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

In the matter of an Application for Orders in the nature of Writs of *Certiorari* and *Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) application No: 410/2024

AIA Insurance Lanka Ltd.,
AIA Tower.
92, Dharmapala Mawatha,
Colombo 07.

PETITIONER

-Vs-

1. Right to Information Commission,
   Room No:203-204,
   BMICH Premises, Bauddhaloka Mawatha, Colombo 07.

2. Justice Upaly Abeyrathne (Rtd.),
   Chairman,
   Right to Information Commission.

3. Kishali Pinto Jayawardena,
   Commissioner,
   Right to Information Commission.

4. Jagath Liyana Arachchi,
   Commissioner,
   Right to Information Commission.

5. A. M. Nahiya,
   Commissioner,
   Right to Information Commission.

6. Justice Rohini Walgama (Rtd.),
Commissioner,
Right to Information Commission.

All of
Room No:203-204,
BMICH,
Bauddhaloka Mawatha,
Colombo 07.

7. Ven. Ambalangoda Dhammalankara
Thero,
Dharshanikaramaya,
No.169, Galle Road,
Dehiwala.

RESPONDENTS

Before: S. U. B. Karalliyadde, J.

Dr. D. F. H. Gunawardhana, J.

Counsel: Nigel Hatch, PC with Siroskshi Illangage instructed by Indunil Bandara for the Petitioner.

Dilumi de Alwis instructed by Aruni Senarathna for the 1st to 6th Respondents.

Written submissions tendered on:

23.07.2025 by the Petitioner

01.07.2025 by the 1st to 6th Respondents

Argued on: 07.07.2025

Decided on: 30.07.2025

S. U. B. Karalliyadde, J.

The Petitioner is a company duly incorporated under the Companies Act, No. 07 of 2007 and is carrying out long-term insurance business (P1 and P1(a)). The 7th Respondent had made a complaint dated 27.04.2021 marked as P2 to the Petitioner regarding an Agent of the Petitioner miscommunicating the payment and benefit of an Insurance Policy. With the participation of the 7th Respondent, the Petitioner conducted an inquiry against the said Agent on 07.05.2021 and 14.12.2021 and thereafter, the Petitioner refunded the 7th Respondent the money which the 7th Respondent had paid for the Insurance Policy (P4). Thereafter, the Petitioner received a Right to Information Form (RTI Form) from the 7th Respondent dated 30.01.2022 marked as P3 and 26.09.2022 marked as P3(a) requesting the inquiry recordings and the details of the disciplinary process conducted against the said Agent by the Petitioner. The Petitioner had not responded to the RTI Form of the 7th Respondent and had orally communicated its refusal to provide such recordings to the 7th Respondent.

Thereafter, the Petitioner received the notice dated 07.02.2023 marked as P5 from the Right to Information Commission, the 1st Respondent, directing the Petitioner to be present for an inquiry on an appeal (marked as P5(a) to P5(c)) made by the 7th Respondent. On the day of the said inquiry, the Petitioner raised a preliminary objection that the 1st Respondent had no jurisdiction to hear and determine the appeal

made by the 7th Respondent as the Petitioner is not a 'public authority' under the Right to Information Act, No. 12 of 2016 (the Act) and therefore the appeal should be dismissed *in limine*. The Petitioner submitted written submissions on the said preliminary objections (marked as P7). Subsequently, the registration of the Petitioner with the Insurance Regulatory Commission of Sri Lanka (P9(b)), the Articles of Association (P9(e)) and the Memorandum of Association (P9(f)) were also submitted by the Petitioner on the request of the Director General of the 1st Respondent (P9 and P9(c)). The preliminary objection raised by the Petitioner was overruled at the hearing held on 30.05.2024 (P10), and the Petitioner received the determination of the 1st Respondent dated 30.05.2024 marked as P12.

Being aggrieved by the said determination marked as P12, the Petitioner made this Writ Application seeking the following *substantive* reliefs, *inter alia*,

b. For the grant and issuance of an order in the nature of a Writ of Certiorari quashing the purported Determination (P12);

c. For the grant and issuance of an order in the nature of Writ of Prohibition, prohibiting and/or preventing the 1st and/or 2nd and/or 3rd and/or 4th and/or 5th Respondents and/or their servants and/ or agents and/ or whomsoever acting under their directions from taking any step whatsoever against the Petitioner under the Right to Information Act No. 12 of 2016;

d. For the grant and issuance of an order in the nature of Writ of Prohibition, prohibiting and/or preventing the 1st and/or 2nd and/or 3rd and/or 4th and/or 5thRespondents and/ or their servants and/ or agents and/ or whomsoever acting under their directions from proceedings with the purported inquiry No. RTIC/Appeal/1273/2022;

e. For an Order dismissing the purported inquiry No. RTIC/Appeal/1273/2022 before the 1st Respondent;

When this matter was taken up for argument, the learned President's Counsel appearing for the Petitioner made oral submissions, and the learned Counsel appearing for the 1st to 6th Respondents did not make oral submissions, but reserved rights to file written submissions. Accordingly, the written submissions have been filed on 01.07.2025. In response to those written submissions, the Petitioner has submitted written submissions on 23.07.2025. This Court now will consider the arguments put forward by both parties to this Application.

The learned President's Counsel appearing for the Petitioner argues that the Petitioner is not a 'public authority' under Section 43 of the Act and the inquiry conducted against the insurance Agent is of private law and the 1st to 6th Respondents lacks jurisdiction to hear and determine the appeal made against the Petitioner, therefore, the determination marked as P12 is, arbitrary, unreasonable, *ultra vires* and contains error of law on the face of record.

First, I will examine the provisions of the Act relevant to this Application. In terms of Section 3(1) of the Act, subject to the limitations set out in Section 5, every citizen has a right of access to information which is in the possession, custody or control of a public authority. In terms of Section 24 of the Act, any citizen who wishes to obtain information under this Act can make a request to the appropriate information officer, specifying the particulars of the information requested. Under Section 31(1)(a), any citizen who is aggrieved as a result of refusing a request made for information can prefer an appeal to the designated officer within fourteen days of the refusal. In terms of Section 31(3), the designated officer shall decide on any appeal preferred under Section 31(1) within three weeks of the receipt of the appeal. If a citizen aggrieved by a decision made under Section 31(1) of the Act or if failed to obtain a decision within the period specified under Section 31(3) of the Act,they can prefer an appeal to the Commission (the 1st Respondent) under Section 32 of the Act.It is evident from the provisions of the Act that information can only be requested from a 'public authority'. Section 43 of the Act defines the term 'public authority'. The question before this Court is to determine whether the Petitioner falls within the definition of a 'public authority' under Section 43 of the Act. In the order marked as P12, the 1st Respondent has come to the conclusion that the Petitioner is a 'public authority'in terms of Section 43(g) of the Act. Section 43(g) of the Act reads thus,

> *"a private entity or organisation which is carrying out a statutory or public function or service, under a contract, a partnership, an agreement or a*

license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or service."

The 1st Respondent arrived at the above conclusion in the order marked as P12 in the following manner.

"*රක්ෂණ සේවාව පිලිබඳව පවතින නෛතික තත්වය සම්බන්ධයෙන් මෙහිදී කොමිෂන් සභාවේ අවධානය යොමු විය. 1951 අංක 14 දරණ මෝටර් රථ ආඥා පනතේ 99 වගන්තිය අනුව රක්ෂණ සහතිකයක් නොමැතිව මෝටර් රථයක් භාවිතා කිරීම හෝ ධාවනය කිරීම වරදක් ලෙස දක්වා ඇත. ඒ අනුව 99 වන වගන්තියේ විධිවිධාන කඩ කරනු ලබන තැනැත්තෙකු වරදකට වරදකරු වන අතර, එසේ වරදකරු කරනු ලැබීමේ දී රුපියල් විසි පන්දහසකට නොඅඩු හා රුපියල් පනස් දහසකට නොවැඩි දඩයකට හෝ මාසයකට නොවැඩි කාලයක් සඳහා බන්ධනාගාරගත කිරීමකට හෝ එම දඩය හා බන්ධනාගාරගත කිරීම යන දෙකටම ඔහු යටත් විය යුතු බව ආඥා පනතේ 218 වගන්තියේ දැක් වේ. (2019 අංක 10 දරණ මෝටර් රථවාහන (සංශෝධන) පනතින් සංශෝධිත වගන්තිය) ඒ අනුව අනෙකුත් රක්ෂණ කෙසේ වෙතත් මෝටර් රථ රක්ෂණය සෑම මෝටර් රථ හිමියකුට ඇති ව්‍යවස්ථාපිත වගකීමකි.*

එසේම ඉහත කී මොටර් රථ ආඥා පනතේ 100 වගන්තිය අනුව මෙම රක්ෂණ සහතිකය නිකුත් කල යුත්තේ වෙළඳ විෂය භාර අමාත්‍යවරයා විසින් බලය පවරන ලද රක්ෂණකරුවෙකු විසින් බව දක්වයි. එබැවින් මෝටර් රථ රක්ෂණය සාමාන්‍ය ව්‍යාපාරයක් නොව එය ව්‍යවස්ථාපික කර්තව්‍යයක් වේ. නමුත් මෙම AIA රක්ෂණ

සමාගම වාහන රක්ෂණ කාර්යය සිදු කරන බවට කොමිෂන් සභාව ඉදිරියේ කරුණු හෙළිදරව් වී නොමැත.

එසේ වුවත් කලින් කලට සංශෝධනය වූ 2000 අංක 43 දරණ රක්ෂණ කර්මාන්තය නියාමය කිරීමේ පනතේ 12(1) වන වගන්තිය දක්වන්නේ රක්ෂණ නියාමන කොමිෂන් සභාවේ (කලින් රක්ෂණ මණ්ඩලයේ) ලියාපදිංචි නොවී රක්ෂණ ව්‍යාපාරයේ යෙදිය නොයුතු බවයි. එසේම එම පනතේ රක්ෂණ සමාගමක් ලෙස ලියාපදිංචි වීම සඳහා අවශ්‍ය සුදුසුකම්ද දක්වා ඇත. එසේම තම ව්‍යාපාර කටයුතු සිදුකිරීම සඳහා සෑම රක්ෂණ ආයතනයකටම රක්ෂණ නියාමන කොමිෂන් සභාව විසින් බලපත්‍රයක් නිකුත් කරන බවත් පනතේ 15 වගන්තියේ දැක්වේ.

AIA රක්ෂණ සමාගම විසින් අදාල බලපත්‍රය කොමිෂන් සභාව වෙත ඉදිරිපත් කර ඇත.

ඒ අනුව රක්ෂණ නියාමන කොමිෂන් සභාවෙන් බලපත්‍රයක් ලබාගෙන ව්‍යවස්ථාපිත කාර්යයක් ඉටු කරන බැවින් AIA රක්ෂණ සමාගම තොරතුරු දැනැනීමේ අයිතිවාසිකම් පනතේ 43 වගන්තියේ පොදු අධිකාරිය යන අර්ථ නිරූපනයෙහි (උ) යටතේ වන පොදු අධිකාරයක් වන බවට තීරණය තරමින් AIA රක්ෂණ සමාගමේ මූලික විරෝධතාව ප්‍රතික්ෂේප කිරීමට මෙම කොමිෂන් සභාව තීරණය කරයි."

The Respondents' argument regarding the Petitioner's claim is that, in terms of Section 12 of the Regulation of Insurance Industry Act, No. 43 of 2000 (as amended) (Insurance Industry Act), unless registered, no person can engage in insurance business in Sri Lanka. Accordingly, the Petitioner has obtained a valid license issued by the Insurance Regulatory Commission of Sri Lanka under the Insurance Industry

Act. Therefore, the Petitioner is a private entity licensed by the Government under Section 43(g) of the Act. The Respondents further argue that the Petitioner performs a statutory function as the Insurance Industry Act prohibits carrying out insurance business without a valid license, and non-compliance with such provisions follows severe punishments, and therefore, insurance companies perform a statutory function by operating within a framework designed to ensure accountability to the public and the regulatory body.

Upon considering the arguments advanced by the Respondents and the order marked as P12, it appears that the Respondents have concluded that, in terms of Section 43(g) of the Act, private entities engaged in a statutory or public function or service pursuant to a contract, partnership, agreement, or license with the Government, its Agents, or local authorities fall within the definition of a 'public authority'. However, upon a careful examination of Section 43(g) of the Act, this Court observes that the Respondents have failed to take into account a material portion of the said provision in arriving at the aforesaid conclusion. Even though Section 43(g) states that a private entity licensed from the Government which carrying out a statutory or public function or service is considered a 'public authority' under the Act, the latter part of the section emphasises the fact that it relates "*only to the extent of activities covered by that statutory or public function or service*". Thus, under Section 43(g) of the Act, a private entity may be regarded as a 'public authority' only to the extent of the

activities connected to the specific statutory or public function or service licensed or authorised by the Government.

In the instant Application, the Petitioner has obtained a license from the Insurance Regulatory Commission of Sri Lanka under the Insurance Industry Act to carry out long-term insurance business (P1(a)). However, the 1st Respondent has erred in coming to the conclusion that the Petitioner is a 'public authority' under the Act, as it has failed to take into consideration the nature of the information requested by the 7th Respondent. The 7th Respondent has requested the inquiry recordings and details of the disciplinary inquiry, along with the actions taken by the Petitioner against its Agent (P3 and P3(a)). Under Section 43(g) of the Act, the Petitioner can be regarded as a 'public authority' only to the extent that it is engaged in carrying out functions regulated by the provisions of the Insurance Industry Act in relation to the conduct of insurance business. The Insurance Industry Act does not contain any provision relating to the conduct of internal disciplinary inquiries concerning persons or Agents of such persons engaged in the business of insurance. Therefore, considering the fact that the information requested by the 7th Respondent are internal disciplinary inquiry proceedings of the Petitioner not governed under the Insurance Industry Act, this Court is of the view that there is an error of law on the face of record as the 1st Respondent has acted without jurisdiction in deciding to continue the inquiry by coming into the conclusion that the Petitioner is a 'public authority' under Section 43(g) of the Act.

Mahinda Samayawardhena, J., in the case of *Hijra Farms (Pvt) Ltd. v. Commissioner General of Labour*,[1] held that,

> "*Error of law on the face of the record is a ground for certiorari.*
>
> *If the tribunal had no jurisdiction to inquire into the matter, there is no issue that the decision taken is a nullity. On the other hand, even if the tribunal had jurisdiction to inquire into the matter, the decision can still become a nullity if inter alia (a) it has identified a wrong issue as the correct issue to be answered or (b) having initially identified the correct issue, ultimately, albeit bona fide, answered a wrong issue as the correct issue*."

In *Gunasekera v. De Mel, Commissioner of Labour*[2], the Supreme Court held that,

> "*Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent,*

[1] CA/WRIT/292/2014, CA Minutes of 20.05.2020

[2](1978) 79(2) NLR 409

unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable body of persons properly instructed in the law applicable to the case could have made." (emphasis added)

It was held in the case of *Anisminic Ltd v. Foreign Compensation*[3]that, "*the error destroyed the jurisdiction of the Commission and made its decision Ultra Vires*"

Considering the above-stated facts and authorities, this Court is of the view that the 1st Respondent has acted outside its jurisdiction and therefore the order marked as P12 is *ultra vires*. Therefore, this Court is inclined to grant relief prayed for in the prayer (b) to issue a Writ of certiorari to quash P12.

Dr. Sunil Cooray's book on 'Principles of Administrative Law in Sri Lanka' (Vol. 2, 4thedn)[4] states thus,

[3]Commission (1968) APP. L.R. 12/17

"The circumstances in which certiorari and prohibition will be available have been summed up by Lord Justice Atkin, an English judge, in the following famous words which on numerous occasions have been cited and followed by our Courts:

'Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs.' [R v. Electricity Commissioners (1924) 1 KB 171]"

In "Administrative Law", by H. W. R. Wade and C.F. Forsyth (11thedn),[5] it has been stated that,

"*Although a prohibiting Order was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective, and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by a prohibiting Order*."

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[4]at Page 911.

[5] at page 511.

This Court is of the view that, having considered the aforementioned authorities and the fact that the 1st Respondent acted without jurisdiction in concluding that the Petitioner falls within the definition of a ‘public authority’ under Section 43(g) of the Act, it is inclined to grant the Writs of Prohibition as prayed for in prayers (c) and (d) of the Petition in the instant Application.

The learned Counsel appearing for the 1st to 6th Respondents further argues that the Petitioner is not entitled to invoke the writ jurisdiction of this Court, as the Petitioner has an alternative remedy by way of an appeal under Section 34 of the Act to make an appeal to this Court. In terms of Section 34 of the Act, a citizen or a public authority aggrieved by a decision made by the 1st Respondent under Section 32 of the Act can appeal against such a decision to this Court. The 1st to 6th Respondents’ argument is that a statutory remedy is available to the Petitioner, and therefore, this is not a fit case to exercise the discretionary remedy of this Court. This Court agrees with the fact that when there is an effective alternative remedy available, writ courts are reluctant to exercise its jurisdiction. However, it is the view of this Court that whether the Petitioner should resort to such an alternative remedy available to him depends on the facts and circumstances of each case. Considering the nature of the information requested, this Court has already held that the Petitioner does not fall within the definition of a 'public authority' under Section 43(g) of the Act. Accordingly, the 1st Respondent has acted without jurisdiction in determining that the Petitioner is a public authority. Therefore, the availability of an alternative remedy does not prevent this

Court from exercising its writ jurisdiction. In the case of *Sirisena v. Kotawara Udagama Corporative Society Ltd*,[6]which was an application for a writ of Certiorari to quash an award of an arbitrator, Gratien, J. issued a writ of Certiorari to quash the award made by the Respondents who have flagrantly exceeded the limited statutory powers conferred on them. Gratien J. also observed that,

> *"It is no doubt a well-recognized principle of law that the Supreme Court will not as a rule make an order of Mandamus or Certiorari where there is an alternative and equally convenient remedy available to the aggrieved party. But the rule is not a rigid one."*

In *Kanagarathna v. Rajasundaram*,[7] Samarakoon, C.J.,referring to the above case, held that, "*The availability of an alternative remedy does not prevent a Court from issuing a Writ of Prohibition in cases of excess or absence of jurisdiction*."

Referring to the above two cases, in the case of *Sinha Cement (Pvt) Ltd v. Director Central Investigation Bureau Sri Lanka*,[8] C. P. Kirtisinghe, J.also held that, "*In any event, the availability of an alternative remedy does not prevent this court from issuing a Writ in a case of excess or absence of jurisdiction."*

[6]51 NLR 262

[7](1981) 1 SLR 492

[8]CA Writ Application No: 128/2017, CA Minutes of on 14.09.2023

Having considered the above authorities and the fact that the 1st Respondent has acted without jurisdiction, this Court is of the view that the availability of an appeal under Section 34 of the Act does not preclude the exercise of this Court's writ jurisdiction.

Under the above-stated circumstances, this Court is of the view that the order made by the 1st Respondent marked as P12 is issued without jurisdiction as it contains an error of law on the face of the record and therefore is *ultra vires*. Accordingly, this Court grants relief prayed for in prayers (b), (c), (d) and (e) of the Petition. Application allowed. No costs ordered.

Application allowed

JUDGE OF THE COURT OF APPEAL

Dr. D. F. H. Gunawardhana, J.

I agree with my brother, Justice S.U.B. Karalliyadde, on the factual matrix, and also particularly on his final conclusion. However, I wish to deal with certain matters in my separate judgement, for different reasons, which I will set out below. It is my view too that the Petitioner is entitled to the relief sought which is granted by my brother, Justice S.U.B. Karalliyadde. Therefore, I confess, that I refrain from referring to the same facts adverted by Justice S.U.B. Karalliyadde to avoid repetition.

Background

The Petitioner is a body corporate incorporated under the Companies Act, No. 7 of 2007. It has the license to carry on its business of 'life insurance' only (as described as "Long-Term Insurance" Business) under the Regulation of Insurance Industry Act, No. 43 of 2000 (as amended). The 1st Respondent is the Right to Information Commission (herein after referred to as the "RTIC") created by the Right to Information Act, No. 12 of 2016 (herein after referred to as the "Right to Information Act"). The 2nd Respondent is the chairman of the RTIC, whilst the 3rd to 6th Respondents are Commissioners of the 1st Respondent. It is further alleged that 2nd to 5th Respondents are signatories to the impugned order dated 30th May 2024 annexed to the Petition marked as **P12** (herein after referred **P12** or impugned order). The 7th Respondent is an individual who has lodged an appeal with the 1st Respondent, in terms of the RTIC seeking certain information from the Petitioner. This has arisen in the following way.

The Petitioner had received a certain sum of money amounting to Rs. 4,001,580/- (four million one thousand five hundred and eighty rupees) as *premia* from the 7th Respondent to obtain a certain policy of insurance. The Petitioner had so received the said sum, in the process of issuing a life insurance policy applied (proposed) by the 7th Respondent, through an Agent. The 7th Respondent, pending the issuance of the policy, made a complaint against the said Agent of the Petitioner. The Petitioner had

inquired into the complaint; and consequently, decided to refund the said amount to the 7th Respondent which the Petitioner asserts that the inquiry against the Agent was conducted only as an internal inquiry to clear its name and to maintain a good name in the industry.

Subsequent to refunding of the said sum, the 7th Respondent, had initiated proceedings under the Right to Information Act, No. 12 of 2016, and noticed the Petitioner, which the Petitioner had ignored. Thereafter, the 7th Respondent made an appeal to the 1st Respondent, the Right to Information Commission, to ascertain the particulars of the inquiry held by the Petitioner as an internal inquiry against its Agent on the complaint made by the 7th Respondent. Consequently, the 1st Respondent upon noticing the Petitioner to appear before it embarked on an inquiry. At the said inquiry, the Petitioner was represented by an Attorney-at-Law.

At the very outset of the inquiry, a preliminary objection was raised as to the maintainability of the appeal lodged by the 7th Respondent on the basis that the Petitioner is neither a part of the Government nor a public company nor is it engaged in any business with the Government. After hearing the preliminary objections followed by the written submissions filed by the parties, the 2nd to 6th Respondents by the impugned order dated 30.05.2024 have rejected the preliminary objections and directed to inquire further into the appeal lodged by the 7th Respondent. The said order is marked as **P12**, annexed to the Petition.

Being aggrieved by the said order, the Petitioner has sought to obtain a W*rit of Certiorari* to quash the order contained in **P12**. This was argued on 7th of July 2025 before us; hence this judgment.

The Respondents have filed their formal objections. It is the position of the Respondents that, since the Petitioner is engaged in a business regulated by a statute, the Petitioner cannot deny that there is any public element involved in its business. In addition to that, they relied heavily on Section 43(g) of Right to Information Act to bring public element into the Petitioner. As such, they sought the dismissal of this application.

At the hearing, Mr. Nigel Hatch, Learned President Counsel for the Petitioner argued that the Petitioner is challenging the impugned order of the Right to Information Commission on several grounds. Firstly, **P12** has been made without any jurisdiction as far as the Petitioner is concerned. Therefore, there is a 'patent lack of jurisdiction' in the RTIC when it made the decision contained in **P12** (the impugned order).

Further elucidating the same argument, Mr. Hatch P.C. contended that the Petitioner being a private limited company, does not fall within Section 43 of the Right to Information Act No. 12 of 2016, therefore, the RTIC does not have any authority to compel the Petitioner to submit any information on the basis that it is a public corporation. Therefore, Mr. Hatch P.C. contended that **P12** is *ultra vires*.

In addition to that, he argued that the Chief Legal Officer of the Petitioner attended every day of the proceedings. On one of those proceedings, the 3rd Respondent indicated orally that the Petitioner's business falls within the ambit of a public corporation since a public element is involved; whereby the 3rd Respondent had made an attempt to expand the authority of the Commission. Therefore, the decision made by the RTIC as indicated by the 3rd Respondent is capricious, as established in **P10**, that was made prior to **P12**; though **P10** had not provided any reasoning as the maintainability of the appeal by the 7th Respondent.

Mr. Hatch P.C. further contended that, as reflected in **P12**, the RTIC has given a strained interpretation which does not fall into any concepts of business of insurance available in textbooks. Mr. Hatch P.C. further contended that the Petitioner is a private entity which is only engaged in life insurance policy after the segregation of insurance businesses; therefore, it does not underwrite or undertake general insurance. Therefore, Sections 99 read with 100 and 105 of the Motor Traffic Act, No. 14 of 1951 (as amended) do not apply to contracts entered into by the Petitioner and its customers.

On the application of the Counsel for the Respondents, permission was given to advance her argument by way of a written submission. In her written submission, argument advanced by Ms. Dilumi de Alwis is of two folds: One, as a matter of preliminary issue.

Ms. Dilumi de Alwis argues that the Petitioner is not entitled to obtain any relief as sought, since he has failed to exercise right of appeal against any order or decision made by the Right to Information Commission.

Secondly, she argued that, since the business engaged by the Petitioner involves a public element, it is not entitled to refuse any information to disclose as decided by the Right to Information Commission. She heavily relies on Section 43(g) of the Right to Information Act. In addition to that, she further argues that the Petitioner is subjected to be regulated under the provisions of the Regulation of Insurance Industry Act, and the Companies Act, therefore, the Petitioner is bound by the statute to divulge all information. As such, it is not entitled to obtain writs in the nature of *Writs of Certiorari* or *Prohibition*.

Historical evolution and statutory law of insurance

To understand the present status of the law relating to the insurance industry in Sri Lanka, I am of the view that the short history of the evolution of statutory law that governs the law of insurance should be dealt with before giving an interpretation to the relevant statute.

By 1960, there had been so many mushroom-insurance companies operating in Sri Lanka engaged in general and life insurance. Nevertheless, the Government elected by the 1960 election (August election) decided to nationalise the insurance industry by introducing the Control of Insurance Act No. 25 of 1962; thereby, establishing the

Sri Lanka Insurance Corporation; in which the monopoly was created. Thereafter, no company or individual was permitted to engage in the business of insurance in Sri Lanka until the 1979 Act was enacted[9], in terms of which the National Insurance Corporation was established.

However, in 1987 the insurance industry was privatised and the two corporations owned by the Government, namely the Sri Lanka Insurance Corporation and the National Insurance Corporation, (both) were privatised by converting them into public companies and selling their shares in the share market[10].

However, for the purpose of regulating the insurance industry the Regulation of Insurance Industry Act, No. 43 of 2000 was introduced by the Government of the day, having repealed the Control of Insurance Act, No. 25 of 1962, introduced the Regulation of Insurance Act, No. 43 of 2000. However, in 2011 the insurance industry was further regulated.

Therefore, the business of the insurance industry was segregated in 2011 by an Act of Parliament; whereby, it is required that insurers who are engaged in the business of 'general' and 'life insurance' after the promulgation of the Regulation of Insurance Industry (Amendment) Act, No. 3 of 2011 to segregate their business. Therefore, they can alternatively have the business of either general insurance or life insurance only,

[9] National Insurance Corporation Act, No. 1 of 1978

[10] Conversion of Public Corporations or Government Owned Business Undertaking Into Public Companies Act, No. 23 of 1987

but not both. Thus, those who are engaged in life insurance cannot be engaged in general insurance.

Therefore, after the promulgation of the Regulation of Insurance Industry (Amendment) Act, No. 3 of 2011, the business was thus segregated. As the Petitioner asserts it is only engaged in the business of life insurance and not in general insurance. Therefore, it only issues life insurance policies and undertakes and underwrites life insurance and related matters, not any general insurance. As such, it is not permitted to engage itself in any general insurance business, including the insurance required to be insured under the Motor Traffic Act, No. 14 of 1951 (herein after referred to as the "Motor Traffic Act"). As such, the mandatory insurance required by Section 100 read with Section 105 of the Motor Traffic Act does not come within the purview of the business engaged by the Petitioner. As such, it can be said that the Petitioner's business of insurance is only limited to a certain private contract which is governed by the law of insurance in addition to the law of contracts.

Contract of Life Insurance

As far as life insurance policies are concerned, the parties relevant to the business is only the insurer and the insured. Life insurance can be distinguished from other contracts of insurance: One such is that, without any insurable interest, nobody is entitled to enter into a life insurance policy. The other feature is that life insurance is a

long-term insurance; whereas other insurance policies are for a limited period or based on certain contingencies that is expected to take place. Nevertheless, the benefit of the life insurance policy can be claimed by the very person whose life is insured after the maturity; hence, it is called a long-term policy as well[11].

However, in between when an insurance policy is proposed, there can be an intermediary or an agent or a broker. There are ancillary contracts between the Agent and the customer or the proposed insurer and the proposed insured. In this case, there is no insurance policy issued. The *premia* paid by the 7th Respondent had already been refunded after the domestic inquiry[12], due to the misconduct or misrepresentation by the Agent who introduced the 7th Respondent to the Petitioner. Therefore, that relevancy of such an insurance does not arise here. The only question pertinent to this application is whether the purview of the authority of the 1st Respondent can be extended to private contracts. As I mentioned above, no element of public body, or public element (any government element) is involved in this matter. Therefore, the 2nd to 5th Respondents have totally misdirected themselves in holding that there is a public element involved, since by law the insurance required under the Motor Traffic Act No. 14 of 1951 is only relevant to third party insurance and motor traffic policies. Since, the 7th Respondent is a private individual, who proposed to obtain a life insurance policy, it is totally different from motor traffic insurance. As such, it is my

[11] Birds, J., 'Birds' Modern Insurance Law' (2007) 7th Edition, Chapter 3 - 4

[12] Birds, J., 'Birds' Modern Insurance Law' (2007) 7th Edition, Chapter 8 "Premiums"

view that a *Writ of Certiorari* lies since the decision is *ultra vires* and against the statutory provisions and also obnoxious to the law of contract of insurance as well.

The 2nd to 6th Respondents erred

It is decided on behalf of the 1st Respondent by **P12** that the Petitioner is engaged in the business of insurance, and by law, it is required to issue insurance in terms of the Motor Traffic Act (as amended) as well. It is also mentioned in the said order that the Motor Traffic Act mandatorily requires to insure motor vehicles when a motor vehicle is put on the road as, at anytime, and anywhere an accident can take place which might damage life or result in bodily injury of individuals. Therefore, there is a mandatory requirement by the Motor Traffic Act for any person, or user, or an owner of a motor vehicle to have insured it before putting it onto the road, at least covering the third party.

However, it must also be mentioned that such an insurance policy can only be issued now (after the Regulation of Insurance Industry (Amendment) Act, No. 3 of 2011) only by an insurance company or insurer who is engaged in 'general insurance' and not engaged in 'life insurance'. Therefore, as decided by the 2nd to 5th Respondents on behalf of the 1st Respondent, the RTIC, the very basis on which a public element is involved in the insurance business engaged by the Petitioner does not fall within the public element of any requirement under the Motor Traffic Act. As such they have totally misinterpreted the particular provisions of the Motor Traffic Act as well as the

insurance business engaged by the Petitioner. In addition to that, they have not appreciated or rather have lost sight of the provisions of the Regulation of Insurance Industry (Amendment) Act, No. 3 of 2011. As such the decision contained in **P12** is palpably wrong and cannot stand in the eyes of the law of the land. Therefore, the preliminary objections raised by the Petitioner on notice of the Respondents to appear to inquire into the appeal should have been considered in light of the statutory provisions provided in the Regulation of Insurance Industry (Amendment) Act, No. 3 of 2011, in addition to the principles relevant to the life insurance policies which the several Respondents have failed to do.

Preliminary objection

It has been argued for and on behalf of the Respondents by way of a written submission, as a preliminary matter, that this Court should not grant a *Writ of Certiorari* as a discretionary remedy on the complaint made by the Petitioner to this Court, on the basis that there is a right of appeal available to a party or a public corporation aggrieved by any decision made by the Right to Information Commission.

However, suffice it to say, as I have mentioned above, the first matter that must be borne in mind is whether the Right to Information Commission lacks jurisdiction to make findings or arrive at any decisions. The "lack of jurisdiction" may be of twofold: one is "patent lack of jurisdiction", and the other is "latent lack of jurisdiction". Patent lack of jurisdiction arises when there is an apparent absence of

jurisdiction on the face of the record, and the Court, Tribunal, or statutory body exercising quasi-judicial powers cannot proceed with the matter. Latent lack of jurisdiction, of course, is a hidden issue that can only be determined after certain evidence is presented. This aspect of the law is extensively dealt with in the two landmark judgements, *P. Beatrice Perera v National Housing Commission*[13] and *S. Henrietta Fernando v W. Robinson Fernand*o[14].

Having consulted relevant authorities, His Lordship Samerawickrame, J in *S. Henrietta Fernando v Robinson Fernando* (supra), deduced the following formula;

> *"Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself ex meromolu to raise the point even if the parties fail to do so. In Farquharson v. Morgan? Halsbury L.C. said, "It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior court from exceeding its jurisdiction. That is to say, where the want of jurisdiction appears upon the libel, as in an ecclesiastical court, or upon the face of the record, and does not depend upon a mere matter of fact, and a cause is*

[13] [1974] 77 NLR 361

[14] [1971] 74 NLR 57

entertained by an inferior court which is clearly beyond its jurisdiction, no consent of parties will justify the Superior Court in refusing a prohibition. "

In the same case, Lopes L.J. said, "The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by Lord Denman (G N. & M. 176) to be for the sake of the public, because 'the case might be a precedent if allowed to stand without impeachment' and I would add for myself, because it is a want of jurisdiction which the court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken."

The position however appears to be different where the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts. In such a case, it is for a party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts. A Court has to proceed upon the facts placed before it and its jurisdiction must therefore depend upon them and not upon the facts that may actually exist."[15]

With the same vigour, a few years later, Tennekoon, C.J in *Perera v National Housing Commission* also faced with a similar situation deduced as follows.

"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court

[15] [1971] 74 NLR 58

may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectusjurisdictionis and the second a 'latent' or contingent ' want of jurisdiction or a defectustriationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may stop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction. This distinction is brought out in certain passage which I quote

from Shortt on Mandamus (1887) and Spencer Bower on Estoppel by Representation."[16]

Accordingly, the jurisdictional issue can be taken up anytime. Therefore, it is my view in this case that, since the Petitioner's business does not fall into the category of a public corporation, it also does not have any element of public law which attracts the scope of Section 43 of the Right to Information Act. This is due to the nature of the contracts that the Petitioner is permitted to engage in, in terms of Section 12 of the Regulation of Insurance Industry Act (as amended), which only allows the Petitioner to enter into life insurance contracts (described as "Long Term Insurance" Business), not general insurance contracts, under which third-party insurance is a necessary element. The Petitioner is not permitted to engage in any third-party insurance in that sense, which attracts the Motor Traffic Act. Therefore, it is very clear that no public element is involved in the business. As such, the 1st Respondent patently lacks jurisdiction, and the decision taken by the 2nd to 6th Respondents is erroneous on the face of the record.

Application of the Right to Information Act

The Right to Information Act was promulgated in 2016 as an election pledge by the then popularly known as 'Government for Good Governance', elected in 2015. The Preamble of the Act deals with as to how and why it is promulgated; thus,

[16] [1974] 77 NLR 366

"WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance."

In addition to that, although certain information is liable to be disclosed under the Right to Information Act; on the other hand, certain information need not be disclosed due to various reasons. One such information is *inter alia* dealt with as follows,

"Section 5

(1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where-...

(g) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;"

The information liable to be disclosed under the RTI is also dealt with, and such information only relates to a certain public authority or is germane to a public element only. Therefore, it is pertinent to address what the 'public element' is; which is dealt in the Interpretation Section of the Act. As argued by the learned Counsel for the Respondents in her written submissions, the relevant part of the Act is Section 43(g), which for clarity I will reproduce the same.

"(g) a private entity or organisation which is carrying out a statutory or public function or service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or service;"

However, as I have mentioned above, the 1st to 6th Respondents though entertained the 7th Respondent appealed under the Right to Information Act, the public element of the Petitioner company involved in the said provision of Section 43(g) of the Act is not established. Therefore, such information by the Petitioner is not liable to be disclosed in terms of Section 5 of the Act. Accordingly, there is a clear lack of jurisdiction for the 1st to 6th Respondents to entertain the appeal by the 7th Respondent. As such, for the reasons adumbrated by me in my separate judgement, I agree with my senior brother, Justice S. U. B. Karalliyadde, with the conclusion that he has arrived at, but for different reasons.

JUDGE OF THE COURT OF APPEAL