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Judgment
47/1964

IN THE PRIVY COUNCIL

No. 42 of 1962.

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

B E T W E E N :-

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

78686

- (1) THE UNIVERSITY COUNCIL OF THE VIDYODAYA UNIVERSITY OF CEYLON
 - (2) VENERABLE WELIWITEYE SIRI SORATHA NAYAKE THERO (deceased)
 - 10 (3) VENERABLE PALANNARUWE WIMALADHAMMA NAYAKE THERO
 - (4) VENERABLE KALUKONDAYAWE PANNASEKERE NAYAKE THERO
 - (5) VENERABLE PARAWAHERA WAJIRANANA NAYAKE THERO
 - (6) STEPHEN FREDERICK DE SILVA
 - (7) PANDIT GABRIAL PERERA WICKREMAARATCHI
 - (8) NORMAN EDWARD WEERASOORIA
 - (9) HETTIARATCHIGE JINADASA (ceased to be a member of the University Council)
 - 20 (10) ANANDA WELIHENA PALLIYA GURUGE
 - (11) DON PAULIS JAYASEKERE (ceased to be a member of the University Council)
 - (12) LEKAMWASA LIYANAGE KANAKERATNE GUNATUNGA (ceased to be a member of the University Council)
 - (13) LALITHA ABHAYA RAJAPAKSE
 - (14) CHANDRA DATTA ASHEYASIRI GUNAWARDENE
 - (15) GAMINI JAYASOORIYA
 - 30 (16) CHRISTOPHER WILLIAM WIJEKON KANNANGARA
 - (17) WIMALA DHARMA HEWAVITARNE
 - (18) ANDREW MARTIN SAMARASINGHE (deceased)
 - (19) MUDALIYAR EGODAGE ALFRED ABEYESEKERE
 - (20) PAULUS EDWARD PEIRIS DERANIYAGALA
 - (21) NISSANKA PARAKRAMA WIJERATNE (appointed in place of the 9th Respondent-Appellant)
 - (22) MAPATUNGA JAMES PERERA (appointed in place of the 11th Respondent-Appellant)
 - (23) WELIGAMA FOEWATTE GALLAGE ARIYADASA (appointed in place of the 12th Respondent-Appellant)
 - 40 (24) DR. ATUKORALAGE DON PETER ALBERT WIJAYA GUNAWARDENE (appointed in place of the deceased 18th Respondent-Appellant)
- (Respondents) APPELLANTS
- and -
- LINUS SILVA (Petitioner) RESPONDENT

CASE FOR THE APPELLANTS

This is an appeal from a Judgment and

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p.87

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pp.12,13.

Order of the Supreme Court of Ceylon dated the 20th November, 1961 whereby it was ordered and directed that an Order of the University Council of the Vidyodaya University of Ceylon dated the 4th July, 1961 terminating as from the 4th July, 1961, the Respondent's appointment as Professor and Head of the Department of Economics and Business Administration, be quashed.

2. These proceedings arose out of an application for the grant and issue of Mandates in the nature of Writs of Certiorari and Mandamus to quash the aforesaid Order of the University Council and to grant a Mandate compelling, commanding and directing the Appellants and each one of them to recognise that the Respondent was and is Professor and Head of the Department of Economics and Business Administration in the aforesaid University and not to impede the Respondent from discharging the duties of the said office. The Supreme Court granted the remedy prayed for by way of Certiorari and made no order in respect of the prayer relating to Mandamus. 10 20

3. The principal issue in this appeal is whether the Supreme Court were right in holding that the University Council, in dismissing the Respondent, were acting in a judicial or quasi-judicial capacity and were, therefore, amenable to Certiorari or whether they were acting in an administrative capacity in which case, as the Supreme Court held (it is submitted rightly), the application must fail. 30

4. The Vidyodaya University of Ceylon was established by the Vidyodaya University and the Vidyalankara University Act, No. 45 of 1958, the material sections of which are annexed hereto. Section 13 declares that the authorities of the University shall be the Court, the Council, the Senate, the Faculties, the General Board of Studies and Research, and such other bodies as may be prescribed by Statute as the Authorities of the University. Section 17(2) describes the persons who shall constitute the membership of the Council which, by Section 17(1) is declared to be the Executive Body of the University. Section 31 provides that the appointment of a professor or lecturer in the University shall be made by the Council. Section 18(e) empowers the Council:- 40

"To suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds 50

of the members of the Council, renders him unfit to be an officer or teacher of the University."

5. The Respondent was first appointed to the permanent staff of the University on the 15th May, 1959. By a letter dated the 1st September, 1960, the second Appellant purported to promote the Respondent to the post of Professor and Head of the Departments of Economics and Business Administration with effect from the 1st October, 1960. By a letter dated the 2nd September, 1960, the Respondent acknowledged the said letter and stated that he was pleased to accept the appointment. It was the case for the Respondent that these letters constituted a valid agreement between the parties. It was contended for the Appellants that these letters did not constitute a valid Agreement as required by Section 33 of Act No. 45 of 1958 since the Respondent was given a draft Agreement in writing in the usual form to be signed by him but failed and neglected to sign the same. At a meeting of the Council held on the 4th July, 1961, at which twenty out of twenty-three members were present, a resolution was passed unanimously in the following terms:-
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- "In the opinion of the Council the conduct of Mr. Linus Silva, the Professor of Business Administration, rendered him unfit to be a member of this University."
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- It was also unanimously decided that the services of the Respondent should be terminated forthwith and on the same date a letter signed by the Vice-Chancellor informed the Respondent of the Council's decision. The Vice-Chancellor also enclosed a cheque for three thousand three hundred and forty-six rupees and fifteen cents, being the balance of salary due to the Respondent in terms of the decision of the Council.
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6. On the 8th August, 1961, the Respondent filed in the Supreme Court a Petition applying for the grant and issue of Mandates in the nature of Writs of Certiorari and Mandamus as aforesaid. In the course of the said Petition he referred to a meeting of the Vidyodaya University Teacher's Association which considered a fast unto death embarked upon by a lecturer at the University and a students' demonstration in sympathy therewith. At this meeting the Respondent moved a resolution
- pp.37,38.
pp.9,10.
- pp.10,11.
- pp.12,13.
- pp.1 to 9.
- p.4, l.17

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referring to "certain distressing and regrettable incidents" which had brought "disrepute to the University", and respectfully requesting the Prime Minister to institute such inquiries and adopt such remedial measures which would serve the best interests of all concerned and permit the continued existence of the University as a real Temple of learning dedicated to the pursuit of disinterested knowledge. The meeting did not come to any final conclusion concerning the said resolution.

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p.5, 1.9

7. In the course of the Petition the Respondent also referred to one Dr. Ananda Guruge who was a member of the Ceylon Civil Service and Assistant Secretary to the Ministry of Education and who also held the posts of Administrative Assistant to the Vice-Chancellor of the Vidyodaya University, for which he was paid an allowance of Rs. 1000/- per month, and Visiting Professor and Head of the Department of Sanskrit of the University, for which he was paid an additional fee for delivering lectures and setting question papers and correcting answer scripts in the University. The Respondent said that in June, 1961, a decision was made that it was not conducive to the public interest and the cause of National Education in Ceylon that persons in the permanent employment of the Ministry of Education should hold appointments under the Vidyodaya and Vidyalankara Universities and receive salaries and fees and other emoluments from the said Universities.

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p.5, 1.25

The Respondent said that Dr. Ananda Guruge suspected him of having induced the Government to make this decision, and wrote a letter to a Cabinet Minister complaining of the Respondent's conduct. He further averred that Dr. Ananda Guruge was present and actively participated in the meeting of the Council of the 4th July, 1961, and that the order dismissing him was made maliciously, unlawfully and for reasons extraneous to those contained in Section 18(e) aforesaid. He averred that Dr. Ananda Guruge was biased against him and that the decision made by the Council was, therefore, wrongful and illegal. He submitted that the Council had acted wrongfully and unlawfully and in violation of the rules of natural justice by not making him aware of the nature of the accusations against him and also by not affording him an opportunity of being heard in his defence.

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p.7, 1.30

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pp.17 to 23.

On the 8th August, 1961, the Respondent lodged an Affidavit in which he deposed to the same matters as were referred to in his aforesaid Petition.

p.25.

8. On the 11th October, 1961, the Appellants

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lodged a Statement of Objections including the following:-

"(a) The 1st Respondent Council is in fact and in law the executive body of the Vidyodaya University of Ceylon which is responsible for the administration of the University and it is not a judicial or quasi-judicial body.

p.26, l.7
to l.43.

10 (b) The Council does not maintain a record nor has it made any orders which are capable of being reviewed or questioned by means of a Writ of Certiorari.

(c) The 1st Respondent Council is not a body against which a Writ of Mandamus can issue.

20 (d) The Petitioner was an employee of the Vidyodaya University of Ceylon and the decision to terminate such employment by the 1st Respondent Council cannot be reviewed by way of Certiorari.

3. These Respondents further state that this is not a fit case for the exercise of the discretion vested in Your Lordships' Court in granting the high prerogative writs of Certiorari and or Mandamus in as much as :-

30 (a) There was no necessity and in any event there was no legal obligation cast on the Respondents to inform the Petitioner of the grounds of the termination of his services since the Respondents acted in their capacity as members of the chief executive and administrative body of the Vidyodaya University and were fully aware of the Petitioner's dereliction of duty and other lapses which rendered him unfit to be a member of the teaching staff of the University and they had full power and authority to terminate the petitioner's services.

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(b) The Petitioner has the alternative remedy of bringing an action in the ordinary way, to vindicate his rights in the original Courts and/or before a Labour Tribunal. "

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- p.27. 9. In support of the said Statement of Objections the Appellants filed an Affidavit sworn by the second Appellant and dated the 10th October, 1961. In the course of this Affidavit he deposed, inter alia, that
- p.29, 1.12 (a) he was advised that the letters referred to in paragraph 5 hereof did not constitute in law a valid Agreement in writing between the Vidyodaya University and the Respondent. 10
- p.29, 1.43 (b) whilst admitting that the Respondent attended to his duties preparatory to the inauguration of the Department of Economics and Business Administration which took place on the 20th December, 1960 he denied that he thereafter duly attended to the duties as Professor and Head of the Department under his charge. In his Affidavit he set out the grounds and reasons for his denial. 20
- p.32, 1.24 (c) he admitted that Dr. Ananda Guruge was present at the meeting of the Council on the 4th July, 1961, and stated that, being a member of the Council appointed by His Excellency the Governor-General, he was entitled to be so present. He emphatically denied the allegation that the order was made maliciously, unlawfully and for reasons extraneous to those contained in Section 18(e) aforesaid, and stated that the allegations made against himself and the members of the Council were incorrect and without any foundation whatsoever. 30
- p.32, 1.36 (d) he referred to certain complaints with reference to the conduct of the Respondent and to reports received in regard to the work of the Respondent's Department.
- p.33, 1.28 (e) he stated that he himself visited the Respondent's Department at times when the Respondent should have been present but on not one occasion was the Respondent present. On several occasions he telephoned the Department at times when the Respondent should have answered his calls. He referred to rule 19 of the instructions to Deans and Professors requiring all lecturers other than visiting lecturers to spend at least two hours in the University other than time spent in teaching and to 40
- p.34, 1.22

keep the University Office informed of these hours. He averred that the Respondent had given no information as required by this rule, nor had he complied with it in any way.

- 10 (f) the Respondent was present at the meeting of the Senate on the 28th February, 1961, and his conduct at the meeting and in the deponent's presence was such that it was apparent to him and to all those present that the Respondent's continued employment would be detrimental to the best interest of the University and the objects with which it had been created. At the said meeting of the Senate it was decided to appoint a committee to investigate and report on the work of the Department of Economics, but the deponent was aware that the Respondent prevented the said committee from doing the work entrusted to it. p.34, 1.37
- 20 (g) there was considerable unrest among the students of the University from March to June, 1961 and several members of the Council were aware that the Respondent was instrumental in causing the unrest. The students started a strike on 3rd June, 1961. p.35, 1.8
- 30 (h) all these matters were carefully considered at the meeting on the 4th July, 1961. It was attended by all except three of the Appellants. Those present were satisfied that the continuance of the Respondent in the service of the University and his presence would be an impediment to the progress of the University and would be detrimental to the noble objects with which the University had been founded. In consequence the Council passed the resolution as afore-said and decided that the services of the Respondent should be terminated forthwith. p.35, 1.14
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10. The Judgment of the Supreme Court was delivered by T.S. Fernando J. and included the following passage:-

"The petitioner contends that in terminating his appointment the respondents have acted wrongfully and unlawfully and

p.91, 1.1.

Record

also in violation of the rules of natural justice by not making the petitioner aware of the nature of the accusations against him and also by not affording him an opportunity of being heard in his defence. Various allegations, e.g. of bias have been included in the petition and affidavit presented to this Court by the petitioner, and some of these have been refuted by affidavits presented by the respondents. It does not become necessary to examine and consider any of the allegations on the present application except that which is designed to show that the order embodied in letter "E" was made in violation of the rules of natural justice. Learned counsel appearing for the respondents admitted that the petitioner was not informed of the accusations against him and was not afforded any opportunity of defending himself against them. He contended however that the violation of natural justice, the non-observance of the audi alteram partem rule, is irrelevant in the present case where the respondents in dismissing the petitioner were acting not in a judicial or quasi-judicial capacity but purely in an administrative capacity. He submitted, for that reason that their action was not liable to be canvassed by way of certiorari. Learned counsel for the petitioner, while not disputing that in deciding whether the petitioner was unfit to be a teacher of the University the Council acts in an administrative capacity argued that in making that administrative decision as to unfitness the relevant law required the Council to ascertain the existence of certain facts objectively, and that in the ascertainment of these facts the Council was required to act judicially. It can hardly be doubted that, if in the process of arriving at a decision as to unfitness of the petitioner to remain as a teacher the Council is throughout acting in an administrative capacity, there is no room for the requirement of the observance of the rules of natural justice. The application therefore turns on the question whether at any stage in arriving at the administrative or subjective decision as to unfitness the Council is required to consider certain matters judicially. If so, the Council would be amenable to certiorari. If not, this application must fail."

The learned Judge next proceeded to review a number of authorities including decisions of the Judicial Committee of the Privy Council and of the

Courts of England and Ceylon. He then proceeded as follows :-

p.98, 11.23-37
p.99, 11. 1-18

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"I should now revert to the question to which I have made some reference earlier, viz. the existence at some stage of a lis before the Council which attracts to it the duty on the part of the Council to act judicially. Where the administrative process and the quasi-judicial process are so intermingled that the product is, as one eminent English judge has stated, a hybrid operation, it may not be easy to make a strict demarcation of the points at which the administrative process is stayed, the judicial process is brought on, and thereafter the administrative process is resumed; it is nevertheless not difficult to envisage at the stage of deciding the existence of incapacity or misconduct the arising of a process in the nature of a prosecution or proposition which requires for its consideration something in the nature respectively of a defence or a refutation or negation thereof. If lis in this context is to be given the very strict and technical meaning it bears in court litigation, it will be difficult to discover the existence of such a lis in the processes considered in the cases of (1) R. v. Postmaster-General; ex parte Carmichael¹⁴ and (2) R. v. Boycott; ex parte Kennedy¹⁵, cases dealing with the issue of medical certificates, in both of which the process was held to be in the nature of a judicial act. Whatever name be given to the process, the operation involved cannot be performed without a consideration of matters not only in support of the proposition but also of those against it. The latter cannot properly be considered without an opportunity being afforded for their presentation."

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The learned Judge was, therefore, of opinion that the Council was under a duty to act judicially at the stage of ascertaining objectively the facts as to incapacity or misconduct. The non-observance of the rules of natural justice being admitted by the Appellants the Respondent was in his opinion entitled to a grant of a Mandate in the nature of a Writ of Certiorari to quash the order of

p.99, 1.19

Record

discontinuance of his service as a teacher, subject to consideration of other objections raised on behalf of the Appellants to such a grant.

- p.100, 1.3 The learned Judge rejected the contention, put forward on behalf of the Appellants, that since the Respondent had not signed the special form of Agreement he must have been considered to have been appointed under Section 18(f), which applies to ordinary employers and not under Section 18(e) which applies to officers or teachers. He was satisfied that the Appellants could not, having regard to their conduct, now be heard to say that the Respondent was dismissed by virtue of the power vested in the Council by Clause (f) of Section 18. The letters cited above provided, in his opinion, a sufficient Agreement within the meaning of Section 33. 10
- p.101, 1.36 The learned Judge next held that it could not be implied from the Respondent's acceptance of the **balance** of his salary that he had acquiesced in the termination of his services. 20
- p.102, 1.8 The learned Judge next held that in the case of a dismissal of a person in the situation of the Respondent the common law remedy of an action for wrongful dismissal was not an adequate remedy and that the Respondent was, therefore, entitled to proceed by way of Certiorari.
- p.103, 1.10 11. The learned Judge next held that even if, as contended on behalf of the Appellants, it was open to the Respondent to take his grievance to a Labour Tribunal established under Section 31(a) of the Industrial Disputes Act, No. 43 of 1950, as amended by (Amendment) Act, No. 62 of 1957, this remedy was not as convenient, speedy and effective as that which the Respondent had already invoked. 30
- p.103, 1.42 Finally, the learned Judge held that this was a case in which the Respondent was entitled to the writ ex debito justitiae.
- p.104, 1.5 12. The learned Judge made no order in respect of the prayer relating to Mandamus. 40
13. The Appellants respectfully submit that the judgment and order of the Supreme Court of Ceylon should be set aside and judgment entered in favour of the Appellants with costs throughout for the following amongst other

R E A S O N S

- (1) BECAUSE in passing the Order of the 4th July, 1961, the Council were acting in an administrative and not a judicial or quasi-judicial capacity and, therefore, the remedy of certiorari was not open to the Respondent.
- 10 (2) BECAUSE the Supreme Court erred in holding that the Respondent had been validly appointed as an officer or teacher of the University.
- (3) BECAUSE by accepting the balance of salary tendered with the letter of dismissal the Respondent acquiesced in his said dismissal.
- (4) BECAUSE the appropriate remedy, if any, was by way of an action for wrongful dismissal and not by way of certiorari.
- 20 (5) BECAUSE, in the alternative, the appropriate remedy was by proceedings under the Industrial Disputes Act as aforesaid and not by way of certiorari.

DINGLE FOOT

D.S. WIJewardane

A N N E X U R E

Vidyodaya University and Vidyalankara

University Act, No. 45 of 1958

2. (1) There shall be established, in accordance with the provisions of this Act, a University with the name of "The Vidyodaya University of Ceylon" and a University with the name of "The Vidyalankara University of Ceylon".

10 13. The Authorities of the University shall be the Court, the Council, the Senate, the Faculties, the General Board of Studies and Research, and such other bodies as may be prescribed by Statute as authorities of the University.

17. (1) The University Council shall be the executive body of the University.

(2) The Council shall consist of the following persons:-

(a) The ex-officio members who shall be -

- 20 (i) the Vice-Chancellor,
(ii) the Director of Education, and
(iii) the Deans of the Faculties.

(b) Other members who shall be -

- 30 (i) three members appointed by the Chancellor,
(ii) two members elected by the Court from among its own body,
(iii) two members elected by the Senate from among its own body, and
(iv) in the case of the Vidyodaya University of Ceylon five members elected by the Vidyadhara Sabha from among its own body, and in the case of the Vidyalankara University of Ceylon five members elected by the Vidyalankara Sabha from among its own body.

(3) Members of the Council other than ex-officio members shall hold office for a period of three years:

40 Provided that the members of the Council elected under the provisions of sub-paragraphs (ii) and (iii) of paragraph (b) of sub-section (2) shall retain their membership so long only within the said period of three years as they continue to be members of the body which elected them.

(i)

(4) The quorum for a meeting of the Council shall be prescribed by Statute.

18. Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following powers and duties:-

.....

(e) to appoint officers whose appointment is not otherwise provided for, and to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University; 10

(f) to appoint, and to suspend, dismiss or otherwise punish persons in the employ of the University other than officers and teachers;

33. (1) Every appointment of a teacher, Registrar or Librarian shall be upon an agreement in writing between the Corporation and such teacher, Registrar or Librarian. Such agreement shall - 20

(a) in the case of experienced persons who have already gained distinction in their subjects, be for such period and on such terms as the Council may resolve, and

(b) in other cases, be for a probationary period of three years which may be extended by the Council by resolution for a further period not exceeding one year, if the Council thinks fit.

61. In this Act, unless the context otherwise requires - 30

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"officer" means the Vice-Chancellor, the Registrar, the Dean of any Faculty, the Librarian, or the holder of any office created by Statute;

.....

"teacher" includes Professor, Lecturer and any other person imparting instruction in the University and who is in receipt of an annual salary, or, in the case of a Bhikkhu, an allowance;

No. 42 of 1962

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF
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B E T W E E N :-

THE UNIVERSITY COUNCIL
OF THE VIDYODAYA
UNIVERSITY OF CEYLON
AND 18 OTHERS

... ... Appellants

- and -

LINUS SILVA Respondent

CASE FOR THE APPELLANTS

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