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

Buttala Co-operative Rural Bank,
Buttala.

Respondent-Appellant

D.M. Nirosha Samanmalee,
Halmilla Ara,
Wellawaya Road,
Buttala.

Petitioner-Respondent

Court of Appeal Case No:
CA (PHC) 62/2016
H.C. Monaragala Case No:
05/2015 (Writ)

-Vs-

1. Uva Provincial Co-operative,
   Employee Commission,
   No. 199, Keppetipola Road,
   Badulla.
2. Buttala Co-operative Society,
   Buttala.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondent-Respondents

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : Nuwan Bopage with Chathura Weththasinghe for the Respondent-Appellant.

D.P.L.A. Kashyapa Perera for the Petitioner-Respondent.

Rajin Gooneratne, SC for the 1st and 3rd Respondents.

Written Submissions: By the 1st and 3rd Respondent-Respondents 10/01/2020

By the Petitioner-Respondent on 26/05/2020 and 02/07/2020

By the 1st and 4th Respondent-Respondents 03/07/2020

Argued on : 22/06/2020

Judgment on : **31/07/2020**

A.L. Shiran Gooneratne J.

The Respondent-Appellant, Buttala Co-operative Rural Bank, (hereinafter referred to as the Appellant) has invoked the jurisdiction of this Court to set aside the order dated 01/03/2016, delivered by the learned Provincial High Court Judge of Monaragala permitting an application to issue a writ in the nature of *Mandamus* directing the Appellant to reinstate the Respondent as reflected in the impugned

document dated 08/09/2010, marked "P4". By the said order, the Provincial High Court upheld the determination by the 1st Respondent-Respondent, Uva Provincial Co-operative Employees Commission (hereinafter referred to as the 1st Respondent Commission) to reinstate the Respondent in the Appellant bank from 08/09/2010. The said determination was made consequent to a disciplinary inquiry held by the 2nd Respondent Society against the Appellant on charges of fraud. By determination dated 10/10/2008 (document marked "P3") the services of the Respondent were terminated by the Appellant with effect from 26/03/2005.

When this case was taken up for argument, the Appellant raised the following grounds of appeal.

1. The decision of the 1st Respondent Commission does not contain an enforceable administrative direction in the nature of a public duty.
2. Is the Respondent guilty of laches?

In support of the first ground of appeal, the Appellant contends that the direction given by the 1st Respondent Commission to the Appellant does not impose a duty in the nature of a public duty capable of been enforced by way of a writ of *Mandamus,* since the Appellant is not a public entity which executes public functions. The position taken up by the Appellant in effect, is that the impugned order dated 08/09/2010, marked "P4", is not an order which could be enforced by way of a prerogative writ.

"Within the field of public law the scope of mandamus is still wide and the Court may use it freely to prevent breach of duty and injustice: Instead of being astute to

discover reasons for not applying this greater constitutional remedy for error and misgovernment we think it is our duty to be vigilant to apply it in every case to which by any reasonable construction it can be made applicable." ***(Administrative Law Wade and Forsyth, 11th Edition at 522)***

It is observed that the impugned decision was made by the 1st Respondent Commission under Regulation 135, in terms of the Co-operative Employees Commission Act No. 12 of 1972, as amended, (referred to as the Commission Act). Submission to the appeal process in terms of the said regulation or the appeal process under Section 35 of the Commission Act was not invoked by the Appellant at any time.

The Appellant also takes up the position that a writ of *Mandamus* being a discretionary remedy relating to an administrative action cannot be enforced against the Appellant since it does not perform a public function. Therefore, it is contended that the relationship between the Respondent and the Appellant is contractual in nature and therefore, writ will not lie to enforce contractual rights.

"An order of Mandamus will be granted ordering that an act to be done which a statute requires to be done and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body." ***(Halsbury's Laws of England, Vol. (1), 4th Edition (Administrative Law) paragraph 132****. "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 Vs. Abeyratne and Others (S.C. Appeal No. 85/2008 & 101/2008; S.C.M. 01.06.2009)**

On this point, in ***Jayasinghe Vs. The Attorney General and Others (1994 2 SLR 74) Fernando, J.*** held that,

"The powers of a Co-operative Society in relation to its employees are subject to the statute, the regulations made there under and the directions of the Co-operative Employees Commission established under the Co-Operative Employees Commission Act No. 12 of 1972. Disciplinary action and dismissal are subject to appeal or review by the Commission. Employees of Co-operative Societies thus enjoy a status, in relevant respects similar to that of public officers; their position is significantly different to that of private sector employees. Disciplinary action is governed by statutory provisions rather than by contract. Disciplinary action by a Co-operative Society- interdiction, framing charges, holding inquiries and dismissal- is "administrative" action within the meaning of Article 126."

The charge sheet (vide page 169 of the brief marked "P2") served on the Respondent makes it clear that the Respondent was employed as an Acting Manager of the Appellant bank, which comes within the purview of the 2nd Respondent Society in terms of Section 9 of the Co-operative Societies Law No. 5 of 1972 (as amended). It is also noted that the charge sheet preferred against the Respondent is under Section 32(1) of the Co-operative Employees Commission Act.

"Judicial review may also be used to compel the performance of public duties by public authorities. Statute may impose a duty upon a public body to do some specific act. Failure to act will be unlawful and may be remedied by way of judicial review, usually by the grant of mandamus, ordering the public body to carry out its duties." (***Judicial Review in Public Law, Lewis, 5th Ed. Page 171, 4-076)***

Therefore, it is clearly established that the Appellant bank and the 1st Respondent Commission are two public authorities exercising public functions which are subject to judicial review. In such instance, the Court can grant order compelling the performance of such public duty.

Accordingly, we do not see any merit in the 1st ground of Appeal and therefore it is rejected.

The position of the Respondent is that the decision taken by the 1st Respondent Commission or the 2nd Respondent-Respondent, Buttala Co-operative Society was not challenged by the Appellant before any Court of competent jurisdiction nor offered any reasonable or justifiable ground for refusal to execute or to give effect to the impugned order. In the circumstances, the Respondent had no other alternative remedy but to invoke the public law jurisdiction vested in the Provincial High Court. The Respondent argues that, the Appellant did not abide by the order of reinstatement of service of the Respondent by the 1st Respondent-Commission and that the 1st Respondent-Commission failed to give effect to its determination by the enforcement mechanism provided by the Act to implement

the order of reinstatement. Therefore, it is contended that the failure of the Appellant bank to comply with the decision of the 1st Respondent Commission caused irreparable damage and injustice to the Respondent.

Considering the nature of the function performed by the 2nd Respondent society, there can be no doubt that the said determination was made in terms of the statute and therefore, is subject to judicial review and, *"the duties owed by a statutory body as employer to the employee are treated as duties of a public nature and enforceable by mandamus at the instance of the employee"* ***(Pathirana Vs. Goonesekara (1962) 66 NLR 464)***

Administartive Law Wade and Forsyth, 11th Ed. at page 520, states;

"The prerogative remedy of a mandatory order has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of a mandatory order is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him."

It is noted from documents marked "P5" to "P10", that the 1st Respondent-Commission at various occasions had requested the Appellant to enforce the impugned determination reflected in document marked "P4", dated 08/09/2010. Letters dated 05/08/2014 and 27/02/2015 marked "P8" and "P9" respectively, emphatically stated its stand. However, the Appellant failed to act as required by

the 1st Respondent-Commission or to defend its position in a competent court of law. It is also observed that, on their part, the 1st Respondent Commission too failed to institute action in the Magistrates Court in terms of Section 35 of the Act against the Appellant for contravening the provisions of the Act.

In all the above circumstances, the question that arises for determination is whether the Respondent is guilty of laches?

Respondent's employment was terminated on 10/10/2008 **(P3)**, and thereafter, an appeal was made against the said order on 25/03/2009 (**P4**). The Commission sent several letters to the Appellant to execute its decision. (**P5 to P10**). However, the Appellant failed to comply with the directions given by the Commission. Prior to invoking jurisdiction, the Respondent has rightly pursued all options available as an employee of the Appellant bank, to the best of her ability to have the said determination enforced.

"The doctrine of laches in Courts of equity is not an arbitrary or technical doctrine". (***Weerasuriya, J.*** in ***Ceylon Insurance Co., Ltd. Vs. Nanayakkara and Another (1999) 3 SLR 50.***)

In ***Bisomenike Vs. De Alwis ((1982) 2 SLR 368, 378) Sharvananda, J*** (as he then was) quoted with approval the following observations from ***Lindsey Petroleum Co. Vs. Hurd ((1874) LR 5 PC 221, 239, 240).***

"where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equal to a waiver

of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material…… the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy."

In ***Loku Balakumar Vs. Balasingham Balakumar (SC 125/94 SCM 11.09.1995) Fernando, J.*** dealing with the question of laches observed as follows,

"……..mere delay does not automatically amount to laches….. the circumstances of the particular case, the reasons for the delay and the impact of the delay on the other party must all be taken into account…… In any event the question of laches cannot be determined only by considering, how many trial dates or how long a period of time has elapsed. The circumstances are relevant….."

What is abundantly clear in this case is that the Appellant and the 1st Respondent-Commission failed to carry out a public law duty owed to the Respondent thereby causing irreparable damage and injustice to the Respondent. If the Appellant was aggrieved by the determination to reinstate the Respondent, the Appellant was able to invoke suitable remedial measures as provided by statute to challenge the said decision. The 1st Respondent on its part failed to implement the impugned decision as provided by Section 35 of the Act. It is an admitted fact that

in terms of Section 35 of the Co-operative Employees Commission Act, the 1st Respondent-Commission is empowered to enforce the impugned determination against the Appellant in the Magistrates Court for willful neglect, refusal or failure to do any act required by the Commission to be done. Therefore, inaction on the part of the two authorities are clearly established. Due to such inaction an application was initiated by the Respondent in the Provincial High Court to have the determination of the Commission enforced when all other remedial action was not forthcoming.

Therefore, we do not find any reason to conclude that the Respondent is guilty of inordinate delay in invoking the jurisdiction of the Provincial High Court.

For all the reasons stated above, the Judgment of the learned High Court Judge is affirmed.

Application dismissed. I make no order as to costs.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL