

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF**

**SRI LANKA**

In the matter of an Application for Orders in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application**

**No. 235 / 2012**

1. Dayani Thanuja Herath Randeni,

No. 9/3, Gomes Path,

Colombo 5.

2. Thisumi Malinima Jayalath,

No. 9/3, Gomes Path,

Colombo 5.

**Petitioners**

**-Vs-**

H.M. Gunasekara,

Former Secretary to the Ministry of Education,

'Isurupaya',

Sri Jayawardenapura Kotte,

Batramulla.

And 13 Others

**Respondents**

**BEFORE** : Vijith K. Malalgoda P.C. (PCJ) &  
A.H.M.D. Nawaz, J.

**COUNSEL** : Shyamal A. Collure with A.P. Jayawera for the  
Petitioners

Janak de Silva DSG with M. Jayasinghe for the  
1<sup>st</sup> - 3<sup>rd</sup> and 8<sup>th</sup> - 12<sup>th</sup> Respondents.

**Argued on** : 05.05.2015

**Decided on** : 03.09.2015

**A.H.M.D.Nawaz J,**

In this instant application the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners who are both mother and daughter respectively seek several reliefs in the nature of writs of certiorari and mandamus in respect of the decisions of the Respondents and the purported duty owed to the Petitioners as regards the admission of the 2<sup>nd</sup> Petitioner to Grade One of Vishaka Vidyalaya, for the year 2012. The writs of certiorari have been sought to quash respectively;

- a) the decision of the 1<sup>st</sup> Respondent not to admit the 2<sup>nd</sup> Petitioner to Grade One of Vishaka Vidyalaya, Colombo for the year 2012, contained in the letter marked "P12" and
- b) the decision and the finding of the 8<sup>th</sup> to 12<sup>th</sup> Respondents in respect of the 2<sup>nd</sup> Petitioner referred to in "P12".

The discretionary remedies of mandamus are to the following effect;

- a) An order directing the 2<sup>nd</sup> to 12<sup>th</sup> Respondents or any one or more of them to admit the 2<sup>nd</sup> Petitioner to Grade One of Vishaka Vidyalaya, for the year 2012 on merit, and/or in terms of the marking scheme contained in the circular marked "P2";
- b) in the alternative to the above relief (a), an order directing and/or compelling the 2<sup>nd</sup> to 12<sup>th</sup> Respondents to admit the 2<sup>nd</sup> petitioner to the corresponding Grade at Vishaka Vidyalaya, Colombo as at the final determination of the application;

In this application the recommendation of the 8<sup>th</sup> to 12<sup>th</sup> Respondents and the decision of the 1<sup>st</sup> Respondent contained in P12, which are sought to be quashed are described as *null and void, of no avail or consequences in law, arbitrary, unreasonable, unfair, perverse, illegal, mala fide, ultra vires in excess of jurisdiction* and that they are against the legitimate expectations of the Petitioners – please vide paragraph 20 of the petition.

The resolution of the issues raised in this case revolves around circular P2 which is no doubt traceable to the Education Ordinance.

The 1<sup>st</sup> Respondent (the then Secretary to the Ministry of Education) issued this circular bearing No. 2011/18 dated 11.05.2011, setting out among other things the terms of criteria and marking scheme upon which admission of children to Grade One in all government schools for the year 2012 would be regulated (P2).

Clause 6 of the said circular which applied to the Petitioners had the following stipulations and effect.

- (a) Clause 6.0 specified that 50% of the admissions will be based on the proximity to School rul. This criterion is explained in detail in Clause 6.1.
  
- (b) According to Clause 6.1.1 an applicant can obtain a maximum of 35 marks if the names of both the father and mother appear in the electoral register for a period of 5 years previous to the year in which the application is made. In this case the application was made in 2011 and hence it is arguable, subject to counter arguments by the Respondent, that the 5 year period for consideration would span over 2010, 2009, 2008, 2007 and 2006. 7 marks are awarded for each year.
  
- (c) In the application submitted by the petitioners it is contended that the name of the parents had appeared in the electoral register for the premises No. 9/3, Gomes Path, Colombo 5 for the years 2011 and 2010. It is contended by the Respondents that since 2011 is not relevant in terms of P2, the petitioner has been awarded 7 marks for this criterion for the year 2010 (R1) because the

Compact Disk given by the Election Commissioner's Department had disclosed its veracity.

In the teeth of all these competing arguments from both the Petitioner and Respondent, when this matter was taken up for argument, the learned Deputy Solicitor-General raised a preliminary objection to the maintainability of this application for judicial review on the ground that since the Petitioners are guilty of suppression and or misrepresentation of material facts, the application should be dismissed *in limine*. The preliminary objection in the main pertains to the question whether the Petitioners have been guilty of willful deception in regard to the criterion of residence stipulated in the circular P2. The willful suppression as alleged by the Respondents in their written submissions as regards the residence qualification goes as follows;

#### **RESIDENCE AT 9/3, Gomes Path, Colombo-5**

The Petitioners had submitted two documents with their application to establish residence at 9/3, Gomes Path, Colombo-5. They were as follows;

- (i) Registered lease No. 4703 dated 10.03.2011 attested by A.A.H.W. Jayasekera, attorney-at-law & Notary Public. The lease period for two years is between 01.05.2011 and 30.04.2013.
- (ii) Unregistered lease for the period between 01.05.2006 and 30.04.2009.

The period between 01.05.2009 and 30.04.2011 has not been covered in either of the aforesaid leases.

The two indentures of leases have been executed between one Sinha Arachchige Kalyani Silva, the owner of premises No. 9/3, Gomes Path, Colombo 5 and the 1<sup>st</sup> Petitioner Dayani Thanuja Herath Randeny. The schedule thereto refers to "All that First Floor only of the storied house and premises bearing No. 9/3, Gomes Path, Colombo 5". However it is contended by the Respondents that in terms of the Circular P2 the year 2011 is irrelevant. It is further asserted by the Respondents that the Petitioners have not produced any other lease or deed to establish their right to the residency at 9/3, Gomes Path, Colombo 5.

This contention of the Respondents brings to the fore only the sufficiency or insufficiency of proof of residence as required by the residence criterion stipulated in the circular and we are not inclined to treat this as a preliminary objection to the maintainability of judicial review. If it all, this relates to the process of decision-making we hold that this is a matter that must be canvassed at the substantive hearing into this application for judicial review.

The Respondents attribute falsity to the claim of residence of the Petitioners by contrasting two separate leases. They are the following-

- (a) A separate lease marked R3 that is appended to the statement of objections between one Sinha Arachchige Kalyani Silva, allegedly the owner of premises No. 9/3, Gomes Path, Colombo 5 and one Manel Thilak Gunasinghe describes the demised premises as "**All that house and premises bearing No. 9/3, Gomes Path, Colombo 5 .**
- (b) The lease between the 1<sup>st</sup> Petitioner and the self same Sinha Arachchige Kalyani Silva which permits the petitioners to occupy '**all that the First Floor**

***only of the storied house and premises bearing No. 9/3, Gomes Path, Colombo 5.***

Both indentures have been executed by the same Attorney-at-Law and Notary Public A.A.H.W. Jayasekera. Hence the assertion is made that the fact that the Petitioners occupied the ground floor is not supported either by the lease they rely on, which purportedly gives them a right to occupy the First Floor, or the lease produced by these Respondents in favour of Manel Thilak Gunasinghe which permits the said Manel Thilak Gunasinghe to occupy the whole premises.

We are mindful of the circumstances in which execution of documents such as indentures of leases does take place and many a lapse pass muster beyond the prudence of parties, however clever they may be and even an attentive notary to whom the minutiae of execution are entrusted is no exception to drafting frailties. It has to be borne in mind that the Petitioners were not parties to the indenture of lease entered into between Sinha Arachchige Kalyani Silva and Manel Thilak Gunasinghe and we are not inclined to visit the Petitioners with any sanction for falsity at this stage on account of the discrepancies between the differing descriptions of occupancy in the deeds. There may be a degree of knowledge of culpability on the part of the Petitioners or it may be a pure drafting lapse on the part of the Notary. We are of the view if it is the drafting lapse that gave rise to the allegation of falsity, it is our considered view that the Petitioners cannot be visited with any sanction on the score.

At this stage we would, in the circumstances, give the Petitioners the benefit of the doubt arising upon these two indentures until the result of the site inspection that

has been adverted to in the statement of objections and other facts have been fully gone into at the stage of hearing and eventually adjudicated upon.

In this case, the preliminary objection goes to the very root of the pleadings and such objection cannot be decided without carefully going into the pleadings and the documents relating to the circumstances of this case.

We hasten to point out that we have borne in mind the oft-quoted dictum of Pathirana J in *W.S. Alphonso Appuhamy v L. Hettiarachchi* 77 NLR 131 at 135-6:-

“The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-Parte Princess Edmorbd de Poigns*. Although this case deals with a writ of prohibiting the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination.”



This principle has been followed consistently by our courts including in the cases of *Hulangamuwa v Siriwardena* [(1986) 1 SLR 275], *Collettes Ltd., v Commissioner of Labour* [(1989) 2 SLR 6], *Laub v Attorney General* [(1995) 2 SLR 88], *Blanca Diamonds (Pvt) Ltd., v Wilfred Van Els* [(1997) 1 SLR 360], *Jayasinghe v the National Institute of Fisheries* [(2002) 1 SLR 277] and *Lt. Commander Ruwan Pathirana v Commodore Dharmasiriwardene and Others* [(2007) 1 SLR 24].

In fact in *Dahanayake and Others v Sri Lanka Insurance Corporation Ltd., and Others* 2005 1 SLR 67 the Court of Appeal said that if there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination.

As pointed out by the learned DSG, Marsoof J in *Namunukula Plantations Ltd., v Minister of Lands and Others* (SC Appeal No. 46/2008; S.C. Minutes of 13.3.2012) stated that:-

“...it is interesting to note that the Supreme Court of India has recently lamented on the increase in the number of cases in which parties have attempted to misuse the process of Court by making false or misleading statements or by suppressing the relevant facts or by trying to mislead the Court in passing order in their favour... The above observation is not only relevant to India, as it may apply with equal force to other nations, neighboring as well as more distant, where there is a great need for the courts to be vigilant in their quest to ascertain the truth, and to deal with more strictly than they may have done in the past, with litigants whose deception or fraudulent conduct is detected.”

We are not fortified at this stage that there has been persuasive material before us to incline to the view that the Petitioners have willfully suppressed or misrepresented material facts before us. We would also not encourage the practice that the preliminary objection will be converted into a resolution of rival positions that should be adjudicated upon only at the stage of hearing.

“A preliminary objection has been defined in Venkataramaiya's Law Lexicon Page 1875 as follows. The epithet "preliminary" is inappropriate as regards this objection because a preliminary objection is one that is raised to the sustainability of an application or action on the basis of the assumption of the truth of all the averments of fact made by the suitor, in the application or plaint and is no therefore, one that can be taken in argument though not raised in the written defence. The objection here is obviously and entirely different and is not one which can be taken in argument without raising it in the written defence so as to given an opportunity to the opponent to state his answer or explanation” - *Prabhakar Gerald Walter v. Chief Secretary* (1953 AIR TC 286 at 291).

In the circumstances we overrule the primary objections raised in the case and this Court would proceed to fix this matter for argument.

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda P.C. (PCJ)**

**JUDGE OF THE COURT OF APPEAL**