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

In the matter of an application for mandates in the nature of Writs of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No: 691/2009

M.B. Yatawara,
88, Uduwela Road, Ampitiya.

PETITIONER

Vs.

1. Hon. Sarath Ekanayake
   Chief Minister and the Minister in Charge of the subject of Local Government,
   Central Province,
   Office of the Chief Minister
   District Secretariat, Kandy.

2. Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha, Ampitiya.

3. D.M. Wijeratne,
   Secretary,
   Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha, Ampitiya.

4. N. Mahendrarajah,
   Retired Judicial Officer,
   Inquiry Officer,
   176/3, Bandaranaike Mawatha, Kegalle.

5. T.M. Surendra Bandara,
Vice Chairman,
Kandy Kadawath Sathara and
Gangawatta Korale Pradeshiya
Sabha, Ampitiya.

6. The Returning Officer,
Kandy District,
District Secretariat, Kandy.

7. Hon Tikiri Kobbekaduwa,
Governor of the Central Province,
Office of the Governor of the
Central Province, Kandy.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Faisz Mustapha, P.C with Senany Dayaratne and Ms. Nishadee Wickremasinghe for the Petitioner

Uditha Egalahewa, P.C with Ranga Dayananda for the 1st Respondent

Suranga Wimalasena, Senior State Counsel for the 6th and 7th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 1st October 2018

Tendered on behalf of the 1st Respondent on 14th December 2018

Decided on: 1st February 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 12th June 2018, all Counsel moved that this Court pronounce judgment on the written submissions that would be tendered by the parties. While written submissions have been tendered on behalf of the Petitioner and the 1st Respondent, the Attorney-at-Law for the 6th and 7th Respondents have informed this Court by way of a motion filed on 7th January 2019 that written submissions would not be tendered on their behalf as no relief has been sought against the said Respondents.

The Petitioner has filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decision of the 1st Respondent contained in the letter dated 22nd September 2009, annexed to the petition marked '**A6**'[1];

b) A Writ of Certiorari to quash the order of the 1st Respondent published in Gazette No. 1618/27 dated 11th September 2009, marked '**A7**'[2].

The issues that arise in this application for the consideration of this Court revolve around the power of the Minister in charge of local government of a Province to take action against a Chairman of a Pradeshiya Sabha under the provisions of the Pradeshiya Sabha Act No. 15 of 1987, as amended (**the Act**) and the procedure that should be followed in that regard.

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[1] 'A6' is the letter by which the Petitioner was informed that he has been removed from the post of Chairman of the Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha.

[2] 'A7' is the Gazette notification relating to the removal of the Petitioner from the post of Chairman of the Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha.

Section 185 of the Act confers the Minister the power to suspend and/or remove a Chairman of a Pradeshiya Sabha. The provisions of Section 185 of the Act which are relevant to a consideration of this application are re-produced below:

Section 185 (1) – "If at any time the Minister is satisfied that there is sufficient proof of-

(a) incompetence and mismanagement, or

(b) persistent refusal or wilful neglect to perform the duties imposed by this Act, or

(c) misconduct in the performance of those duties, or

(d) persistent disobedience to or disregard of the directions, instructions or recommendations of the Minister, or the Commissioner, or

(e) abuse of the powers conferred by this Act on the part of the Chairman of a Pradeshiya Sabha or any of the members of the Pradeshiya Sabha,

the Minister may as the circumstances of each case may require, by Order published in the Gazette,

(i) remove the Chairman from office, or
(ii) remove all or any of the members from office; or

(iii) dissolve the Pradeshiya Sabha,

and such Order shall as soon as may be convenient be laid before Parliament."[3]

Section 185 (2) – "The Minister shall before making an Order under subsection (1), appoint, **for the purpose of satisfying himself in regard to any of the matters referred to in subsection (1)**, a retired judicial officer to inquire into and report upon such matter **within a period of three months**, and such officer shall in relation to such inquiry have the powers of a Commission of Inquiry appointed under the Commissions of Inquiry Act."[4]

Section 185 (3)(a)(i) – "When the Minister appoints a retired Judicial officer under subsection (2) to inquire into any matter, the Minister may, as the circumstances of each case may require, by Order published in the Gazette suspend 'the Chairman from office and direct the Vice Chairman or, where the office of the Vice-Chairman is vacant or where the Vice-Chairman has been suspended, the Assistant Commissioner of the region, to exercise the powers and perform the duties of the Chairman."

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[3] Section 2(3)(a)(i) of the Provincial Councils (Consequential Provisions) Act No. 12 of 1989 reads as follows: "Where any law made prior to November 14, 1987, on any matter set out in List I of the Ninth Schedule to the Constitution for any Order, Proclamation, Notification, regulation or rule made under that law to be laid before Parliament, such provision shall have effect in relation to a Province as if references in it to Parliament were a reference to the Provincial Council established for that Province."

[4] The Sinhala text of Section 185(2) is as follows: අමාත්‍යවරයා විසින් (1) වැනි උප වගන්තිය යටතේ නියමයක් කිරීමට පෙර (1) වැනි උප වගන්තියේ සඳහන් යම් කාරණයක් සම්බන්ධයෙන් තමා සැහිමකට පත්වනු පිණිස ඒ කාරණය ගැන මාස තුනක කාල සීමාවක් ඇතුළත පරීක්ෂාකොට වාර්තා කිරීම සඳහා විශ්‍රාමලත් අධිකරණ නිලධාරියෙකු පත්කර යුතු අතර එම නිලධාරියාට එම පරීක්ෂණයට අදාලව පරීක්ෂණ කොමිෂන් සභා පනත යටතේ පත් කරන ලද පරීක්ෂණ කොමිෂන් සභාවක බලතල තිබිය යුතුය.

Section 185 (3)(b) – "**Upon the receipt of the report** of the person appointed under subsection (2), the Minister may make an Order under subsection (1) or revoke the Order made under paragraph (a) of this subsection."

This Court observes that identical provisions are contained in Section 2(1) – (3) of the Supervision and Administration of Local Authorities Statute No. 7 of 1990, enacted by the Central Provincial Council (**the Statute**).[5]

The facts of this matter very briefly are as follows.

The Petitioner had contested the elections held in April 2006 for the Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha from the United National Party. The Petitioner states that the United National Party had polled the highest number of votes for the said Pradeshiya Sabha at the said election and that he polled the highest number of preference votes from his party. The Petitioner had subsequently been appointed as the Chairman of the said Pradeshiya Sabha.

The 1st Respondent, the Chief Minister and the Minister of Local Government of the Central Provincial Council, had issued the Petitioner with a letter dated 3rd December 2007,[6] requesting him to show cause in respect of the charges set out in the said letter relating *inter alia* to mismanagement of the affairs of the said Pradeshiya Sabha. The Petitioner states that he submitted his response by letter dated 25th January 2008[7], denying all the charges leveled against him.

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[5] A copy of the said Statute has been annexed to the petition, marked 'P1'.
[6] This letter has been annexed to the petition, marked 'P2'.
[7] This letter has been annexed to the petition, marked 'P3'.

By an Order dated 18th June 2008 published in Gazette Extraordinary No. 1554/11 dated 20th June 2008 and annexed to the petition marked '**P4**', the 1st Respondent, acting in terms of the powers vested in him by Section 185(3)(a)(i) of the Act, read together with the provisions of Section 2(2) of the Provincial Councils (Consequential Provisions) Act No. 12 of 1989[8] and Section 2(3)(a)(i) of the Statute[9] had temporarily suspended the Petitioner from the post of Chairman of the said Pradeshiya Sabha with immediate effect. The Order relating to the suspension of the Petitioner was consequent to an Order of the same date made by the 1st Respondent under Section 185(2) of the Act appointing Mr. G.S Wattegedara to inquire and report within 3 months, whether the Petitioner has committed any misdeeds described in Section 185(1) of the Act.[10]

The Petitioner states that a copy of the said Order '**P4**' and a charge sheet signed by the 1st Respondent had been served on him by the Assistant Commissioner of Local Government on 2nd July 2008.[11] This Court observes that the suspension of the Petitioner from the post of Chairman of the said Pradeshiya Sabha is in accordance with the procedure laid down in Section

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[8] Section 2(2) of Act No. 12 of 1989 reads as follows: "Where any law made prior to November 14, 1987, on any matter set out in List I of the Ninth Schedule to the Constitution confers power on a Minister to make any Order, Proclamation, Notification, regulation or rule, such power shall, in relation to a Province and unless the context otherwise requires, be exercised by the Governor of that Province or the Minister of the Board of Ministers of 'that Province to whom that subject has been assigned, and accordingly, references in any provision of the law conferring that power, to a " Minister " shall be deemed to include a reference to the Governor of the Province or the Minister of the Board of Ministers of the Province to whom that subject has been assigned."

[9] Section 2(3)(a)(i) thereof reads as follows:

"(3) (අ) යම් කාරණයක් ගැන පරීක්ෂා කිරීම සඳහා අමාත්‍යවරයා විසින් (2) වැනි උප වගන්තිය යටතේ විශ්‍රාමලත් අධිකරණ නිලධාරියෙකු පත්කරන විටක, එක් එක් අවස්ථාවේ තත්ත්වයන් අනුව අවශ්‍ය විය හැකි පරිදි අමාත්‍යවරයා විසින් ගැසට් පත්‍රයෙහි පළ කරනු ලබන නියමයක් මගින් –

(i)අවස්ථාවෝචිත පරිදි නගරාධිපතිවරයාගේ හෝ සභාපතිවරයාගේ ධුරය දැරීම අත්හිටුවා නියෝජ්‍ය නගරාධිපතිවරයාට හෝ උප සභාපතිවරයාට හෝ නියෝජ්‍ය නගරාධිපතිවරයාගේ හෝ උප සභාපතිවරයාගේ තනතුර පුරප්පාඩු වී ඇති අවස්ථාවක දී හෝ ධුරය අත්හිටුවන ලද අවස්ථාවක නාගරික කොමසාරිස්වරයාට හෝ යම් පළාත් පාලන සභකාර කොමසාරිස්වරයෙකුට නගරාධිපතිවරයාගේ හෝ සභාපතිවරයාගේ බලතල ක්‍රියාත්මක කිරීමටත්, ඔහුගේ කාර්යයන් ඉටුකිරීමටත් අවස්ථාවෝචිත පරිදි විධානය කරනු ලැබිය හැකිය,..."

[10] The Order appointing the Inquiry Officer appears in the Gazette Notification 'P4'.

[11] A copy of the letter dated 2nd July 2008 has been annexed to the petition, marked 'P5'.

185(3)(a) of the Act and that even though the matters that led to the suspension of the Petitioner and the charges made against the Petitioner have been challenged, there is no dispute between the parties with regard to the procedure followed in that regard.

The Inquiry Officer appointed by the Order '**P4**' had resigned due to personal reasons and the 1st Respondent, by an order published in Gazette Extraordinary No. 1561/22 dated 7th August 2008 annexed to the petition marked '**P7**' had appointed the 4th Respondent as the Inquiry Officer, "to inquire and report within 3 months time from 18th June 2008" whether the Petitioner has committed any misdeeds described in Section 185(1) of the Act.

The Petitioner states that pursuant to receiving summons from the 4th Respondent, he presented himself for an inquiry on 31st August 2008. According to the Petitioner, the inquiry had been held on 31st August 2008 and 7th September 2008 where the evidence in chief of one witness had been recorded.

As borne out by the Orders marked '**P4**' and '**P7**', the mandate of the Inquiry Officer appointed initially and the 4th Respondent was to inquire and report to the 1st Respondent within a period of 3 months from 18th June 2008, whether the Petitioner had committed any misdeeds set out in Section 185(1). However, as the inquiry was yet proceeding at the end of this 3 month period, the 1st Respondent, by an Order published in Gazette Extraordinary No. 1566/23 dated 11th September 2008, annexed to the petition marked '**P10**', had extended the time period of the 4th Respondent to conduct the inquiry and

submit his report by a period of 3 months from 17th September 2008. It does not appear that the Petitioner objected to this extension of time.

The Petitioner states that after the said extension, the inquiry had been scheduled for 7 dates but that the inquiry had to be re-fixed on 4 occasions due to the non-availability of the Inquiry Officer. At this point of time, the Petitioner invoked the jurisdiction of this Court by way of Writ Application No. CA 919/2008 (**CA 919/2008**), wherein the Petitioner complained *inter alia* that the inquiry was not a *bona fide* and credible exercise, that he feared that the inquiry would not be concluded in an expeditious manner and that the extension of the time period of the Inquiry Officer by Order '**P10**' is bad in law as the Act does not provide for any extensions to be granted to the Inquiry Officer to submit his report, beyond the initial period of 3 months.

This Court observes that after the filing of the said application on 11th November 2008, the 1st Respondent had extended the time available to the 4th Respondent to conduct the inquiry and submit his report, on two further occasions, until 15th June 2009.[12]

This Court, by its judgment delivered in CA 919/2008 on 30th July 2009,[13] upheld the submission of the Petitioner that the Act has not specifically provided the Minister the power to extend the time period of the Inquiry Officer beyond the initial period of three months specified in Section 185(2) of the Act and held that the extension of time granted by '**P10**' is *ultra vires* the

[12] Order published in Gazette Extraordinary No. 1576/24 dated 20th November 2008, annexed to the Statement of Objections of the 1st Respondent in CA 919/08 marked '1R2' extending the time period for three months from 16th December 2008 and Order published in Gazette Extraordinary No. 1593/24 dated 18th March 2009, annexed to the petition marked 'P16', extending the time period for three months from 15th March 2009.

[13] A copy of the judgment has been annexed to the petition, marked 'A5'.

powers conferred on the 1st Respondent by Section 185 of the Act. This Court had accordingly issued a Writ of Certiorari to quash the Order marked '**P10**'. Neither party has submitted that the 1st Respondent has appealed against the said judgment and therefore, as between the parties, there was a binding decision on the validity of the extension of time.

Although this Court had held in CA 919/2008 that the extension of the time period beyond the three month period ending 17th September 2008 is *ultra vires* the powers of the 1st Respondent, by a letter dated 22nd September 2009 annexed to the petition marked '**A6**', the 1st Respondent had proceeded to dismiss the Petitioner from the post of Chairman of the said Pradeshiya Sabha. The order of dismissal has been published in Gazette Extraordinary No. 1618/27 dated 11th September 2009, annexed to the petition, marked '**A7**'.

The letter '**A6**', which is sought to be quashed by a Writ of Certiorari in this application, reads as follows:

> "මහනුවර කඩවත්සතර හා ගගවට කෝරළේ ප්‍රාදේශිය සභාවේ සභාපති වශයෙන් කටයුතු කල මහින්ද බණ්ඩාර යටවර වන ඔබට ම විසින් නිකුත් කල අංක 2008.08.21 දිනැති චෝදනා පත්‍රය හා බැඳේ.
>
> චෝදනා සම්බන්ධයෙන් පරීක්ෂා කිරීමට පත්කරන ලද විශ්‍රාමලත් අධිකරණ නිළධාරීගේ වාර්තාව මා වෙත ලැබී ඇති අතර, ඉන් ඔබ වෙත නිකුත් කර ඇති සියලුම චෝදනා වලට අනුව ඔබ විසින් අකාර්යක්ෂම සහ නොමනා පාලනයක් සිදුකර ඇති බව අනාවරණය වේ.
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> මේ සම්බන්ධයෙන් කරුණු තවදුරටත් සොයා බැලීමෙන් අනතුරුව ඔබ මහනුවර කඩවත්සතර සහ ගගවට කෝරළේ ප්‍රාදේශිය සභාවේ අකාර්යක්ෂම හා නොමනා පාලනයක් ගෙන ගොස් ඇතිබවට මා සැහිමකට පත්වන බැවින් ප්‍රාදේශිය සභා පනතේ

185(1)(i) වගන්තිය සහ 1990 අංක 07 දරන පළාත් පාලන ආයතන පරීපාලනය හා අධීක්ෂණය කිරීමේ ප්‍රඥප්තියේ 2(1)(i) වගන්තියෙන් මාවෙත ලැබී ඇති බලතල අනුව ඔබගේ ධුරය අත්හිටවූ දින සිට ක්‍රියාත්මක වන පරිදි ඔබ ප්‍රාදේශිය සභාවේ දැරූ සභාපති ධුරයෙන් මෙයින් ඉවත් කරමි.

මෙකී නියමය ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ අංක 1618/27 හා 2009 සැප් 11 දින දරන අතිවිශේෂ ගැසට් පත්‍රය මගින් ප්‍රකාශයට පත් කර ඇත."

The consequences of being dismissed from the post of Chairman of a Pradeshiya Sabha have been set out in Section 9(3) of the Local Authorities Elections Ordinance No. 53 of 1946, as amended, which reads as follows:

"…. no person who, at any time after the appointed date, is removed from the office of …… Chairman or member of any …. Pradeshiya Sabha, by Order published under …… section 185 of the Pradeshiya Sabha Act, ….. shall be qualified for a period of five years from the date of such removal from office to be elected under this Ordinance, or to sit or vote as a member of any local authority."

Thus, by virtue of '**A6**' and '**A7**' not only was the Petitioner removed from the post of Chairman as well as from his membership in the Pradeshiya Saba, the Petitioner was also disqualified from becoming a member of any local authority for a period of 5 years from the date of the initial suspension.

The Petitioner thereafter filed this application on 14th October 2009, wherein it was alleged *inter alia* that the 4th Respondent did not afford the Petitioner an opportunity of giving evidence or of summoning any witnesses on his behalf, that the 1st Respondent has taken into consideration irrelevant matters in arriving at his decision and that as the inquiry could not have proceeded

beyond the three month period provided by Section 185(2) of the Act, all steps taken thereafter, including the removal of the Petitioner from the post of Chairman is of no force or avail in law.

The Pradeshiya Sabha Act has been enacted to provide for the establishment of pradeshiya sabhas with a view to provide greater opportunities for the people to participate effectively in the decision-making process relating to administrative and development activities at a local level. In terms of Section 2(1) of the Act, the Minister may, with a view to facilitating the effective participation of the people in local government and development functions, by Order published in the Gazette declare any area to be a Pradeshiya Sabha area for the purposes of the Act. Section 3 provides that, "the Pradeshiya Sabha constituted for each Pradeshiya Sabha area shall be the local authority within such area and be charged with the regulation, control and administration of all matters relating to public health, public utility services and public thoroughfares and generally with the protection and promotion of the comfort, convenience and welfare of the people and all amenities within such area". This Court observes that in addition to the above, the relevant Pradeshiya Sabhas are responsible for the maintenance of public drains, waterways, public fairs, local markets, lighting of streets and public places etc. Thus, a pradeshiya sabha plays a very important role in the day to day lives of our people.

Members are elected by the people to the pradeshiya sabha every five years, with an expectation that the members so elected would address the day to day issues of the ward in an expeditious and efficient manner. However, not only should the elected representatives of the people be efficient, they should ensure good governance at all times and maintain strict financial discipline in

respect of the funds of the local authority and refrain from any abuse of power. The Act provides a mechanism by way of Section 185 to address incompetence, mismanagement, misconduct and abuse of power and thereby ensure good governance by empowering the Minister to suspend and/or remove a member, Chairman or dissolve even an entire local council.

The legislature however has been conscious that the powers of suspension and removal of a member, conferred on the Minister by Section 185 of the Pradeshiya Sabha Act can be abused. The provisions in Section 185(1)-(3) of the Act seeks to strike a balance between the powers of the Minister to deal with mismanagement and abuse of power on the one hand and the rights of the Chairman to protect himself from any arbitrary exercise of that power by the Minister, on the other. As part of this process, several checks and balances have been set out in Section 185 of the Act.

The Act specifies that a suspension can be effected only once an Inquiry Officer has been appointed. The Act requires the Minister to appoint a retired Judicial Officer to inquire into such mismanagement, inefficiency and abuse of power, thereby demonstrating the seriousness with which the inquiry must be conducted and the credibility that is attached to the inquiry. In keeping with the principles of administrative law, the Inquiry Officer is required to provide both parties an opportunity to lead the necessary oral and documentary evidence to substantiate the charges as well as rebut the charges, thus ensuring that the principles of a fair hearing are adhered to at all times during the inquiry. The Inquiry Officer is required to submit a report within a period of three months of being appointed, to enable the Minister to satisfy himself with regard to the allegations against the Chairman, the member or the Council

itself. As held by the Supreme Court in **Sarath Dharma Siri Bandara vs. Sarath Ekanayake**[14], the Minister cannot remove the Chairman on his own accord and the report of the Inquiry Officer is necessary for the Minister to take a decision. The entire process outlined above must therefore be conducted in a manner that is fair by all parties.

It appears to this Court that the requirement for the Inquiry Officer to conduct an inquiry and submit his report within 3 months from the date of his appointment has been imposed in order to ensure that the Chairman who is a duly elected representative of the people is not suspended from office indefinitely. The question however arises whether the requirement to conclude the inquiry and submit the report within 3 months is mandatory or directory. As would be adverted to later, this Court in CA 919/2008 took the view that the time period was mandatory. However, in **Mohammed Ishak vs Moraes**[15] this Court had held as follows:

> "This court is of the view that section 185 of Act, No. 15 of 1987 is directory and not mandatory and therefore the Inquirer is not bound to deliver the order within 3 months.
>
> The petitioner having delayed the proceedings at the inquiry by taking various preliminary objections cannot be heard to say that there has been a transgression of the temporal span. This appears to be mischievous and the petitioner is estopped from taking up this objection."

[14] SC Appeal No. 85/2011; SC Minutes of 18th September 2014.
[15] 1996 (1) Sri LR 145 at 156. This case had not been cited in CA 919/2008.

It appears that in the above case, this Court was influenced by the conduct of the petitioner when it held that the time period is directory.

The Petitioner had cited the judgment of this Court in **Sarath Dharma Siri Bandara vs Sarath Ekanayake**[16] where this Court had followed the judgment in CA 919/2008. However, in appeal, the Supreme Court has held that "any interpretation of Section 185(2) of the Pradeshiya Sabha Act No. 15 of 1987 on the basis that the time period of 3 months is mandatory, would defeat the intention of the legislator who intended to ensure good governance based on a transparent system."[17]

In concluding that the time period is directory, the Supreme Court appears to have been influenced by the conduct of the petitioner in that case, as borne out by the following paragraph:

> "the parties to the inquiry can purposely delay the proceedings of the inquiry by all kinds of methods, so that the end result would be, for the report to reach the Minister after 3 months. Was that the intention of the Legislature? In the instant case, neither of the situations discussed above arose. Both parties to the inquiry never complained when the Inquiring Officer asked for extensions, four times after the expiry of three months from the date of the appointment. They conveniently participated at the inquiry without objecting to the extensions. They have acquiesced in the proceedings. How could they have complained about the inquiry going beyond three months, as illegal and *ultra vires*? The facts in this case amply show that the person appointed by the Respondent to defend the

[16] CA (Writ) Application No. 928/08; CA Minutes of 18th January 2011.
[17] Supra

Respondent at the inquiry had requested the Inquiring Officer to hold the inquiry only once a week as he was unable to come for the inquiry otherwise and on that account the extensions of time were granted to facilitate the conclusion of the said inquiry."

The conduct of the Petitioner in this case is different to what has been described by the Supreme Court. Here, the Petitioner did not object to the first extension but invoked the jurisdiction of this Court when he doubted the *bona fides* of the inquiry process.

Be that as it may, it would appear to this Court that to hold that the time period is mandatory would be too rigid, given the objective that is sought to be achieved by an inquiry being conducted is to ensure good governance and financial discipline by the elected representatives of the people and prevent abuse of power and mismanagement. On the other hand, to hold that it is directory can lead to abuse, as what has happened in this case.

The first Inquiry Officer appointed on 18th June 2008 had not held the inquiry even on one date nor has any explanation been offered as to why prompt action was not taken to commence the inquiry, since the Order '**P4**' specifically required the Inquiry Officer to submit his report within 3 months. The second Inquiry Officer had been appointed on 7th August 2008. However, when one considers the fact that the inquiry had commenced only on 31st August 2008, it appears to this Court that there was no sense of urgency on the part of the Inquiry Officer to commence the inquiry and conclude same within the 3 month time period specified in '**P7**'.

As alleged by the Petitioner, from 31st August 2008 to 11th November 2008, which is the date on which CA 919/2008 was filed complaining of the process, only 9 sittings of the inquiry had been scheduled. No explanation has been offered as to why the inquiry could not have been fixed on a day to day basis or at least why the proceedings could not have been conducted on a more regular basis, especially since the amended charge sheet annexed to the petition marked '**P9**' contained the names of twenty witnesses. Out of the 9 sittings held prior to CA 919/2008 being filed, at least 3 sittings had been postponed due to the non availability of the Inquiry Officer. It appears to this Court that no one other than the Petitioner was interested in concluding this inquiry expeditiously, although the time period provided in '**P4**' and '**P7**' for the Inquiry officer to submit his report was only 3 months.

It is in this background that this Court, while agreeing with the decision of the Supreme Court in Sarath Dharma Siri Bandara's case[18], takes the view that an Inquiry Officer must take control of the proceedings and endeavour to conclude the inquiry as expeditiously as possible and within the 3 month period initially made available. Any extension of time must be supported by adequate reasons from the Inquiry Officer as to why the inquiry could not be concluded within 3 months. Such a course of action would ensure that the objective of Section 185 of the Act is achieved.

This Court will now consider the several complaints of the Petitioner.

The first submission of the Petitioner is that in terms of Section 185(2) of the Act, the purpose of appointing a retired Judicial Officer *inter alia* is to conduct

[18] Supra

an impartial and independent inquiry and report upon the charges made against the Chairman for the purpose of enabling the Minister to satisfy himself with regard to the charges levelled against the Chairman. It was therefore submitted that the 1st Respondent can only take into consideration the matters set out in the report of the Inquiry Officer in arriving at a decision whether to remove the Chairman of a Pradeshiya Sabha. In other words, the Petitioner's argument is that the Minister can only be guided by the report of the Inquiry Officer in arriving at his decision.

The Petitioner states that the 1st Respondent has however taken into consideration matters other than what has been set out in the report of the Inquiry Officer. The Petitioner is relying on the words "මේ සම්බන්ධයෙන් කරුණු තවදුරටත් සොයා බැලීමෙන් අනතුරුව" in '**A6**' in support of his position.

This Court observes that by appointing a retired Judicial Officer as the Inquiry Officer and requiring the Minister to act on the said report ensures that the Minister acts in a transparent and unbiased manner. This is important especially since the Petitioner and the 1st Respondent may belong to rival political parties, as is the case in this application. Thus, it is the view of this Court that the scheme set out in Section 185(1)-(3) of the Act requires the Minister to act only upon the report submitted by the Inquiry Officer. To permit the Minister to make further inquiries which in any event have not been disclosed, and to act upon such further inquiries vitiates the safeguards that the legislature has put in place in the provisions of Section 185(1)-(3) of the Act. Such conduct on the part of the 1st Respondent amounts to the 1st Respondent acting outside the four corners of Section 185 of the Act and is *ultra vires* the powers conferred on the 1st Respondent.

The following passage of Lord Denning M.R. in **Secretary of State for Education and Science v. Tameside Metropolitan Borough Council** [19] sets out succinctly what is meant by 'being satisfied':

> "Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another. To my mind, if a statute gives a minister power to take drastic action if he is "satisfied" that a local authority has acted or is proposing to act improperly or unreasonably, then the minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair opportunity of dealing with it. I am glad to see that the Secretary of State did so in this case. He had before him the written proposals of the new council and he met their leaders. In addition, however, the minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with good reasons or at any rate is a decision which a reasonable person might reasonably reach."

[19] 1977 AC 1014 at 1025.

In these circumstances, this Court is of the view that the 1st Respondent exceeded the powers conferred on him by Section 185(2) of the Act when he took into consideration matters other than the report of the Inquiry Officer, in arriving at his decision to remove the Petitioner from the post of Chairman. The decision of the 1st Respondent in '**A6**' and '**A7**' is therefore liable to be quashed by a Writ of Certiorari.

The next complaint of the Petitioner is that he was not afforded a hearing and that the inquiry proceeded *ex parte*. The learned President's Counsel for the 1st Respondent has set out in detail in his written submissions, the sequence of events that took place after CA 919/2008 was filed on 11th November 2008. This Court observes that the witness called on behalf of the prosecution has been cross examined on six occasions, right up to 31st May 2009. What transpired thereafter, until the judgment of this Court in CA 919/2008 on 30th July 2009 was delivered, has not been explained by either party. What is significant however, is that the Inquiry Officer submitted his report on 2nd August 2009, which is just three days after the said judgment was delivered. The Inquiry Officer's report could have only taken into consideration the evidence of the solitary witness called by the prosecution. This Court is at a loss to understand how the Inquiry Officer could have submitted his report without affording the Petitioner an opportunity of presenting his defence. To this extent, whatever the conclusions that the Inquiry Officer may have reached, is one sided and it is unsafe to arrive at any conclusion or make any determination based on such report, especially in view of the serious consequences that follow a dismissal. This Court is of the view that it is fundamental that an Inquiry Officer follow the principles of natural justice and

affords both parties a proper hearing, including the right to the accused to present his side of the story.

In **Gamlathge Ranjith Gamlath vs Commissioner General of Excise and two others**,[20] Sripavan J (as he then was) held as follows:

> "It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide Errington v. Minister of Health[21]). The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In Schmidt and another v. Secretary of State for Home Affairs[22] Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say."

Although the Petitioner has not sought a Writ of Certiorari to quash the findings of the Inquiry Officer,[23] this Court is of the view that a conclusion reached in violation of the fundamental principles of natural justice should not

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[20] CA (Writ) Application No. 1675/2002; CA Minutes of 28th March 2003.
[21] (1935) 1 KB 249.
[22] (1969) 2 Ch. 149 at 170.
[23] A copy of the report of the Inquiry Officer has not been tendered to this Court by the 1st Respondent.

be allowed to stand and for that reason, the decision of the 1st Respondent contained in '**A6**' and '**A7**' is liable to be quashed by a Writ of Certiorari.

The final submission of the Petitioner is that the 1st Respondent proceeded to act on the report of the 4th Respondent and removed the Petitioner from the post of Chairman of the said Pradeshiya Sabha, as evidenced by '**A6**' dated 22nd September 2009 and '**A7**' dated 11th September 2009, inspite of the decision of this Court on 30th July 2009 to quash by a Writ of Certiorari, the extension of the time period granted to the 4th Respondent to conduct the inquiry and submit a report by 17th September 2008. An appeal has not been filed against the said judgment and therefore, as between the Petitioner and the 1st Respondent, there was a binding decision of this Court quashing the extension of time granted to the Inquiry Officer.

The effect of the said judgment is two fold. First, whatever the evidence that was recorded after 17th September 2008 could not have been acted upon by the Inquiry Officer as the mandate of the Inquiry Officer had come to an end by 17th September 2008. The second is that in the absence of a report from the 4th Respondent as at 17th September 2008, the 1st Respondent could not have acted against the Petitioner in terms of Section 185(1) of the Act and dismissed the Petitioner from the post of Chairman of the said Pradeshiya Sabha.

As held by Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**[24], the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. To do otherwise would be to act illegally.

[24] 1985 AC 374.

In this instance, even after this Court had held that the extension of the time period beyond the initial period of 3 months is illegal, the 1st Respondent proceeded to arrive at a finding partially based on a report submitted after the expiry of the said 3 month period. This is clearly illegal. This Court is of the view that the 1st Respondent could not have acted under Section 185(1) of the Act if he did not have the report of the Inquiry Officer within the period of 3 months stipulated in the Order made under Section 185(3) of the Act and for that reason, the 1st Respondent clearly acted outside the law that regulates his power when he issued '**A6**' and '**A7**'. Thus, this Court is of the view that the decision in '**A6**' and '**A7**' is liable to be quashed by a Writ of Certiorari.

The consequence of the above illegal action of the 1st Respondent was the automatic disqualification of the Petitioner from contesting elections to a local authority for 5 years, with effect from 20th June 2008. The said period of 5 years has now lapsed and the Petitioner would have been eligible to contest the elections to local authorities conducted after June 2013. It is in these circumstances that the learned President's Counsel for the 1st Respondent has submitted that the granting of the relief prayed for would be futile and that, the Writ of Certiorari being a discretionary remedy, this Court would not exercise its discretion where it would be futile to do so or where it would be an exercise in vain.

While the superior Courts of our country have over the years upheld the said submission of the learned President's Counsel[25], in several other cases, it has been held that futility will not prevent the Court from issuing a Writ if the issue

[25] See P.S.Bus Company vs Ceylon Transport Board 61 NLR 491 at 495.

is of public importance or where laws delays has given rise to the objection of futility, as in this case.

In **Selvamani vs Dr. Kumaravelupillai and Others**[26] the Petitioner challenged the decision to demote him to the post of Sanitary Labourer from that of Project Operator. After being demoted, the Petitioner had been sent on vacation of post, which order had not been challenged by him. In this background, Sisira de Abrew J held as follows:

> "Even if this application of the Petitioner is granted, he is not entitled to resume his earlier office in view of the Order of vacation of post. Therefore issuing a writ of Mandamus in this case would be futile. A writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served."

In **Ratnasiri vs Ellawala**[27] what was sought to be quashed was the decision said to have been made by the Transfer Board, to whom the power of transfer has been delegated by the Public Service Commission. However, the Public Service Commission had approved and adopted the decision of the Transfer Board and no relief has been sought against that decision. Marsoof J P/CA (as he then was) held that it would be futile to grant the reliefs prayed for since it would still leave intact the decision of the Transfer Board.

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[26] 2005 (2) Sri LR 99.
[27] 2004 (2) Sri LR 180 at 208.

In **Centre for Policy Alternatives (Guarantee) Limited vs Dayananda Dissanayake**[28], the appellant had filed two applications in the Court of Appeal challenging the appointment of the 2nd Respondent as the Chief Minister of the Uva Province on the basis that their nominations were not valid insofar as their names were not included in the nomination papers put forward by their respective parties or groups for the Provincial Council Elections in question and therefore could not be nominated to fill a vacancy in the membership of the Council that occurred subsequently. After argument, this Court had dismissed the said applications. On appeal, it was contended that the 2nd Respondent had ceased to hold office as Chief Minister and that it would be futile to hear and determine the appeals. It was argued by the Appellants that if the objection of futility is now upheld, the Court of Appeal judgment will be regarded as authoritative and binding, in respect of all future vacancies in any Provincial Council, and the Commissioner would be bound to act on the basis of that judgment, thereby giving rise to fresh litigation.

Mark Fernando J having considered the issue of futility, held as follows:

> "In this case we are not faced with a situation in which the impugned decision or declaration had ceased to be operative before the litigation commenced " (as in *Punchi Singho v Perera,*[29]) or where an order for relief might be futile because the official to whom it was directed had lawful authority to revoke it (as in *Ramaswamy v Moregoda*[30]). On the contrary, **it**

[28] 2003 (1) Sri LR 277.

[29] 53 NLR 143; An application for a mandate in the nature of a Writ of quo warranto does not lie where the respondent to the application has already resigned from the office in respect of which the application is made and no advantage will be gained by the issue of the Writ.

[30] 63 NLR 115. A Writ of mandamus directing that a visa be granted will not be issued where the Controller of Immigration and Emigration has the power to cancel the visa as soon as it has been issued. The respondent is

is the law's delays which have given rise to the objection of futility. In *Sundarkaran v Bharathi,*[31] the petitioner prayed for certiorari to quash the refusal to issue him a liquor license for 1987 and for mandamus to grant him that license. In September 1987 the Court of Appeal dismissed the application. In November 1988 - long after the end of the relevant year - this Court set aside the judgment of the Court of Appeal, quashed the decisions of the respondents, and ordered that the **Respondents should make due inquiry upon its merits in regard to any *future* application** which the Petitioner might make for a liquor license. Amerasinghe, J, observed that the Court would not be acting in vain, and that quashing the decision not to issue him a license for 1987 and requiring that he be fully and fairly heard before a decision is arrived at with regard to any future application would not be a useless formality."

Mark Fernando J held further that "this Court would not be acting in vain in setting aside the judgment of the Court of Appeal, as it is in the public interest that the Commissioner, political parties, independent groups, candidates and voters should know with certainty the procedure for the filling of vacancies in Provincial Councils."

The above decision was cited with approval by Marsoof J in **University of Peradeniya vs. Justice D.G. Jayalath, Chairman University Services Appeals Board and Others**[32].

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thus able to render ineffective any mandate requiring him to issue a visa, and for that reason, it would be futile to issue the Writ.

[31] 1989 (1) Sri LR 46.

[32] 2005 (3) Sri LR 337.

The question that must now be considered, in the light of the above judgments, is whether issuing a Writ of Certiorari to quash '**A6**' and '**A7**' would be futile or an exercise in vain. It is clear from the above judgments that the facts and circumstances of each case have been taken into consideration in deciding whether a Writ should issue or not, and that it is difficult to lay down a rule. This Court, while being reluctant to exercise its discretion where it would be futile to do so, takes the view that it would be open to this Court to issue the Writ in any case in which the facts and circumstances warrant such a course of action.[33]

Accordingly, this Court is of the view that this is a fit case where its discretion should be exercised, for two reasons. The first is that the decision of the 1st Respondent was taken after this Court had quashed the extension of the time period available for the Inquiry Officer to submit his report and there was a binding decision between the parties. This demonstrates not only the blatant disregard that the 1st Respondent had towards a judgment of this Court but also the motives with which the 1st Respondent had acted.

The second is the public importance that is attached to the issue before this Court. Pradeshiya Sabhas play an extremely important role in the day to day affairs of the people and to deprive the people of their duly elected Chairman without any legal basis affects the smooth administration of the pradeshiya sabha and the quality of the services provided to the people. While it is absolutely important that prompt and effective action is taken against any mismanagement or abuse of power by a Chairman or member of a local authority, it is equally important that the checks and balances that have been

[33] Vide Mendis, Fowzie and Others Vs. Goonawardena and G.P.A. Silva 1978-79 (2) Sri LR 322 at page 357.

laid down by the legislature should be strictly adhered to. Where it is apparent to this Court, as in this case, that a decision has been arrived at by ignoring the said checks and balances, it is not safe to allow such decisions to remain, as there is always the possibility of such action being repeated.

For the aforementioned reasons, this Court issues a Writ of Certiorari in terms of paragraphs (c) and (d) of the prayer to the petition quashing the decision contained in '**A6**' and '**A7**' to remove the Petitioner from the post of Chairman of the Kandy Kadawath Sathara and Gangawata Korale Pradeshiya Sabha. This Court makes no order with regard to costs.

Judge of the Court of Appeal