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

CASE NO: CA/WRIT/384/2018

1. Sanath Lalantha Peiris,
   No.69A, Pinidiyamulla Road,
   Angangoda,
   Payagala.
2. H. M. Srilal Herath,
   Elle Gedera, Galkanda,
   Diyatalawa.
3. A. H. M. Mahinda Hemasiri Abeyratne,
   'Gampathi Niwasa', Thattewa,
   Anamaduwa.
4. M. Kanthi Violet Jayasinghe,
   Manana,
   Mahagama.
5. W. M. Priyanka Damayanthi,
   No.78/B/4, Maningamuwa Road,
   Kindelpitiya,
   Welmilla.
6. Suraj Prabodha Wijerathna,
   No.24/36A, Anthony Mawatha,
   Hurimaluwa,
   Rambukkana.

   Petitioners

Vs.

1. R. Semasinghe,
   Former Commissioner General of Excise,
   c/o Commissioner General of Excise,
   Excise Department of Sri Lanka,
   No.353, Kotte Road,
   Rajagiriya.

1A. A. Bodaragama,
   Commissioner General of Excise,
   Excise Department of Sri Lanka,
   No.353, Kotte Road,
   Rajagiriya.

2. Buddhika Weheragoda,
   Commissioner of Excise (Administration and Human Resources),
   Excise Department of Sri Lanka,
   No.353, Kotte Road,
   Rajagiriya.

3. Kapila Kumarasinghe,
   Deputy Commissioner of Excise (Crime),
   Excise Department of Sri Lanka,
   No.353, Kotte Road,
   Rajagiriya.

4. Sameera Jayawardene,
   Deputy Commissioner of Excise
   (Administration),
   Excise Department of Sri Lanka,
   No.353, Kotte Road,
   Rajagiriya.
5. S. R. Attygalle,
   Secretary,
   Ministry of Finance and Economic
   Affairs,
   The Secretariat,
   Colombo 01.
6. M. A. B. Daya Senarath,
   Secretary,
   Public Service Commission,
   No.1200/9, Rajamalwatte Road,
   Battaramulla.
   Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Shyamal A. Collure with Prabhath Amarasinghe, A. P. Jayaweera and Ravindra Silva for the Petitioners.
Maithri Amarasinghe, S.C., for the Respondents.

Argued on: 24.06.2020

Decided on: 15.07.2020

Mahinda Samayawardhena, J.

The Petitioners are employees of the Excise Department. The dispute pertaining to this application relates to their transfers. The annual transfers of the Excise Department had been initially done according to the scheme of transfers marked P19. This scheme of transfers was first replaced by P22 and P23; thereafter, by P33 and P34. At the time material to this application, the schemes P33 and P34 were in force, the latter being applicable to Excise Chief Inspectors and Excise Inspectors, and the former to other Excise employees. By P38 and P39, the transfers relevant to this dispute were given effect to be operative from 01.01.2019. The Petitioners have filed this application seeking to quash by certiorari P38 and P39, together with the attachments marked P38(a) and P39(a), on the basis the said decisions are a nullity. Let me now consider why the Petitioners say so.

It is common ground the transfers of Public Officers are governed by the procedural Rules made by the Public Service Commission, published in the Gazette Extraordinary No.1589/30 dated 20.02.2009 marked P18(a). In terms of Rule 194, a Public Officer can be transferred only by the Public Service Commission or by an Authority with Delegated Power. Insofar as the Excise Department is concerned, the said power has been delegated by the Public Service Commission to the 1st Respondent Commissioner General of Excise.

Rules 197-209 provide for setting up an Annual Transfer Committee, and Rules 210-211 for setting up an Annual Transfer Proposals Review Committee. Rule 212 says the 1st Respondent who is the "*Authority with Delegated Power shall issue annual transfer orders taking into consideration the proposals of the annual transfer committee and the recommendations of the annual transfer proposals review committee.*" There is no dispute that decisions to transfer shall ultimately be taken by none other than the 1st Respondent, upon having taken into account the proposals of the Annual Transfer Committee and the recommendations of the Annual Transfer Proposals Review Committee.

The Petitioners say P38 and P39 are a nullity because the decisions to transfer therein have been taken not by the 1st Respondent but by the Annual Transfer Committee. This complaint is not unfounded. By the 1st paragraph of P38 and P39, it is abundantly clear the decisions to transfer have been taken not by the 1st Respondent but by the Annual Transfer Committee, and the 1st Respondent is merely *announcing* the decision of the Annual Transfer Committee. He has not taken an *independent decision* upon the proposals and recommendations, respectively, of the Annual Transfer Committee and the Annual Transfer Proposals Review Committee. The said first paragraph of P38 and P39 reads as follows:

> මගේ සමාංක හා 2018.10.22 දිනැති නිවේදනය අනුව 2019 වාර්ෂික ස්ථාන මාරු වීම් සඳහා ඔබ විසින් ඉදිරිපත් කරන ලද අයදුම්පත් සම්බන්ධයෙන් මෙම දෙපාර්තමේන්තුවේ **ස්ථාන මාරු මණ්ඩලය විසින් ගනු**

> **<u>ලැබූ තීරණ අනුව</u>** මේ සමඟ ඇති උපලේඛනයේ සඳහන් ස්ථාන මාරුවීම් 2019.01.01 දින සිට ක්‍රියාත්මක වන පරිදි මෙයින් **<u>නිවේදනය</u>** කරනු ලැබේ.

This is *ultra vires* on the part of the Annual Transfer Committee and abdication of statutory duty on the part of the 1st Respondent, to whom alone power has been delegated by the Public Service Commission.

Learned State Counsel appearing for the Respondents states in the written submission that in issuing P38 and P39, the 1st Respondent does not act as a rubber stamp, and the Court shall take a purposive approach, and the word "decision" found therein shall be replaced with the word "recommendation". I am not inclined to agree. It cannot be so simple when the legislature has carefully chosen three separate words – proposal, recommendation and decision – to deal with three separate acts. There are no other items of evidence to suggest the 1st Respondent took the said decisions independently.

The next submission of learned State Counsel is the Public Service Commission later approved P38 and P39, and therefore the constitutional ouster clause contained in Article 61A of the Constitution becomes operative, ousting the jurisdiction of this Court to review the decision/approval of the Public Service Commission.

Article 61A reads as follows:

> *Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the [Public Service] Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

I must emphasise that an ouster clause – be it statutory or constitutional – which takes away the rights of a citizen to come before Court against wrongful administrative decisions shall be liberally interpreted in order to protect such rights and not deny them.

Article 61A can be invoked only when a decision has been taken by the Public Service Commission or by a Committee/Public Officer to whom the Public Service Commission has delegated its power. In the facts and circumstances of this case, Article 61A has no application, as the Petitioners are challenging the decision taken by a Committee which had no power or duty to take such a decision. The said decision is *ultra vires* and therefore a nullity. A decision which is a nullity cannot be given validity by ratification by the Public Service Commission or any other authority for that matter. Simply stated, if the decision is a nullity, there is nothing to ratify or approve. Hence Article 61A does not arise for consideration. (*Vide Abeywickrema v.*

Pathirana [1984] 1 Sri LR 215, Abeywickrema v. Pathirana [1986] 1 Sri LR 120, Chandrasiri v. Attorney General [1989] 1 Sri LR 115, Gunaratne v. Chandrananda de Silva [1998] 3 Sri LR 265, Kotakadeniya v. Kodithuwakku [2000] 2 Sri LR 175)

Lord Denning in *Macfoy v. United Africa Co. Ltd. [1961] 3 ALL ER 1169* at 1172 states:

> *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void. Without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

The above passage was referred to with approval by G.P.S. de Silva J. (later C.J.) in *Rajakulendran v. Wijesundera [1982] 1 Sri Kantha LR 164* at 168-169, Sharvananda J. (later C.J.) in *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands (1978) 80 NLR 1* at 182, and Sripavan J. (later C.J.) in *Leelawathie v. Commissioner of National Housing [2004] 3 Sri LR 175* at 178.

Sharvananda J. in *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands* (*supra*) at 182 quoted the following portion of Hailsham (4th Edition) Vol. I, paragraph 27:

> *No legally recognised rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law.*

This principle was applied by the Supreme Court in the more recent case of *Padmal Ariyasiri Mendis v. Vijith Abraham de Silva [2016] BLR 69* at 73, where it was held:

> *The deed No. 1551 is void ab initio and therefore the title does not pass from the plaintiff to any other person. Therefore deed which was executed thereafter, i.e. deed No. 976 is also void ab initio.*

Wade in *Administrative Law* (9th Edition) at page 280 states:

> *Where some act or order is invalid or void, the consequences are followed out logically: consequential acts are also invalid.*

The final argument of learned State Counsel is the Petitioners' application shall be dismissed on futility.

P38 and P39 are dated 12.11.2018. The Petitioners came before this Court on 07.12.2018. As at today, out of the six Petitioners, the transfers of only the 3rd and 4th Petitioners remain active: the 3rd and 4th Petitioners were transferred for a period of three years, whereas the other Petitioners were transferred for one year, which has now lapsed. However, futility on this basis shall not be a ground for dismissal of the application *in toto*.

In the first place, the rights of the parties shall be decided at the time of institution of the action.

Secondly, this Court does not act in vain by formally quashing P38 and P39 by certiorari to impress upon the 1st Respondent how he shall act in future. Other authorities who discharge functions of a public nature may also take note that the same fate will befall them if they too behave as the 1st Respondent did in this instance.

In *Sundarkaran v. Bharathi [1989] 1 Sri LR 46*, the Petitioner-Appellant applied for certiorari and mandamus against the refusal of a liquor license for the year 1987. When the matter came before the Supreme Court in 1988, it was only academic as the year 1987 had passed. Nonetheless, whilst allowing the appeal, Justice Amarasinghe took the view "*The court will not be acting in vain in quashing the determination not to issue the licence for 1987 because the right of the Petitioner to be fully and fairly heard in future applications is being recognised.*"

In *Nimalasiri v. Divisional Secretary, Galewela [2003] 3 Sri LR 85*, Sripavan J. (later C.J.) stated:

> *Learned State Counsel urged that it is a futile exercise to issue a writ of certiorari because the decision complained of related to the year 2002 which had already expired. However, following the decision in Sudakaran v. Barathi and others [1989] 1 Sri LR 46 this Court issues a writ of certiorari quashing the decision of the second Respondent contained in the letter dated 27.08.2002 marked (P4). Thus this Court is not acting in vain because the right of the Petitioner to be fully and fairly heard in future application is recognized.*

I quash P38 and P39, insofar as the Petitioners are concerned, by a writ of certiorari. Accordingly, I grant the reliefs as prayed for in paragraphs (c) and (e) of the prayer to the petition.

The application is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal