IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

C A (Writ) Application

No. 767 / 2010

1. Murtaza Abid Moosajee
2. Abidhusein Gulamabbas Moosajee,
3. Shamim Abid Moosajee,

4. Zaibun-Nisa Abid
   Moosajee,
5. Fatema Abid
   Moosajee,

   ALL PARTNERS OF:

   "Moosajee Sons",

   No.754/28,

   Adamally Place,

   Galle Road,

   Colombo-04

PETITIONER

-Vs-

1. W R M D T Balalle
   Hon. President of the Labour
   Tribunal,
   The Labour Tribunal (No. 1-
   Additional),
   Vauxhall Street,

Colombo 02.

2. R P L Rajapakshe,

   56/2,

   Kidiwalawatte,

   Thawalampitiya,

   Meerigama.

3. C Waniganayake,

   Assistant Commissioner of Labour

   (Colombo -East),

   Labour Secretariat,

   Colombo 05.

RESPONDENTS

Before: A H M D Nawaz J

P. Padman Surasena J

Counsel : Chrishmal Warnasuriya for the Petitioner

Parakrama Agalawatta with Shyamalee Weliwatta for the 2nd Respondent

Suranga Wimalasena SSC for the Attorney General

Argued on: 2016 – 10 – 31

Decided on : 2017 - 03 - 13

JUDGMENT

P Padman Surasena J

At the commencement of the argument, learned counsel for the Respondents took up a preliminary objection to the maintainability of this application before this court on the basis that the orders which the Petitioners have challenged in this proceedings are appealable orders. In order to evaluate this argument it is necessary to look at the nature of the orders under challenge in this application.

The orders which the Petitioners seeks to challenge in this application are produced marked **P 6(a)** and **P 9**. The order marked **P 6(a)** is an order in which the 1st Respondent, namely learned President of the Labour Tribunal has refused permission to call another witness on behalf of the Petitioner

who was the respondent in that case. It must be noted that this application had been made after both parties had closed their respective cases and on the date fixed for filing of Written Submissions. The applicant too had concluded his evidence by that time.

The other order marked **P 9** which is being challenged in this proceedings is the final order of the 1st Respondent President of the Labour Tribunal. That order was delivered after the completion of the case before him and hence is the final order of that case.

It is the position taken up by the Petitioners that the above orders made by the 1st Respondent (i. e. Orders marked **P 6(a)** and **P 9** dated 13/09/2010 and 26/10/2010, respectively) are illegal, null and void and of no force or avail in law, inter alia because[1];

a) they are ultra Vires the purport and ambit of the Industrial Disputes Act No. 43 of 1950 (as amended) and / or Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended);

b) there is error "on the face of the record" itself;

c) they are against the principles of natural justice;

[1] Paragraph 14 of amended Petition

d) they are unreasonable and/or irrational;

e) they offend the principles of fairness and/or proportionality;

f) they are arbitrary, capricious, unwarranted and manifestly irregular;

g) they are procedurally flawed;

h) they amount to a failure to uphold the Petitioners' substantive legitimate expectations;

i) they tantamount to an abuse of due process of law guaranteed to citizens of this Republic which independent of all other grounds and without prejudice thereto, constitute matters fit & proper to be reviewed and set aside by this Court in the exercise of the jurisdiction of this Court under Article 140;

j) they, if permitted to stand, also constitutes a violation of the Fundamental Rights of the Petitioners, particularly under Articles 12(1) and 14(1)g of the Constitution;

k) they are devoid of any valid reasoning and in fact no valid reasons exist therefor.

It is on the aforesaid premises that the Petitioners state that they are entitled in law *ex debito justitiae* and/or constitutionally as citizens of this Republic to seek from this court,

(a) A mandate in the nature of a Writ of Certiorari quashing the decision of the 1st Respondent dated 13/09/2010 marked **P 6(a)**;

(b) A mandate in the nature of a Writ of Certiorari quashing the decision of the 1st Respondent dated 26/10/2010 marked **P 9**;

(c) A mandate in the nature of a Writ of Prohibition preventing the 1st Respondent and/or 3rd Respondent from proceeding against the 1st Petitioner in any manner whatsoever based on the above purported findings/decisions marked **P 6(a)** dated 13/09/2010 and the decision marked **P 9** dated 26/10/2010.[2]

The Petitioners have taken up the position that alternate remedies will not satisfactorily address the Petitioners grievances in the circumstances of this case.

In view of the above submission by the Petitioner, it becomes necessary for this Court to consider the nature of the alternate remedy that the Petitioner has in this instance.

[2] Paragraph 15 & 18 of the amended petition

Section 31D(3) of the Industrial Disputes Act specifically gives a right of appeal to a party dissatisfied with an order of the Labour Tribunal to prefer an appeal to the Provincial High Court on a question of law.

Section 31D(9) of the Industrial Disputes Act has made the provisions of Chapter XXVIII of the Code of Criminal Procedure Act relating to appeals from Magistrate's Court to the Court of Appeal, have *mutatis mutandis* been made applicable in regard to the matters connected with the hearing and disposal of an appeal preferred under the above section.

It is relevant to note that section 328 of the Code of Criminal Procedure Act which is in Chapter XXVIII therein has vested with the appellate court powers of reversing the order of the original court, ordering a re-trial and altering the judgment varying its conditions. Further, section 329 of the Code of Criminal Procedure Act states that it is open for the Appellate Court to direct, if it thinks necessary, that further evidence be taken.

It is also important at this juncture that this Court be mindful of the fact that Section 31C (1) of the Industrial Disputes Act has clearly set out the nature of the function of a Labour Tribunal. It is to the following effect:

"..... Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make, not later than six months from the date of such application, such order as may appear to the tribunal to be just and equitable. ....."

Traversing through the grounds upon which the Petitioners have stated that they are entitled to writs under Article 140 of the Constitution clearly show that all these grounds could be considered, evaluated and eventually decided in the appeal in the light of the facts of the case. Therefore the best forum to decide the issues that are being canvassed by the Petitioners in this proceeding would be the Provincial High Court which would sit in appeal to consider the impugned orders of the learned president of the Labour Tribunal.

Writ jurisdiction conferred on this court by Article 140 of the Constitution is a discretionary remedy which will be exercised at the discretion of the Court. Availability of regular procedure provided for the exercise of a right of appeal in which the appellate jurisdiction of the Provincial High Court can be invoked in a wider scope than the writ jurisdiction should be

considered as an effective, convenient, satisfactory alternative that is available to the Petitioners.

Indeed the learned counsel for the Petitioners in the course of his submission conceded that the appeal filed by the Petitioners in the Provincial High Court is pending at the moment.

The Petitioner has also specifically averred this in paragraph 17 of his amended petition.

This court is mindful that the Supreme Court in Somasundaram Vs Forbes[3] has held as follows:

"..... In this area of the law where there is no illegality, the court should first look into the question whether a statute providing for alternative remedies expressly or by necessary implication excludes judicial review. If not, where remedies overlap, the court should consider whether the statutory alternative remedy is satisfactory, in all the circumstances..... If not the court is entitled to review the matter in the exercise of its jurisdiction. Of course if there is an illegality, there is no question but that the court can exercise its powers of review. ....."

[3] 1993 (2) SLR 362 at 369

Pursuant to the above judgment, this Court having considered the decision in the above case[4] held subsequently in the case of Ishak Vs Lakshman Perera, Director General of Customs and others[5] as follows:

"..... Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the court is coming to a discretionary decision." "Where there is a choice of another separate process outside the courts, a true question for the exercise of discretion exists. For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the court will attach importance to the indication of Parliament's intention. ....."

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[4] 1993 (2) SLR 362
[5] 2003 (3) SLR 18

In that case also the Petitioner of that case himself had claimed that he had already invoked the jurisdiction of the District Court to canvass the identical facts before the competent regular court as per section 154 of the Customs Ordinance and the court went on to observe in those circumstances as follows:

"..... In this context, the President's Counsel appearing for the Petitioner has cited the case of Somasundaram Vanniasingham Vs. Forbes and another[6] and suggested that it represents a new approach to the rule relating to alternative remedies in exercising writ jurisdiction.

The Respondents submit that this case has no application to the point urged by them. In that case the court held that there is no rule requiring the exhaustion of administrative remedies. The point urged by these respondents is that there is an alternative statutory remedy for the Petitioner before a court of law and not the availability of any administrative remedy. In these circumstances this court finds that as there is an alternative, adequate remedy provided in section 154 of the Customs Ordinance, and as the Petitioner himself has already instituted action

[6] Ibid.

admittedly in the competent Court of civil jurisdiction, the Court would not exercise its discretion in favour of the issue of its writ jurisdiction ....."[7]

For the reasons set out above we are of the opinion that there is no necessity for this court to go into the questions that have been agitated by the Petitioners in this application since those issues could eventually be decided by the Provincial High Court if so urged by any party in the appeal that is pending before it. Further, if this court embarks on a task of adjudicating upon the issues raised by the Petitioners in this case, such an action would tantamount to hearing an appeal made against those two impugned orders by the learned President of the Labour Tribunal. This court cannot see any justification as to why this court should engage itself in such an exercise under these circumstances. As has been referred to in the judgment cited above, this Court is of the view that it being an appellate court has a duty to regulate the tendency of the litigants to resort to unnecessary multiple litigations particularly when there is a procedure of litigation clearly laid down in law.

As regards the order marked **P 6(a)** it is to be noted that the learned president of the Labour Tribunal by that order had refused to permit the 1st

[7] Supra at page 23

Petitioner to call another witness on the date fixed for filing of written submissions. It is relevant to note that by that time the 1st Petitioner who was the Respondent in the case before the Labour Tribunal, having led the evidence of his witnesses had closed his case.[8] Thereafter at the end of the inquiry he had closed his case for the 2nd time also.[9]

As the learned counsel for the Petitioner submitted that there are grounds for the issuance of a writ on the basis he had set out in his petition, this Court has to proceed to consider the nature of the evidence sought to be placed before the Labour Tribunal by the witness whom the 1st Petitioner had wanted to call subsequently.

The purpose as to why this witness was to be called has been clarified by the Petitioners in their counter affidavit. According to paragraph 16(b), (c) and (d) of the said counter affidavit and the document produced marked **P 10** the intended witness one K A Wijeratne whose evidence was sought to be adduced by the 1st Petitioner, has stated in the letter dated 2010-09-24 marked **P 10** that the 2nd Respondent was found working at some establishment in the months of June, July and August in the year 2010.

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[8] 1st Petitioner had closed his case on 2009-12-08.
[9] 1st Petitioner had closed his case for the 2nd time on 2010-08-06.

However, it has to be borne in mind that the service of the 2nd Respondent with the Petitioners had been terminated on 2008-10-17. In the light of that fact, this Court is unable to see any merit in that argument as the intended evidence does not appear to be relevant to the issues at hand.

Thus, the Petitioner's endeavor in this application to have a final judgment of the Labour Tribunal quashed by a writ of Certiorari cannot be successful.

In these circumstances, we uphold the preliminary objection raised by the learned counsel for the 2nd Respondent and proceed to dismiss this application with costs.

JUDGE OF THE COURT OF APPEAL

A H M D Nawaz J

I agree,

JUDGE OF THE COURT OF APPEAL