

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

An appeal made under and in terms of Article 154 P
(6) read together with Article 138 of the Constitution
of the Democratic Socialist Republic of Sri Lanka.

Case No: CA (PHC) 114/2010

H.C. Rathnapura Case No: WA 28/2009

M.K.Priyanka Anusha

Delgamuwa, Kuruwita.

4th Respondent –Appellant

Vs.

Dehipayalage Thilakarathne

Muruthaketiya, Kadangoda,

Kuruwita.

Petitioner-Respondent

01. Co-operative Employees Commission

Sabaragamuwa Provincial Council,

New Town, Rathnapura.

02. Commissioner and Registrar of the

Sabaragamuwa Province Co-operative
Development,

New Town, Rathnapura.

03. Kuruwita Multipurpose Co-operative

Society Limited,

Kuruwita

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

R.M.D. Bandara with Lilanthi De Silva for 4th Respondent-Appellant

Asthika Devendra with Kaneel Maddumage for Petitioner-Respondent

Upul Kumarapperuma with Sachini Dassanayake for 3rd Respondent-Respondent

Manohara Jayasinghe State Counsel for 1st Respondent-Respondent

Written Submissions tendered on:

4th Respondent-Appellant on 13.02.2015, 09.12.2016 and 06.08.2018

Petitioner-Respondent on 24.02.2015, 09.12.2016 and 09.08.2018

3rd Respondent-Respondent on 23.04.2015

Argued on: 18.06.2018

Decided on: 21.09.2018

Janak De Silva J.

This is an appeal made by the 4th Respondent-Appellant (Appellant) against the judgement of the learned High Court Judge of the Sabaragamuwa Province holden in Ratnapura dated 12.10.2010.

The 3rd Respondent-Respondent (3rd Respondent) called for applications for the post of Business Development Officer. One qualification required was that the candidate should possess a minimum of five years' experience in a permanent post of Clerk/Branch Manager/Typist/Field Officer/Account Assistance/Internal Auditor. Both the Appellant and Petitioner-Respondent (Respondent) applied for the post.

At the interview, the Respondent received 224 marks whereas the Appellant received only 191 marks. The 3rd Respondent decided to appoint the Respondent to the post and sought approval of the 1st Respondent-Respondent (1st Respondent) for the said appointment.

Thereafter the Appellant had made a complaint to the 1st Respondent that she was not given the proper marks. The 1st Respondent directed the 3rd Respondent to appoint the Appellant to the said post (☉☉.3).

The Respondent then instituted proceedings before the High Court of the Sabaragamuwa Province holden in Rathnapura challenging the said decision of the 1st Respondent. The learned High Court Judge granted the relief prayed for in the application and hence this appeal.

The 1st Respondent appears to have concluded that the Respondent did not have a minimum of five years' experience in a permanent post of Clerk/Branch Manager/Typist/Field Officer/Account Assistance/Internal Auditor. However, this does not appear to have been the basis for the objection made by the Appellant.

In fact, as far as the 3rd Respondent was concerned, there was no doubt that the Respondent possessed the minimum of five years' experience in a relevant permanent post. Letter dated 14.07.2009 (☉☉.1) sent by the 3rd Respondent to the 1st Respondent shows that the Respondent possessed the minimum qualification. It is the same in the annexures attached to letter dated 02.09.2008 (☉☉.2) by which the 3rd Respondent sought the approval of the 1st Respondent to appoint the Respondent.

The evidence before the High Court also establishes the fact that the Respondent possessed the minimum qualification. The first appointment of the Respondent by the 3rd Respondent was to the post of clerk on 28.06.1991 (☉☉.5) which was subject to a probationary period of two years. There is no inflexible rule providing for the automatic renewal of probation and that an inference of renewal can only be drawn in those cases in which the circumstances justify it [*State Distilleries Corporation v. Rupasinghe* (1994) 2 Sri. L. R. 395]. The evidence before the High Court did not show any act on the part of the 3rd Respondent extending the period of probation beyond

27.06.1993. In fact, the 3rd Respondent, the employer, did not contend that the said probationary period was extended.

Furthermore, the Respondent was appointed permanently as a Field Officer by the 3rd Respondent with effect from 01.09.2001 (3①) which appointment was made with the specific approval of the 1st Respondent as reflected in letter dated 21.01.2002 (3②).

The applications for the post of Business Development Officer was called on 07.07.2008. Clearly by this time the Respondent had served more than five years in a permanent post of Clerk/ Field Officer.

The Appellant contended that the Respondent has not been issued with a letter of appointment in accordance with schedule 1 of the Regulations dated 26.11.1981 made under section 32(1) of the Co-operative Employees Commission Act No. 12 of 1972 (Regulation) (③.4). If this submission is to be accepted then even the status of the Appellant as a permanent employee is also questionable for Regulation 11 requires that the appointment must be subject to a probationary period of two years whereas the letter of appointment issued to the Appellant (1⑩) does not have such a term.

The issuing of a proper letter of appointment is a matter for the 3rd Respondent as the employer and not the Respondent as the employee. *Lex non cogit ad impossibilia* that is, the law does not expect a person to do what is impossible. The Respondent certainly cannot be penalized when all available material show that the Respondent was holding a permanent post with the approval of the 1st Respondent.

For the foregoing reasons, the learned High Court Judge correctly concluded that the 1st Respondent erred in concluding that the Respondent did not have a minimum of five years' experience in a permanent post of Clerk/Field Officer.

At the hearing, the Appellant submitted several preliminary objections on which the judgment of the learned High Court Judge should be set aside which does not appear to have been urged before the High Court.

The preliminary objections raised by the Appellant for the first time in appeal are:

- (a) The decision sought to be quashed was not made in the exercise of any statutory power and hence a writ of Certiorari does not lie.
- (b) Office to which the Respondent is seeking appointment is not a public office and hence a writ of Mandamus does not lie.
- (c) Petition is misconceived in law as much as it seeks a writ of Mandamus on the 1st Respondent Commission without naming a natural person who holds public office.
- (d) The 1st Respondent Commission does not owe any public duty to the Respondent and hence he has no status to make an application for a writ of Mandamus.

The learned Counsel for the Respondent submitted that none of these preliminary objections were taken before the High Court and as such should not be considered by Court. I will now consider this submission.

The appeal before Court is against an order made by the High Court in the exercise of the jurisdiction conferred upon it by Article 154P (4) of the Constitution. Section 7 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 states that the provisions of written law applicable to applications the Court of Appeal invoking the jurisdiction vested in that Court by Articles 140 and 141 of the Constitution shall, mutatis mutandis, apply to applications made to a High Court established by Article 154P of the Constitution invoking the jurisdiction vested in that Court by paragraph (4) of Article 154P of the Constitution. The relevant procedural rules are found in The Court of Appeal (Appellate Procedure) Rules 1990 (Rules).

Rule 3(7) allows a Respondent to file a statement of objections and state further that where it contains any averments of fact, it shall be supported by an affidavit in support of such facts. This clearly indicates that a statement of objections is not limited to averments of facts and it can contain averments of law as well as law and facts. This is further corroborated by Rule 4(5)(b) which provides that the written submissions of the Respondent shall contain as concisely as possible the questions of law or the matters which are in issue in the application.

The Appellant did file a statement of objections in the High Court but none of the preliminary objections raised before this Court was urged before the High Court. The Appellant did not file any written submissions in the High Court. Clearly, the Appellant failed to comply with the Rules. What is interesting is that the 1st Respondent, whose actions are impugned in these and the proceedings before the High Court did not raise any of the preliminary objections raised by the Appellant. The 1st Respondent informed Court that it will not be filing any written submissions. The first time that these preliminary objections are raised by the Appellant is in the written submissions filed in this Court on 13.02.2015.

It is in this context that Court must decide whether to consider the preliminary objections raised belatedly by the Appellant. In *Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority and another* [(2003) 3 Sri. L. R. 146] the Court of Appeal held that a preliminary objection can be a pure question of law, it could be based on a mixed question of law and facts and even on a question of fact alone.

It is trite law that a pure question of law can be raised for the first time. The Supreme Court in *Somawathie v. Wilmon and others* [(2010) 1 Sri. L. R. 128] held that a new ground cannot be considered for the first time in appeal, if the said new ground has not been raised at the trial under the issues so framed. It was further held that the Appellate Court could consider a point raised for the first time in appeal if the following requirements are fulfilled:

- (a) The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact.
- (b) The question raised for the first time in appeal, is an issue put forward in the Court below, under one of the issues raised, and
- (c) the Court which hears the appeal has before it all the material that is required to decide the question.

In *Romesh Coorey v. Jayalath, Sub-Inspector of Police and others* [(2008) 2 Sri.L.R. 43 at 51] Dr. Bandaranayake J. (as she was then) upon a consideration of Rules 45 (6), (7) and (8) and 30(4) of the Supreme Court Rules of 1990 held:

“Accordingly, on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the petitioner's objections are taken along with the objections and/or written submissions filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights.”

I am of the view that the same reasoning is applicable in view of the Rules that apply when the writ jurisdiction of this Court or the High Court of the Provinces is invoked. A further reason for insisting that preliminary objections in writ applications must be raised in the objections and/or written submissions filed by the Respondents prior to the hearing is as otherwise it will amount to acquiescence or waiver. Of course, if the preliminary objection is on the patent lack of jurisdiction, it can be raised at any time as no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature [*Beatrice Perera v. Commissioner of National Housing* (77 N.L.R. 361)]. However, the preliminary objections raised by the Appellant does not raise any issues of patent lack of jurisdiction.

Accordingly, I am of the view that the Appellant cannot be permitted to raise the preliminary objections formulated before this Court for the first time. These preliminary objections should have been raised in the objections and/or written submissions filed before the High Court.

For the foregoing reasons, I see no reason to interfere with the judgement of the learned High Court Judge of the Sabaragamuwa Province holden in Ratnapura dated 12.10.2010.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal