

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of a Writ of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

W. M. M. Premalal Kumarasiri
No. 36, London Road, Badulla.

Petitioner

Vs.

Case No: C. A. (Writ) Application 238/2017

1. National Transport Commission
No. 241, Park Road, Colombo 05.
2. M. A. P. Hemachandra,
Chairman,
National Transport Commission,
No. 241, Park Road, Colombo 05.
3. B. M. Iftikar
General Manager,
National Transport Commission,
No. 241, Park Road, Colombo 05.
4. Prof. J. M. S. T. Bandara
5. Dr. Dimantha De Silva
6. Dr. S. P. W. Jayasiriwardene
7. A. M. R. J. K. Jayasinghe
8. Asanga Dayaratne
9. Ananda Wijaratne
10. M. Dhanushka Weligama (AAL)
11. Janaka Mallimaarachchi

All of No. 241, Park Road, Colombo 05.

Respondents

Before: Janak De Silva J.

Counsel:

Jacob Joseph for the Petitioner

Nayomi Kahawita SSC for the Respondents

Written Submissions tendered on:

Petitioner on 31.05.2019

Respondents on 26.03.2019

Argued on: 21.01.2019

Decided on: 19.07.2019

Janak De Silva J.

The Petitioner obtained a leasing facility for bus bearing no. JF 5160 from Arpico Finance Co. (Ltd) and thereafter applied for and obtained a passenger transport permit bearing no. NTC 9971 (P2) from the 1st Respondent for route no. 99 Badulla-Colombo semi-luxury service on 13.09.2004. This permit was extended up to 12.09.2006.

The Petitioner states that as he found it difficult to pay the lease rental, he entered into an agreement with one Chamila Chinthaka Basnayake on 19.01.2006 (P3) to transfer the said bus. However, the leasing company seized the bus bearing no. JF 5160 on 24.07.2006 for non-payment of lease rental.

Section 23(1) of the National Transport Commission Act No. 37 of 1991 (Act) reads:

“Every application for a passenger service permit under section 24 shall be made by the registered owner of the omnibus in respect of which the application is made to the Commission in such form as may be prescribed.”

This is a clear indication that the owner of the bus and the permit holder must be the same person. In fact, the permit issued to the Petitioner (P2) contains the number of the bus JF 5160. The Petitioner has both in the petition (paragraph 5) and letter dated 23.09.2006 (P5) admitted that the bus bearing no. JF 5160 was sold and transferred to Chamila Chinthaka Basnayake.

Section 28 of the Act reads:

“No passenger service permit granted under section 24 to any person shall be transferable to any other person, and accordingly any such transfer shall be null and void.”

Condition 9 of the permit issued to the Petitioner states that if any transfer of a bus in relation to which the permit has been issued is to be made for the purpose of operation of the bus on the permitted route, it should be subject to prior consent of the National Transport Commission (Commission).

It also appears that the Petitioner had furnished particulars which to his knowledge are false or incorrect which is a violation of section 31(1)(c) of the Act.

Since the Petitioner had violated the provisions in section 28 and 31(1)(c) of the Act, the Commission cancelled the permit NTC 9971 issued to the Petitioner by letter dated 19.04.2007 (P6). The Petitioner preferred an appeal to the Secretary to the Ministry of Transport against the said cancellation by appeal dated 30.04.2007 in terms of section 33(1) of the Act [P7, P7(A)].

The Secretary to the Ministry of Transport directed the Commission to revalidate the permit (P2) subject to warning the Petitioner that he must inform the Commission of any change in the information in the permit. The Commission accordingly by letter dated 20.09.2007 (P9) requested the Petitioner to come to the Commission and take further steps and notified the Petitioner that the permit will be cancelled if there is any violation of the conditions therein.

However, the Petitioner failed to operate the bus on the route for which the permit was granted although he sought and was granted permission by the Commission to operate the bus within 30 days from 15.10.2007. In fact, he failed to operate the bus even by 22.08.2008. Accordingly, the Commission by letter dated 22.08.2008 (P13) informed the Petitioner that it will act on the basis that the permit is cancelled. In this instance, the Petitioner failed to prefer an appeal to the Secretary to the Ministry of Transport as provided for in the Act.

Instead, the Petitioner preferred an appeal to the Minister of Transport who then directed the Commission to issue another permit to a different bus route to the Petitioner as an alternative relief and the Commission did so by issuing permit no. 11199 dated 28.05.2009 to the Petitioner to ply on Lunugala-Colombo route (P15, P18 and paragraph 10 of objections). However, the Petitioner again transferred the said permit no. 11199 to another person in contravention of section 28 of the Act (paragraph 13 of the objections).

On 11.04.2017 (P34) the Secretary to the Ministry of Transport has reconfirmed an earlier decision taken by the Ministry to revalidate permit no. NTC 9971 issued to the Petitioner. The Petitioner is seeking a writ of mandamus directing 1st to 3rd Respondents to implement and revalidate permit no. NTC 9971 in terms of letter dated 11.04.2017 (P34).

A writ of mandamus would lie when a statutory duty is cast upon a public authority with a correlative right to demand its discharge [*Urban Development Authority v. Abeyratne and Others* (S.C. Appeal No. 85/2008 & 101/2008; S.C.M. 01.06.2009)]. Hence the question is whether there was a statutory duty on the Commission to act as directed by the Secretary to the Ministry of Transport vide his letter dated 11.04.2017 (P34). That decision is not one made in terms of any statutory power vested in the Secretary as it was not made upon an appeal made to him in accordance with section 33(1) of the Act.

In any event, there is no statutory duty on the Commission to revalidate permit no. NTC 9971 since it was for bus bearing no. JF 5160 of which the Petitioner is admittedly not the owner now. As explained above, section 23(1) of the Act requires the bus owner and the permit holder to be the same person. Mandamus will not lie where the act sought to be enforced is contrary to law.

The unmeritorious conduct of the Petitioner is also an issue that must be considered by this Court. In terms of Article 140 of the Constitution this Court must act "according to law" in deciding whether to issue a writ of mandamus. This means English common law principles [*Sirisena Cooray v. Tissa Dias Bandaranaike* (1999) 1 Sri. L. R. 1 at 14-15)].

English Courts have considered the conduct of the Petitioner in deciding whether to grant discretionary relief by way of judicial review. A ratepayer was denied a remedy to quash a refusal to make a refund of rates because of his previous deliberate and unjustifiable withholding of rates owed [*Dorot Properties Ltd. v. London Borough of Brent* (1990) C.O.D. 378]. A local authority which pursued pointless litigation was denied any remedy [*Windsor and Maidenhead Royal BC v. Brandrose Investments Ltd.* (1983) 1 W.L.R. 509]. A local council which sought to challenge ministerial confirmation of its own proposals for re-organising schools, relying on their own procedural error was denied relief [*R. v. Secretary of State for Education and Science ex. P. Birmingham City Council* (1985) 83 L.G.R. 79].

The Petitioner violated the provisions of the Act and the conditions in permits issued to him not once but twice by transferring them to a third party without the permission of the Commission. He also furnished to the Commission particulars which to his knowledge are false or incorrect which is a violation of section 31(1)(c) of the Act.

Furthermore, both the permits NTC 9971 (P2) and permit no. 11199 dated 28.05.2009 was issued to the Petitioner without following tender procedure [P37 filed with counter objections last page point nos. 2 and 3]. The reasons for failing to follow the tender procedure is apparent on a careful consideration of the material before court.

A litigant who seeks the protection of the rule of law by way of judicial review must in the first place have acted according to it. The Petitioner had failed to do so and hence I am not inclined to grant any discretionary relief to him.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal