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

Micro Cars Limited,
No.873, Kandy Road,
Wedamulla,
Kelaniya.
Petitioner

CASE NO: CA/WRIT/427/2016

Vs.

1. Consumer Affairs Authority,
   2nd Floor, C.W.E. Secretarial Building,
   No.27, Vauxhall Street,
   Colombo 02.
2. Hasitha Thilakarathna,
   Chairman,
   Consumer Affairs Authority,
   2nd Floor, C.W.E. Secretarial Building,
   No.27, Vauxhall Street,
   Colombo 02.

2A. Anura Maddagoda,
Chairman,
Consumer Affairs Authority,
2nd Floor, C.W.E. Secretarial Building,
No.27, Vauxhall Street,
Colombo 02.

2B. Lalith N. Senaweera,
Chairman,
Consumer Affairs Authority,
2nd Floor, C.W.E. Secretarial Building,
No.27, Vauxhall Street,
Colombo 02.

2C. Major Genera (retired) D.M.S. Dissanayaka,
Chairman,
Consumer Affairs Authority,
2nd Floor, C.W.E. Secretarial Building,
No.27, Vauxhall Street,
Colombo 02.

3. Sandaruwan Lankeshwara,
Executive Director,
Consumer Affairs Authority,
2nd Floor, C.W.E. Secretarial Building,
No.27, Vauxhall Street,
Colombo 02.

4. M.M. Rushdi,
   Executive Director,
   Consumer Affairs Authority,
   2nd Floor, C.W.E. Secretarial
   Building,
   No.27, Vauxhall Street,
   Colombo 02.
5. M.L.T. Nayeem,
   Executive Director,
   Consumer Affairs Authority,
   2nd Floor, C.W.E. Secretarial
   Building,
   No.27, Vauxhall Street,
   Colombo 02.
6. S.P.W. Gunasekara,
   No.42, 2nd Lane,
   Kandewatta, Galle.

   Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sanjeewa Jayawardena, P.C., with Charitha Rupasinghe for the Petitioner.
Nayomi Kahawita, S.C., for the 1st-5th Respondents.
Pathum Wickramaratna for the 6th Respondent.

Argued on: 29.07.2020

Decided on: 18.09.2020

Mahinda Samayawardhena, J.

The 6th Respondent consumer purchased a car from the Petitioner company. During the warranty period, she complained to the 1st Respondent Consumer Affairs Authority about defects in the vehicle and sought the intervention of the latter to get a refund of her payment. The 1st Respondent initiated an inquiry into the complaint.

At the inquiry held on 13.10.2015, as admitted in paragraph 25 of the petition, "*the Petitioner agreed to repair and obtain a valuation report within a week from the date on which the 6th Respondent hands over the vehicle to the Petitioner.*" The vehicle had been accordingly handed over to the Petitioner on or around 13.10.2015. The further inquiry was fixed for 26.10.2015.

Admittedly, the Petitioner did not participate in the further inquiry on 26.10.2015 but the 6th Respondent did. The Petitioner did not inform the 1st Respondent of its inability to participate in the inquiry. No explanation was given prior to the inquiry even, at least, by telephone. In the result, the 1st Respondent made the impugned *ex parte* Order marked P14(b) dated 26.10.2015 whereby the Petitioner was directed to refund the full purchase price to the 6th Respondent. It is relevant to note that the vehicle was with the Petitioner at that time.

P14(b) was sent to the Petitioner with P14(a) dated 20.07.2016 whereby the Petitioner was requested to refund the said money within thirty days of the date of P14(a).

Thereafter the Petitioner sent P15(a) dated 29.07.2016 to the 1st Respondent seeking to vacate the *ex parte* Order P14(b) and refix the inquiry.

This application to vacate the *ex parte* Order was rejected by the 1st Respondent by P17 dated 29.09.2016. In P17, it was further informed that proceedings would be instituted in terms of section 13(6) of the Consumer Affairs Authority Act to recover the money payable to the 6th Respondent, as the Petitioner had failed to comply with the directive of the 1st Respondent.

The Petitioner filed this application on 09.12.2016 seeking to quash P14(a) and P14(b) by a writ of certiorari and to restrain the 1st Respondent by a writ of prohibition from taking steps to institute proceedings in the Magistrate's Court in furtherance of the said impugned Orders.

Let me first address the pivotal point raised by the Petitioner at the argument.

There is no dispute that the quorum for any meeting of the 1st Respondent shall be four members.

The Petitioner submits that there was no quorum of the 1st Respondent to make the impugned Order P14(b) and therefore the Order has no force in law.

The Petitioner also says that P14(b) was not signed by any member of the 1st Respondent. I presume the Petitioner takes up this point in order to emphasise that there was no quorum.

The Petitioner further says this position was taken up in paragraph 30 of the petition.

I am not inclined to agree that the Petitioner took up the position in the petition that the impugned Order P14(b) is void due to a lack of quorum. The Petitioner did not take up such a position even in its counter affidavit.

Paragraph 30 of the petition reads thus:

> *Physically annexed only to the said purported directive [P14A], was a purported order/inquiry report [P14B] prepared by 2nd, 3rd 4th and 5th Respondents, which most significantly, was backdated or adjusted to 26th October 2015, i.e. the date of further inquiry, which was unsigned, and strangely had been copied to the 6th Respondent but not to the Petitioner.*

Whether or not there was a lack of quorum is not a pure question of law. It is firstly a question of fact, which, if proved, becomes a question of law. It is unfair by the 1st Respondent and the 6th Respondent for the Petitioner to take up such a position for the first time at the argument. Had such a position been taken up either in the petition or at least in the counter affidavit, the 1st Respondent would have had the opportunity to respond to it with supporting documents. When it is taken up at the argument for the first time, that opportunity is lost to the 1st Respondent. There is no admission on the part of the 1st Respondent that there was a lack of quorum. There is no clear evidence for this Court to come to a firm conclusion that there was no quorum. This is made clear by paragraph 5(3) of the

written submission of the Petitioner itself, filed after the argument, wherein the Petitioner says "*the Respondents have studiously steered clear of annexing any inquiry report that had been duly signed*". It is settled law that this Court in exercising writ jurisdiction cannot decide disputed questions of fact for obvious reasons.

In *Diesel and Motor Engineering PLC v. Consumer Affairs Authority in Sri Lanka*,[1] I quashed the decision of the Consumer Affairs Authority on the basis of lack of quorum as the Petitioner in the said case explicitly took up that position in a separate averment in the petition, to which the Respondent Consumer Affairs Authority replied by way of a separate averment in the statement of objections that one of the members of the panel of inquiry had stepped out and was not present when the settlement, which was later converted to a formal Order, was recorded. The explanation of the Respondent being legally unacceptable, I held that there was a lack of quorum. The case at hand is not comparable.

Similarly, in *Shell Gas Lanka Ltd. v. Consumer Affairs Authority of Sri Lanka*,[2] which I cited in the said Judgment in coming to my decision, the objection of lack of quorum had been taken up in the petition and was answered in the statement of objections of the Respondent.

[1] CA/WRIT/43/2016, CA minutes of 22.11.2019.
[2] [2007] 2 Sri LR 212.

It seems to me the position in *KIA Motors (Lanka) Limited v. Consumer Affairs Authority*,[3] the case cited by the Petitioner, is also the same.

In the facts and circumstances of this case, I take the view that the Petitioner cannot take up the issue of lack of quorum for the first time at the argument.

This leads me to consider the contention of the Petitioner that the impugned decision P14(b) is unsigned and therefore invalid.

Although the Petitioner in paragraph 30 of the petition says in passing that P14(b) was unsigned, the Petitioner did not tender the full document of P14(b) to substantiate this claim. I use the words "in passing" because the Petitioner does not take up the clear position that P14(b) is unsigned and therefore a nullity in the forefront of the petition. The Petitioner tendered only two pages of P14(b) with the petition. In short, the Petitioner did not attach the unsigned part of the said document with the petition.

Thereafter the Petitioner tendered a six-page document as P14(b) with the motion dated 17.01.2017. In that document, on pages five and six under "signed by", four names are mentioned but without signatures in the relevant places. The four names include the Chairman of the 1st Respondent. However, according to paragraph (e) of the prayer to the petition, P14(b) was signed by the Chairman of the 1st Respondent. The position of the Petitioner is not clear.

[3] CA/WRIT/66/2013, CA minutes of 26.05.2020.

Although the Petitioner in the written submission filed after the argument says "*P14(b) which is an unsigned and unauthenticated and unendorsed and unsigned purported inquiry report, [which] is absolutely unlawful and simply cannot be accepted in terms of the statute*", the Petitioner itself tendered the signed copy of P14(b) with the motion dated 13.01.2017 when it moved to support the application for interim relief. This signed copy of P14(b) is a part of the Magistrate's Court proceedings initiated against the Petitioner by the 1st Respondent to recover the money payable to the 6th Respondent. The Petitioner did not challenge the veracity or genuineness of those signatures at that time.

I need hardly emphasise the discretionary nature of the prerogative writs which cannot be invoked as a matter of right. He who invokes the writ jurisdiction of this Court shall come with clean hands and act in utmost good faith.

In the facts and circumstances of this case, I am unable to accept the said fresh point advanced by the Petitioner at the stage of the argument.

Let me now consider the standpoint taken up by the Petitioner in the petition.

The Petitioner seeks to quash the decision in P14(b) by certiorari on the merits. In my view, it is not possible to do so in the unique facts and circumstances of this case. Admittedly, the decision in P14(b) was made *ex parte*.

In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd*,[4] the Supreme Court, citing several authorities,[5] held:

> *A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*

A party cannot, without having purged default in the original Court by which the *ex parte* Order was made, come before the Court of Appeal straightaway against such Order on the merits.[6]

However, in an exceptional situation, the Court of Appeal can exercise revisionary jurisdiction to set aside an *ex parte* Judgment or Order made by a lower Court, if it is palpably wrong, perverse and results in a manifest failure of justice.[7]

As I held in *Certis Lanka Security Solutions (Pvt) Ltd v. Weerasinghe*,[8] this principle of law shall not be confined to judicial proceedings but shall be extended to inquiries by any tribunal exercising quasi-judicial or administrative powers that affect the rights of citizens.

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[4] [1987] 1 Sri LR 5.
[5] *Loku Menika v. Selenduhamy* (1947) 48 NLR 353, *Habibu Lebbe v. Punchi Etana* (1894) 3 CLR 85, *Caldera v. Santiagopulle* (1920) 22 NLR 155 at 158, *Weeratne v. Secretary, D.C. Badulla* (1920) 2 CLR 180, *Dingirihamy v. Don Bastian* (1962) 65 NLR 549, *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd* (1962) 66 NLR 472, *Nagappan v. Lankabarana Estates Ltd* (1971) 75 NLR 488.
[6] *Jana Shakthi Insurance v. Dasanayake* [2005] 1 Sri LR 299 at 303, *Penchi v. Sirisena* [2012] 1 Sri LR 402 at 408.
[7] *Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited* [1995] 1 Sri LR 22 at 40.
[8] CA/WRIT/191/2013, CA minutes of 06.08.2020.

In the instant case, as I have already stated, upon receipt of the impugned Order P14(b) with the letter P14(a), the Petitioner by P15(a) rightly requested the 1st Respondent to vacate the *ex parte* Order P14(b) and refix the matter for inquiry. This was refused by the 1st Respondent by P17.

In my view, the Petitioner should have come before this Court primarily seeking to quash P17 by certiorari. If P17 is quashed and P15(a) is allowed, the 1st Respondent would have to vacate P14(b) and hold the inquiry afresh. The Petitioner did not do so.

This Court cannot hold the default inquiry or main inquiry and make an Order on the merits. It appears the Petitioner expects this Court to do so.

The Petitioner says that although the 1st Respondent made the impugned *ex parte* Order P14(b) on 26.10.2015, the Petitioner by letter dated 26.10.2015 marked P13(a) informed the 1st Respondent of its inability to attend the inquiry on 26.10.2015. The Petitioner tenders the registered postal article receipt marked P13(b) as proof. Although P13(a) is dated 26.10.2015, the post office date stamp on P13(b) shows it was posted only on 28.10.2015.

The vehicle, which was handed over to the Petitioner as per the consensus reached on 13.10.2015, remains in the custody of the Petitioner.

For the aforesaid reasons, I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal