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

In the matter of an application in terms of Article 154P (4) of the Constitution of the Republic of Sri Lanka against the judgment dated 14-11-2014 of the High Court of Kurunegala

J.H.S.Jayamaha

Green Villege,Welagane,

Maspotha

Petitioner-Appellant

C.A. (PHC) No: 188/2014

Provincial High Court of North Western

Province Case No:HCW 04/2012

Vs.

01. Provincial Public Service Commission
(North Western Province)
Kurunegala.

02. Secretary,
Chief Ministry (North Western Province)
Kurunegala.

03. Director,
Zonal Education Office,
Kurunegala.

04. Brother G.Densil G.Mendis(deceased)
Principal,

Ku/St.Annes College,
Kurunegala.

05. Brother A.E.Tharsiyars

Principal,

Ku/St.Annes College,

Kurunegala.

Added Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Chula Bandara for Petitioner-Appellant

Anusha Fernando Deputy Solicitor General for Respondents-Respondents

Written Submissions tendered on:

Petitioner-Appellant on 7th June 2018

Respondents-Respondents on 8th March 2017

Argued on: 22nd March 2018

Decided on: 5th July 2018

Janak De Silva J.

This is an appeal against the judgement of the learned High Court Judge of the North Western Province holden in Kurunegala dated 14th November 2014.

The Petitioner-Appellant (Appellant) was serving as the librarian of St. Anne's College Kurunegala when the 2nd Respondent-Respondent (2nd Respondent) transferred her to Pothuhera Junior

School, Kurunegala as its librarian. The Appellant claimed that the transfer is illegal, irregular, unreasonable, capricious and ultra vires.

The Appellant states that she is a diploma holder of the Sri Lanka Library Services Association and was on 01.09.1987 appointed as a Grade III Librarian by the Education Committee of the Public Service Commission. She was promoted to Grade I of the Sri Lanka Library Service with effect from 01.09.2005. She was working at St. Anne's College, Kurunegala from 21.11.2001 to 31.01.2012.

The Appellant claims that she obtained leave from work on 30.11.2010 to attend the alms giving of her late husband and when she reported back to work on 01.12.2010, she was informed by the 4th Respondent-Respondent (4th Respondent) that the library had been closed and that he had taken the inventory of the library into his custody. Thereafter, she was prohibited from entering the school library and compelled to spend her time from morning till afternoon in the staff room till 31.01.2012.

The 2nd Respondent had by letter dated 16.01.2012 (P8) informed the Petitioner that she had been transferred to Pothuhera Junior School, Kurunegala as its librarian.

The Appellant claims that the transfer was outside the annual transfers for the year 2012 and in violation of section 11 of the Minutes of the Sri Lanka Librarian Service (P2) which states that when transferring a librarian, he/she shall be transferred to a school where there is a library which has a grade comparable with his/her service grade. The Appellant submits that Pothuhera Junior School, Kurunegala is not a school where there is a library with a grade comparable with the grade of the Appellant.

The Appellant filed the above application in the High Court of the North Western Province holden in Kurunegala and sought a writ of certiorari to quash the transfer dated 16.02.2012 (P8). In fact, the transfer letter of the Appellant P8 is dated 16.01.2012 and not 16.02.2012 as set out in the prayer to the petition filed in the High Court.

The learned High Court judge dismissed the application and hence this appeal.

The primary complaint of the Appellant is that she has been transferred in violation of section 11 of the Minutes of the Sri Lanka Librarian Service (P2). She contends that in terms of P2, her transfer was restricted to a school to which a Grade I Librarian appointment could be made as she was serving as Grade I Librarian at St. Anne's College Kurunegala prior to her transfer. The 2nd and 3rd Respondents contend that P2 is not applicable to the Appellant which I am persuaded to accept as the correct position. The Gazette marked P2 is applicable to Sri Lanka Librarian Service and covers the officers in the Central Government whereas the Appellant is not an officer of the Central Government. She was absorbed into the provincial service by P3 in 1991 and the said letter of appointment states, at paragraph 4, that she can be transferred to any place within the North-Western Province.

Even if it is assumed that the Appellant's contention is correct, the Appellant has failed to produce any document to show a classification of libraries. Instead she has produced P9 which is a classification of schools and not libraries. Hence assuming that P2 is applicable to the Appellant, the provision relied on by the Appellant cannot be applied in the absence of a classification of libraries which the Appellant has failed to produce to substantiate her claim. This was the conclusion that the learned High Court Judge arrived at on this issue and I am in agreement with these findings.

The Appellant further contends that the transfer is arbitrary and irrational. The reasons for the transfer according to the 2nd and 3rd Respondents-Respondents (3rd Respondent) is exigency of service and to establish that they have produced a letter dated 28.12.2011 (2V4) from the Principal of Pothuhera Junior School, Kurunegala addressed to the 3rd Respondent requesting for a librarian for the library in the school built as a world bank project. The Appellant submits that this is well after the date on which the Appellant was relieved of her duties as librarian at St. Anne's College and that there is also no documentation to show the date on which the world bank project was competed and the library opened.

The Appellant in this application is impugning the decision of the 2nd Respondent. No allegations of mala fides have been made against him in the petition. A court will not in general entertain allegations of bad faith made against the repository of a power, unless bad faith has been

expressly pleaded and properly enumerated in detail. [*Gunasinghe v Hon Gamini Dissanayake* (1994) 2 Sri.L.R. 132]. The 2nd Respondent has considered the request made by the Principal of Pothuhera Junior School, Kurunegala in deciding to transfer the Appellant. I am of the view that it is not arbitrary or irrational.

I wish to refer to another matter on which the learned High Court Judge held against the 2nd and 3rd Respondents. They raised a preliminary objection that the Appellant had failed to exhaust the right of appeal given to the Appellant and as such this application must be dismissed in limine. The learned High Court Judge rejected this as he concluded that there was no right of appeal given to the Appellant.

However, I am unable to agree with the learned High Court Judge on this issue. Section 32(1) of the Provincials Councils Act No. 42 of 1987 as amended (Act) vests, subject to any other law, the Governor with the power of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service of such province. In terms of section 32(2) of the Act, the Governor can delegate any of his powers to the Provincial Public Service Commission (PPSC) which in turn can delegate it to the Chief Secretary or any officer of the provincial public service of that Province. The document 2V3 shows that the Governor did delegate some of his powers to the PPSC which in turn delegated it to inter alia the Chief Secretary the 2nd Respondent who made the impugned decision in this case. The power of transfer is one such power delegated.

Section 32(2B) of the Act gives a right of appeal to the PPSC to any officer of the provincial public service of a Province aggrieved by any order made by the Chief secretary or any officer of the provincial public service of that Province. Hence the Appellant did have a right of appeal to the PPSC which was not exhausted.

The question then is whether a Court can refuse to exercise powers of judicial review in these circumstances. The general principle is that an individual should normally use alternative remedies where available rather than judicial review [*R. (Davies) v. Financial Services Authority* (2004) 1 W.L.R. 185; *R. (G) Immigration Appeal Tribunal* (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [*Rodrigo v. Municipal Council Galle* (49 N.L.R. 89); *Gunasekera v. Weerakoon* (73 N.L.R. 262);

Obeysekera v. Albert & others (1978-79) 2 Sri.L.R. 220); *Rev. Maussagolle Dharmarakkitha Thero and another v. Registrar of Lands and others* (2005) 3 Sri.L.R. 113]. The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [*R (Cowl) v. Plymouth City Council* (2002) 1 W.L.R. 803; *R. v. Barking and Dagenham LBC Ex. P. Lloyd* (2001) L.G.R. 421; *R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal* (2008) E.L.R. 739].

However, as it is a general principle, Courts have recognized several qualifications in its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available [*E.S. Fernando v. United Workers Union and another* (1989) 2 Sri.L.R. 199]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists.

However, I am of the view that none of those considerations are present in this case. The Appellant did not seek any interim relief from the High Court. The only relief that is sought is a quashing of the decision to transfer her which was issued on 16.01.2012 and the judgement of the High Court was on 14.11.2014 more than 2 years and 10 months from the impugned decision. The administrative remedy may well have provided a decision earlier than that.

In conclusion I wish to advert to the following statement of Lord Donaldson of Lymington M.R. in *R. v. Panel on Take-overs and Mergers Ex. P. Guinness Plc* (1990) 1 Q.B. 146 at 177]:

> "I approach this appeal by reminding myself that the judicial review jurisdiction of the High Court, and of this court in appeal, is a supervisory or "long stop" jurisdiction...consistently with this "long stop" character, it is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, at least in so far as the alleged cause of complaint could thereby be remedied. The rationale for this self-imposed fetter upon the exercise of the court's

jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given."

Both these rationales have practical utility in our legal system. Where Parliament has set up appellate procedures for addressing excesses of administrative power, that procedure must generally be resorted to prior to invoking the discretionary power of judicial review. This will assist in the Courts been able to exercise judicial review speedily when required. However, even in such situations the Courts may still exercise powers of judicial review if relevant considerations exist.

Accordingly, I am of the view that the relief claimed by the Appellant should have been rejected on that ground alone.

Subject to my findings on the alternative relief, I see no reasons to interfere with the judgement of the learned High Court Judge of Kurunegala dated 14th November 2014.

The appeal is dismissed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal