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

In the matter of an Application under Article 140 of the Constitution for mandates in the nature of Writs of *Certiorari and Prohibition.*

**C.A.(Writ)Application No. 357/2010**

01. Anthony Nirmal Fernando.
02. Mohamed Reyaz Mihular.
03. Timothy John Surendraraj Rajakarier.

Joint Liquidators of Bonaventure Apparels Lanka (Private) Limited, all of KPMG Ford Rhodes Thornton & Company of No.32A, Sir Mohamed Macan Marker Mawatha, Colombo 03.

**Petitioners**

**Vs.**

01. Registrar General of Companies,
Companies House,
No.400,
D.R. Wijewardane Mawatha,
Colombo 10.

02. The Hon. Attorney General,
The Attorney General's Department,
Hulftsdorp,
Colombo 12.

**Respondents**

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| **BEFORE** | : | **ACHALA WENGAPPULI, J.** |
| **COUNSEL** | : | Dr. Harsha Cabral PC with Buddhika Illangathilake for the Petitioners.<br>Anusha Samaranayake S.D.S.G. for the Respondents. |
| **ARGUED ON** | : | 09.12.2019 |
| **WRITTENSUBMISSIONS TENDERED ON** | : | 25.09.219 &05.09.2020 ( by the Petitioner)<br>24.09.2019 ( by the 1st Respondent) |
| **DECICED ON** | : | 04.09. 2020 |

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**ACHALA WENGAPPULI, J.**

The Petitioners are the joint liquidators of Bonaventure Apparels Lanka (Private) Ltd., (hereinafter referred to as the "Company"), appointed by the District Court of *Negombo* in case No. 2425/SPL, after it had decided to liquidate the said Company under the provisions of the Companies Act No. 17 of 1982, on 23.07.2001. (hereinafter referred to as the said "Act"). They also functioned as liquidators of Bontex Lanka (Private) Ltd., appointed by the said Court, after it had decided to liquidate the said Company in case No. 2424/SPL on 14.05.1999 on the application of Messrs Kay Jay Agencies Limited.

It is stated by the Petitioners that they have been discharging their duties duly as the Liquidators of the said two Companies and have

submitted the accounts of the receipts and payments in relation to the said two Companies to the 1st Respondent, as required by Section 296 of the said Act, who accepted the same "*without any demur*".

The Petitioners claim that they became aware that the said two Companies had been included in the list published on 05.05.2009 in the "Daily News" newspaper by the 1st Respondent in terms of Section 487(3) of the Companies Act No.7 of 2007 as Companies that are liable to be struck off, in terms of the said Section upon their failure to apply for re-registration.

In challenging the legality of the said "decision" of the 1st Respondent to include the said two Companies in the list of Companies, which are liable to be struck off, the Petitioners, by their applications in WRT 357/2010 and WRT 358/2010, have sought Writs of Certiorari in quashing the inclusion of the names of Bonaventure Apparels Lanka (Pvt.) Limited and Bontex Lanka (Private) Ltd., in the list of Companies that are liable to be struck off, ,in terms of Section 487(3) for their failure to apply for re-registration.

At the hearing of the two applications, the parties agreed that a common judgment could be pronounced by Court on them since both these applications (WRT 357/2010 and 358/2010) were in fact based on an identical legal issue concerning the inclusion of their names in the list of Companies that are liable to be struck off.

Learned President's Counsel for the Petitioners contends that Section 487(2) of the Companies Act No. 07 of 2007 required all "existing Companies" to apply for re-registration and for the assignment of a new

Company number within 12 months coming into operation of the said Act of No. 7 of 2007. If a Company failed to make such an application, the 1st Respondent, after having caused to publish the name of such Company in a daily newspaper, would strike its name off from the register maintained by him. Learned President's Counsel made reference to Section 529 of the said Act where the word Company is defined as "a Company incorporated under this Act or an existing Company" and since the District Court had already made order that the two Companies are liquidated, they could not be considered as existing Companies.

Therefore, the Petitioners claim that both these Companies, having ceased all operations pursuant to the winding up order made by the District Court of *Negombo,* were already under liquidation, and therefore could not be considered as "existing Companies" within the meaning of Section 487(2) of the Companies Act No. 7 of 2007 since the affairs of the said Companies are completely wound up, the Court shall, upon an application made by the Petitioners, would have to make an order that the Companies be dissolved, which is in terms of Section 395 of the Companies Act, similar in effect to the striking off the name of the Company from the register in terms of Section 487 of the Companies Act.

In invoking the jurisdiction conferred under Article 140 of the Constitution by the two applications, the Petitioners seek the issuance of Writs of *Certiorari* in quashing the "decision" to include the names of Bonaventure Apparels Lanka (Pvt.) Ltd. and Bontex Lanka (Private) Ltd., in the list of Companies that are liable to be struck off from the register maintained by the 1st Respondent under Section 473. They also seek issuance of a Writs of Prohibition, in restraining the 1st Respondent from

striking off the names of Bonaventure Apparels (Pvt.) Ltd. and Bontex Lanka (Private) Ltd. from the said register maintained by the 1st Respondent. They claim that the decision of the 1st Respondent to include the Company in the list of Companies liable to be struck off in terms of Section 487(3) for failure to apply for re-registration (tendered and marked as P4) is therefore "*arbitrary, unlawful, illegal, unreasonable, irrational, ultra vires of the powers of the 1st Respondent, not a bona fide exercise of the statutory powers*" vested in him and therefore *ex facie* null and void.

In resisting the Petitioner's application, the 1st Respondent states in his objections that the Company is an "existing company" within the meaning of the relevant provisions of the Companies Act No. 7 of 2007 and there are consequences which follows upon noncompliance of the statutory provisions contained in Section 487 of the Companies Act No. 7 of 2007 by operation of law, which automatically triggers upon the failure to apply for re-registration leaving no discretion with him.

At the inquiry into the application of the Petitioners held by this Court on 09.12.2019, learned President's Counsel for the Petitioners contended that at the time the District Court made order that the two Companies had been wound up, Section 487(4) of the Companies Act No. 17 of 1982, which contained the applicable law at that point of time, had no specific provisions recognising the status of the Petitioners as liquidators of the Company as the persons who could apply to the 1st Respondent to have a new numbers assigned to the two Companies.

Learned Deputy Solicitor General, in her reply contended that the process sought to be quashed by the Petitioners is clearly an automatic

process, which is set out in motion by operation of law, leaving no discretion on the part of the 1st Respondent and due to that reason, the impugned act of inclusion of the names in the list published is not amenable to Writ jurisdiction. She also stressed that the 1st Respondent had only made a publication and not made a determination and on that ground too no Writ lies.

Learned Deputy Solicitor General was of the view that the Petitioners could have acted under the provisions of Section 487(5) of the Companies Act, within a period of six months since the publication, as the wording of the Section indicates inclusion of liquidators.

In view of the submissions of the parties, it appears that one of the core issues that had to be determined is whether the two Companies could be considered as "existing Companies" in respect of Section 487(2) of the Companies Act or not. Its relevant to note that both Act No.17of 1982 and No.7 of 2007 had identical provisions on this issue.

It is undisputed that there is no application by either of the two Companies for re-registration and the 1st Respondent had included the two Companies in the list of Companies that had been published in the newspapers which are to be struck off from the list of Companies.

The District Court of *Negombo* made orders of liquidation and appointed the Petitioners as liquidators in 1999 and 2000. The 1st Respondent had published the names in newspapers on 05.05.2007. By then, the Companies Act No. 17 of 1982 had succeeded by the Companies Act No. 7 of 2007. It is the submission of the parties that the provisions of Act No. 7 of 2007 that are applicable to the instant applications.

Section 487(2) of the Companies Act No 7 of 2007 states as follows;

> *"Within a period of twelve months from the coming into operation of the Act all existing companies shall apply to the Registrar to assign a new number as its company number, in a form as may be prescribed by the Registrar. The new number so assigned shall be entered in the register and also on the fresh certificate of incorporation to be issued under the provisions of subsection (6) of section 485."*

Section 529 of the said Act where the word Company is defined as *"a Company incorporated under this Act or an existing Company"* and if the two Companies are not "existing Companies" as per the definition of the Section, then these provisions have no application since they were not incorporated under the Act No. 7 of 2007 but under the provisions of Act No. 17 of 1982.

The two Companies that came into existence with its incorporation under the Act No. 17 of 1982, were under compulsory liquidation when the Act No. 7 of 2007 was enacted. The question whether the two Companies could be considered as "existing Companies" must be answered in the light of the statutory provisions governing their dissolution.

Section 316(1) of the Act No. 7 of 2007 states "where the affairs of a Company have been completely wound up, the Court shall where the liquidator makes an application on that behalf, make an order that the Company be dissolved from the date of such order and the Company shall be dissolved accordingly."

It is clear that the Petitioners have not made any applications to Court that the affairs of the two Companies have been completely wound up. The Court had not made orders that the two Companies be dissolved. It has been said that "legal personality of the Company ceases to exist with the making of the Order of dissolving the Company by Court", thus marking the terminal point of existence the Company under compulsory liquidation. Unless the affairs of the two Companies have been "completely wound up" and the Court had made orders that the two Companies be dissolved, it necessarily follows that the two Companies should therefore be considered as" existing Companies" as far as the provisions of Section 478(2) is concerned.

It had been observed by the then Supreme Court in ***Hire Purchase Company Ltd. & Another v Fernando*** 79 (II)NLR 15 that;

> *"As is well known a company comes into existence as a legal personality on its incorporation and ceases to exist as such on its dissolution. Winding up or liquidation is the process whereby the management of the company's affairs is taken out of its directors' hands. A liquidator is appointed to administer the property of the company. He must apply the assets to the payment of the creditors in their proper order. The point to be remembered is that throughout this process of winding up the company does not cease to exist as a legal entity (vide the proviso to section 219 of the Companies Ordinance)."*

The conclusion reached by this Court on the status of the two Companies that are under liquidation is not in conflict with the rest of the

provisions that govern the affairs of liquidators since Section 292(1)(b) of Act No. 7 of 2007, empowers the Petitioners *"to carry on the business of the company so far as may be necessary for the beneficial winding up of such company"* and Section 292(2)(b) states that the liquidator in a winding up by the Court shall have power *" to do all acts and to execute in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use when necessary, the seal of the Company, ...".*

Therefore, the two Companies should have applied for re-registration. Then the question arises whether the Petitioners could have made the application for re-registration in view of the statutory provisions of Section 487(4) of the Act No. 7 of 2007.

Section 487(4) states that;

> *"During the period of six months referred to in sub section (3), in addition to a director of the Company, shareholder of such company or a person who has registered a charge under section 102 or a person who has a money claim pending before a Court or in arbitration proceedings, shall also be entitled to apply to the Registrar to have a new number assigned to such company under subsection (2)".*

Learned President's Counsel contended that the Petitioners, being the liquidators of the two Companies, were not recognised by the said sub section by conferring them with an entitlement to apply to the Registrar of Companies for re-registration. Learned DSG did not agree. She contends that the words " in addition" and " also" in the said subs section denotes that the list of the individuals that are stated therein are not exhaustive and

should be considered as similar to the usage of the word "inclusive of" in statutes indicating the references are not exhaustive, and therefore the Petitioners could have made applications for re- registration of the two Companies, which they failed to.

With due respect to the learned DSG, this Court holds a different view in relation to the usage of the words "in addition" and "also" in the said sub section, which in its opinion could not be considered as a situation similar to the one where the Legislature had indicated its intention by using the words "inclusive of" in the enactment of the relevant statutory provisions. The plain reading of the said subsection indicate that the words "in addition" and "also" have been used to stress the limitation of the scope of individuals who are recognised within the said sub section, a position contrary to the one that had been advanced on behalf of the 1st Respondent.

In these circumstances, and having considered the wording of the said sub section, this Court is of the view, that there is merit in the submissions of the learned President's Counsel and in fact it had been journalised that there is a proposal to amend Section 487 upon recommendations of the Company Law Advisory Committee of the Law Commission, which would have resolved the contentious issue. The two matters were mentioned by the Court from November 2013 to June 2019 to facilitate such a move but the issue could not unfortunately be resolved.

The role of a Court in this type of situation is aptly described in the Supreme Court in its judgment of ***Sriyani Silva v Iddamalgoda, Officer-in- Charge, Police Station Payagala*** (2003) 1 Sri L.R. 14, which had quoted

the judgments of ***Barru v Lachchman*** 111 PR 193 and ***Rananjaya Singh v Bainath Singh & Others*** AIR 1954 SC 749, where it has been stated thus;

> *" ... if the result of giving effect to the plain meaning is unfortunate, it is for the Legislature to take action to remedy the defects of the law as enacted and it is not for the Courts to usurp functions of the Legislature ..."*

The other core issue that had been raised before this Court, in view of the submissions of the learned Deputy Solicitor General is whether the statutory provisions contained in Section 478(3) confers a discretion on the 1st Respondent in causing the publication of the names of the two Companies in a daily newspaper or not.

Upon perusal of the wording of the Section 478(3), it is evident that it deals with two situations. Firstly, it deals with the situation "where an existing company fails to comply with the requirements imposed under subsection (2) of this Section within the time specified therein, then the Registrar shall cause to be published the name of such Company in a daily newspaper in Sinhala, Tamil and English language, and ...". Secondly the said sub section also deals with a situation which had not arisen for consideration as yet, as it states "... where such company continues to fail to comply with those requirements, thereafter, the Registrar shall, within six months of the publication of its name in the newspapers, strike off the name of such company from the register maintained by him under the provisions of Section 473".

Learned Deputy Solicitor General, in her submissions had emphasised that the presence of the word "shall" in the said subsection left

no discretion on the 1st Respondent as it mandated that he "shall cause to be published the name of such Company in a daily newspaper" if such Company had failed to apply for re-registration. It seems that there is no discretion conferred by the said subsection on the 1st Respondent in respect of a Company which had failed to make an application for re-registration within the time specified in sub section 478(2).

It is stated by *Jain* and *Jain,* in their authoritative text on The Principles of Administrative Law (1988) 4th Ed, at p. 325 that;

> *"Functions dischargeable by the administration may either be ministerial or discretionary. A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or judgment of the authority. it does not involve investigation into disputed facts or making of choices."*

The impugned actions, upon which the Petitioners have sought Writs of Certiorari, that the 1st Respondent's causing the publication of the names of the two Companies in the daily newspapers, are clearly functions mandated by law since there was no discretion was left on the 1st Respondent, when a Company failed to apply for re-registration within the stipulated period of time, not to publish the name of such a Company.

In the Privy Council judgment of ***Naakuda Ali v Jayaratne*** 51 NLR 457, Lord *Radcliff* has stated;

*"... there is really no ground for holding that the Controller is acting judicially or quasi judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of Certiorari."*

This Court, in its judgment of ***General Secretary of the United National Party v The Commissioner of Elections & Others*** (1998) 2 Sri L.R. 57 has stated its view on the availability of judicial review over the functions of a public officers and the issuance of a Writ of *Certiorari;*

*"It was argued that the functions of the elections officers are purely ministerial and therefore not amenable to a Writ of Certiorari. The law has developed since the decision in Electricity Commissioners (1924) 1 KB 171. The Primary purpose of Certiorari in modern administrative law is to quash an ultra vires decision. That is, where a public body acts in a way that is not permitted, or exceeds the powers that the Courts recognize the body as possessing, whatever the source of the power. The effect of Certiorari is to make it clear that the statutory or other public powers have been exercised unlawfully, and consequently to deprive the public body's act of any legal basis. - Clive Lewis - Judicial Remedies in Public Law, p. 145. When an order is quashed, it is the legality of the order itself, and not the decision to make it, with which the law is concerned. - Wade & Forsyth - Administrative Law, 7th Ed. p. 634. The modern function*

*of Certiorari: is to provide an appropriate form of relief to a successful applicant; the task of setting the boundary of the Court's public law power of review is now determined by the notion of the need for judicial supervision of public functions. De Smith, Woolf and Jowell - Judicial Review of Administrative Action, 5th Ed. p. 693."*

In view of the above considerations, this Court is of the view that the impugned act of the 1st Respondent, sought to be quashed by the issuance of Writs of Certiorari is not tainted with any illegality that therefore not an act that should be nullified by the issuance of a Writ of Certiorari. On that account, issuance of Writ of Prohibition does not arise.

The applications of the Petitioners, namely Writ Application Nos.WRT 357/2010 and WRT 358/2010 are accordingly refused. The two petitions of the Petitioners in relation to the said two applications are hereby dismissed.

Parties will bear their costs.

**JUDGE OF THE COURT OF APPEAL**