

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, Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Republic.

Case No. CA (Writ) Application 327/2013

1. Free Trade Zones & General Services Employees Union (Nidahas Welanda Kalapa Saha Podu Sewa Sewaka Sangamaya)

2. Warahena Liyanage Don Anton Marcus
The Joint Secretary of Free Trade Zones & General Services Employees Union

3. Galgamuwa Arachchige Sudarma Shamalee
The President of Free Trade Zones & General Services Employees Union

1st to 3rd Petitioner above all of No. 141,
Ananda Rajakaruna Mawatha, Colombo 10.

4. Inter Company Employees Union (Anthar Samagama Sevaka Sangamaya)

5. Adhikari Appuhamilage Janaka Adhikari
The General Secretary of Inter Company Employees Union

6. Herath Mudiyanse Wasantha Samarasinghe
The President of Inter Company Employees Union

4th to 6th Petitioners above all of No. 12/2,
Weera Mawatha, Subootheripura, Battaramulla.

Petitioners

Vs.

1. Ms. P. Wickramasinghe
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 05.

- 1(a) Mr. Herath Yapa
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 05.
- 1(b) Ms. M. D. C. Amarathunga
Commissioner General of Labour,
Department of Labour,
Labour Secretariat, Colombo 05.
2. Gamini Lokuge Esq., MP
Hon. Minister of Labour and Labour Relations,
Ministry of Labour and Labour Relations,
Labour Secretariat, Colombo 05.
- 2(a) Wijedasa Rajapaksha Esq., MP
Hon. Minister of Justice and Labour Relations,
Labour Secretariat, Colombo 05.
- 2(b) S. B. Nawinne Esq., MP
Hon. Minister of Labour and Labour Relations,
Ministry of Labour and Labour Relations,
Labour Secretariat, Colombo 05.
- 2(c) W. D. J. Seneviratne Esq., MP
Hon. Minister of Labour and Trade Union
Relations,
Ministry of Labour and Labour Relations,
Labour Secretariat, Colombo 05.
- 2(d) Ravindra Samaraweera Esq. MP
Hon. Minister of Labour and Trade Union
Relations and Sabaragamuwa Development,
Ministry of Labour and Labour Relations,
Labour Secretariat, Colombo 05.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Chrishmal Warnasuriya for the Petitioner

Sobhitha Rajakaruna SDSG for the Respondents

Argued on: 14.05.2019

Written Submissions tendered on:

Petitioner on 19.07.2019

Respondents on 23.08.2019

Decided on: 20.05.2020

Janak De Silva J.

The 1st and 4th Petitioners are Trade Unions registered in terms of the Trade Unions Ordinance No. 14 of 1935. The 2nd, 3rd, 5th and 6th Petitioners are respectively the Presidents and Secretaries of the 1st and 4th Petitioners.

The Petitioners claim that formulating regulations to give effect to the provisions of the Industrial Disputes Act No. 43 of 1950 (as amended) (IDA Act) is exclusively vested in the 2nd Respondent Minister and must be exercised in terms of section 39(1) of the IDA Act, all such regulations tabled in Parliament, approved and notification of such approval gazetted in order for them to have legal validity and effect as set out in section 39(2) of the IDA Act.

They further claim that it is clear from the terms of section 39(2) of the IDA Act that the 2nd Respondent Minister is the sole authority empowered in law to formulate such regulations inter alia in respect of all matters for which regulations are required, for carrying out the provisions of the IDA Act or giving effect to its principles and this power cannot be re-delegated, circumvented or abdicated in any manner.

The Petitioners contend that a predecessor of the 1st Respondent issued Circular No. 02/2011 marked P7 in contravention of the power vested exclusively in the 2nd Respondent Minister and as such P7 is ultra vires and in excess of his authority.

The Petitioners are seeking the following relief:

- (a) A writ of certiorari quashing the regulations bearing No. 02/2011 dated 01/03/2011 marked P7;
- (b) A writ of mandamus directing the 2nd Respondent to proceed to take steps forthwith under section 39 of the Industrial Disputes Act No. 43 of 1950 (as amended) and carry out his statutory duty and obligation to formulate regulations to give meaningful effect to the provisions of Section 32A of the Industrial Disputes Act (Amendment) No. 56 of 1999.

Upon a perusal of Section 32A of the IDA Act (As amended by Act No. 56 of 1999) there can be no doubt that the Commissioner of Labour or an officer authorized by him in that behalf is empowered to conduct a poll at any work place in order to ascertain whether at least forty per centum of the workmen on whose behalf the trade union seeks to bargain with the employer, are members of such trade union.

The scope and ambit of this power must be understood in the context of rules of statutory interpretation.

In *Liyanage and Others v. Gampaha Urban Council and Others* [(1991) 1 Sri.L.R. 1] it was held that in construing instruments that confer power what is not permitted should be taken as forbidden. This strict doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied. Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. Acts of statutory authorities that go beyond the strict letter of this enabling provision can reasonably be considered as being incidental to or consequential upon that which is permitted, been done with a view to promoting the general legislative purpose in the conferment of power to such authorities. This is in keeping with the purposive approach to statutory interpretation. Anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by courts in an exercise of statutory interpretation.

The learned counsel for the Petitioners submitted that the power to make regulations is with the Minister which has been encroached upon in this instance by the Commissioner of Labour. In other words, he sought to establish that P7 contains regulations which only the Minister is empowered to promulgate.

Upon a careful consideration of P7 it is evident that the Commissioner of Labour did not mean to lay down any regulations therein. The word “regulation” is not found in P7. It is termed

merely as a “circular”. Then again, the use of the term “circular” is not decisive. There is a great variation in nomenclature, and it is extremely difficult to say what, if any, substantial difference there is between an order, a special order, a rule and a regulation [*Law and Orders*, Carleton Kemp Allen, 45].

Wade and Forsyth, *Administrative Law*, 8th Ed., page 851 states:

“Departmental circulars are a common form of administrative document by which instructions are disseminated, e.g. from a department in Whitehall to its local offices or to local authorities over which it exercises control. Many such circulars are identified by serial numbers and published, and many of them contain general statements of policy...They are therefore of great importance to the public, giving much guidance about governmental organisation and the exercise of discretionary powers. In themselves they have no legal effect whatever, having no statutory authority”

Our Courts have adopted a similar approach when it came to deciding whether a “circular” is a “regulation” having statutory authority. In *Piyasiri v. People’s Bank* [(1989) 2 Sri.L.R. 47] a staff circular was considered to be only a circular and not a regulation having statutory force. The Supreme Court in *Weligama Multi-Purpose Co-operative Society Ltd., v. Chandradasa Daluwatta* [(1984) 1 Sri.L.R. 195] held a circular not to be a regulation and that it did not have the status or attribute of a regulation. In *Mallika and Others v. Ruhunu Development Bank* [(2008) 2 Sri.L.R. 177] this Court held the impugned circular to be a communication between the administration of the bank and its staff.

The Circular No. 02/2011 (P7) is an internal circular addressed to several designated officers of the Department of Labour and sets out the procedure that should be followed in conducting a poll at any work place in order to ascertain whether at least forty per centum of the workmen on whose behalf the trade union seeks to bargain with the employer, are members of such trade union.

Where the Commissioner of Labour has been empowered to conduct a poll, in the absence of specific statutory provisions governing the conduct of such poll, Commissioner of Labour has the power to decide the procedure to be followed in the conduct of such poll. Such an interpretation in my view can reasonably be considered as being incidental to or consequential upon that which is permitted, being done with a view to promoting the general legislative purpose in the conferment of power on the Commissioner of Labour to conduct such poll.

That is exactly what the Commissioner of Labour has done by P7. It provides for the procedure to be followed in conducting the poll he has been authorised to do. It lays down what may be

termed as guidelines in the conduct of the poll. Such guidelines assist in establishing transparency and consistency in the conduct of such poll and prevents arbitrariness.

It does not in any way contravene any power vested exclusively in the 2nd Respondent Minister in particular his regulation making power.

Section 39(1) of the IDA Act specifies the areas in which the 2nd Respondent Minister may make regulations. None of them deal with the procedure to be followed in the conduct of such poll.

Therefore, I hold that P7 is not ultra vires the power of the Commissioner General of Labour.

The writ of mandamus also fails for that reason.

For the aforesaid reasons, I dismiss the application without costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal