveyor General's map which the petitioner admittedly used as the ground work for the creation of the impugned map was prepared by the Surveyor General's Department and the copyright is vested with the Surveyor General; that the appellant was permitted to use the map in his publication subject to the condition that limited number of copies would be published, that Royalties were payable and more importantly the insertion of an acknowledgement that the map is reproduced with permission of the Surveyor General and accordingly the ownership of the copyright in the map at all times remained with the Surveyor General. The defendant-respondent submitted that in the circumstances the appellant could not have had copyright in the said map.

I considered the submissions of Counsel carefully and I am of the view that there is no merit in this appeal. The appeal is accordingly dismissed but without costs.

N.E. DISSANAYAKE, J. - I agree.

N.G. AMARATUNGA, J. - I agree.

Appeal dismissed.

JEFFERJEE
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
W.L.R. DE SILVA, J.
SALAM, J.
CA 1234/06
FEBRUARY 2, 2008
APRIL 3, 28, 2008

Employees Provident Fund Act 15 of 1958 amended by 26 of 1981, 42 of 1988, 14 of 1992 – 312, S38 (2) Provident Fund dues – Employee or Independent Contractor? – Inquiry – No reasons given – Is it imperative to give reasons – If not given could the Court arrive at a decision?

The 3rd respondent complained to the 2nd respondent Assistant Commissioner of Labour of the failure on the part of the petitioner to contribute to Employees Provident Fund in favour of the 3rd respondent. It was contended at the inquiry that the 3rd respondent was an independent contractor. The respondents held that, the petitioner is liable to contribute to the Fund.

The petitioner sought a *Writ of Certiorari* to quash the said decision, as reasons were not given.

Held:

(1) Except in the case of an appealable decision, not giving reasons for a decision does not *ipso facto* vitiate that decision.

(2) The purported decision does not contain any reasons. Let alone reasons the impugned order for the payment of EPF does not even contain determination on the crucial issue whether the 3rd respondent was an independent contractor or an employee, and the respondents have not thought it fit to produce the record or any document which contained the reasons.

Per Ranjith Silva, J.

"I do not intend to invoke the jurisdiction of this Court *ex mero motu* to call for the record for the examination of this Court. If I do so that would only

encourage public officials performing public duties wielding powers under draconian laws to disregard the sacred duty of observing the principles of natural justice and then flout the law unscrupulously.

(3) The remedy by way of *Writ of Certiorari* cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals; when hearing appeals the Court is concerned with the merits of the decision under appeal.

In appeal the Appellate Court can modify, alter, substitute or rescind the order or decision under appeal.

In judicial review the Court is concerned with the legality and cannot vary, modify, alter or substitute the order under review.

On appeal the question is right or wrong on review, the question is lawful or wrongful.

(4) It is not for the Court of Appeal to decide whether the 3rd respondent was an employee or not, it was for the 1-2 respondents to decide that issue.The supervisory jurisdiction does not entitle it to usurp this responsibility and to substitute its own view for his

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

1. *Brook Bond (Ceylon) Ltd.* v *Tea, Rubber, Coconut and General Produce Workers Union* – 77 NLR at 6
2. *Unique Gemstones Ltd.* v *W. Karunadasa* – 1995 – 2 Sri LR 357 at 360-361.
3. *Kegalle Plantations Ltd.* v *Silva and others* – 1996 – 2 Sri LR 180.
4. *Karunadasa* v *Unique Gemstones Ltd.* – 1997 – 1 Sri LR 256.
5. *Kusumawathie and others* v *Aitken Spence & Co. Ltd* – 1996 – 2 Sri LR 18
6. *Suranganie Marapana* v *Bank of Ceylon and others* – 1997 3 SLR 156.
7. *Bandara* v *Premachandra* – 1994 – 1 Sri LR 301.
8. *Tennekoon* v *De Silva* – 1997 – 1 Sri LR 16.
9. *Guneratne* v *Ceylon Petroleum Corporation* – 1996 – 1 Sri LR 315.
10. *Wickrematunga* v *Ratwatte* – 1998 – 1Sri LR 201.
11. *Wijepala* v Jayawardene – SC 89/95 SCM 30.6.1995.
12. *Footwear (Pvt) Ltd. and two others* v *Aboosally - former Minister of Labour and Vocational Training and others* – 1997 – 2 Sri LR 137.
13. *R.* v *Deputy Industrial Injuries Commissioner – ex parte Moore* – 1965 1 All ER 81 at 84.

14. *Chulasubadra* v *The University of Colombo and others* – 1986 – 2 Sri LR 288.

A.P. Niles for petitioner.

Milinda Gunetilake for respondents.

Cur.adv.vult

June 25, 2008

RANJITH SILVA , J.

The petitioner one Mr. Mohamadally I. Jafferjee, a partner of the firm "Jafferjee Brothers" filed this application in this Court invoking the writ jurisdiction of this Court under article 140 of the Constitution of the Republic of Sri Lanka challenging the propriety of the order dated 29.06.2006 made by the 2nd respondent, the Assistant Commissioner of Labour Colombo North, directing the petitioner to pay a sum of Rs. 3,69,825/- to the 3rd respondent being the amount due to the 3rd respondent from the petitioner by way of contributions to the provident fund under and in terms of the provisions of Se. 12 read with Se. 10 of the Employees Provident Fund Act No. 15 of 1958 as amended by Acts No. 26 of 1981, No. 42 of 1988 and No.14 of 1992. (Hereinafter referred to as the EPF Act).

The business registration of the said partnership is annexed to the petition marked as P2. Admittedly the firm known as Jafferjee Brothers (hereinafter referred to as the "firm") had entered into a contract on 20.06.1994 by which the 3rd respondent was appointed a consultant to the wood work project of the said firm. The initial monthly consultancy fee paid to the 3rd respondent was Rs. 5000/- which over the years had been increased to Rs.15750 by the said firm until the services of the 3rd respondent were terminated in the year 2003.

The 3rd respondent complained to the 2nd respondent of the failure on the part of the petitioner to contribute to the employees' provident fund in favour of the 3rd respondent as stipulated under the EPF Act. Consequently, an inquiry was held and at the inquiry it was contended on behalf of the firm that the 3rd respondent was

an independent contractor and not an employee. Hence, the firm denied its liability to contribute to the EPF. Having inquired into the complaint of the 3rd respondent the 2nd respondent decided that the work done by the 3rd respondent was in fact that of an employee and therefore payments received by the 3rd respondent for the services rendered by the 3rd respondent to the "firm" attracted the provisions of the EPF Act and hence ordered the "firm" to pay a sum of Rs. 3,69,825/- to the 3rd respondent as contributions for the Employees Provident Fund in respect of the 3rd respondent (Vide P-1 and R-1).

Upon the failure of the "firm" to comply with the aforesaid order, the 1st and 2nd respondents filed a certificate in the Magistrate's Court of Colombo in proceedings bearing No. 967/2007, under section 38(2) of the EPS Act to recover the monies due to the 3rd respondent.

The case for the Petitioner in a nut shell:

1) The 2nd respondent did not give reasons for his decision marked P1, and thereby failed to observe the principles of natural justice in arriving at the aid impugned decision.

2) Since the 1st and the 2nd respondents failed to assign reasons for there decision dated 29.06.2006 which is marked as P1, it is open to this court to review all the material presented by all parties in this case and to arrive at a decision thereon.

3) The 1st and the 2nd respondents misinterpreted the documents submitted to the said respondents by the petitioner, in deciding the question, whether the 3rd respondent was an independent contractor or an employee.

4) The 3rd respondent being a consultant, was a skilled person and the partners of the firm were not in a position to tell him how to do his work and therefore, the application of the control test to the facts and circumstances of the instant case, would lead to the inevitable conclusion that the 3rd respondent was not an employee.

5) The application of the organization/integration test to the facts and circumstances of the instant case would lead to the

inevitable conclusion that the 3rd respondent was not an employee.

6) The application of the economic reality test is not appropriate in the present case because the present case is a matter of a consultancy where the ownership of assets does not come into play.

Failure to assign reasons as ground to avoid liability

It is trite law that when a statute confers a right of appeal against a decision, the decision making authority is obliged to disclose the reasons for its decision. In *Brook Bond (Ceylon) Ltd.* v *Tea, Rubber, Coconut and General Produce Workers' Union*(1) at 06. It was held that where an appeal lies from the order of a tribunal to a higher Court though the appeal may be on a question of law, it is the duty of the tribunal to set down its findings on all disputed questions of fact and to give reasons for its order. Questions of law must necessarily be considered in relation to the facts and it would be impossible for a Court of Appeal to discharge its functions properly unless it has before it the findings of the original tribunal on the facts as well as its reasons for the order.

In the instant case the decision of the Commissioner is not subject to an appeal. Therefore the question is whether the duty to give reasons extends to non-appealable decisions as well. This needs a critical evaluation and an in-depth analysis of the current law on this topic. Does Natural Justice require that reasons be provided by the decision maker? The right to receive reasons flows by implication from the rules of natural justice, the relevant rule is the right to be heard. (*audi alterem partem*). If a person is entitled to be heard before a decision is reached against him, then it follows that the person is entitled to a reasoned consideration of what he or she says.

Reasons can become a powerful tool to prevent the arbitrary exercise of power and to ensure public accountability. Reasons facilitate open government and transparency. Secrecy with regard to any decision generates suspicion and speculation. Reasons will help in ensuring that public decision making is not *ad hoc*, capricious or arbitrary but closely thought out and rational.

Undoubtedly it will enhance the confidence of the public reposed in the decision making authority and will enhance significantly the integrity of the public decision making.

In this regard I would like to quote a paragraph from the book *"Administrative Law" by Wade and Forsythn 9th edition, page 522.* I quote, "The principles of natural justice do not; as yet, include any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply expressed by the expanding law of judicial review, now that so many decisions as *liable to be quashed* (emphasis is mine) or appealed against on grounds of improper purpose, irrelevant considerations and errors of law various kinds. Unless the citizen can discover the reasons behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. *The right to reasons is therefore an indispensable part of a sound system of judicial review.* (emphasis added.)"

From the above quotation it is quite clear that even in the case of non appealable decisions reasons should be given by the decision making authority, for various reasons stated therein especially so where the person is given the right to be heard, as in the instant case.

It was held by Senanayake, J. in *Unique Gemstones Ltd.* v *W. Karunadasa*(2) 360-361; I quote, "I am of the view the Commissioner should give reasons for his decision. The present trend which is a rubric running throughout the public law is that those who give administrative decisions where it involves the public, whose rights are affected; especially when proprietary rights are affected should give reasons for its decisions. The action of the public officers should be 'transparent' and they cannot make blank orders. The giving of reasons is one of the fundamentals of good administration. In my view it is implicit in the requirement of a fair hearing to give reasons for a decision. The standards of fairness are not immutable, they may change with the passage of time both in the general and in there application to decisions of a particular type. The principles of fairness are not to be applied identically in every situation. But the fairness demanded is dependent on the

context of the decision. The present trend is to give reasons and a failure to do so amounts to a failure to be manifestly seen to be doing injustice. I am of the view that it is only in special circumstances, the reasons should be withheld, i.e. where the security of the state is affected, and otherwise a statutory body or a domestic tribunal should give reasons for its decision. Though the T.E. Act is silent on this matter, the Commissioner being a creature of a statute performing a public function, it is not only only desirable but also necessary to give reasons for its decision".

Per Senanayake, J.

"The common law as understood by us has now been battered down. Reasoned orders are the *sine qua non* of administrative justice even if the statute is silent" *Kegalle Plantations Ltd.,* v *Silva and others.*(3)

When this matter came up in appeal in the Supreme Court in *Karunadasa* v *Unique Gemstones Ltd.*(4) at 256. The Supreme Court observed that the matter did not end there; that the legal position was not clearly appreciated and that the parties have not realized the need to invite the Court of Appeal to call for an examine the record and the recommendation. Thus the Supreme Court has taken the view that in cases where there is no right of appeal the decision making authority must either give the decision with the reasons for its decision or should make the reasons available to the Court of Appeal for examination by the Court when required to do so. On an examination of the reasons if the Court of Appeal finds that reasons were given and the decision is not wholly unreasonable, illegal or *ultra virus*, *writ of certiorari* will not lie.

But a somewhat deferent view was expressed in the following case which appears to be the better view and in keeping with the world trend.

In *Kusumawathie and others* v *Aitken Spence and Co. Ltd*(5) 18 (C.A.) (as he then was) held "The finding that there is no requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders. If a decision that is challenged is not a speaking order, when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed. Rule 52 of the Supreme Court Rules 1978 is intended to

afford an opportunity to the respondents for this purpose. The reasons thus disclosed form part of the record and are in themselves subject to review. Thus if the Commissioner fails to disclose his reasons to Court exercising judicial review, an inference may well be drawn that the impugned decision is *ultra virus* and relief granted on that basis."

Reasons means not just the evidence recorded and the documents filed but an evaluation of the evidence and whenever possible, an interpretation of the documents.

Reasons in the context of Article12 of the Constitution

In *Suranganie Marapana* v *the Bank of Ceylon and others*(6) at 156 the Chairman of the Bank stated in his affidavit submitted to the Supreme Court that the refusal to extend the services of the petitioner was done *bona fide* and unanimously after a careful evaluation of her application and the need of the Bank to increase the efficiency of the legal department.

The Court held in that case; I quote "The Board failed to show the Court that valid reasons did exit for the refusal to grant the extension which was recommended by the corporate management. Instead, a veiled suggestion was made that the efficiency of the Legal Department was not up to expectations. This insinuation was baseless and unwarranted. Hence, the refusal to grant the extension of services sought was arbitrary, capricious and unfair. It was also discriminatory and violative of the petitioner's right to equal protection of the law under article 12(1) of the constitution" *Bandara* v *Premachandra*(7),*Tennakoon* v *De Silva*(8),*Gunaratne* v *Ceylon Petroleum Corporation*(9), *Wickramatunge* v *Ratwatte*(10), and *Wijepala* v *Jayawardena*.(11)

In *Bandara* v *Premachandra (supra)* Fernando, J. held: "... In the Establishment Code "without assigning any reasons' only means that no reason need be stated to the officer but that a reason, which in terms of the code justifies dismissal, must exist; and, if not disclosed legal presumptions will be drawn ..."

Held further *per* Fernando, J. "The state must, in the public interest, expect high standards of efficiency and services from

public officers in there dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavour to ensure that this expectations is realized."

Therefore except in the case of an appealable decision, not giving reasons for a decision does not *ipso facto* vitiate that decision. Yet valid reasons that justify the decision should be disclosed. In the instant case the 1st and 2nd respondents in their objections filed in this Court and in their submissions both written and oral, have drawn our attention to numerous documents and in fact have given there own interpretation to the said documents filed by them and the petitioner, but failed to show us any reason given by the said respondents in arriving at their decision. The 1st and the 2nd respondents completely failed to invite this Court to call for the record for the examination of this Court.

The decisions in *Karunadasa* v *Unique Gemstone Ltd., (supra)* apply with equal force to the facts and circumstance of the instant case. According to the *ratio desidendi* in the above case, the Assistant Commissioner (2nd respondent) being a public servant, was under a public duty to give reasons for his decision as it was a decision, made under the provisions of a statute, affecting the proprietary rights of the petitioner. As the impugned decision of the 2nd respondent was not an appealable order his failure to give reasons in the decision itself or along with the decision would not render the decision a nullity as long as there were good reasons for the decision. The Court of Appeal may call for the record and examine the record on application made in that behalf to ascertain whether there were valid reasons disclosed, for the decision. If it is found thereafter, that there were justifiable reasons for the decision then *certiorari* would not lie.

In the instant case we find that the purported decision dated 29.06.2006 marked as P1 does not contain any reasons. Let alone reasons the impugned order for the payment of EPF does not even contain determination on the crucial issue whether the 3rd respondent was an independent contractor or an employee. The 1st and the 2nd respondents have not thought it fit to produce the record or any document which contained the reasons for the decision although they ought to have known that they could invite

the Court of Appeal to call for an examine the record. We have perused the objections filed by the 1st and the 2nd respondents on 30.10.2007 but failed to see that they have produced such record or document for the examination of this Court or at least have invited this Court to call for the record to be examined by this Court. The 1st and the 2nd respondents were represented by a lawyer but opted not to invite this Court to call for the record, may be for reasons best known to them. For the reasons stated I do not intend to invoke the jurisdiction of this court *ex mero motu* to call for the record for the examination of this Court. If I do so that would only encourage public officials performing public duties wielding powers under draconian laws to disregard the sacred duty of observing the principles of natural justice and thus flout the law unscrupulously. Every order or decision is not challenged and it is only in a very few cases, those who are aggrieved enter litigation which is very arduous, tedious and unbearably expensive. Decision making bodies are fully aware of this fact and they might even attempt to give reasons belatedly for their decisions once they realize that their decisions are being challenged. Such a practice can lead to corruption and to a negation of the principles of natural justice.

2nd ground urged by the petitioner is: since the 1st and the 2nd respondents failed to assign reasons for their decision dated 29.06.2006 which is marked as P1, it is open for this Court to review all the material presented by all parties in this case and to arrive at a decision thereon.

The remedy by way of *certiorari* cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically deferent from appeals when hearing an appeal the Court is concerned with the merits of the decision under appeal. In appeal the appellate Court can modify, alter, substitute or rescind th order or decision under appeal. (Vide Article 138 of the Constitution that gives the forum jurisdiction to the Court of Appeal for the correction of all errors in fact, or in law, committed by Courts of first instance, tribunal or other institution.) In Judicial review the Court is concerned with its legality and cannot vary, modify, alter or substitute the order under review. On appeal the question is right or wrong, on review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as

happens when an appeal is allowed, a Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. *Footwear (Pvt.) Ltd., and two others* v *Aboosally, former Minister of Labour and Vocational Training and others.*(12)

Diplock, L.J. in *R.* v *Deputy Industrial Inquiries Commissioner ex parte Moore*(13) at 84 opined as follows I quote; "the requirement that a person exercising quasi-judicial functions must base his decision on evidence means that it must be based on material which tends logically to show the existence or non existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which could be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value; the weight to be attached to it is a matter for the person to whom parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the Court does not entitle it to usurp this responsibility and to substitute its own view for his".

Sharvananda, C.J. quoted this statement of law with approval in *Chulasubadra* v *The University of Colombo and others* (14) at 288.

Therefore it is my view that it is not for us to decide whether the 3rd respondent was an employee or an independent contractor. It was for the 1st and 2nd respondents to decide that issue. The issue is a mixed question of fact and law and this Court could intervene if that decision was illegal or *ultra virus*. But it is not for this Court or the Counsel who appeared for the said respondents to try and justify the decision, by belatedly assigning reasons for the impugned decision if the decision was made without assigning reasons or at least if the record does not show that the 2nd respondent had even his reasons for his decision.

For the reasons adumbrated I find that; dealing with the rest of the grounds urged by the petitioner would be futile. It would be redundant to attempt to go into the correctness of the impugned decision which is not a reasoned out decision as the said decision is *ultra virus* the enabling statute namely the EPF Act.

Accordingly we issue a *writ of certiorari* to quash the impugned decision / notice dated 29.06.2006 made by the 2nd respondent and a writ of prohibition prohibiting the 1st and 2nd respondents from initiating or maintaining any proceedings for the enforcement of the said decision.

Application for mandate in the nature of *writs of Certiorari* and Prohibition is hereby allowed. In all the circumstances of the case we do not order costs.

SALAM, J. - I agree.

Appeal allowed.

FOWZIE AND OTHERS
v
VEHICLES LANKA (PVT) LTD.

SUPREME COURT
BANDARANAYAKE, J.
DISSANAYAKE, J.
BALAPATABENDI, J.
SC SPL LA 286/2007
CA 944/2006
JANUARY 8, 28, 2008
FEBRUARY 5, 6, 2008

Applicability of SC Rules 1990 – Rule 8 (3) – Rule 8 (5) – Rule 40 – Tendering the relevant number of notices along with the application for service on respondents in time – Variation or extension of time permitted with permission of Court – Does non compliance with Rule 8 (3) result in the dismissal of the application?

The respondent contended that the petitioners had not complied with Rule 8 (3) of the SC Rules 1990 and sought the dismissal of the application, in limine.

Held

(1) A careful examination of Rule 8 (3) clearly indicates that the purpose of it is to ensure that the respondents have received the notices of the petitioners' application lodged in this Court and in the event that the

said notice not been received by the respondents, to make provision for the Registrar to dispatch fresh notice by registered notice.

(2) The SC Rules 9 of 1990 makes provision for the petitioner to file an application for a variation or an extension of time, if and when the need arises (Rule 40).

(3) There is non compliance with Rule 8 (9) of SC Rule 1990 and the petitioners also had not taken steps to make an application (Rule 40) for variation or an extension of time in tendering notices as required by Rule 8 (3).

APPLICATION for Special leave to appeal from a judgment of the Court of Appeal on a preliminary objection raised.

Cases referred to:

(1) *Samantha Niroshana* v *Senarath Abeyruwan* – SC Spl LA 145/2006 – SCM 2.8.07.
(2) *Kiriwante and another* v *Navaratne and another* – 1990 - 2 Sri LR 393
(3) *Rasheed Ali* v *Mohamed Ali and others* – 1981 – 2 Sri LR 29
(4) *Soong CheFoo* v *H. K. de Silva* – SC Spl LA 184/2003 – SCM 25. 11. 03 K.M.
(5) *Gangodagedara* v *Mercantile Credit Ltd* – 1988 – 2 Sri LR 253
(6) *Jayawardena, Someswaran and Manthri & Company* v *Jinadasa* – 1994 – 3 Sri LR 185
(7) *Samarawickrema* v *Attorney General* – 1983 2 Sri LR 162
(8) *Shanmugavadivu* v *Kulatilaka* – 2003 – 1 Sri LR
(9) *Annamalie Chettiar* v *Manjula Karunasinghe and another* – SC 69/2003 – SCM 6.6.05
(10) *Wickramatilaka* v *Marikkar* – (1895) 2 NLR 9
(11) *Re Chenwel* – 8 Ch D 506
(12) *Sadlar* v *Whiteman*
(13) *Reg* v *Skeen* – (1910) 1 KB 868 at 892
(14) *K. Reaindran* v *K. Velusomasundaram* – SC Spl LA 298/99 – SCM 7.2.00
(15) *N. A. Premadasa* v *People's Bank* – SC Spl LA 212/99 – SCM 24.2.00
(16) *Hameed* v *Majibdeen and and others* – SC Spl LA 38/01 – SCM 23.7.01
(17) *R. M. Samarasinghe* v *R. M. D. Rathnayake and others* – SC Spl LA 51/2001 – SCM 27.7.01
(18) *C. A. Haroon* v *S. K. Muzoor and another* – SC Spl LA 158/ 2006 – SCM 24.11.2006

Sanjay Rajaratnam DSG for respondents-petitioners
Faiz Musthapha PC with *Thushani Machado* for petitioner-respondent

Cur.adv.vult

July 8, 2008

SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal date 10. 09. 2007. By that judgment the Court of Appeal issued a *writ of certiorari* quashing Regulation 2(3) and Regulation (b) made by the 1st respondent-petitioner and published in Gazette No. 1446/31 dated 25.05.2006 prayed by the petitioner-respondent (hereinafter referred to as the respondent). The respondents-petitioners (hereinafter referred to as petitioners) had thereafter preferred an application for Special Leave to Appeal to this Court.

When that application of the petitioners for Special Leave to Appeal came up for support for the consideration of the grant of Special Leave, learned president's Counsel for the respondent took up a preliminary objection that the petitioners had not complied with the requirement in Rules 8(3) and 40 of the Supreme Court Rules 1990 and therefore submitted that the application for Special Leave to appeal should be dismissed in *limine*.

The facts relevant to the preliminary objection raised by the learned President's Counsel for the respondent, as presented by him, *albeit* brief, are as follows:

The petitioners had filed the application for Special Leave to Appeal on 22.10.2007, but the notices were not tendered on that date. The respondent had received a copy of a motion along with the petition and affidavit filed and in the said motion it was stated that the registered Attorney for the petitioners had sought three (3) dates for the learned Deputy Solicitor General to support the application for Special Leave. However, according to the learned President's Counsel for the respondent, there was no notice sent to the respondent from or through the Registry of the Supreme Court.

When the connected application No.1492/2006 came up for hearing before the Court of Appeal on 30.10.2007, the State Counsel appearing for the respondents in that application had moved that the hearing of that case in the Court of Appeal be deferred in view of the pendency of this application before the Supreme Court. Thereafter, the registered Attorney-at-Law for the respondent had perused the Record and had observed that the petitioners had failed to tender notices for service on the respondent along with the application for Special Leave as required by Rule 8(3) of the Supreme Court Rules of 1990.

On 30.10.2007, the Attorney-at-Law for the respondent filed a motion and moved this Court to reject the application for Special Leave, for the reason that the petitioners had not complied with Rule 8(3) of the Supreme Court Rules of 1990. Thereafter on 31.10.2007 notices and the annexures were tendered by the petitioners at the Registry without a motion.

Accordingly learned President's Counsel for the respondent contended that the petitioners had not complied with Rule 8(3) of the Supreme Court Rules 1990 and relying on the decision of this Court in *Samantha Niroshana* v *Senarath Abeyruwan*[1] submitted that the petitioners cannot now invoke the Courts discretion in terms of Rule 40 to obtain an extension of time to comply with Rule 8(3) of the Supreme Court Rules 1990. Accordingly respondent the learned President's Counsel for the respondent contended that the said preliminary objection be upheld and the application for Special Leave to Appeal be dismissed *in limine*.

Learned Deputy Solicitor General for the petitioners conceded that the notices were tendered to the Registry of the Supreme Court, 7 (seven) working days after the Special Leave to Appeal application was filed. Learned Deputy Solicitor General further conceded that the decision in which the learned President's Counsel for the respondent was relying on, viz, *Samantha Niroshana* v *Senarath Abeyruwan (supra)* was correct in deciding to uphold the preliminary objection of the respondent as the petitioners in that case had not acted reasonably and efficiently upon discovery of the defect in their

application for Special Leave to Appeal and the respondents had not received notice of the Special Leave to Appeal application. The position taken by the learned Deputy Solicitor General for the petitioners therefore was that, in the circumstances of the present case, the petitioners have discharged the requirements of Rule 8(3) and thereby had fulfilled the objective of the said Rule 8(3), even though such execution may not have been in strict compliance of Rule 8(3) of the Supreme Court Rules of 1990. Learned Deputy Solicitor General submitted that he is relying on the decisions of *Kiriwanthe and another* v *Navaratne and another*(2) and *Rasheed Ali* v *Mohamed Ali and others*(3).

Having stated the submissions of the learned President's Counsel for the respondent and the learned Deputy Solicitor General for the petitioners, let me now turn to consider the factual position of the objection raised by the learned President's Counsel for the respondent with reference to the provisions contained in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and the decided cases.

As the Record of the Special Leave to Appeal application reveals, on 22.10.2007, the petitioners had lodged an application in the Supreme Court and sought for Special Leave to Appeal from the judgment of the Court of Appeal dated 10. 09. 2007. A motion had been filed by the Attorney-at-Law for the petitioners, which stated thus:

> "a) My appointment as Attorney-at-Law for the 1st – 3rd respondents-petitioners above named,
>
> b) Petition together with the affidavit of the 2nd respondent-petitioner and documents marked A1 – A11 and move that Your Lordships' Court be pleased to accept the same.
>
> .....
>
> Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 date

22.10.2007 is annexed hereto.

Colombo on this 22nd day of October 2007.

Attorney-at-Law for the 1st to 3rd respondents-petitioners."

On 30.10.2007, Attorney-at-Law for the respondent filed the proxy on behalf of the respondent and also filed a motion moving Court to reject the Special Leave to Appeal application as the petitioners had not complied with Rule 8(3) of the Supreme Court Rules 1990.

Thereafter on 01.11.2007 petitioners had tendered the notices and the annexures without a motion and on the same date, the Registry of the Supreme Court had dispatched the said notices along with the documents by registered post to the respondent.

Having considered the factual position pertaining to the preliminary objection, let me now turn to examine the provisions pertaining to Rule 8(3) of the Supreme Court 1990. Rule 8, which is contained in Part I of the Supreme Court Rules 1990, deals with Special Leave to Appeal and is in the following terms:

> "The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-Law, if any, and the name, address and telephone number, if any, of the Attorney-at-Law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."