WESTERN PROVINCE TECHNOLOGICAL OFFICERS (CIVIL) UNION
v
NIMAL KARUNARATNE AND OTHERS

SUPREME COURT.
SHIRANEE TILAKAWARDANA, J.
SALEEM MARSOOF, J. AND
ANDREW SOMAWANSA, J.
S.C. APPEAL NO. 07/2005
S.C. (SPL.) L.A. NO. 175/2004
C.A. (WRIT) 1144/2000
SEPTEMBER 27, 2007

Writ of Certiorari – Provincial Councils Act of 1987– Section 32(1) – The decision to classify technical officers of the Sri Lanka Technological Services (SLTS) according to their specialization into the 'buildings' and 'irrigation' categories – Supreme Court Rules – Rule 30 and or Rule 34 – Failure to file written submissions, sanction – Deprivation of the right to be heard – Whether appeal ought to be dismissed? – Constitution – Article 154, Article 154(C), Article 154(F)1, 154(G), Article 154(H) – Thirteenth Amendment – Reserved – Provincial – Concurrent lists – 1972 Constitution – Section 27(1).

The Intervenient-respondent-petitioner, which is the Western Province Technological Officers (Civil) Union (Appellant) sought special leave to appeal from the decision of the Court of Appeal, quashing by way of Certiorari the decision to classify technical officers of the Sri Lanka Technological Services (SLTS) according to their specialization into the 'buildings' and 'irrigation'

categories. The original writ application was filed in the Court of Appeal by the 1st to 33rd petitioners-respondents. The Court of Appeal allowed the appellant union to intervene and oppose the application of the petitioners-respondents.

The Supreme Court granted Special Leave to Appeal against the judgment of the Court of Appeal.

Held:

(1) Where there is a failure to file written submissions in terms of Rule 30, the sanction is simply a deprivation of the right to be heard. However, sanction becomes ineffective in a case where the parties in default have in fact been heard without any objection being raised at the hearing.

per Saleem Marsoof, J.

"The conduct of the parties in not taking up any objections at the hearing to each other's defaults and the absence of prejudice to the parties as a result of these possible defaults, I am of the opinion that the discretion of Court ought to be exercised in favour of the appellant."

(2) Failure to include a necessary party is a fatal irregularity which warrants the rejection of the writ petition *in limine*.

(3) *The opening words of Section 32(1) of the Provincial Councils Act of 1987, viz "Subject to provisions of any other law...."* highlight the need to understand the said provision in the context of other provisions of law which include the provisions of the Constitution with the view to devolving legislative and executive power to the Provinces without parting with its supremacy or its powers to the Provincial Councils.

(4) It is clear from Article 154 F(1) of the Constitution that while the Provincial Board of Ministers are Constitutionally charged with the responsibility of aiding and advising the Governor in the exercise of his functions, the Governor is bound in law in the exercise of his functions, as a general rule to "act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion."

(5) The position of the Governor is similar to that of the President under the 1972 Constitution of Sri Lanka, who by section 27(1) thereof was bound to act on the advice of the Prime MInister. The Governor is required by law to act on the advice of the Board of Ministers. Accordingly, the failure to cite the members of the Board of Ministers as respondents to the writ petition was a fatal irregularity.

Held further:

(6) No immunity from judicial review is conferred by the Constitution on the Board of Ministers or the Governor, except to the limited extent that Article 154 (F(2) of the Constitution, which requires the Governor himself to decide whether in a given situation he will have to act on advice or in his discretion, and provides that "The decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called

in question in any Court on the ground that he ought or ought not have acted on his discretion."

(7) As far as decisions and actions of the Provincial Ministers are concerned, it is trite law that the extent of their amenability to *certiorari* and other writs is similar to that of Ministers appointed under Chapter VIII of the Constitution, and neither they nor their decisions or actions enjoy any immunity from judicial review. Hence, Courts are not inhibited from exercising supervisory jurisdiction over the decisions or actions of Ministers, whether appointed under Chapter VIII or Chapter XVIIA of the Constitution, and granting mandates in the nature of the Writ of *Certiorari* whenever appropriate.

(8) The term jurisdiction has become synonymous with 'power' and the ambit of *Certiorari* has expanded to embrace decisions and actions of various bodies or persons exercising powers or functions of a *public nature*; the writ does not lie if circumstances necessary for the grant of certiorari do not exist.

Held further:

(9) 1st to 33rd respondents and the members of the petitioners union were absorbed into the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields, which justified the categorization of officers in the SLTS into 'buildings' and 'irrigation'.

(10) The division of the SLTS into 'buildings' and 'irrigation' is neither arbitrary nor unreasonable and is also consistent with the SLTS minutes as well as SLES where posts are grouped according to expertise.

Cases referred to:

1) *A.C. Muthappan Chettiar* v *M.R. Karunanayake and Another* 2005 BLR 4.
2) *Mohamed Khairas* v *Chairman, Pradeshiya Sabha, Karandeniya and three Others* 2006 BLR 36.
3) *Samarawickrema v Attorney-General* 1983 2 Sri LR 162.
4) *Hatton National Bank Ltd.* v *Casimir Kiran Atapattu and Another* 2007 BLR 78.
5) *Kiriwanthe and Another* v *Navaratne* 1990 2 Sri LR 393.
6) *Ramasamy* v *Ceylon State Mortgage Bank* 78 NLR 510.
7) *Karunaratne* v *Commissioner of Co-operative Development* 1978-79 2 Sri LR 510.
8) *Gnanasambanthan* v *Rear Admiral Perera* 1983 2 Sri LR 169.
9) *Abeyadeera* v *Dr. Stanley Wijesundera* 1983 2 Sri LR 267.
10) *Farook* v *Siriwardena, Election Officer* 1997 1 Sri LR 145.
10a) In *Re Thirteenth Amendment* 1987 2 Sri LR 312 at 323
11) *Parameswary Jayathevan* v *Attorney-General and Others* 1992 2 Sri LR 356.
12) *Premachandra* v *Major Montague Jayawickrema and Another* (Provincial Governor's case) 1994 2 Sri LR 90.

13) *Maithripala Senanayake, Governor of the North-Central Province and Another* v *Gamage Don Mahindasoma and Others* 1998 2 Sri LR 333.
14) *Mudiyanse* v *Christie Silva, Government Agent, Hambantota* 1985 2 Sri LR 52.
15) *T.N. Fernando, Assistant Commissioner of Excise, Kalutara* v *Nelum Gamage, Bribery Commissioner and Another* 1994 3 Sri LR at 194.
16) *G.P.A. Silva and others* v *Sadique and Others* 1978-79-80 1 Sri LR 166.
17) *Waas Gunawardena* v *Perera and Another* 1997 2 Sri LR 222.

APPEAL from the judgment of the Court of Appeal.

Kuvera de Zoysa with *Senaka de Saram* for the intervenient-petitioner
Mohan Peiris, P.C. with *Kamran Aziz* for the 1st to 33rd petitioners-respondents.
Rajiv Gunatilake, S.C. for the 1 to 6th respondents-respondents.

Cur.adv.vult.

September 11, 2008

SALEEM MARSOOF, J.

The Intervenient-Respondent-Petitioner, which is the Western Province Technological Officers (Civil) Union (hereinafter referred to as 'the Appellant'), sought special leave to appeal from the decision of the Court of Appeal dated 1st June 2004, quashing by way of *certiorari* the decision to classify technical officers of the Sri Lanka Technological Service (SLTS) according to their specialization into the 'buildings' and 'irrigation' categories. The original writ application was filed in the Court of Appeal by the 1st to 33rd petitioners-respondents, who were employees of the Western Province Provincial Council holding positions in Class II B, Class II A,Class I and Special Class of the SLTS, who had been absorbed into the service of the said Council around 1990 from the Agrarian Services Department. The said petitioners had cited the Chief Secretary of the Provincial Public Service Commission, the Governor and the Deputy Chief Secretary (Engineering) all of the Western Province, along with the Secretary to the Ministry of Public Administration, Home Affairs and Plantation Industries, and the Attorney-General as respectively the 1st to 6th respondents to their application. The appellant union had been permitted by the Court of Appeal to intervene and oppose the application of the petitioners-respondents.

On 7th February 2005, this Court granted special leave to appeal against the Judgment of the Court of Appeal specially on the following questions:

"(a) Did the Court of Appeal err in failing to consider that the members of the Board of Ministers of the Western Province, have not been cited as respondents to the application of the petitioners-respondents though they are necessary parties?

(b) Did the Court of Appeal err in failing to consider that the said decision of the Board of Ministers of the Western Province, which has been subsequently approved by the Governor of the Western Province, is not subject to judicial review?

(c) Did the Court of Appeal fail to consider that there are no grounds existing to exercise judicial review against the said decision?

(d) Did the Court of Appeal fail to consider that the 1st to 33rd respondents and the members of the Petitioner Union were absorbed to the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields?

(e) Did the Court of Appeal fail to consider that in terms of Clause 4(i) of the Engineering Service Circular No. 31, which was amended by Engineering Service Circular No. 31 (1), the SLTS officers in the Western Provincial Council have to be grouped according to their specialization on the same grouping as the Engineers in the SLES minutes?"

Failure to file Written Submission

Before considering the questions on which special leave has been granted, it is necessary to deal with a preliminary objection taken by learned President's Counsel for the 1st to 33rd petitioners-respondents in his written submissions dated 24th October 2007. It is the contention of the learned President's Counsel, that the Appellant has failed to tender its Written Submissions within six weeks of the granting of special leave to appeal by this Court in compliance with the mandatory provisions of Rules 30(1) and 30(6) of the Supreme Court Rules, and that the appeal should therefore be dismissed *in limine* for failure to diligently prosecute the same as contemplated by Rule 34 of the said rules.

Learned President's Counsel for the 1st to 33rd petitioners-respondents relies on the judgment of this Court in *A.C. Muthappan Chettiar* v *M.R. Karunanayake and Another*[1]. In that case, the appeal

was dismissed for non-compliance with Rule 34, and in an exhaustive judgment Shirani A. Bandaranayake, J, (with Raja Fernando, J. and N.G. Amaratunga, J. concurring) refers to the previous judgments of this court in which appeals have similarly been dismissed for failure to diligently prosecute them. The decision in *Muthappan Chettiar* has subsequently been followed in *Mohamed Khairas* v *Chairman, Pradeshiya Sabha, Karandeniya and Three Others*(2). In all these cases, the preliminary objection had been taken up at the hearing and the Court had heard submissions on the specific issue of non-compliance with Rule 34 before deciding that it was appropriate in the circumstances of those cases to dismiss the appeals in *limine*, obviating the need to go into the merits.

What happened in the instant case is quite different. Special leave to appeal was granted in this case on 7th February 2005 and the case was listed for hearing on 13th June 2005. On 28th February 2005, the Attorney-at-Law for the Appellant union filed a motion with which he tendered an additional affidavit adverting to certain facts, and it appears from the docket that with a subsequent motion dated 3rd March 2005, *he filed the written submissions of the appellant union well within the time of 6 weeks specified in Rule 30(6).* However, although a copy of the written submissions is available in the docket, my earnest endeavours of tracing the original motion to verify whether the written submissions were filed with notice to the other parties, have not proven fruitful. There is nothing in the docket to show that the Appellant union complied with the latter part of Rule 30(6) which required him (or it, as in this case) at the time of lodging the written submissions in the Registry to *"forthwith give notice thereof to each respondent by serving on him a copy of such submissions."* In fact, the chronology of events in this case, suggests that there has been a failure to give notice of the filing of the written submissions by the appellant. The docket shows that as the learned President's Counsel who then appeared for the appellant was in a personal difficulty, the appeal was not taken up for hearing on 13th June 2005, and was thereafter re-fixed for hearing on several dates, namely, 3rd October 2005, 7th February 2006, 12th June 2006, 2nd October 2006, 9th February 2007 and 8th June 2007, on which dates the hearing was postponed for one reason or another. It appears from the docket that when the case came up for hearing on 8th June 2007, it was moved out on behalf of the learned Counsel for the appellant, and the Court

has specifically recorded that the learned Counsel for the 1st to 33rd petitioners-respondents submitted that the appellant has not filed written submissions "and therefore this matter cannot be argued today". Unfortunately, on that occasion, the attention of Court had not been drawn to the fact that the written submissions of the Appellant had in fact been filed on 3rd March 2005. The question of failure to give notice of filing of written submissions could have been resolved on that date if it had been raised by learned Counsel for the 1st to 33rd petitioners-respondents at that stage.

The case was ultimately taken up for argument on 27th September 2007, and submissions were made by Counsel on the merits without any preliminary objection being taken up on the basis that there has been a failure to comply with Rule 30 and / or Rule 34. On that day, after hearing arguments of Counsel on the merits of the appeal, the parties were permitted to file further written submissions within one month from that date. This, the appellant and the 1st to 33rd petitioners-respondents, did in time. The preliminary objection to the maintainability of the appeal was in fact raised in the written submissions of the 1st to 33rd petitioners-respondents dated 24th October 2007. Not surprisingly, the written submissions of the appellant dated 27th October 2007 are confined to the merits of the case and do not deal with the issue of the alleged non-compliance of the appellant with the Supreme Court Rules. It is likely that Counsel for the appellant was not aware of the preliminary objection taken up in the written submissions of the 1st to 33rd petitioners-respondents and had no opportunity of responding to the same in the written submissions filed by him.

Where there is a failure to file written submissions in terms of Rule 30, the sanction is simply a deprivation of the right to be heard. It is expressly provided in Rule 30(1) that-

> "No party to an appeal *shall be entitled to be heard*, unless he has previously lodged five copies of his written submissions (hereinafter referred to as "submissions", complying with the provisions of this rule." (Emphasis added).

This sanction becomes ineffective in a case such as the present where the parties in default have in fact been heard without any objection being raised at the hearing. Of course, the Court has a

discretionary power under Rule 34 to decide whether the appeal ought to be dismissed for failure to prosecute the appeal with due diligence, and the failure to file written submissions in time or to give proper notice thereof may become relevant for this purpose. I have been able to trace only one case, viz, the decision of this Court in *Samarawickrema* v *Attorney-General*[3] in which an appeal was dismissed for the failure on the part of the appellant to give notice of the filing of written submissions to the respondent. This was a decision based on the corresponding provisions of Rule 35(e) of the previous Supreme Court Rules of 1978, and it appears from the report that while the appellant had no means of proving that a copy of the written submissions alleged to have been filed on his behalf had been served on the Attorney-General, there was also no record of the receipt at the office of the Attorney-General of the written submissions which Counsel for the appellant stated had been handed over. In a very brief judgment, the Court held that compliance with this provision was "imperative," and in all the circumstances of that case (which were not explained in the judgment) considered it appropriate to dismiss the appeal. On the other side of the line is the recent decision of this Court in *Hatton National Bank Ltd.* v *Casimir Kiran Atapattu and Another*[4], in which the appellant had filed written submissions in time but had failed to give notice thereof to the respondent. The court exercised its discretion in favour of the party in default, and granted further time to serve on the other party a copy of the written submissions. In this context it is important to bear in mind the words of M.D.H. Fernando, J., who in *Kiriwanthe and Another* v *Navaratne*,[5] at 404 observed that-

> "The weight of authority ... favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) *is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefore, in the context of the object of the particular rule."* (Emphasis added).

In the instant case, the Appellant union in fact has filed the written submissions in time but it is uncertain whether notice thereof was given

to the other parties. It appears from the minutes of proceedings of 8th June 2007 that the learned Counsel for the 1st to 33rd petitioners-respondents did to have the written submissions of the appellant probably because the same had not been served on him at the time of filing. However, the fact that no preliminary objection was taken at the hearing of the appeal on 27th September 2007 to the appellant being heard by Court, clearly shows that the other parties had condoned the omission. This may very well be because the learned Counsel for the 1st to 33rd petitioner-respondents wisely chose not to throw stones from a glass house, as the 1st to 33rd petitioners-respondents were themselves at default, due to the unexplained delay in filing their written submissions. The written submissions of those petitioners-respondents were filed only on 4th August 2006, *very much outside the time limit of twelve weeks set out in Rule 30(7),* which is reproduced below:

> "The respondent shall within six weeks of the receipt of notice of the lodging of the appellant's submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions. *Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal, as the case may be giving notice in the manner."* (Emphasis added).

In all the circumstances of this case, considering that there is some doubt as to whether the appellant in fact contravened the rules, and the greater certainty that the 1st to 33rd petitioners-respondents themselves had defaulted in filing their written submissions on time, the conduct of the parties in not taking up any objections at the hearing to each others' possible defaults and the absence of prejudice to the parties as a result of these possible defaults, I am of the opinion that the discretion of Court ought to be exercised in favour of the appellant. The preliminary objection is therefore overruled.

Failure to cite the Board of Ministers

The learned Counsel for the appellant union strongly contends that the Court of Appeal has erred in failing to consider that the members of the Board of Ministers of the Western Provincial Council, who allegedly took the impugned decision, have not been cited as

respondents to the application of the petitioners-respondents though they are necessary parties. He submits that the failure to add the said MInisters as parties to the writ petition in the Court of Appeal even after the filing of the Objections of the State which included an affidavit from the 4th respondent-respondent dated 25th September 2001 disclosing the role played by the Board of Ministers, is fatal to the writ application as the proper parties were not before court as required by law. He has invited the attention of Court to the decisions in *Ramasamy* v *Ceylon State Mortgage Bank*(6), *Karunaratne* v *Commissioner of Co-operative Development*(7), *Gnanasambanthan* v *Rear Admiral Perera*(8), *Abayadeera* v *Dr. Stanley Wijesundara*(9) and *Farook* v *Siriwardena Election Officer*(10), which clearly set out the legal proposition that the failure to implead a necessary party is a fatal irregularity which warrants the rejection of the writ petition *in limine*.

Learned President's Counsel for the 1st to 33rd petitioners-respondents does not contest the correctness of the said proposition of law, but submits that the members of the Board of MInisters were not necessary parties to the writ application. It therefore becomes necessary to carefully examine the writ petition filed by the 1st to 33rd petitioners-respondents in the Court of Appeal and the other pleadings in the case to ascertain whether the Board of MInisters of the Western Province had any role to play in the process by which the impugned decision was made.

Although in the petition filed by the 1st to 33rd petitioners-respondents in the Court of Appeal it has been stated that the decision to classify officers in the SLTS into the categories of 'buildings' and 'irrigation' was made by the 1st to 4th respondents-respondents (paragraph 16), and it was sought to be implemented by the 1st respondent-respondent, who is the Chief Secretary for the Western Province (paragraph 17), no document embodying the decision was produced with the petition by which a writ of *certiorari* was sought to quash the said decision. It is, however, clear from paragraph 12(c) of the affidavit dated 25th September 2001 filed by the 4th respondent-respondent and the Memorandum marked 4R5(a) and the Decision of the Board of Ministers marked 4R5(b) that the impugned decision to categorize the SLTS as aforesaid was in fact placed before the Board of Ministers of the Western Province by the Chief Minister of the Province, who was also *inter alia* the Minister for Provincial

Administration, and was approved by the said Board on 17th August 2000. It is evidenced by the document marked 4R5(c) that the decision was thereafter approved by the Governor of the Western Province, on whom the power of making appointments to the Provincial Public Service is vested by section 32(1) of the Provincial Councils Act No. 42 of 1987. This Section provides that-

> *"Subject to the provisions of any other law* the appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Service of each Province is thereby vested in the Governor of that Province." (Emphasis added).

It is relevant to note that in terms of section 32(3) of the Provincial Councils Act, the Governor has the power and responsibility of providing for, and determining, "all matters relating to officers of the Provincial Public Service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers." It is further provided that in formulating such schemes of recruitment and codes of conduct "the Governor shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service and the codes of conduct prescribed for officers holding corresponding offices in the public service."

In this backdrop, learned President's Counsel contends that there was neither a necessity nor a requirement to cite the members of the Board of Ministers as respondents to the petition before the Court of Appeal, as the final decision was made by the Governor of the Province who is a party to these proceedings. He submits that the Board of Ministers had merely adopted the Central Government Circular No. 31 dated 5th August 1997 (P12), which was subsequently amended by Engineering Service Circular No. 31(1) dated 5th September 2000 (X3), in order to absorb individuals in the SLTS of the Western Province into the Sri Lanka Engineering Service (SLES). He submits that the Board of Ministers of the Western Provincial Council, had no power to decide on the adoption of Central Government Circulars, and further submits that the power to approve and implement such Circulars in terms of Section 32 is vested exclusively in the Governor concerned. He also submits that the Board of Ministers

of the Western Provincial Council was neither empowered nor obliged to approve the impugned decision, although in fact it had sought to do so. He emphasized that as the power to make all decisions relating to the provincial public service is vested exclusively in the Governor of the Province, and since he was cited as the 3rd respondent-respondent to these proceedings, there was no necessity to cite the members of the Board of Ministers of the Western Province as respondents to the writ petition.

I am unable to agree with the submissions of the learned President's Counsel for the 1st to 33rd petitioners-respondents as they overlook the important opening words of Section 32(1) of the Provincial Councils Act of 1987, *viz., "Subject to the provisions of any other law .....*" These words highlight the need to understand the said provision in the context of other provisions of law, which undoubtedly include the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka. In 1987, Parliament enacted the Provincial Councils Act along with the Thirteenth Amendment to the Constitution with the view to devolving legislative and executive power to the Provinces without parting with "its supremacy or its powers to the Provincial Councils" *(see, In Re the Thirteenth Amendment to the Constitution*[10a] at 323). By this Amendment, while reserving to itself as stated in Article 154G(7) of the Constitution, exclusive *legislative* power with respect to all matters set out in List II (Reserved List) to the Ninth Schedule, which included the 'National Public Services' (item (n) of List II), it vested in Provincial Councils by Article 154G(1) the power to make statutes with respect to matters set out in List I (Provincial Councils List) without any consultation with Parliament, and by Article 154G(5)(b) the power to make statutes with respect to matters set out in List III (Concurrent List) "after such consultation with Parliament as it may consider appropriate in the circumstances of each case." Express reference is made in List I (Provincial Councils List) to the Provincial Public Service in Appendix III item 3, and the Provincial Councils Act was enacted by Parliament, as contemplated by Article 154Q(d) of the Constitution and as explicitly stated in the preamble to the Act, "to provide for the procedure to be followed in Provincial Councils; for matters relating to the Provincial Public service; and for matters connected therewith or incidental thereto." The devolution of *executive* power to the Provinces is dealt with in Article 154C of the Constitution, which provides that-

> "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised *by the Governor* of the Province for which that Provincial Council is established, *either directly or through Ministers of the Board of Ministers, or through officers subordinate to him,* in accordance with Article 154F." (Emphasis added).

Referring to the above quoted provision, Kulatunga, J., observed in *Parameswary Jayathevan* v *Attorney-General and Others*[11] at 360-361 that -

> "At the level of a Provincial Council, Article 154C provides that executive power extending to matters with respect to which a Provincial Council has the power to make statutes shall be exercised by the Governor of the Province directly or through the Board of Ministers, or through officers subordinate to him, in accordance with Article 154F. Article 154F establishes a Board of Ministers and provides, *inter alia*, that the *Governor shall, in the exercise of his functions, act in accordance with the advice of the Board of Ministers,* except in so far as he is by or under the Constitution required to exercise his functions in his discretion." (Emphasis added).

It is therefore clear from Article 154F(1) of the Constitution that while the Provincial Board of Ministers is constitutionally charged with the responsibility of aiding and advising the Governor in the exercise of his functions, the Governor is bound in law in the exercise of his functions, as a general rule to "act in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion." The position of the Governor is similar to that of the President under the 1972 Constitution of Sri Lanka, who by Section 27(1) thereof was bound to act on the advice of the Prime Minister, which is reminiscent of the position of the Crown in the modern Westminster system.

It is important to bear in mind that Article 154F(1) recognizes that there may be exceptional situations in which the Governor is constitutionally required to act in his discretion. However, the decisions of the Supreme Court have been careful not to interpret the term "except" as used in that provision too widely. Thus in *Premachandra* v

Major Montague Jayawickrema and Another[12] *(Provincial Governors' Case)*, one of the questions referred to the Supreme Court for interpretation was, whether the exercise of the power vested in the Governor of a Province under Article 154F (4) of the Constitution, to appoint as Chief Minister, the member of the Provincial Council who "in his opinion, is best able to command the support of a majority of the members of that Council," is solely a matter for his subjective assessment and judgment. G.P.S. de Silva, C.J. (with Bandaranayake, J., and Fernando, J., concurring) answered the question in the negative. His Lordship sought to justify his decision by reference to two fundamental principles of our Constitution, namely, the Rule of Law and the concept that "Statutory power conferred for public purposes is conferred as it were upon trust, ... that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended." *(at 102-103).* His Lordship stressed that there are no absolute or unfettered discretions in public law and that discretions are conferred on public functionaries "in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted." (at 105) Considering the purpose for which by Article 154F(4) the Constitution gave the Governor a discretion, His Lordship observed at 105 that -

> "By the exercise of the franchise the people of each Province elect their representatives, for the purpose of administering their affairs. The Governor is given a discretion in order to enable him to select as Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose, personal or political."

The decision of this Court in *Maithripala Senanayake, Governor of the North-Central Province and Another* v *Gamage Don Mahindasoma and Others*[13] involved the power of the Provincial Governor to dissolve the Provincial Council in terms of Article 154B of the Constitution which was required by Article 154B (8)(d) to be exercised "in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council." The

Supreme Court considered the duty to act in accordance with the advice of the Chief Minister mandatory, and therefore the exercise of power by the Governor to dissolve the Provincial Council as not discretionary.

It is clear from the affidavit of the 4th respondent-respondent dated 25th September 2001 and the documents marked 4R5(a), 4R5(b) and 4R5(c) that the Governor of the Western Province, who is the 3rd respondent-respondent to this appeal had clearly acted on the advice of the Board of Ministers, as he is required by law so to do. I am therefore of the opinion that the failure to cite the members of the Board of Ministers as respondents to the writ petition was a fatal irregularity. A decision in point is that of *Mudiyanse* v *Christie Silva, Government Agent, Hambantota*(14), cited by learned President's Counsel for the 1st to 33rd petitioners-respondents himself, which arose from an application for *certiorari* to quash a decision taken by the Government Agent to refuse a license sought under Section 28A (1) of the Excise Ordinance as amended by Excise (Amendment) Law No. 24 of 1977. The Section empowered the Minister of Finance to direct the Government Agent to refuse or cancel a license, and the latter was obliged to give effect to such direction. The Minister was not cited as respondent to the writ petition, and the Court held that insofar as the refusal to the license was not one made by the Government Agent on his own volition in the exercise or purported exercise of the powers vested in him but one made in pursuance of the direction given by the Minister of Finance, the application for *certiorari* should have been made against the Minister and not against the respondent. In my opinion, the Court of Appeal has in the instant case, erred in quashing the decision taken by the relevant Governor on the advice of the Board of Ministers, in proceedings in which the members of the Board have not been cited as respondents and without giving them a hearing, despite the fact that the Governor was obliged in law to follow such advice. I therefore hold that the writ application should have been dismissed by the Court of Appeal in *limine*, and in the circumstances, the decision of the Court of Appeal dated 1st June 2004 which sought to quash the impugned decision without hearing the Board of Ministers who made the decision, should be set aside.

Judicial Review of Decisions of Provincial Boards of Ministers

In view of the finding that the Court of Appeal erred in quashing the impugned decision in proceedings in which the members of the Board of Ministers were not parties and without hearing them, it is strictly not necessary to go into the other questions on which special leave to appeal had been granted by this Court. However, as Counsel had in their oral and written submissions addressed some of these issues, I wish to set out herein very briefly, my views in regard to these matters as well.

Although this Court had granted special leave to appeal on question (b), namely whether the Court of Appeal had erred in failing to consider that the impugned decision of the Board of Ministers of the Western Province, which has been subsequently approved by the Governor of the Western Province, was not subject to judicial review, learned Counsel for the appellant, quite rightly, did not press this line of argument at the oral hearing and in his written submissions. No immunity from judicial review is conferred by our Constitution on the Board of Ministers or the Governor, except to the limited extent that Article 154F(2) of the Constitution, which requires the Governor himself to decide whether in a given situation he will act on advice or in his discretion, and provides that "the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted on his discretion. " In *Premachandra v Major Montague Jayawickrema and Another (supra)*, the Supreme Court considered this provision in depth and held that the ouster of jurisdiction of court applies only to the Governor's decision as to whether he should act on advice or in his discretion, and does not apply to the appointment of a Chief Minister under Article 154F (4). The court availed itself of the opportunity of examining the ambit of the power of judicial review with respect to the exercise of powers by a Provincial Governor, and observed at page 116, that-

> "The exercise of the powers vested in the Governor of a Province under Article 154F(4) excluding the proviso, is not solely a matter for his subjective assessment and judgment; it is subject to judicial review by the Court of Appeal. In application for *Quo Warranto, Certiorari* and *Mandamus*, the Court Appeal has power to review the appointment, *inter alia,* for unreasonableness, or if

made in bad faith, or in disregard of the relevant evidence, or on irrelevant considerations, or without evidence."

The above dictum is equally applicable to the exercise of powers by a Provincial Board of Ministers, although the grounds of review mentioned therein are not exhaustive. As far as decisions and actions of the Provincial Ministers are concerned, it is trite law that the extent of their amenability to *certiorari* and other writs is similar to that of Ministers appointed under Chapter VIII of the Constitution, and neither they nor their decisions or actions enjoy any immunity from judicial review. Our Courts have not been inhibited from exercising supervisory jurisdiction over the decisions or actions of Ministers, whether appointed under Chapter VIII or Chapter XVIIA of the Constitution, and granting mandates in the nature of the writ of certiorari whenever appropriate. I therefore, hold that question (b) on which special leave was granted should be answered in the negative.

It is however, vital to bear in mind that as observed by Kulatunga, J. in *T.N. Fernando, Assistant Commissioner of Excise, Kalutara* v *Nelum Gamage, Bribery Commissioner and Another*[15], *certiorari* "is a remedy whereby decisions and orders of inferior tribunals are examined to determine whether they are within their jurisdiction or powers." Although in modern times, the term 'jurisdiction; has become synonymous with 'power' and the ambit of *certiorari* has expanded to embrace decisions and actions of various bodies or persons exercising powers or functions of a public nature, the writ does not lie if circumstances necessary for the grant of *certiorari* do not exist (See, *G.P.A. Silva and Others* v *Sadique and Others*[16] and *Waas Gunawardena* v *Perera and Another*[17]. In particular it is important to remember that unlike a Court exercising appellate powers, a writ court does not get into the shoes of the authority whose action it is competent to review, it being concerned only with the question of the legality or validity of the impugned action as opposed to its correctness. As Wade observes -

"The system of judicial review is radically different from the system of appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review the Court is concerned with its legality. On an appeal the question is

"right or wrong?" On review the question is "lawful or unlawful?" (H.W.R. Wade and C.F. Forsyth, Administrative Law (Ninth Ed.) page 33).

The question therefore is whether there existed any grounds which vitiated the decision taken by the Governor of the Western Province on the advice of the relevant Board of Ministers to divide the SLTS of the Western Province into the categories of 'buildings' and 'irrigation', or as formulated by this Court for granting special leave to appeal, did the Court of Appeal fail to consider that there are no grounds existing to exercise judicial review against the said decision?

The Court of Appeal sought to quash the impugned decision mainly on the basis that the decision to subdivide the SLTS into 'buildings' and 'irrigation' is arbitrary, unreasonable and ultra vires the Sri Lanka Technological Service Minutes (SLTS Minutes) published in the Gazette Extraordinary No. 1094/2 dated 23rd August 1999, marked P2, which came into force retrospectively with effect from 1st July 1994. It is common ground that at the time when they invoked the writ jurisdiction of the Court of Appeal, the 1st to 33rd petitioners-respondents as well as the members of the appellant union held positions in several classes in the Sri Lanka Technological Service (SLTS) and were in the employ of the Western Provincial Council. The 1st to 33rd petitioners-respondents were absorbed into the service of the Western Province from the Agrarian Services Department in 1990 or thereafter, while the members of the appellant union were absorbed into the said service from other Departments such as the Building Department, the Housing Department, the Land Development Department, the Animal Production and Health Department and the Education Department. The said SLTS Minutes specifically provided for the SLTS to be administered by a 'Board' which was responsible for the management of the service, the training and deployment of its personnel and inter-department transfers under the supervision of the Public Service Commission, where relevant.

It appears that for a considerable period of time after being absorbed into the service of the Western Provincial Council, the 1st to 33rd petitioners-respondents and the members of the appellant union have been grouped together as members of a unified and

common service, and it is apparent from letters such as the letter dated 15th November 1994 marked P22(a) (page 73 of the brief), issued to the 32nd petitioner-respondent at the time of his absorption into the SLTS of the Western Province, that this arrangement was made pending the adoption of a regular service structure in the Engineering Organization of the Western Province. The obstacle to treating all technical officers in the service of the Western Provincial Council as a unified service was the fact that the officers absorbed from Departments such as Irrigation and Agrarian Services generally had no qualifications or experience in building work, and those absorbed into the service from the other departments did not have competence in irrigation work.

It is significant to note that although the 4th respondent-respondent has produced marked 4R1 an organizational chart which somewhat differs from the chart produced by the 1st to 33rd petitioners-respondents marked P1, a common feature of both these charts is that the officers of the SLTS who came under Deputy Chief Secretary (Engineering) of the Western Province functioned under two Directors who are designated respectively Director-Buildings and Director-Irrigation, and this position is also evidenced by the fact that by the letter dated 6th January 1997 (which is found along with P22(a) at page 74 of the brief) the 32nd petitioner-respondent was transferred with effect from 1st February 1997 to the Irrigation Division of the Western Province Engineering Organization coming under the Director-Irrigation. Although it is stated in paragraph 6(c) of the Counter Objections of the 1st to 33rd petitioners-respondents that a majority of them "have served for longer periods under the Director-Buildings than under the Director-Irrigation," it is clear from this averment that the functional division of SLTS into 'buildings' and 'irrigation' had existed long prior to the making of the impugned decision dated 22nd September 2000 marked 4R5(c) by the 3rd respondent-respondent Governor. It is noteworthy that the said decision was made after a fair amount of discussions between the concerned officers and representatives of the appellant union, minutes of which have been tendered to Court marked 4R4(a), 4R4(b) and 4R4(c), upon the advice of the Board of Ministers of the Western Province as evidenced by the Memorandum dated 9th August 2000 marked 4R5(a) and the

Approval of the Board of Ministers dated 17th August 2000 marked 4R5(b).

The 1st to 33rd petitioners-respondents challenged the impugned decision on the basis that their promotional prospects would be adversely affected by the said decision as it allocated 199 out of the total cadre of 238 in Class I, Class II A and Class II B, and 43 out of the total cadre of 52 in the Special Class of the SLTS to the Buildings Division, leaving a mere 39 and 9 of the cadre vacancies in the respective classes to the Irrigation Division. However, I am of the opinion that since Class I, Class II A and Class II B of the SLTS have a combined cadre without a cadre ratio, the promotional prospects of those in these classes would not be adversely affected by the said categorization as they do not need cadre vacancies in order to be promoted to Class I. Furthermore, as pointed out by learned State Counsel for the 1st to 6th respondents-respondents, in view of the decision reflected in the minutes of the meeting held on 2nd August 2000 marked 4R4(c), even promotional prospects to the Special Class will not be adversely affected. In any event, it is expressly provided in Clause 5.1 of the SLTS Minutes that "the number of posts which should be in the Special Grade shall be recommended by the Sri Lanka Technological Services Board taking into account the requirements of each department and requirements of promotion, subject to the provisions of Section I of Chapter II of the Establishments Code". According to Clause 3:2 of the Minutes of the Sri Lanka Engineering Service (SLES Minutes published in the Gazette Extraordinary bearing No. 509/7 dated 7th June 1988 marked P23), read with its Schedule, posts in the Engineering Service are grouped into *inter alia* Civil Group I – Buildings, Civil Group 2 – Highways, and Civil Group 3 – Water & Land Resources Development, which includes Irrigation. It is clear that the function of division of the SLTS of the Western Province into the categories of 'buildings' and 'irrigation' was effected as provided in Clause 5.1 of the SLTS Minutes, which in fact falls in line with Clause 3:2 of the SLES Minutes. It is significant to note that the Engineering Services Circular No. 31 dated 3rd August 1997 marked P12 provides for officers in the SLTS to be promoted to certain classes of the SLES where posts are grouped according to expertise as noted above.

In the circumstances, it is abundantly clear that the division of the SLTS into 'buildings' and 'Irrigation' is neither arbitrary nor unreasonable and is also consistent with the SLTS Minutes as well as the SLES Minutes and other applicable circulars. Clause 4(i) of the aforesaid Engineering Services Circular No. 31 (P12) expressly requires the technical officers of the SLTS attached to Provincial Councils to be classified "according to their specialization on the same grouping as the Engineers as specified in the SLES Minutes," and in fact by the Engineering Services Circular No. 31(1) dated 5th September 2000 marked X3, the earlier Circular marked P12 has been amended, to enable an officer in SLTS who has passes in Hydraulics and Irrigation subjects to be eligible for promotion to the Engineering Grade in the SLES. None of these circulars have been challenged in these proceedings. I am therefore of the opinion that there were no grounds for the exercise of judicial review by the Court of Appeal in this case, and that the Court of Appeal has in fact failed to consider that the 1st to 33rd respondents and the members of the Petitioner Union were absorbed to the SLTS of the Western Province from different Departments and they professed expertise and specialization in different fields, which justified the categorization of officers in the SLTS into 'buildings' and 'Irrigation'. The Court of Appeal has also failed to take into consideration the effect of the aforesaid Engineering Service circulars which has facilitated the promotion of officers from SLTS to SLES.

For the foregoing reasons, I allow the appeal, set aside the decision of the Court of Appeal dated 1st June 2004 and make order dismissing the application filed by the 1st to 33rd petitioners-respondents in the Court of Appeal. In all the circumstances of this case, I make no order as to costs.

TILAKAWARDANE, J.- I agree.

SOMAWANSA, J. - I agree.

Appeal allowed. Judgment of the Court of Appeal set aside.