

Airline Pilots Guild of Sri Lanka v. Sri Lankan Airlines

RTICAppeal/99/2017

*Appeals heard as part of the meetings of the Commission on 13.11.2017, 08.01.2018,
06.02.2018 and 23.02.2018*

Record of Proceedings and Order delivered on 23rd March 2018

Present

Mr. Mahinda Gammampila - Chairman
Ms. Kishali Pinto-Jayawardena -Member
Mr. S.G. Punchihewa - Member
Dr. Selvy Thiruchandran – Member
Justice Rohini Walgama, Member

In Attendance

Mr. Piyathissa Ranasinghe - Director – General
Ms. Mathuri Maran - Legal Researcher
Ms. Imalka Abeysinghe - Junior Researcher

Information Request filed on: 29.06.2017

Response by Information Officer on: 19.07.2017

Appeal filed to Designated Officer on: 02.08.2017

Response by Designated Officers on: 23.08.2017

Appeal filed to RTI Commission on: 15.09.2017

Written Submissions filed on;

By the Appellant: 04.12.2017, 18.01.2018, 14.02.2018

By the Respondent: 05.01.2018, 05.02.2018, 20.02.2018

Counsel for the Appellant:

Mr. Nalin Ladduwahetty, P.C.
Mr. Hafeel Farisz, AAL
Mr. Shamir Zavahir, AAL

Counsel for the PA:

Dr. Shivaji Felix, AAL

Appellant (Pilots Guild) represented by:

Captain Ruwan Vithanage, President, Airline Pilots Guild of Sri Lanka
Ms. S. M. Kankanamge, First Officer – Pilots Guild

PA represented by:

Mr. M.A. Ranasinghe, Head of Group – Legal, Sri Lankan Airlines
Ms. Shiara Sellamuttu, Group Legal Affairs Manager (Information Officer), Sri Lankan Airlines

Order on Jurisdictional Objection

Matters Arising During the Hearing

This Order is made pursuant to reserving of the same at the conclusion of the hearing on 23rd February 2018. The respective positions of the Appellant and Sri Lankan Airlines, as reflected in their Written Submissions (received by the Commission respectively on 14th February 2018 and 20th February 2018) and the oral submissions made before us on 23rd February 2018 and 6th February 2018, are as follows.

Sri Lankan Airlines does not dispute the fact that it is an entity owned by the Government of Sri Lanka (vide Written Submissions dated 20th February 2018). In the preliminary objection raised in relation to the jurisdiction of the Commission to hear this appeal, it disputes however that it comes within the ambit of Section 43 of the Right to Information Act (hereafter the RTI Act) which defines a public authority as a ‘company incorporated under the Companies Act, No 7 of 2007’ (hereafter the Companies Act, 2007) being that it was an existing company that was ‘re-registered’ under the Companies Act, 2007 which falls outside the ambit of the RTI Act.

As detailed in its Written Submissions, it contends that the incorporation of a company is what makes it a juristic person and that this is analogous to the birth of a person since the incorporation certificate is similar to a birth certificate of a natural person. Therefore the incorporation of a company under a particular statute is not a changing narrative but a dateable fact and a company is incorporated on the date of initial incorporation. A re-registration following the repeal of the statute under which it was incorporated, did not constitute a fresh incorporation but a continuation of the existing incorporation.

Sri Lankan Airlines reiterated that it was incorporated in January 1979 under the Companies Ordinance bearing the name Air Lanka Limited. Further, it changed its name to Sri Lankan Airlines Limited in 1999 by certificate issued by the Registrar – General of Companies under the Companies Act, No. 17 of 1982. In order to comply with the provisions of the Companies Act, 2007, which required re-registration of existing companies, Sri Lankan Airlines had applied for re-registration and was issued with a certification bearing number PB 67 by the Registrar – General of Companies. Sri Lankan Airlines submitted that if all companies were incorporated under the Companies Act, 2007, the Act would not distinguish between existing companies and companies incorporated under the Act.

A copy of the certificate of original incorporation (dated 11th January 1979) under the Companies Ordinance and of the certificate of incorporation (dated 9th November 2007) under the Companies Act, 2007 was submitted by the national carrier.

Responding to the submissions of Sri Lankan Airlines, the Appellant noted that Section 485 of the Companies Act, 2007 serves as a deeming provision by which existing companies (defined in Section 529) are deemed to be ‘formed and registered’ under the said Act. Section 485 of the Companies Act, 2007 states,

“(1) In the application of the provisions of this Act to existing companies, it shall apply-

(a) in the case of a limited company other than a company limited by guarantee, as if the company has been formed and registered under the provisions of this Act as a limited company;

(b) in the case of a company limited by guarantee, as if the company had been formed and registered under the provisions of this Act as a company limited by guarantee;

(c) in the case of a company other than a limited company, as if the company had been formed and registered under the provisions of this Act as an unlimited company; and

(d) in the case of a company which is a people's company, as if had been formed and registered under the provisions of this Act as a limited company.”

Consequently all existing companies are incorporated anew and are statutorily bound to be ‘deemed to have been formed and registered’ under the Companies Act, 2007. The Appellant also argued that, Section 487 (2) of the Companies Act, 2007 was clear and unambiguous regarding the new registration number granted to the Public Authority. Section 487 (2) states;

“Within a period of twelve months from the coming into operation of this Act, all existing companies shall apply to the Registrar to assign a new number as its company number, in a form as may be prescribed by the Registrar. The new number so assigned shall be entered in the register and also on the **fresh certificate of incorporation** to be issued under the provisions of subsection (6) of section 485.”

Counsel for the Appellant contended further in oral hearings before this Commission on 23rd February 2018 that even on a purely legal argument, a new Act would precede a previous Act and in case of a conflict, the will of the Parliament would be its latest will which is the Companies Act, No. 7 of 2007.

In counter, it was contended by Counsel for Sri Lankan Airlines that the words ‘formed and registered’ in Section 485 of the Companies Act, 2007 was intended only for harmonising purposes as opposed to being intended to operate as a fresh incorporation. Sri Lankan Airlines further provided a copy of its 2016-2017 Annual Report on the request of the Commission.

Decision of the Commission

At the outset, this Commission takes cognizance of the fact that Section 529 of the Companies Act, 2007 defines a “Company” to mean a Company incorporated under this Act or an existing Company. Irrespective as to whether a company was ‘in existence’, (in that it had been incorporated prior to the passage of the Companies Act No 7 of 2007) or afterwards, the Act considers both categories as “companies” thus making its provisions applicable to both.

The objection raised by Sri Lankan Airlines is confined to the argument that Section 43 of the RTI Act defining Public Authorities under the Act specifically applies only to a ‘company incorporated’ under the Companies Act, 2007’ and that Sri Lankan Airlines is an existing company that had ‘re-registered’ under the Companies Act, 2007, therefore falling outside the ambit of the RTI Act.

In consideration of this objection and following careful examination of the submissions advanced by both parties, it is pertinent to note that Part XVII (transitional provisions) of the Act (Sections 485 - 487) titled “Application of Act to Existing Companies” provides for the manner in which the Act should be made applicable to existing Companies. Under this Part, all Companies existing as at the Appointed Date of the Companies Act No 7 of 2007, must register under the 2007 Act, change the names if necessary as per the provisions of the Act, and obtain a new Company registration number.

The consequences that will ensue if these actions are not taken are distinctly laid down in the Act. In the event of failure to conform, the Registrar of Companies (after giving 12 months public notice) will strike off the name of the Company and all properties of that Company will be vested in the State for disposal [Section 487(5)]. But where compliance is manifested, ‘existing Companies’ are also considered ‘as if incorporated under the Companies Act’ along with a new registration Number.

Section 485 (6) of the Companies Act, No.7 of 2007 is to the following effect;

“(a) The Registrar shall enter the new name on the register in place of the former name, consequent to the deemed change of name under the provisions of subsection (5), and issue a fresh certificate of incorporation including the said suffix or the said abbreviation, as the case may be, in such certificate of incorporation.

(b) Such fresh certificate shall be issued after the Registrar has assigned a new number in terms of the provisions of section 487.”

Applying the law to the facts of this appeal, it is pertinent that the certificate of incorporation (emphasis ours) of Sri Lankan Airlines as a limited company under Section 485 (6) of the Companies Act (2007), dated 9th November 2007 describes it as an ‘existing company’ which is registered as a Limited Company **‘as if incorporated’** under the Act (emphasis ours).

The said certificate of incorporation (emphasis ours) states further that the above mentioned new number has been assigned to it and entered in the Register of Companies. Perusal of that ‘new number’ indicates that is PB 67 which is preceded by the old number of the certificate of incorporation which is PBS 1020.

Thus, even if a distinction is to be drawn between a company newly incorporated under the Companies Act, 2007 and ‘an existing company’ incorporated under previous legislation, that is an artificial distinction that takes on colour for the limited purposes of regulating the

regime under the 2007 Act at the precise point of that Act coming into force, rather than as a distinction that is meant to continue in perpetuity.

In any event, the said distinction becomes a distinction without a difference on the face of the certificate of incorporation of Sri Lankan Airlines (dated 9th November 2007) in consequence of which the national carrier is deemed to be incorporated and re-registered under the Companies Act of 2007 without which the said national carrier would have been bereft of its legal and/or juristic persona in its future operations.

In arriving at that finding, it must be emphasized that this Commission paid due regard to and was conscious of its statutory function in not attempting to make an overreach in interpreting the provisions of the RTI Act but rather, confining itself to the framework of the provisions of the Companies Act, 2007 to determine as to what import is required to be given to the definition of a 'Public Authority' as coming within the legislative intent of Section 43 (e) of the RTI Act. The preamble to the RTI Act imposes a duty upon the Commission as the statutory appellate body established under the Act, to 'foster a culture of transparency and accountability in Public Authorities.' Thus, the RTI Act was legislatively designed to apply to Public Authorities in the overriding public interest and this Commission is duty bound to enter upon its decisions with that consideration in mind.

It would thus be anathema, in our view, to give a ruling placing the respondent national carrier as lying outside the definition of a 'Public Authority' as contemplated in Section 43 (e) of the RTI Act, disregarding the 'deeming effect' of the certificate of incorporation applicable to the same under the Companies Act, 2007. This would give rise to the possibility that, not just the respondent national carrier but a vast number of other companies may see fit to purportedly claim the benefit of that same exemption and render themselves outside the reach of the RTI Act, consequently resulting in Section 43 (e) of the said Act being reduced to a futility.

We are fortified in this approach by established canons of statutory interpretation including the excellent and well-known reminder that statutes must receive a sensible construction such as will give effect to the legislative intention so as to avoid an unjust and absurd conclusion and further that, every effort must be made to engage in such construction 'as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*' (*Heydon's Case* [1584] 76 ER 637, 3 CO REP 7a).

In this instance, the 'cure and the remedy' proposed by the RTI Act must not be rendered redundant. Neither must the legislative intent in the Act's avowed purpose to 'foster a culture of transparency and accountability in Public Authorities' (vide preamble to the RTI Act) be defeated.

We are also mindful of the caution that provisions of a statute must be so construed as to make it effective and operative, on the principle '*ut res magis valeat quam pereat*.' As well reminded by Viscount Simon LC in *Nokes v. Doncaster Amalgamated Collieries* ((1940) AC 1014); 'if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the

view that Parliament would legislate only for the purpose of bringing about an effective result.’

Then again, in *Shannon Realties Ltd v. Ville de St Michel* ((1924) AC 185), the following principle of construction is demonstrated viz. “Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system”

In conclusion, we are in no doubt that Sri Lankan Airlines comes within the ambit of Section 43 of the Right to Information Act, which defines a public authority as a ‘company incorporated under the Companies Act, No 7 of 2007’ in which the State or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or otherwise has a controlling interest.” A contrary finding would disturb an effective and smooth working system as contemplated by the RTI Act, bringing about uncertainty, friction and confusion.

As reiterated during previous hearing into this matter (Vide Record of Proceedings of the Commission dated 6th February 2018), this objection that the RTI Act does not apply to it is being raised after more than a year of Sri Lankan Airlines acting in compliance with the RTI Act, including making the appointment of an Information Officer and a Designated Officer. Further, Sri Lankan Airlines has affirmed on record that it is incorporated under the Companies Act (2007) in its official documentation as well as in the legal notice available on its website, (<http://www.srilankan.com/a/plan-and-book/legal-notice>).

In the circumstances and for the aforesaid reasons, the preliminary objection relating to jurisdiction raised by Sri Lankan Airlines is dismissed.

Matter adjourned for April 24th, 2018 for consideration on the merits subject to the Public Authority availing itself of the right to appeal against this decision under Section 34 (1) of the RTI Act.
