IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

A matter of an appeal filled under Article 154 P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Jayalath Pedige Prema Jayantha of

No.10 Jayalatha Sevana, Malgammana,
Moronthota.

Petitioner-Appellant

Case No. CA(PHC) 182/2008 **Vs.**

High Court of Kegalle Case No. 2777/Writ

01. Secretary
Chief Ministry,
Sabaragamuwa Provincial Council,
New Town, Ratnapura.

02. Secretary
Provincial Public Services Commission
New Town,Ratnapura.

03. The Governor
Governor's Office,
Sabaragamuwa Provincial Council,
New Town,Ratnapura.

04. Zonal Director,
Zonal Director's Office,Kegalle.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Sunil Abeyratne with Thashira Gunatilleke for Petitioner-Appellant

Indula Ratnayake State Counsel for Respondents-Respondents

Written Submissions tendered on:

Petitioner-Appellant on 19th April 2018

Respondents-Respondents on 11th April 2018

Argued on: 7th March 2018

Decided on: 29th June 2018

Janak De Silva J.

This is an appeal against the order dated 16th December 2008 by the learned High Court Judge of the Sabaragamuwa Province Holden in Kegalle by which she dismissed the writ application bearing No. 2777/Writ filed by the Petitioner-Appellant (Appellant).

The Appellant was the acting Principal of K/Halmessa Primary School when he was indicted on a complaint made by a 10-year-old student involving sexual misconduct. After the indictment was served on the Appellant trial was taken up in the High Court of Kegalle where he was acquitted on 29.10.1999 the ground that the evidence of the complainant was not reliable.

Previously, a disciplinary inquiry was commenced against the Appellant in terms of the Establishments Code (E-Code) on the same incident and on 18.08.1999 he was found guilty of all three charges and dismissed from service.

On 06.12.1999 the Appellant appealed to the Provincial Public Service Commission (PPSC) against the said dismissal and the PPSC rejected the appeal on 16.02.2000. The Appellant appealed to the Governor on 13.04.2000 and 01.01.2002 against the said rejection and the Governor rejected the appeal on 26.02.2002.

Thereafter, the Appellant filed the above application in the High Court of the Sabaragamuwa Province holden in Kegalle and sought, inter alia, the following relief:

(a) A writ of certiorari quashing the decisions made by the 1st, 2nd and 3rd Respondents reflected in P. 12, P.14 and P. 19;

(b) A writ of mandamus directing the 1st, 2nd and 3rd Respondents to reinstate the Appellant in service with back wages from the date of his interdiction.

The learned High Court Judge of the Sabaragamuwa Province Holden in Kegalle dismissed the writ application bearing No. 2777/Writ filed by the Appellant and hence this appeal.

The learned High Court Judge held that Article 55(5) of the Constitution (as it stood then) was a bar to the invocation of the writ jurisdiction of the High Court as it was the Supreme Court which had exclusive jurisdiction. She did so on the basis that the members of the Provincial Public Service were "public officers" within the meaning of Article 170 of the Constitution.

The impugned decisions in this application except the decision of the Governor rejecting the appeal on 26.02.2002 were all made when the original version of Article 55(5) of the Constitution was in force. The 17th Amendment to the Constitution, which was certified on 3.10.2001, repealed the original Article 55(5) and brought in a new Article 55(5) as well as a new Article 61A.

They read as follows:

> "55(5). Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article l26 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission

or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer."

"61A. Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law."

A plain reading of the original version of Article 55(5) and present Article 61A shows a difference in its scope and ambit. In these circumstances, this Court will have to examine the effect of the constitutional amendments as well as inter alia the principle that the rights of the parties are to be determined as at the date the application in determining the correctness of the conclusion of the learned High Court as to jurisdiction. This may also require an interpretation of the Constitution which in terms of Article 125 of the Constitution is a matter within the sole and exclusive jurisdiction of the Supreme Court.

In these circumstances, I am of the view that this matter can be disposed of other grounds as Article 138 of the Constitution states that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The main ground on which the Appellant appealed to the authorities against his disciplinary order is that he was acquitted by the High Court on the same charges. That however is not the correct position.

The disciplinary inquiry was based on charge sheet P11 which refers to charges based on "attempting to commit sexual harassment". The indictment in the High Court contained a charge for "grave sexual abuse" under section 365B of the Penal Code.

The initial disciplinary order P12 was made on 18.08.1999 and the acquittal in the criminal case was made subsequently on 29.10.1999. The Appellant appears to take the position that since he was acquitted of the criminal charges, the findings of the disciplinary inquiry cannot be sustained. I am unable to agree with this position for several reasons.

The burden of proof in the two proceedings are different as the charges under the Penal Code in the High Court has to be proved beyond reasonable doubt whereas the charges in the disciplinary proceedings must be proved on a balance of probability.

Chapter XLVIII: sections 27:11 of the Establishments Code (E-Code) indicates that there is no barrier to a departmental inquiry being conducted against a public officer whilst criminal proceedings are in progress against that public officer for an offence which falls under the E-Code. The section states that the Disciplinary Authority **should hold a disciplinary inquiry independent of the court proceedings in progress** and should only suspend or postpone the inquiry for compelling reasons and unavoidable obstacles. The fact that both proceedings can be done in parallel is further supported by section 27:6 of the E-Code. This section requires the Head of Department or a staff officer to retain certified copies of any documents that are handed over to relevant authorities for legal proceedings, if those documents may become necessary for a disciplinary inquiry against the accused public officer. The retention of certified copies for the disciplinary inquiry is thus mandated because the original documents will be in the custody of courts in a parallel court proceeding.

Further, section 27:12 of the E-Code states that court proceedings still being in progress will not inhibit a disciplinary order being made at the end of the disciplinary inquiry. Section 27:13 of the E-Code states that a court order being made against the public officer should not inhibit the disciplinary inquiry if it is still in progress and that it should be concluded and an appropriate disciplinary order made unless there are unavoidable obstacles to the continuation of the disciplinary inquiry. These sections reinforce the proposition that both proceedings can be conducted in parallel.

The question whether parallel proceedings could be conducted when both proceedings *deal with the same charges/offences* is also answered in the affirmative by the E-Code. Section 27:11 of the E-Code requires the relevant disciplinary authority to hold an independent disciplinary inquiry even where court proceedings **for an offence which falls within the Code** are in progress. Therefore, it can be reasonably concluded that the disciplinary authority can normally inquire into the offence that is already before court in addition to other relevant offences. This conclusion is strengthened when one considers section 27:15 of the E-Code. The section envisages departmental inquiries and court proceedings being held **'with regard to a charge or a series of charges' and states that the fact that the officer is acquitted in the Court proceedings should in no way affect the implementing of the disciplinary order made on the matters revealed in the departmental disciplinary inquiry.** Similarly, section 27:14 of the E-Code states that a public officer who has been acquitted of a charge or series of charges at a departmental inquiry but found guilty **of the same charges** at a Court of Law, could still be dealt with in terms of the Code. Therefore, the provisions of the Establishments Code make it very clear that parallel proceedings can be conducted against a public officer even in relation to the same charge/offence.

Section 28:6 of the E-Code unequivocally states that the fact that an officer has been acquitted or discharged or found not guilty by a Court of Law is no reasons at all why he should not be dealt with under the E-Code, if there is sufficient material on which disciplinary proceedings can be taken against him.

Accordingly, I am of the view that the acquittal of the Appellant in the criminal case does not in any way prevent the disciplinary order been implemented.

Furthermore, the prayers for writs of certiorari are misconceived I law. The Appellant sought a writ of certiorari to quash the decision made by the PPSC by which the appeal of the Appellant was rejected. Amaratunga J. in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258 at 267] held that the first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to

the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine. Hence the writ of certiorari sought against the PPSC without making all the members who took part in the impugned decision is misconceived in law and fatal to the said relief.

In any event, the prayer for a writ of mandamus is misconceived in law. The prayer to the petition seeks a writ of mandamus inter alia compelling the 2nd Respondent to reinstate the Appellant in service with back wages from the date of his interdiction. The 2nd Respondent is only the Secretary to the Sabaragamuwa Provincial Public Service Commission by *nominee officii*. The members of the PPSC have not been made Respondents to this application.

Where it is sought to command a body of persons to exercise any power, each member of that body must be made a respondent. The reason is if not, mandamus cannot be enforced by imposing a punishment for contempt of court in the event that such body of persons fail to carry out the command of the court. [*Haniffa v. Chairman, Urban Council Nawalapitiya* (66 N.L.R. 48); *Mahanayake v. Chairman, Petroleum Corporation* [(2005) 2 Sri.L.R. 193]. Our courts have consistently followed this rule. *Samarasinghe v. De Mel and Another* [(1982) 1 Sri.L.R.. 123 at 128]; *Abayadeera and 162 Others v. Dr. Stanely Wijesundera, Vice Chancellor, University of Colombo and Another* [(1983) 2 Sri.L.R. 267]; *Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* [(2006) 1 Sri.L.R. 7]; *Shums v. People's Bank and others* [(1985) 1 Sri.L.R. 197 at 204]. I have adopted this reasoning in *Bandara and others v. Provincial Public Service Commission of the Uva Province and others* [CA(PHC) 182/2012; C.A.M. 05.04.2018].

The prayer for a writ of mandamus against the 1st and 3rd Respondents must also fail. Both these Respondents are not legal persons and have been named by *nominii officii*. In *Haniffa v. The Chairman, Urban Council, Nawalapitiya* (66 NLR 48) Thambiah J. stated that a mandamus can only issue against a natural person, who holds a public office. In *Samarasinghe v. De Mel and*

Another [(1982) 1 Sri.L.R.. 123 at 128] this Court quoted with approval *Haniffa's* judgment as follows:

> "The petitioner's application is beset with other difficulties as well. The petitioner has made W. L. P. de Mel, Commissioner of Labour, the respondent to his application. It is common ground that he has now ceased to hold this post and is presently the Secretary, Ministry of Trade. The petitioner has not sought to substitute the present holder of the office. A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court. (*See, Haniffa v. The Chairman, U. C. Nawalapitiya, 66 NLR 48*). Before this Court issues a Mandamus, it must be satisfied that the respondent will in fact be able to comply with the order and that in the event of non-compliance, the Court is in a position to enforce obedience to its order. Mandamus will not, in general, issue to compel a respondent to do what is impossible in law or in fact. Thus, it will not issue ..... to require one who is functus officio to do what he was formally obliged to do." (*de Smith, 2nd Edn. 581*). So it seems to me, that even if the petitioner's application succeeded, the issue of a Mandamus would be futile."

Haniffa's judgment was again quoted with approval by the present Court of Appeal sitting as three judges in *Abayadeera and 162 Others v. Dr. Stanely Wijesundera, Vice Chancellor, University of Colombo and Another* [(1983) 2 Sri.L.R. 267]. In *Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* [(2006) 1 Sri.L.R. 1] the Petitioner sought to rely on the Court of Appeal (Appellate Procedure) Rules 1990 to support his argument that an application for writ of mandamus can be maintained against a public office without naming the holder of the office. Marsoof J. (at page 17) disagreed with this contention and said that "...this being an application for mandamus, relief can only be obtained against a natural person who holds a public office as was decided by the Supreme Court in Haniffa v. Chairman, Urban Council, Nawalapitiya".

For the foregoing reasons, I see no merit in this appeal of the Appellant.

The appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal