

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

Kumudini Madugalle,
No. 42/5S, Kandawatta Road,
Battaramulla.
Petitioner

CASE NO: CA/WRIT/540/2019

Vs.

1. National Housing Development
Authority,
No. 34, Sir Chitampalam A.
Gardiner Mawatha,
Colombo 02.
2. Ocean View Development
Company (Pvt) Ltd.,
No. 25, Ocean Tower, Station
Road
Colombo 4.
3. Condominium Management
Authority,
1st Floor,
National Housing Development
Authority,

No. 34, Sir Chitampalam A.
Gardiner Mawatha,
Colombo 02.

4. Hon. Mahinda Rajapakse,
Minister of Urban Development,
Water Supply
and Housing Facilities,
No. 35, 'Lakdiya Medura',
New Parliament Road, Pelawatta,
Battaramulla.
5. Secretary,
Ministry of Urban Development,
Water Supply
and Housing Facilities,
2nd Floor, "Sethsiripaya"
Battaramulla.
6. Registrar of Land,
Land Registry,
Sir Marcus Fernando Mawatha,
Colombo 7.
7. Mainland Global (Pvt) Ltd.,
No. 160A, Poorwarama Road,
Colombo 5.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Chinthaka Mendis with Dhanushka
Rajaratnam for the Petitioner.

Indumini Randeny, S.C., for the 1st, 3rd, 5th
Respondents.

Kamal Dissanayaka with Sunil Withanage and
Atheek-Imam for the 2nd Respondent.

Wasantha Fernando for the 7th Respondent.

Argued on: 09.06.2020

Decided on: 16.06.2020

Mahinda Samayawardhena, J.

By Deed of Transfer marked P1, the 1st and 2nd Respondents as joint vendors sold to the Petitioner the residential condominium unit marked 1A/F1/P3 depicted in Plan 1299A, together with the parking space marked 1A/F1/P3/A3 in the same Plan, located on the “ground floor” of Block A. The complaint of the Petitioner is that she was not given the said parking space, and that parking space, together with some other allotments, has now been earmarked to be sold to the 7th Respondent by the 2nd Respondent. By this writ application, the Petitioner seeks to quash by certiorari the decision of the 1st and/or the 2nd and/or the 4th and/or the 5th Respondent to alienate the said parking space on the ground floor of Block A to the 7th Respondent or any other person.

Even if the Petitioner’s version of events is entirely correct, I have no doubt the Petitioner is not entitled to invoke the writ jurisdiction of this Court to remedy the situation. The Petitioner’s grievance stems from the violation of the contractual

obligation based on the said Deed by the 1st and 2nd Respondents. Then the proper forum for the Petitioner to go before for redress is the District Court.

The Petitioner appears to have invoked writ jurisdiction of this Court rather than the civil jurisdiction of the District Court seeking ordinary remedies such as damages, specific performance against the violation of the contract because the 1st Respondent is the National Housing Development Authority, the 4th and 5th Respondents are the Urban Development Authority, and the 2nd Respondent is an incorporated Company whose major shareholders are the National Housing Development Authority and the Urban Development Authority.

In *Jayaweera v. Wijeratne* [1985] 2 Sri LR 413, this Court held “Where the relationship between the parties is a purely contractual one of a commercial nature neither certiorari nor mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of natural justice even if one of the parties is a public authority.”

G.P.S. de Silva J. (later C.J.) at page 416 reasoned:

It is of the utmost significance that the decision sought to be quashed by certiorari is a decision founded purely on contract. The act or decision complained of arose from an alleged breach of contract. The fact that one of the parties to the contract is the “Competent Authority” appointed by statute cannot alter the intrinsic character of the decision sought to be quashed by certiorari. The decision is one taken wholly within the context of the contractual

relationship and not in the exercise of the powers of a public authority as such. It invoked no administrative powers or authority. It is a decision made in the exercise of a power which springs from contract. In my view, it is a decision clearly within the area of private law and the remedies available are the private law remedies such as damages, declaration, or injunctive relief. On the other hand, Administrative Law is primarily, if not entirely, concerned with the exercise of powers and duties of governmental, statutory and public authorities. Contractual rights, devoid of a statutory flavour, are manifestly beyond the scope of certiorari.

This reasoning is in line with the analysis found in *De Smith's Judicial Review* (8th Edition) at page 148:

The current position on amenability to judicial review of situations involving contracts is the product of two policies. One is that judicial review, as a remedy of last resort, is inappropriate where there is another field of law governing the situation. Thus, contract disputes are normally to be left to the general law of contract...rather than judicial review...The other policy is to recognise that some public functions may be carried out through the medium of contractual relationships, which justifies the use of the Administrative Court's judicial review supervisory jurisdiction.

De Smith further states at 148-149:

In the orthodox approach, the Court assumes that the fact that the source of a public authority's power is statutory is in and of itself insufficient to make a dispute about a contract amenable to judicial review; the Court therefore goes on to consider whether there is some additional "sufficient public element flavor or character" to the situation. A more straightforward approach (though not one widely applied by the Courts) would be to say that if the contractual decision in issue involves that exercise of a statutory power, then in principle it should be subject to judicial review and the Court should consider whether any of the grounds of review have been made out.

As in other contexts, in working out whether a decision is susceptible to judicial review the Court considers two main factors. It will have regard to the source of the power under which the impugned decision is made. If this is purely contractual, judicial review is unlikely to be appropriate; some close statutory (or prerogative) underpinning of the contract will normally be needed. Alternatively, the Court may consider whether the function being carried out by the defendant is a public function.

Although Wade in his treatise *Administrative Law* (11th Edition) at page 673 does not find favour with the exclusion of contractual obligations from judicial review thereby allowing for "wide regions of administrative power to escape from judicial control, contrary to constitutional principles", he nevertheless acknowledges the present trend that "Contractual obligations are

not enforceable in judicial review, unless the question is whether the contracting authority has exceeded its powers”.

In *Weligama Multi Co-operative Society v. Daluwatte* [1984] 1 Sri LR 195 at 199, a Full Bench of the Supreme Court stated:

Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by Mandamus the duty to be performed must be of a public nature and not of merely private character.

The Writ will not issue for private purposes, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by the ordinary contractual remedies such as damages, specific performance or injunction. They are not enforceable by Mandamus which is confined to public duties and is not granted where there are other adequate remedies.

In *Gawarammana v. The Tea Research Board* [2003] 3 Sri LR 120, it was held:

Powers derived from contract are matter of private law. The fact that one of the parties to the contract is a public authority is not relevant since the decision sought to be quashed by way of certiorari is itself was not made in the exercise of any statutory power.

The conclusion in *Mendis v. Seemasahitha Panadura Janatha Santhaka Pravahana Sevaya* [1995] 2 Sri LR 284 is also to the same effect.

In *De Silva v. Sri Lanka Telecom* [1995] 2 Sri LR 38, the telephone of the Petitioner was disconnected. The Petitioner sought a writ of certiorari to quash the said decision and a mandamus on the Director of Communications to restore the facility. This Court dismissed the application *in limine*, as the relationship between the parties was contractual. At page 41 the Court observed:

Learned Counsel for the Petitioner submitted that the agreement to provide a telephone line is one entered into in pursuance of a statutory duty to provide telephone facilities and this application does not fall within the province of pure contract but within the realm of the statutory function of a statutory body. I am unable to accept this submission. The decision sought to be quashed is a decision founded purely on contract. The telephone was disconnected for failure to settle the outstanding bills as provided for in the agreement. This was a decision taken wholly within the context of the contractual relationship between the parties and not in the exercise of the powers of a public authority. Neither Certiorari nor Mandamus will lie to remedy the grievances arising from an alleged breach of contract.

The Judgment in *Lanka Marine Services (Pvt) Ltd v. Sri Lanka Ports Authority* [2010] BLR 187 is in the same tenor, where Sripavan J. (later C.J.) stated at 188 “*Certiorari lies where statutory authorities with powers vested by Parliament exercise those powers to the detriment of the public. It does not lie to remedy grievances arising from an alleged breach of contract.*”

Looking from another perspective, the Court is generally loath to exercise writ jurisdiction where other remedies are available. (*Podi Nona v. Urban Council, Horana* [1981] 2 Sri LR 141; *Refaideen v. Siddique* [2009] BLR 223; *Obeysekera v. Albert* [1978-79] 2 Sri LR 220) I must hasten to add this is not an absolute principle and will depend on the unique facts and circumstances of the given case.

The subject matter of the instant application, which is based on a commercial transaction, eminently falls within the sphere of private law and not public law. The decision sought to be quashed by way of certiorari was not made in the exercise of any statutory power. The Petitioner does not make such a claim either. Rights accrued out of a contractual relationship, devoid of statutory flavour, are outside the scope of writ jurisdiction irrespective of the alleged violator being a public authority.

To be more specific, it is the 2nd Respondent who entered into the Agreement to Sell marked R7(1) with the 7th Respondent, for the sale of space on the ground floor of Block A, inclusive of the parking space claimed by the Petitioner. In the eyes of the law, the 2nd Respondent Company is a distinct legal entity, separate from its shareholders, directors etc. Hence the insinuation that the 1st Respondent and the Urban Development Authority, being majority shareholders, control the affairs of the 2nd Respondent Company is of no relevance. In the Judgment of *Trade Exchange (Ceylon) Ltd v. Asian Hotels Corporation Ltd.* [1981] 1 Sri LR 67, the Supreme Court makes the point clear.

The Respondent was a public commercial company incorporated under the Companies Ordinance and the fact that most of the capital was contributed by the Government or that shares were controlled by the Government did not make it an agent of the Government. The incorporated company was recognized by the law as a juristic person separate and distinct from its members and was an independent body-corporate carrying on commercial activities. Its decisions, made in the course of its business, cannot be reviewed by a superior Court by way of writ.

I must make clear this Judgment shall not be taken to mean that violations based on contracts by public bodies are totally outside writ jurisdiction. There is no such blanket prohibition. Each case shall be treated separately. De Smith in his treatise at page 148 states “*The existence of a possibility of a private law claim does not by itself however, make judicial review inappropriate.*”

For the aforesaid reasons, I refuse to issue formal notice on the Respondents. The application of the Petitioner is dismissed without costs.

Judge of the Court of Appeal