

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

In the matter of an Application for the issue of a Writ in the nature of Writ of Certiorari & Writ of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal

Writ Application No: 396/2014

Antony Suresh Rajakumaran Muttiah
Sole Proprietor,
S P Muttiah & Sons,
No.5, Bagatalle Road,
Colombo 03.

Petitioner

Vs.

1. Dr. (Ms) Saroja Wettasinghe
Directress,
Department of National Archives,
No.7, Reid Avenue,
Colombo 07.
- 1A. Dr. Nadeera Rupasinghe
Director-General,

Department of National Archives,
No.7, Reid Avenue,
Colombo 07.

2. Dr. (Ms) Nanda Wickramasingha
Secretary,
Ministry of National Heritage,
8th Floor, Sethsiripaya,
Battaramulla.
- 2A. A W M Badusena
Secretary,
Ministry of Education,
Isurupaya,
Pelawatta,
Battaramulla.
- 2B. Sunil Hettiarachchi
Secretary,
Ministry of Education,
Isurupaya,
Pelawatta,
Battaramulla.
- 2C. J. J. Rathnasiri
Secretary,
Ministry of Higher Education and Cultural
Affairs,
No.18, Ward Place,
Colombo 07.
- 2D. Mr. Somaratne Vidanapathirana,
Secretary,

Ministry of Buddhasasana, Religious and
Cultural Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

3. Dr. Jagath Balasuriya
Hon. Minister of National Heritage,
Ministry of National Heritage,
8th Floor, Sethsiripaya,
Battaramulla.
- 3A. Akila Viraj Kariyawasam
Hon. Minister of Education,
Ministry of Education,
Isurupaya, Pelawatte,
Battaramulla.
- 3B. Hon. Dr. Wijayadasa Rajapaksa
Minister,
Ministry of Higher Education and Cultural
Affairs,
No.18, Ward Place, Colombo 07.
- 3C. Hon. Vidura Wickramanayaka,
Minister,
Ministry of Buddhasasana, Religious and
Cultural Affairs,
8th Floor,
Sethsiripaya, Battaramulla.
4. Secretary
Ministry of Construction, Engineering
Services,
Housing and Common Amenities,
2nd Floor, Sethsiripaya.

- 4A. Secretary
Ministry of Urban Development and
Housing,
17th Floor, Suhurupaya,
Sri Subhuthipura Road,
Battaramulla.
5. Director Buildings
Department of Buildings
2nd Floor, Sethsiripaya,
Sri Jayawardanapura Kotte,
Battaramulla.
6. Prof. Chitra Weddikkara
No. 31B, Albert Place,
Dehiwala.
7. Eng. M R Jeyachandran
Director-General Buildings,
Department of Buildings,
2nd Floor, Sethsiripaya,
Sri Jayawardanapura Kotte,
Battaramulla.
8. Mr. L A Tissa Ekanayaka
Ombudsman,
Office of the Ombudsman,
No,6, Elibank Road,
Colombo 05.
- 8A. Mr. K.B.K. Hirimburegama
Ombudsman,
Office of the Parliamentary,
Commissioner for Administration
(Ombudsman),
1st Floor, No.14,

R.A. De Mel Mawatha,
Colombo 04.

Respondents

Before : Dhammika Ganepola, J.

Counsel : Lakshmanan Jeyakumar with N. Aarunan for the
Petitioner.
Manohara Jayasinghe, DSG with Avanthi
Weerakoon, SC for the Respondents.

Argued On : 09.07.2024

Written Submissions : Petitioner : 07.10.2024
tendered On 1st – 5th & 7th Respondents : 19.09.2024

Decided On : 08.10.2024

Dhammika Ganepola, J.

The Petitioner in the instant application seeks a mandate in the nature of the Writ of Certiorari to quash the document mark P46 dated 27.01.2014 in which the 2nd Respondent refused to present a Cabinet Memorandum related to the matter in dispute and a Writ of Mandamus compelling the 2nd and/or 3rd Respondents to take steps including presenting a Cabinet Paper, if so required, to pay the contractor the balance payment of Rs. 17,364,873.55 as recommended in documents marked P4, P29, P30, P34, P35, P36, P39 and P43.

The Company, Muttiah & Sons in which the Petitioner is the sole proprietor had constructed a multistoried building for the Department of National Archives [DNA]. Said project was completed on 30.04.1986 after several extensions. The total contract value up to the date of practical completion had been Rs. 56,721,032.22, including Rs.17,127,310.45 of the cost of escalations. The Petitioner states that there had been a dispute between the Petitioner and DNA regarding obtaining a balance payment of the above contract value. The Petitioner had appealed to the Ombudsman in respect of the above dispute. Thereafter, the Ombudsman had determined [P4] that Rs. 55,755,656.14 as the amount that should be paid to the contractor and Rs. 22,403,884.79 as the remaining balance payment due to the Petitioner's Company out of the said amount of Rs.55,755,656.14. Further, the Ombudsman recommended that said outstanding balance to be settled upon completion of the structural adjustments and the maintenance works as agreed by the parties. Rs. 600,000 out of the Rs. 1.2 million which was the estimated cost of the above maintenance by the Director of the National Archives was to be met by the Contractor. The Petitioner states that the contractor satisfactorily completed the restoration works of the building putting its share as agreed and requested the settlement of the outstanding amount of Rs.22,403,884.79 as per the decision of the Ombudsman. It is submitted that although the Director of National Archives paid the Contractor in full with respect to the restoration contract, the outstanding amount of Rs.22,403,884.79 as per the decision of the Ombudsman was defaulted.

The Petitioner states that he was able to initiate a meeting with all relevant officers involved in the matter in dispute in view of seeking out a solution. Consequently, a meeting had been held on 25.11.2009 without the participation of the Petitioner. Petitioner claims that at the said meeting two contradictory decisions have been arrived at: one to pay the Contractor with price escalations and the other to pay the Contractor without price escalations. Said two decisions are reflected in the respective documents marks P18A and P18B. The Petitioner states that the Contractor has accepted the said amount as a part payment of the total due of Rs. 22403,884.79 but not as full and final settlement of all outstanding dues. However, it is submitted that DNA continued to evade the payment of the balance payment of Rs.17,364,873.55.

It is submitted that after several discussions the Minister of National Heritage has given instructions to the Secretary to prepare a Cabinet Paper expeditiously with

regard to the settlement of balance payments to the Contractor. Subsequently, the Secretary of the Ministry of National Heritage by his letter dated 27.01.2014[P46] had informed the Contractor that the final payment of the contract in issue was made on 13.10.2010 according to the Cabinet Decision dated 03.03.2010 and there is no possibility of presenting a Cabinet Memorandum related to this matter again. However, the Petitioner submits that the Cabinet Memorandum [P48C] seeking approval to settle a sum of Rs.5,039,011.24 to the S.P. Muttiah & Sons had been presented based on the erroneous decision [P18B] taken on 25.11.2009 to pay above amount inclusive of price escalations. Being aggrieved by the said decision reflected in P46 the Petitioner seeks reliefs as prayed for in the prayer to the Petition.

The 1st, 4th, 5th and 7th Respondents submit that the Contractor failed to complete the building as per the terms of the agreement and therefore DNA had to obtain the services of another contractor to complete the construction before its inauguration on 11th August 1986. Consequent to several meetings at the respective Ministry, a Committee recommended paying Rs. 5,039,011.24 as the balance payment inclusive of price escalation as per Document mark P18B. Accordingly, the Cabinet Memorandum [P48C] was submitted, and approval was granted by the Cabinet of Ministers for the payment of the said sum. The said amount of payment was made to the Petitioner and the same had been acknowledged by him. Therefore, the Petitioners state that there is no necessity to submit another Cabinet Paper as the payments have already been made as per the Cabinet Decision dated 03.03.2010. The 6th Respondent, served as the Chief Quantity Surveyor on behalf of Design Consortium Limited and rendered its services as Consultant Architects, Engineers and Quantity Surveyors for the project. The 6th Respondent states that the Technical Committee together with the Buildings Department and Design Consortium Limited approved the extension of time and the total contract value as 55,755,656.14 including price escalation of the project. Further, the 6th Respondent states that it is her view as per the Ombudsman's decision that the Contractor should be paid his balance dues of Rs.22,403,884.79.

The Petitioner challenges the impugned decision of the Secretary of the Ministry of National Heritage dated 27.01.2014[P46] in which it states that the final payment for the said contract was done on the 13.10.2010 by the Director National Archives according to the Cabinet Decision dated 03.03.2010. The said Cabinet Decision was followed by the Cabinet Memorandum dated 24.02.2010 [P48C] which was

submitted on the recommendations of the Committee appointed consisting of the Director of National Archives, the engineers who were engaged in the construction of the building and the consultant to look into the matter and report along with their recommendations. The said Committee has recommended that a sum of Rs. 5,039,011.24 should be paid to S.P. Muttiah & Sons as an outstanding amount inclusive of price escalations. The recommendation of the said Committee is reflected in the Document P18B. The Respondents claim that the Petitioner is not entitled for the reliefs claimed as the Respondents claim to have acted in reliance upon the accurate and due documentation in possession of them.

However, the Petitioner believes that the Minister had been misled into believing that P18B reflected the correct decision to pay Rs. 5,039,011.24 to the Contractor with price escalations while the decision to pay that amount without price escalations as per the Document marked P18A as the incorrect decision. It is observed from Document P18B that all the Committee members have placed their signatures on the decision.

Despite the existence of Document P18B, the Petitioner relies on the conflicting decision of the Committee to pay the said sum without price escalation shown in Document P18A. Nevertheless, one of the Committee members (Director Archives) had not placed her signature on Document P18A. The 2nd and 3rd Respondents dispute the genuineness of Document P18A in which the price escalation is inclusive. As well the Respondents challenged the entitlement of the amount of price escalation claimed by the Petitioner. Accordingly, there is no agreement in respect of the genuineness and the contents of Documents P18A, as well as the Petitioner's entitlement to the price escalation as per Document P18A. As such, such evidentiary matters in dispute could only be determined by hearing and giving due consideration to the relevant evidence. Under such circumstances, this Court is not in a position to make a determination based on such disputed facts.

In ***Thajudeen v. Sri Lanka Tea Board and another*** 1981 (2) SLR 471, the court observed that *"the remedy by way of an application for a writ is not a proper substitute for a remedy by way of a suit, specially where facts are in dispute and in order to get at the truth, it is necessary that the question should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the*

Indian cases of Ghosh v. Damodar Valley Corporation, AIR 1953 Cal. 581 and Parraju v. General Manager B.N. Rly. AIR 1952 Cal. 610.”

In *Dr. Puvanendran and another v Premasiri and two others 2009 (2) Sri. L.R. 107* it was held that the Court will issue a writ only if the major facts are not in dispute and the legal result of the facts are not subject to controversy.

Further, it is observed that any balance payment if any as claimed by the Petitioner could be made only after considering the recommendations of the appointed Committee who exercised its discretion. In *Abeyratne v Minister of Lands and Others S.C. (Spl) LA No. 197/08 SC Minutes: 01.06.2009, Sarath N. Silva C.J.*, emphasizing the clear distinction between the two remedies of Certiorari and Mandamus quoted the excerpts from *Administrative Law by Wade and Forsyth (Ninth Edition)* and pronounced that, “*obligatory duties must be distinguished from discretionary powers. With the latter, Mandamus has nothing to do*”. His Lordship Chief Justice reiterated that Mandamus has nothing to do with the exercise of discretionary power.

The Cabinet arrived at its decision on 03.03.2010 based on Document P18B which is intact. Furthermore, it is observed that the Petitioner has sought to quash only the decision reflected in P46 but not the respective recommendations made in Document P18B or the said Cabinet Decision. Hence, any order to be delivered to quash the said decision in P46 would not have any effect on the existing recommendations in P18B. The Petitioner has failed to establish any legal right to make any balance payment. A Writ of Mandamus cannot be sought to enforce a right not of a legal basis but of a purely equitable matter as the function of the Writ of Mandamus is to compel a public authority to do its duty. [see, *Amarasekera v. Hon. Nimal Siripala de Silva and 4 others 2010[B.L.R.] 54*].

At the same instant, even if the Petitioner's application for a Writ of Certiorari is granted, he is not entitled to claim balance payment as the decision in P18B exists. Therefore, issuing a Writ of Mandamus as prayed would be futile. A Writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served.

Accordingly in the circumstances and the reasons given above, I am not inclined to grant any relief prayed for in the prayer of the Petition. Application is dismissed without cost.

Judge of the Court of Appeal