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

Curt Alois Twerenbold,
Royal Park,
No. 115,
Lake Drive,
Rajagiriya.
Petitioner

CASE NO: CA/319/2014/WRIT

Vs.

1. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
2. P. B. Jayasundara,
   Secretary to the Treasury,
   Colombo 1.

2A. R. H. S. Samarathunga,
   Secretary to the Treasury,
   Colombo 1.

3. J. P. Priyangani,
   Senior Manager for Director General,
   Department of Public Enterprises,
   General Treasury,
   Colombo 1.

4. Senaka Walgampaya P.C.,
   Competent Authority of Hotel
   Developers Lanka Ltd.,
   Board of Investment,
   Level 27, West Tower,
   World Trade Centre,
   Colombo 1.
5. P. Santhirasegaram,
   Chairman,
   Compensation Tribunal,
   Tax Appeals Commission Building,
   49/14 Galle Road,
   Colombo 3.
6. P. W. Senarathne,
   Member,
   Compensation Tribunal,
   Tax Appeals Commission Building,
   49/14 Galle Road,
   Colombo 3.
7. Sunil Fernando,
   Member,
   Compensation Tribunal,
   Tax Appeals Commission Building,
   49/14 Galle Road,
   Colombo 3.
8. M. L. Suresha Tharanga,
   Secretary, Compensation Tribunal,
   Tax Appeals Commission Building,
   49/14 Galle Road,
   Colombo 3.

   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Nuwan De Silva for the Petitioner.
Nayomi Kahavita, S.C. for the Respondents.

Argued on: 23.01.2020

Decided on: 19.02.2020

Mahinda Samayawardhena, J.

The Petitioner, a Swiss national, had purchased 139,000 shares of Hotel Developers (Lanka) PLC. This company was later acquired/stood vested in the Secretary to the Treasury for and on behalf of the State, as an underperforming enterprise, in terms of section 2 of the Revival of Underperforming Enterprises or Underutilized Assets Act, No. 43 of 2011. According to section 4 of the Act, the shareholders of the company are entitled to "prompt, adequate and effective" compensation from the State. In addition, the Petitioner states that this transaction is also governed by the bilateral Agreement marked P2 between Sri Lanka and the Swiss Confederation, and Article 6 thereof is relevant in assessing compensation. By and large, the Petitioner has filed this application on the basis that he has not been paid compensation promptly, adequately and effectively. To be specific, the reliefs sought by the Petitioner in the prayer to the petition are to quash by way of a writ of certiorari the defective determination made by the 5th-7th Respondents to pay Rs.35 per share as compensation to him, and to direct the 1st, 4th-7th Respondents by way of a writ of mandamus to pay compensation according to law.

Learned counsel for the Petitioner challenges the determination of the payment of compensation at the rate of Rs.35 per share

on several grounds. Of them, the one which challenges the jurisdiction of the Compensation Tribunal, in my view, goes to the root of the matter.

Sections 5 and 6(1) of the Act read as follows:

> *5(1) The Cabinet of Ministers shall appoint, for the purposes of this Act, a tribunal, to be called the Compensation Tribunal comprising the Chief Valuer and two other persons who are persons having wide experience and who have shown capacity, in commercial valuation.*
>
> *(2) All claims for the payment of compensation under subsection (2) of section 4 shall be made to the Compensation Tribunal appointed under subsection (1) within a period of two years from the date of vesting.*
>
> *6(1) The Compensation Tribunal shall on receipt of claim for the payment of compensation and after such inquiry as it deems necessary, make its award on such claim within a period of twelve months from the date on which the claim was received by it.*

According to these two sections, the award after the inquiry in respect of claims for payment of compensation shall be made by the Compensation Tribunal, which shall comprise the Chief Valuer as the Chairman and two other Members.

The Respondents in paragraphs 7 and 8 of their statement of objections admit that "*the power to assess the compensation has been vested with the Compensation Tribunal which is chaired by the Government Chief Valuer who is named as the 5th Respondent*

of this case"; the other two Members of the Tribunal are named as the 6th and 7th Respondents.

The fact that the Award is made by the Compensation Tribunal comprising the 5th-7th Respondents is made abundantly clear by the public notifications tendered by the Respondents marked R5 and R6. This is reinforced by P10, a letter sent by the Secretary of the Compensation Tribunal to the Petitioner.

The Respondents in paragraph 11 of their statement of objections state that "*the determination of the award of compensation by the Compensation Tribunal was made on 18.12.2013 [R1], and was communicated to the Petitioner on 19.12.2013 [R2], and the Petitioner, by his letter dated 26.12.2013, had acknowledged the receipt of the award of compensation [R3]*".

By paragraph 6 of the counter affidavit the Petitioner has taken the strong position that if, according to the Respondents, R1 is the Award, it is illegal and *ultra vires*, as the Award was made without the 5th Respondent Chief Valuer, presiding as Chairman of the Tribunal.

As seen from the last page of R1, the Award or "Determination of Compensation" has been made by R.A.R.M.N. Rajakaruna as Chairman and the 6th and 7th Respondents as Members of the Compensation Tribunal. It is addressed to the Chief Valuer.

At the argument, learned State Counsel for the Respondents stated that R1 is only a recommendation made by a Committee to the Chief Valuer. This is in contradiction to the position taken by the Respondents in paragraph 20 of the written submissions, where R1 is referred to as "*the Award dated 18*

December 2013". Be that as it may, if this Court accepts the position of learned State Counsel at the argument, where is the Award made by the Compensation Tribunal comprising the Chief Valuer and two other Members? No such Award was tendered at least at the stage of the argument, notwithstanding this matter was in the forefront of the counter objections and the written submissions filed on behalf of the Petitioner.

In the eyes of law, "the Award dated 18 December 2013" marked R1, is not an Award.

There could not have been a fresh Award made by the Compensation Tribunal with the Chief Valuer as the Chairman after R1 dated 18.12.2013, because the letter marked R2 informing the Petitioner of the quantum of compensation is dated 19.12.2013.

Although the Respondents in their statement of objections claim that the Petitioner by R3 "*acknowledged the receipt of the award of compensation notified by letter dated 19.12.2013*", a close scrutiny of R3 reveals that the Petitioner did not consider the said letter as an Award but as an offer of compensation to be accepted or rejected by him. The first sentence of R3 says: "*I have received your letter of 19th December, and I have to reject your offer of compensation [for Rs. 4,865,000/=] unless you will agree that this is a down payment to a later final settlement without any strings attached.*"

The Petitioner had not been served with R1 and R1(a) documents. The Petitioner saw these documents for the first time when they were tendered by the Respondents with their statement of objections.

In *Shell Gas Lanka Ltd. v. Consumer Affairs Authority [2008] 1 Sri LR 128,* the Company came before this Court seeking to quash by certiorari the decision made by the Consumer Affairs Authority on the ground of lack of jurisdiction. According to section 3(4) of the Consumer Affairs Authority Act, No.9 of 2003 read with its Schedule "*The quorum for any meeting of the Authority shall be four members*." There was no dispute that the inquiry was held and the impugned order was made by only three members. This Court set aside the order by certiorari. Sriskandarajah J. at pages 134 stated:

> *It is an admitted fact that the inquiry was held by three inquiring officers and the impugned order marked 2R3(a) was made by them and they have signed the said Order which was communicated by the letter dated 31.08.2005 P14. The duty of the court is to see that power shall not be exercised in unlawful and arbitrary manner, when exercise of such powers affects the basic rights of individuals. The courts should be alert to see that such powers conferred by the statute are not exceeded or abused. The Authority is constituted by at least four members sitting together (the quorum). In the absence of a quorum for the meeting of the members of the Authority to hold and inquiry and to make an Order is devoid of any legal effect. Hence this court issues a writ of certiorari to quash the said order communicated to the Petitioner by letter dated 31.08.2004 marked P14. The application for writ of certiorari is allowed without costs.*[1]

[1] Vide also the leading case of *Paul v. Wijerama (1972) 75 NLR 361.*

In the instant case, it is clear that (a) there is no Award as contemplated by section 6(1) of the Act, and (b) the purported Award marked R1 (insofar as the Petitioner is concerned) was not made by a legally constituted Tribunal.

The pivotal argument of learned State Counsel for the Respondents is that this application of the Petitioner shall be dismissed *in limine* as the Petitioner has not, in terms of section 6(2) of the Act, exercised his right of appeal against the determination of the Tribunal.

Section 6(2) of the Act runs as follows:

> *Any person who is aggrieved by an award made by the Compensation Tribunal may appeal against such award to the Court of Appeal within fourteen days from the date on which the award was communicated to such person, with the leave of the Court of Appeal first had and obtained. The provisions of the Civil Procedure Code relating to appeals to the Court of Appeal from an order of a District Court shall, mutatis mutandis, apply to the making and hearing of appeals under this section.*

According to this section, for the appeal procedure to be invoked, three requirements shall be consummated:

(a) There shall be an Award;

(b) The Award shall be made by the Compensation Tribunal;

(c) The Award shall be communicated to the party entitled to the Award.

It is against an Award made in keeping with the above requirements that an aggrieved party may prefer an appeal with leave obtained from this Court.

In the facts and circumstances of this case, I take the view that these three conditions have not been satisfied. Firstly, there is no Award; secondly, even if there is one, it has not been made by a properly constituted Compensation Tribunal; and, thirdly, a valid Award has not been communicated to the Petitioner. In the eyes of law, the purported Award or "Determination of Compensation" dated 18.12.2013 contained in R1, insofar as the Petitioner is concerned, is a nullity, as it has not been made by a legally constituted Tribunal due to lack of quorum.

The proper forum to canvass lack of jurisdiction or *vires* of the purported Tribunal is the Court of Appeal by invoking the writ jurisdiction of this Court.

Learned State Counsel contends that this jurisdictional objection could have been taken also on appeal. Even assuming so, that does not prevent the Petitioner from invoking the writ jurisdiction of this Court to challenge the decision.

In other words, it is the submission of learned State Counsel that when there is an alternative remedy, such as right of appeal, writ does not lie.

The general rule is that when there is an alternative remedy, the Court will not readily exercise writ jurisdiction. But that is not an inflexible or absolute rule. This is equally true in respect of revision applications.

This has been conceded by learned State Counsel in paragraphs 23 and 24 of the written submissions of the Respondents.

Paragraph 23 reads:

> *In the case of Rasheed Ali v Mohomed Ali and others 1981 1SLR 262, the Supreme Court held that when a statute provides a remedy to an aggrieved party, the Court will not interfere by way of judicial review, unless it can be shown that non-inference will cause a grave denial of justice and a irreparable harm. However, such grave denial of justice and harm should not be attributable to a cause to which the aggrieved party through his or her inaction is directly responsible such as the Petitioner in the instant case.*

I accept the first sentence, but not the second. The denial of justice to the Petitioner did not occur due to any action or inaction on the part of the Petitioner.

The Petitioner in fact had filed a civil case (DMR/2251/2013) against the 1st and 2nd Respondents to this case in the District Court on unjust enrichment. But, as seen from P11, the said case had been dismissed on a preliminary objection taken by the 1st Respondent that after an Award is made, the District Court has no jurisdiction to entertain the action. The Petitioner in paragraph 39 of the petition states that he received the letter marked P12 informing him of the quantum of compensation after filing action in the District Court. The Petitioner has not been sleeping over his rights.

Paragraph 24 of the Respondents' written submissions reads:

> *Further in the case of Halwan and others v Kaleelul Rahuman 2000 3 SLR 50, it has been held by the Court of Appeal that when a statue provides a specific remedy for an aggrieved party, and such party without invoking such remedy seeks judicial review by a way of a writ, the application for a prerogative writ should specify an explanation supported by an Affidavit as to why the statutorily granted remedy was not canvassed. The Petitioner in the instant writ application had neither pleaded nor provided an explanation for not filing an Appeal against the award of compensation within the relevant time frame in the Act.*

The argument that the Petitioner "*had neither pleaded nor provided an explanation for not filing an Appeal against the award of compensation within the relevant time frame in the Act"*, is unacceptable. The Petitioner in paragraphs 36 and 37 of the petition, which I quote below, has given an explanation which is acceptable to this Court.

> *36. The Petitioner states that Section 6(2) of the said "Revival of Underperforming Enterprises of Under Utilized Assets Act No.43 of 2011" requires any person who is aggrieved by an Award made by the Compensation Tribunal to appeal against such Award to the Court of Appeal within fourteen days from the date on which the Award was communicated to such person, with first obtaining leave of the Court of Appeal.*
>
> *37. The Petitioner states that the Petitioner has not received any Award at the moment when this application is being filed, and that the Petitioner is unable to act under the*

> *above mentioned Section 6(2) of the said "Revival of Underperforming Enterprises of Under Utilized Assets Act No.43 of 2011" without an Award being communicated to the Petitioner.*

Even if there were an Award and also a right of appeal, there is no positive legal bar preventing the Petitioner from coming before this Court by way of judicial review challenging the Award. In *Sirisena v. Registrar of Co-operative Societies (1949) 41 CLW 1* at 2 Gratian J. held:

> *It is no doubt a well recognised principle of law that a Superior 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 Rex vs. Wandsworth Justices–ex parte Reid (1942) 1 A.E.R. 56, an application was made for an order of certiorari quashing a conviction made by the justices in excess of their jurisdiction. Objection was taken, inter alia, that as the accused had a right of appeal to quarter sessions, certiorari did not lie. Caldecote L.J., in over-ruling the objection, said "as to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of certiorari to quash the conviction obtained in the manner I have described, the Court should be debarred from making an order. In this case it has been admitted that a mistake has occurred. This Court is in a position to remedy that mistake by making an order of certiorari to*

> *quash the conviction, and that it is the proper order which I think this Court should make." Humphreys J. in a separate judgement expressed the view that "if a person can satisfy this Court that he has been convicted of a criminal offence, as the result of a complete disregard by the tribunal of the laws of natural justice, he is entitled to the protection of this Court even though an alternative remedy was also available." I think that these observations are appropriate to the present proceedings. It is not in dispute that a public officer and an extra–judicial tribunal, acting no doubt through ignorance, have flagrantly exceeded the limited statutory powers conferred on them by the provisions of the Co-operative Societies Ordinance. In the result there is on record an illegal award condemning a man to pay to a public institution the amount of a disputed claim upon which only a Court of law is normally competent to adjudicate. I consider that there is no compelling principle of law which fetters this Court's discretion to quash the illegal award, and I now make order accordingly.*

In the Supreme Court case of *Somasunderam Vanniasinghsm v. Forbes [1993] 2 Sri LR 362,* Bandaranayake J. (later C.J.) citing an array of authorities has clearly held that existence of alternative remedies does not preclude unlawful orders being challenged by judicial review. In the course of the Judgment at page 367 the following excerpt of Wade in *Administrative Law* (5th Edition) page 593 has been cited:

> *There is no rule requiring what is called the exhaustion of administrative remedies….one aspect of the rule of law is that illegal administrative action can be challenged in the*

> *Court as soon as it is taken or threatened. There is therefore no need to pursue any administrative procedure or appeal in order to see whether the action in the end will be taken or not. An administrative appeal on the merits is something quite different from judicial determination of the legality of the whole matter. This restates the essential difference between review and appeal....The Court may (however) withhold discretionary remedies where the most convenient step is to appeal.*

Connected to the availability of alternative remedy, learned State Counsel further states that there has been a delay in filing this application, which also warrants dismissal of the application at the threshold level. At paragraph 35 of the Respondents' written submissions, learned State Counsel submits that "*Since a mandate in the nature of a writ is a prerogative remedy based on just an equitable principles, delay is oft regarded as defeating justice and equity, which in turn obligates the party invoking such a remedy to act without undue delay which the Petitioner had failed to do so*" and cites the Supreme Court case of *Biso Menika v. Cyril de Alwis [1982] 1 Sri LR 368* in support.

There is no time frame within which a party aggrieved by an administrative or judicial decision shall invoke writ jurisdiction. It shall be invoked within a reasonable time. What constitutes reasonable time shall be decided on the unique facts and circumstances of each individual case.

In any event, if the decision is challenged on the basis that the Tribunal which made the impugned decision did so without jurisdiction, and if the Court is satisfied that such complaint is

well-founded, the Court shall not dismiss the application on delay.

In *Biso Manika*'s case, Sharvananda, J. (later C.J.), at page 379 stated:

> *An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the Petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.*
>
> *When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically.*

"Recent practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not readily be denied"—de Smith—Judicial Review—4th Ed. page 426.

In this connection Professor Wade in his "Administrative Law" 4th Ed. at page 561 states: "the discretion to withhold remedy against unlawful action may make inroads upon the rule of Law and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right, but the fact that a person aggrieved is entitled to Certiorari ex debito justitiae does not alter the fact that a Court has power to exercise the discretion against him, as it may in the case of any discretionary remedy."

Unlike in English Law or in our Law there is no statutory time limit within which a petition for the issue of a Writ must be filed. But a rule of practice has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the Court has ample power to condone delays, where denial of Writ to the Petitioner is likely to cause great injustice. The Court may therefore in its discretion entertain the application in spite of the fact that a Petitioner comes to Court late, - especially where the Order challenged is a nullity for absolute want of jurisdiction in the authority making the order.

Finally, learned State Counsel argued that the Petitioner came before this Court challenging only the quantum of damages and therefore has no right now to challenge the Award. I am afraid, I am unable to agree. Even now the Petitioner's grievance is that

he has not been adequately compensated in terms of law. This he emphasises by showing that there is no legally tenable Award made by a properly constituted Compensation Tribunal. His complaint is that had his claim been considered by a properly considered Compensation Tribunal in terms of section 4 of the Act and Article 6 of the Agreement marked P2, he would have been entitled to enhanced compensation.

Before I conclude let me touch upon the applicability of P2. P2 is the bilateral Agreement entered into between the two countries—Sri Lanka and the Swiss Confederation.

Article 12(2) of P2, under the heading "Entry into force, Duration and Termination", states as follows:

> *This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investment made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination and without prejudice to the application thereafter of the rules of general international law.*

According to this Article, the Agreement is effective for 10 years. After the lapse of 10 years, it can be terminated by either party by giving written notice to the other party, in which event, the termination will take effect 12 months after the date of the said notice.

No such written notice of termination was tendered by the Respondents to this Court. Conversely, the Petitioner with his counter objections has tendered a letter dated 10.09.2015 marked X1, issued by the Ambassador to the Swiss Confederation, whereby the Swiss Embassy in Colombo confirms the validity of the said Agreement.

Hence I am unable to accept the argument of the Respondents (taken up at paragraph 38 of the written submissions) that "*the Petitioner's investment is not protected by the said [Agreement] because the [Agreement] was valid for ten years from 1981 and the Petitioner's investment was outside the said period*".

I am aware that the Revival of Underperforming Enterprises or Underutilized Assets Act, No.43 of 2011 was repealed by Act No.12 of 2019. If there are practical difficulties, let the parties arrive at an amicable settlement. As this Court has not been addressed on that aspect, I make no directions in that regard.

For the aforesaid reasons, I quash the decision contained in the letter sent by the Secretary to the Compensation Tribunal to the Petitioner dated 19.12.2013 marked P12/R2, and direct the 1st Respondent by way of a writ of mandamus to take steps to make prompt, adequate and effective compensation in terms of section 4 of the Act and Article 12 of the Agreement P2.

The Petitioner is entitled to costs of the application.

Judge of the Court of Appeal