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

In the matter of an application for writs in the nature of Writ of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohamed Ismail Wahabdeen,

39A/1, O.P.P. Road,

Kalmunai - 12

Petitioner

CA /Writ /468 /2021

Vs.

1. His Lordship Jayantha Jayasuriya,
   Hon Chief Justice and Chairman,
   Judicial Services Commission,
   Colombo 12.
2. His Lordship Buwaneka Aluvihare,
   Member, Judicial Services Commission,
   Colombo 12.
3. His Lordship Sisira de Abrew (Retired),
   Ex-Member,
   Judicial Service Commission,
   Colombo 12.
4. His Lordship L.T.B. Dehideniya,
   Member,
   Judicial Services Commission,
   Colombo 12.
5. The Secretary,

Judicial Service Commission,
Colombo 12.

6. Hon. Gihan Kulatunge,
(Inquiry Officer),
High Court Judge,
Colombo.

Respondents

Before: **B. Sasi Mahendran, J.**

M.C.B.S. Morais, J.

Counsels: Faisz Musthapha, PC with N.M. Shaheid, Keerthi Thillekeratne, Bishran Iqbal and Zaid Ali for the Petitioner

Nerin Pulle, A.S.G. with Tashya Gajanayake, S.C. for the 5th Respondent

Argued On: 21.03.2025

Written Submissions On: 04.04.2025 (by the Petitioner)
03.04.2025 (by the 5th Respondent)

Order On: 28.05.2025

ORDER

B. Sasi Mahendran, J.

This order pertains to the preliminary objection raised by the 5th Respondent on the maintainability of this application.

The Petitioner filed this application by petition dated 11.10.2021, seeking *inter alia* a writ of certiorari to quash the decision of the Judicial Service Commission

marked as P17 and a writ of mandamus compelling the Judicial Service Commission to reinstate the Petitioner as a Judicial Officer.

The facts of this case are as follows:

The Judicial Service Commission has received a complaint dated 23.11.2017 by the Conservator General of Forests, referring to an alleged judicial misconduct by the Petitioner with regard to several interim orders issued by the Petitioner, who was serving as the Magistrate of the Magistrates' Court of Pottuvil in respect of 17 persons accused of having violated Section 6 of the Forest Ordinance as amended by Act No. 65 of 2009. Subsequent to the said complaint, the Commission conducted a disciplinary inquiry, at the end of which the Petitioner was found guilty of 18 charges of misconduct. Thereafter, by letter dated 27.07.2020 marked P17, such decision was communicated by the 5th Respondent to the Petitioner, informing that the Petitioner is dismissed from judicial service as a punishment for the said misconduct.

The Petitioner has preferred the present application against the said decision.

By order dated 08.08.2022, His Lordship Justice Sobitha Rajakaruna, along with His Lordship Justice Ganepola, issued notice only to the 5th Respondent.

For easy reference, an excerpt of the said order is reproduced below:

> "In these circumstances, I am inclined to issue formal notice of this case only to the 5th Respondent. I have come to the said conclusion exercising my discretion after a careful consideration of the whole matter and by reason of the special circumstances of this case. This Court is of the view that apart from the Petitioner, hearing the Attorney General who represents the Secretary to the JSC is sufficient and efficacious in arriving at a final conclusion upon the questions identified in this case for the best interest of justice."

On 21.03.2025, when the matter came up for argument before us, the Counsel for the 5th Respondent raised a preliminary objection with regard to the maintainability of this application on the basis that it would be futile.

The Court directed both parties to tender their written submissions on this matter.

Even though the Petitioner has a right of appeal against the said order in terms of Article 128 (1) or 128 (2) of the Constitution, there is no indication whether the Petitioner has exercised that right.

The impact of refusing to issue notice on the Respondents was considered by His Lordship Arjuna Obeysekere J in Ensen Trading & Industry (Pvt) Limited v. Hon. Mangala Samaraweera and others, CA/Writ/41/2019, decided on 01.04.2019 and held that;

> "In terms of Rule 3(4), the Court will consider the issuing of notices only after the application is supported in open Court. The effect of Rule 3(4) is that Court will issue formal notice only if Court is satisfied that the Petitioner has made out a 'prima facie case'. The fact that notice is refused without proceeding to hear the Respondent, does not mean that there has not been an adjudication of the matter or that the matter has not been decided by a Court of Law. Thus, when notice is refused in an application under Article 140, that is the Order of this Court on the dispute placed before Court in the petition and it is a final Order."

The main objection taken by the Respondent is that the only party on whom the notice was issued was the 5th Respondent, who was the Secretary to the Judicial Service Commission; therefore, whether such notice is sufficient to determine all issues in the case.

In light of this Court's decision to issue notice only against the 5th Respondent, it is our considered view that we are unable to determine the legality of the impugned order marked as P17 in the absence of the members of the Judicial Service Commission before this Court who decided to terminate the service of the Petitioner. The particular decision was not taken by the 5th Respondent. Therefore, we are unable to consider that the order marked P17 is ultra vires.

We are mindful that the Petitioner has failed to name the Judicial Service Commission as a party to this application. We are also mindful that the Petitioner in his petition seeks the following reliefs:

a) "Issue Notice on the Respondents;
b) Call for and examine the record pertaining to the subject matter of this Application;
c) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the decision of the Judicial Service Commission contained in the document produced marked 'P17';
d) Make an interim order directing the 5th Respondent to produce before Your Lordships Court the proceedings of the purported inquiry held by the 6th Respondent and the report/recommendations made by the 6th Respondent
e) Grant and issue a mandate in the nature of Writ of Certiorari quashing the report of the 6th Respondent which is in possession of the Judicial Service Commission
f) Grant and issue a Writ of Mandamus compelling the Judicial Service Commission to reinstate the Petitioner as a Judicial Officer.
g) Grant and issue a Writ of Mandamus compelling the Judicial Services Commission to grant the entitlements of a Magistrate and/or pay back wages to the Petitioner until he is restored to service,
h) Grant costs,
i) And grant such other and further reliefs that Your Lordships' Court shall seem meet"

Although the members of the Judicial Service Commission were named as parties i.e. 1st to 4th Respondents, the Court refused to issue notice to them. This was not challenged till now.

According to the prayer, one of the reliefs prayed for by the Petitioner is to issue a writ of mandamus compelling the Judicial Service Commission to reinstate the Petitioner as a Judicial Officer.

However, the Court has only issued notice to the 5th Respondent, the Secretary to the Commission. In terms of Article 111D (1) of the Constitution, the Judicial Service Commission consists of the Chief Justice and the 2 most senior Judges of the Supreme Court appointed by the President.

"**111 D (1)** There shall be a Judicial Service Commission (in this Chapter referred to as the "Commission") consisting of the Chief Justice and the two most senior Judges of the Supreme Court appointed by the President [subject to the approval of the Constitutional Council.)

(2) Where the Chief Justice and the two most senior Judges of the Supreme Court are Judges who have not had any judicial experience serving as a Magistrate or a District Judge], the Commission shall consist of the Chief Justice, the senior most Judge of the Supreme Court and the next most senior Judge of such Court, who has had experience as [a Magistrate or a District Judge].

(3) The Chief Justice shall be the Chairman of the Commission.]"

According to Article 111H (1) (b), it gives powers to the Commission to appoint judicial officers and scheduled public officers. Article 111H (4) gives authority to the Commission to delegate its power to the Secretary to the Commission only to make transfers in respect of scheduled public officers.

Article 111H (4) reads as follows:

"4. The Commission may by Order published in the Gazette delegate to the Secretary to the Commission the power to make transfers in respect of scheduled public officers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject tosuch limitations as may be specified in the Order."

The term 'scheduled public officers' is interpreted in Article 111M of the Constitution, which reads as follows:

"Scheduled public officer" means the Registrar of the Supreme Court, the Registrar of the Court of Appeal, the Registrar, Deputy Registrar or Assistant Registrar of the High Court or any Court of First Instance, the Fiscal, the Deputy Fiscal of the Court of Appeal or High Court and any Court of First Instance, any public officer employed in the Registry of the Supreme Court, Court of Appeal or High Court or any Court of First

Instance included in a category specified in the Fifth Schedule or such other categories as may be specified by Order made by the Minister in charge of the subject of Justice and approved by Parliament and published in the Gazette."

It is clear that the Constitution does not provide any delegation of power to the Secretary to appoint a Judicial Officer.

Our Courts have held that writs will not be issued if it would be futile.

In Mendis, Fozie, and Others Vs. Goonewardena (1978-1979) 2 SLR 322, His Lordship Vythialingam J held that:

"It is true that the quashing of the findings will not restore the civic rights to the persons affected."

In Siddeek Vs. Jacolyn Seneviratne (1984) 1 SLR 83 at page 90, His Lordship Soza J held that:

"It is necessary at this stage to bear in mind that certiorari is a discretionary remedy – see Wade: "Administrative Law" 5th Ed. (1982) pp. 546, 591. As de Smith says in his work "Judicial Review of Administrative Action" 4th Ed. (1980) p.404:

"Thus, certiorari is a discretionary remedy and may be withheld if the conduct of the applicant, or, it would seem, the nature of the error does not justify judicial intervention."

The Court will have regard to the special circumstances of the case before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality. Accordingly I uphold the order of the Court of Appeal refusing the appellant's application for the issue of a writ of certiorari and dismiss this appeal with costs payable by the appellant to the 4th respondent."

In N.L.D. Ariyaratne v. P.B.P.K. Weerasinghe and Others, SC Appeal No. 182/16, Decided on 29.06.2017, Her Ladyship S. Eva Wanasundera PCJ. Held that:

> "I observe that the primary relief sought in the Application before the Court of Appeal was for a writ of Mandamus to recommence the Arbitration de novo with a new Arbitrator. To recommence the proceedings, the Commissioner has no power under the provisions of the Industrial Disputes Act. It has to go through the hands of the Minister because it is the Minister who has the power to appoint an Arbitrator. The Application before the Court of Appeal was to grant a writ of Mandamus on the Commissioner of Labour. If Court grants a writ of mandamus directing him to recommence the proceedings, that would be futile since he cannot act in commencing the fresh arbitration without power conferred on him by any of the provisions of the Act. The Court can issue a writ of mandamus only to the Minister to recommence arbitration proceedings afresh. When the Minister is not a party to the case, granting a mandate in the nature of a writ of mandamus to the Commissioner of Labour is legally incorrect. So, the workman Petitioner's application before court was improper without the Minister as a party. The relief is wrongly set down in the prayer. No writ will be issued by Court to result in futility."

The main relief sought by the Petitioner is to compel the Judicial Service Commission to reinstate the Petitioner. But he has failed to name the Judicial Service Commission as a party. The Court has issued notice only to the Secretary, who is not a member of the Commission. Under the Constitution, the Commission could only delegate the power to appoint scheduled officers. The question arises whether the 5th Respondent has a legal duty to reinstate the Petitioner.

The following judicial pronouncements lay down the concept of writ of mandamus.

In The King v. Revising Barrister for the Borough of Hanley., The King v. The Town Clerk of Stoke on Trent, (1912) 3 KB 518 at 531, Channell J.

> "Those being the facts which I assume, a question of some difficulty arises as to whether that mistake can be set right. In my opinion it can, under a doctrine of this Court, which is an extremely useful one, and which was established by a majority of the judges in the Court of Exchequer Chamber in Mayor of Rochester v. Reg. (1) The principle laid down in that case is well

established and has to my knowledge been acted upon frequently. The principle is that a mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed; and if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and been succeeded by another person, the writ may be directed to the successor, and it is his duty to obey it; and where there is no successor, but the person who ought to have performed the duty has become functus officio, the latter may be ordered to perform it, though the time within which he could of his own motion have performed it has passed. It is a most useful jurisdiction which enables this Court to set right mistakes. That principle, it seems to me, is applicable to the present case, and it is applicable not only to the non-performance of duties which the person who ought to have performed them has refused upon demand to perform, but also to cases where the non-performance arises from mere inadvertence, where he cannot have had his attention directed to the matter and cannot have refused upon demand to perform them. The requirement that before the Court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable in all possible cases. **Obviously it cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time within which he can do it has passed**." (Emphasis added)

In Credit Information Bureau of Sri Lanka v. Messrs Jafferjee and Jafferjee (Pvt) Ltd, 2005 (1) SLR 89, His Lordship De Silva, J;

"The judicial control over the fast-expanding maze of bodies affecting rights of the people should not be put into watertight compartments. It should remain flexible to meet the requirements of variable circumstances.

There is rich and profuse case law on mandamus on the conditions precedent to the issue of mandamus appear to be:

(a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought (R. v Barnstaple Justices exp. Carder. The foundation of mandamus is the existence of a legal right (Napier ex parte).

(b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.

(c) The legal right to compel must reside in the applicant himself (R. v Lewisham Union)

(d) The application must be made in good faith and not for an indirect purpose.

(e) The application must be preceded by a distinct demand for the performance of the duty.

(f) The person or body to whom the writ is directed must be subject to the jurisdiction of the court issuing the writ.

(g) The Court will as a general rule and in the exercise of its discretion refuse writ of mandamus when there is another special remedy available which is not less convenient, beneficial and effective.

(h) The conduct of the applicant may disentitle him to the remedy,

(i) It would not be issued if the writ would be futile in its result.

(j) Writ will not be issued where the respondent has no power to perform the act sought to be mandated.

The above principles governing the issue of a writ of mandamus were also discussed at length in *PK. Benarji* v *H.J. Simonds*. Whether the facts show the existence of any or all pre-requisites to the granting of the writ is a question of law in each case to be decided not in any rigid or technical view of the question, but according to a sound and reasonable interpretation. **The court will not grant a mandamus to enforce a right not of a legal but of a**

purely equitable nature however extreme the inconvenience to which the applicant might be put." (Emphases added)."

In Janak Housing (Pvt) Ltd. and Another v. Urban Development Authority, 2008 2 SLR 302 at page 304, His Lordship S. Sriskandarajah, J. held that;

"The petitioner to seek a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. Therefore that a mandamus may be issued to compel something to be done under a statute and it must be shown that the statute imposes a legal duty. In *Ratnayake and Others v C.D. Perera and Others* at 456 Sharvananda, J. with Victor Perera, J. and Colin-Thome, J. agreeing held;

> *"The general rule of mandamus is that its function is to compel a public authority to do its duty. The essence of mandamus is that it is a command issued by the Superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. "*

In the instant case, there is no legal duty owed by the 5th Respondent to the Petitioner. When there is no legal duty, the Court has no power to issue a writ of mandamus as prayed by the Petitioner to reinstate the Petitioner as a Judicial Officer. Further, we note that the 5th Respondent is not a member of the Judicial Service Commission. Therefore, this Court is of the view that issuance of the writ of mandamus as prayed by the Petitioner, in these circumstances, would be futile.

We uphold the preliminary objection raised by the 5th Respondent and dismiss the action accordingly

JUDGE OF THE COURT OF APPEAL

M.C.B.S. Morais, J.

I AGREE

JUDGE OF THE COURT OF APPEAL