

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 Mandamus, Certiorari and Writ of Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA-WRT-334-22

Dr. Mahavidanalage Nalaka Sudarshana
Gunarathna
No. 1084/1/N 5th Lane
K.A. Perera Mawatha
Athurugiriya Road, Malabe

Petitioner

1. Prof. Wajira Dissanayaka
President Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
2. Prof Ranil Fernando
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
3. Prof. Surangi Yasawardhana
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
4. Prof Janaki Hewavisanthi
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10

5. Dr. Sunil Wijesinghe
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
6. Dr. D.S Samaraweera
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
7. Dr. Anuruddha Padeniya
Member of Sri Lanka Medical Council
No. 31, Norris Canal Road, Colombo-10
8. Sheila Nilmini Fernandio
No. 5, 1st Lane, Moratu Uyana
Moratuwa.

Respondents

Before : N. Bandula Karunarathna, P/CA, J.
B. Sasi Mahendran, J.

Counsel: Tilak Marapana, PC with R.Y.D. Jayasekara and Chamith Marapana for the
Petitioners
Chathura Galhena with Thanuja Amarasinghe for the 1st to 7th Respondents

Argued On: 29.10.2024

Written 18.11.2024 (by the Petitioner)

Submissions: 18.11.2024 (by the 1st to 7th Respondents)

On

Judgment On: 16.12.2024

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner instituted this application by petition dated 14.09.2022 praying for the following reliefs:

- a. Accept the Petition, Affidavit and annexures filed by the Petitioner
- b. Issue notice on the respondents
- c. Make order granting interim relief by issuing an order staying further proceedings in the inquiry before the 1st to 7th Respondents against the Petitioner until the final determination of this application.
- d. Make order issuing a Writ of Certiorari quashing the order dated 3rd of September 2022 by which the objection raised on behalf of the Petitioner was overruled.
- e. Make order issuing a writ of mandamus directing the 1st to 7th respondents to terminate the inquiry held against the petitioner and discharge him from further proceedings.
- f. Grant costs and such further reliefs as your Lordships' Court seems meet.

The facts of this case are briefly as follows:

According to the Petition, the Petitioner is a medical practitioner who has registered with the Sri Lanka Medical Council (hereinafter referred to as the 'SLMC') and is subject to the disciplinary control of the SLMC. The Petitioner worked in different hospitals across the country and is presently engaged in private medical practice in Malabe. The Petitioner states that he received a letter dated 17.01.2012 from the Registrar of SLMC together with an affidavit by the 8th Respondent informing the Petitioner to submit the explanation within fourteen days to a complaint received by the SLMC which is now referred for a disciplinary

inquiry. The Petitioner states that he forwarded his explanation by letter dated 25.01.2012 to the said letter addressed to the President of the SLMC. The Petitioner avers that the Petitioner was summoned and participated in a preliminary inquiry before the Preliminary Proceedings Committee of the Council on 22.03.2012, 05.04.2012, and 19.04.2012. However, the Petitioner was not informed of the outcome of such inquiry.

The Petitioner further avers that, the Petitioner received a letter dated 24.10.2019 along with a charge sheet from the Professional Conduct Committee informing and requiring the Petitioner to be present for the inquiry to be held on 25.11.2019, where charges are to be inquired into and requiring the Petitioner to answer the charges in writing. The Petitioner submitted his explanation by document marked P6. According to the Petitioner, the inquiry began on 13.01.2020 where the 8th Respondent gave evidence, but the inquiry was terminated as some of the members ceased to be part of the Council. The Petitioner states that a fresh inquiry commenced on 21.05.2022 before a Panel consisting of the 1st to 7th Respondents where the 8th Respondent gave evidence.

The Petitioner further states that, when the inquiry resumed on 03.09.2022, the Petitioner came to know that there was no written complaint or report and that the affidavit marked as P2 had been treated as a complaint to commence the said inquiry. The said disciplinary inquiry was objected by the Petitioner on the basis that there is no proper complaint or report tendered by the complainant which is contrary to Regulation 2 (3) of the Regulation marked as P5C. As per the said Regulation, a complaint or report should be preferred by means of 'a written statement addressed to the Registrar setting out the facts or matters alleged against the Practitioner'.

In this context, the Petitioner invokes the writ jurisdiction of this Court seeking a writ of Certiorari quashing the order dated 03.09.2022 and a writ of Mandamus directing the 1st to 7th Respondents to terminate the inquiry against the Petitioner on the basis that there is no complaint or report against the Petitioner in accordance with the regulation published in the Extraordinary Gazette No. 75777 dated 10.03.1993 marked PC5. Therefore, failure to follow the said procedure is illegal.

When the matter was argued on 29.10.2024, the Respondents took the preliminary objection that the Petitioner has failed to make the SLMC, the Registrar of the SLMC or other members of the SLMC as parties to this application. To counter this argument, the Petitioner stated that the SLMC is not an incorporated body, therefore, it cannot be made a party to this application.

According to the documents, the Council has directed to hold an inquiry against the Petitioner under Section 3 (1) of the said Regulation. For easy reference, the said Section is reproduced below:

“1.Where any complaint or report is placed before the council by the Registrar in pursuance of regulation 2 (2), the Council shall consider the same and determine whether or not such complaint or report, or any part thereof should be referred to the Committee.

According to the above Section, it is clear that the decision to conduct a disciplinary inquiry is within the purview of the SLMC.

The Petitioner has invoked the jurisdiction to issue a writ of Certiorari to quash the decision.

Sunil F.A.Coorey, *Principles of Administrative Law in Sri Lanka*, Fourth Edition Volume II-
Page 911, states;

Availability of Certiorari and Prohibition

“The circumstances in which certiorari and prohibition will be available have been summed up by Lord Justice Atkin, an English judge, in the following famous words which on numerous occasions have been cited and followed by our courts:

" Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs."

This dictum has been analyzed as follows as laying down four conditions which must be satisfied for certiorari or prohibition to issue:-

" Whenever any body of persons, (firstly) having legal authority, (secondly) to determine questions affecting the rights of subjects, (thirdly) having the duty to act judicially, (fourthly) act in excess of their legal authority, they are subject to the controlling jurisdiction exercised by these writs."

According to the Atkinian Formula, the legal authority to hold an inquiry is with the SLMC. But according to the Respondents, they have not been made a party to this application.

It is to be noted that the SLMC is governed by the Medical Ordinance No. 26 of 1927 as subsequently amended. Section 12 (1) of the said Ordinance relates to the constitution of the SLMC which is reproduced for convenience as follows:

“1) The Medical Council shall be a body corporate by the name and style of the "Sri Lanka Medical Council" (hereinafter referred to as the "Medical Council") having perpetual succession, and a common seal with power to sue and to be sued in such name and to acquire and hold property movable and immovable and shall consist of...”

It is pertinent from the said Section that the SLMC is a body corporate that can sue and be sued under its name. However, in the instant application, the Petitioner has not made the SLMC a party to this application which decided to entertain the virtual complaint by the said order dated 03.09.2022, which is sought to be quashed by the Petitioner.

In this context, this Court is concerned about the principle of ‘necessary parties’ which is discussed in the following judgments:

In Rawaya Publishers and Others v. Wijedasa Rajapaksha and Others, 2001 (3) SLR 213, at page 216, his Lordship J.A.N. De Silva, J (P/CA) held that:

“In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of *Udit Narayan Singh v. Board of Revenue* it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of

them could be made respondents in a representative 'capacity (*vide Prabodh Derma v. State of Uttara Pradesh* also see Encyclopedia of Writ Law By P. M. Bakshi)"

In Wijeratne (Commissioner of Motor traffic) v. Ven, Dr. Paragoda Wimalasena Thero and 4 Others, 2011 (2) SLR 258 at page 267, his Lordship Gamini Amaratunga, J. held that:

"The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application, *Abeydeera vs. Dr. Stanley Wijesundara and another ; Farook vs. Siriwardena.*"

In Dominic v. Minister of Lands and Others, (2010) 2 SLR 398 at 405, his Lordship Sriskandarajah, J held that:

"In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of *Udit Narayan Singh v. Board of Revenue* It has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative 'capacity (*vide Prabodh Derma v. State of Uttara Pradesh* also see Encyclopedia of Writ Law By P. M. Bakshi)"

In view of the above authorities it is clear that the failure to name the necessary parties namely: the ICC Housing Private Limited, The co-owner

of the said land, Ocean View Development Company (Private) Ltd and the National Housing Development Authority as parties in this application is fatal.”

In the instant application, the Petitioner has failed to make the SLMC who made the order deciding to entertain the virtual complaint made by the 8th Respondent a party to this application. The failure to name the necessary parties, the SLMC in this application is fatal.

We are mindful that, the Petitioner has taken this objection after the evidence of the complainant and some other witnesses. Further, we are mindful that the initial complaint was made on 25.01.2012. but the Petitioner has failed to take the preliminary objection at that stage. This objection should have been taken when the charge sheet was served to him. Failure to raise the objections at the earliest opportunity implies acceptance. In other words, he has consented to proceed with the inquiry.

According to the submission of the Respondents, Rule 15(2) in the said regulation provides for the raising of preliminary objection.

"After the reading of the charge or charges, the practitioner may if he is present and if he so desires, object to any charge on point of law and upon such objection, the Attorney-at-Law may reply thereto."

We note that the Petitioner has failed to comply with the said Rule.

The Petitioner's conduct therefore is a question of law which denies him the reliefs sought from this Court. Our Courts have held that even though the Petitioner is entitled for relief, still the Courts can refuse considering his conduct.

In Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and Another (1996) 2 SLR 70 at page 73, His Lordship Jayasuriya, J held that:

“I hold that the Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has a discretion to deny him relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief. Applying these principles, I hold that this court is not disposed to grant the Petitioner discretionary relief upon this application in view of inordinate delay and laches in filing the application in Court.”

In Center for Environmental Justice and Others v. National Housing Development Authority and Others, CA/WRT/264/19, Decided on 23.02.2022, His Lordship Mohammed Laffar, J held that:

“In this context, I observe that the Petitioners have been negligent in not addressing the Court in a timely manner and that they have slept over their rights, if any, without any reasonable excuse whatsoever. Therefore, as identified above, the Petitioners’ prayer for grant of Writs by prayers (c) and (d) being substantial relief sought in their Petition, cannot be granted due to severe laches. This Court also observes that the rest of the relief sought by the Petitioners are consequential to the said relief thereto and thus will not be entitled to such.”

It is clear that the objection taken by the Petitioner after 10 years with regard to the non-availability of a complaint or report is to avoid disciplinary proceedings which has an impact on him if proven. The Petitioner should have taken this objection when the charge sheet was framed or when the complainant gave evidence.

For the above-said reasons, we dismiss the action with costs of Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL