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, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No: 82/2019

Gotabaya Nandasena Rajapakse,
No. 26A, Pangiriwatte Road,
Mirihana.

PETITIONER

Vs.

1) Hon. Sampath B Abeykoon,
Permanent High Court Trial-at-Bar,
Western Province,
Hulftsdorp, Colombo 12.

2) Hon. M S K B Wijeratne
Permanent High Court Trial-at-Bar,
Western Province,
Hulftsdorp, Colombo 12.

3) Hon. A A C J Rajaratne
Permanent High Court Trial-at-Bar,
Western Province,
Hulftsdorp, Colombo 12.

All sitting as the Judges of the High Court of the Western Province in their capacity as the Judges of the Permanent High Court Trial-at-Bar holden in Colombo.

4) Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: **Achala Wengappuli, J**

Arjuna Obeyesekere, J

Counsel: Romesh De Silva, P.C with M.U.M. Ali Sabry, P.C, Sugath Caldera, Ruwantha Cooray and Harith De Mel for the Petitioner

Milinda Gunatilake, Senior Deputy Solicitor General with Dileepa Peeris, Deputy Solicitor General, Wasantha Perera, Senior State Counsel and Udara Karunatilleke, State Counsel for the Respondents

Supported on: 30th May 2019, 6th June 2019, 7th June 2019 and 10th June

Written Submissions: Tendered on behalf of all parties on 14th June 2019

Decided on: 18th June 2019

Arjuna Obeyesekere, J

The Petitioner has been indicted by the Hon. Attorney General, together with six others, before the Permanent High Court at Bar for aiding and abetting the 2nd – 6th accused to commit an offence punishable under Section 388 of the Penal Code read together with Section 102 of the Penal Code and Section 5(1) of the Offences against Public Property Act No. 12 of 1982, as amended.

After the service of the indictment but prior to the plea of the accused being recorded, the learned Counsel who represented the Petitioner before the Permanent High Court at Bar had raised the following two preliminary objections with regard to the jurisdcition of the Permanent High Court at Bar:

1. Section 12A of the Judicature Act No. 2 of 1978, as amended, only provides the Permanent High Court at Bar the power to hear, try and determine an indictment against a person in respect of offences specified in the Sixth Schedule to the said Act which are financial and economic in nature and that the charges contained in the indictment do not amount to financial and economic offences as specified in the said Sixth Schedule;

2. Even though the Petitioner has been indicted for aiding and abetting the commission of an offence punishable under the Offences against Public Property Act, the Sixth Schedule to the Judicature Act does not contain such an offence.

Having considered the submissions of the learned Counsel for the Petitioner and the learned Deputy Solicitor General representing the Hon. Attorney General, the Permanent High Court at Bar, by its order delivered on 11th

February 2019, annexed to the petition marked '**P1**' had overruled the said objections and fixed the case for trial.

Dissatisfied with the said order '**P1**', the Petitioner had filed a petition of appeal on 18th February 2019, under and in terms of Section 12B of the Judicature Act No. 2 of 1978, as amended, seeking to set aside the aforementioned Order '**P1**'.[1] A copy of the said petition of appeal has been annexed to the petition marked '**P2**'.

This Court has examined the said petition of appeal '**P2**' and observes that it has been addressed to the Supreme Court and had been filed in the Registry of the Permanent High Court at Bar. The relief sought in '**P2**' *inter alia* are to uphold the preliminary objections raised by the Petitioner, to set aside the Order '**P1**', and to dismiss the prosecution case filed against the Petitioner. This Court observes further that the questions of law which the Petitioner claims are fit for adjudication by the Supreme Court have been set out in paragraph 14 of the petition '**P2**'.

The Permanent High Court at Bar, by an order delivered on 20th February 2019 which has been annexed to the petition marked '**P3**', had rejected the said appeal filed by the Petitioner.

Aggrieved by the said decision '**P3**', the Petitioner has invoked the jurisdiction conferred on this Court by Article 140 of the Constitution, seeking a Writ of

---

[1] Section 12B(1) of the Judicature Act reads as follows: "An appeal from any judgment, sentence or order pronounced at a trial held by a Permanent High Court at Bar under section 12A, shall be made within twenty eight days from the pronouncement of such judgment, sentence or order to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice."

Certiorari to quash the said Order '**P3**', and a Writ of Mandamus directing the 1st – 3rd Respondents, the Hon. High Court Judges of the Permanent High Court at Bar who made the said order '**P3**' to forward the petition of appeal '**P2**' to the Supreme Court.

The learned President's Counsel for the Petitioner made extensive submissions on 30th May 2019 and 6th June 2019. The principal argument of the learned President's Counsel was that in terms of Section 12B(1) of the Judicature Act No. 2 of 1978, as amended, he had a right of appeal against an order made by the Permanent High Court at Bar.[2] His position was that a petition of appeal once filed in the Registry of such High Court must be forwarded to the Supreme Court. He submitted that the Permanent High Court at Bar does not have the power to examine a petition of appeal filed against an order made by it and decide whether the order appealed against is an appealable order or not, or decide whether such petition of appeal should be forwarded to the Supreme Court or not. He submitted further that the Permanent High Court at Bar does not have the jurisdiction to reject a petition of appeal filed against an order delivered by it and that the Permanent High Court at Bar acted *ultra vires* its powers when it rejected the petition of appeal '**P2**' by its Order '**P3**'. In support of this argument, the learned President's Counsel relied on the judgment of the Supreme Court in **Anurudda Ratwatte and others vs The Attorney General**,[3] where the Supreme Court, having determined that the order of the High Court Trial at Bar refusing bail to the accused during the trial is a final order, held that, 'An appeal addressed to a superior court should as a

---

[2] Section 12B(1); Supra.
[3] 2003 (2) Sri LR 39.

rule be submitted to that Court except where specific provision is made empowering the original court to reject such appeal.'[4]

The next argument of the learned President's Counsel was that the order '**P3**' rejecting the petition of appeal had been made in chambers and not in open Court, thus depriving the Petitioner of a hearing prior to an order adverse to him being made. He thus complained that the Permanent High Court at Bar had violated the principles of natural justice and that the said order is procedurally improper.

It was submitted further on behalf of the Petitioner that he had a legitimate expectation that he would be afforded a hearing prior to any order adverse to his interests being made and that the failure by the Permanent High Court at Bar to afford the Petitioner a hearing prior to making the order '**P3**' is in violation of his legitimate expectation.

The final argument of the learned President's Counsel was that the order '**P3**' was biased in law in view of the approach adopted by the Permanent High Court at Bar in dealing with the petition of appeal filed by the Petitioner.

During the course of his submissions, the learned President's Counsel for the Petitioner submitted that the Petitioner has filed SC (Misc) Appeal No. 04/2019 in the Supreme Court on 8th March 2019. A copy of the petition of appeal was handed over to this Court by the learned President's Counsel for the Petitioner. This Court has examined the said petition of appeal and observes that the principal relief sought by the Petitioner in that application is to uphold

---

[4] Ibid. page 43.

the preliminary objections raised on behalf of the Petitioner and to set aside the order produced in this application marked '**P1**'.

The learned Senior Deputy Solicitor General appearing for the Respondents submitted that this Court does not have the jurisdiction to hear and determine this application in view of the fact that the Petitioner has already lodged the aforementioned appeal in respect of the order made on the preliminary objection marked '**P1**'.

The principal relief sought in this application is a Writ of Certiorari to quash the said Order '**P3**' and a Writ of Mandamus directing the 1st – 3rd Respondents, the Hon. High Court Judges who made the said order '**P3**' to forward the petition of appeal '**P2**' to the Supreme Court. While observing that the said relief is inter-related, it is an admitted fact that the Supreme Court is already possessed of an appeal filed by the Petitioner against the order '**P1**'. It was the submission of the learned Senior Deputy Solicitor General that, assuming without conceding that the order of the Permanent High Court at Bar in rejecting the appeal of the Petitioner is bad in law as alleged by the learned President's Counsel for the Petitioner, all what this Court can do after issuing notices and proceeding with the formalities is to direct the Permanent High Court at Bar to forward the petition of appeal filed by the Petitioner to the Supreme Court, to enable the Supreme Court to consider the order '**P1**'. This, he submitted, would be an exercise in vain as the jurisdiction of the Supreme Court has already been invoked by the Petitioner himself in SC (Misc) Appeal No. 04/2019, and the Supreme Court is fully possessed of the matter and is already in a position to consider the order '**P1**'.

In response to the said submission of the learned Senior Deputy Solicitor General, it was submitted by the learned President's Counsel for the Petitioner that the said objection does not relate to the jurisdiction conferred on this Court by Article 140 of the Constitution but is only a matter that this Court can consider when deciding whether to exercise its discretion. He submitted further that there is no assurance that an objection would not be taken by the Hon. Attorney General with regard to the maintainability of the said appeal, and for that reason, it is not correct to state that this Court is engaging in a futile exercise.

The learned Senior Deputy Solicitor General submitted further that this Court does not have the jurisdiction to hear and determine this application in view of the provisions of Section 12B(1) of the Judicature Act which provides that an appeal from any order of the Permanent High Court at Bar should be made to the Supreme Court.

Relying on the provisions of Section 12B(1) of the Judicature Act, the learned Senior Deputy Solicitor General submitted that the legislature has provided a specific remedy in the form of an appeal to the Supreme Court to any person dissatisfied with an order of the Permanent High Court at Bar. He submitted that if the Petitioner was aggrieved by the order '**P3**', he should have exercised the statutory remedy provided in Section 12B(1) of the Act and filed an appeal in terms of Section 12B(1) instead of invoking the Writ jurisdiction of this Court. He submitted that the Supreme Court and this Court have consistently held that its discretionary jurisdiction will not be exercised where a petitioner has an equally effective remedy.

The Petitioner in fact had stated in paragraph 21 of the petition that he is contemplating an appeal against '**P3**' but it was submitted by the learned President's Counsel that an appeal has not been filed against '**P3**'. This Court must observe that no reasons were adduced for the failure by the Petitioner to invoke the specific remedy provided by Section 12B(1) of the Judicature Act. The learned President's Counsel for the Petitioner however submitted that the order '**P3**' is not a judicial Order and that it is more akin to an administrative Order and for that reason, the Petitioner did not have a right of appeal in terms of Section 12B(1).

The learned Senior Deputy Solicitor General drew the attention of this Court to the judgment of this Court in **Halwan and Others v. Kaleelul Rahuman**[5]. The facts of that case very briefly are as follows. The petitioners had sought a Writ of certiorari to quash an order made by the Wakfs Board. An objection was taken that in terms of the Muslim Mosque and Charitable Trusts or Wakfs Act, No. 51 of 1956 (as amended), a right of appeal is available to this Court from the said order and as the petitioners have in fact sought to exercise that right of appeal, the application for the Writ of Certiorari could not be maintained.

Justice Sarath Silva (as he was then) upheld the above argument, and held as follows:

> "A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained, has to invoke and pursue the appellate jurisdiction. When such party seeks judicial review by way of an application for a Writ, as provided in Article 140 of the Constitution he has to establish an excuse for his failure to invoke and pursue the appellate

[5] 2000 (3) Sri LR 50 at page 61.

jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavits and necessary documents. In any event, where such a party has failed to invoke and pursue the appellate jurisdiction the extraordinary jurisdiction by way of review will be exercised only in exceptional circumstances such as, where the court, tribunal or other institution has acted without jurisdiction or contrary to the principles of natural justice resulting in an order that is void. The same principle is in my view applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal."

It was in these circumstances that the learned Senior Deputy Solicitor General submitted that the jurisdiction vested in this Court by Article 140 of the Constitution to grant Writs of Certiorari in accordance with the law should not be exercised in favour of the Petitioner.

When this matter was taken up for further support on 10th June 2019, this Court, taking into consideration the matters that had arisen from the submissions that had already been made by the learned Counsel on the previous occasions with regard to the power to issue Writs under and in terms of Article 140, requested the learned President's Counsel and the learned Senior Deputy Solicitor General to address this Court on whether the Permanent High Court at Bar is a Court of First instance as referred to in Article 140 of the Constitution. The learned Counsel for both parties tendered written submission on this issue on 14th June 2019.

The said issue relates to the jurisdiction of this Court and it is therefore appropriate that it is considered first.

Article 140 of the Constitution reads as follows:

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of **any Court of First Instance** or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of *certiorari, prohibition, procedendo, mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person;"

This Court must note at this stage that except for the amendment made to Article 140 by the First amendment, Article 140 has not been amended by the subsequent amendments to the Constitution.

Although the Constitution itself does not define a 'Court of First Instance', Section 2 of the Judicature Act defines a 'Court of First Instance' in the following manner:

> "The Courts of First Instance for the administration of justice in the Republic of Sri Lanka shall be –
>
> (a) the High Courts of the Republic of Sri Lanka;
>
> (b) the District Courts;
>
> (c) the Small Claims Courts;
>
> (d) the Magistrates' Courts;

(e) the Primary Courts."

The term, 'the High Court of the Republic of Sri Lanka' has been defined in Section 63 of the Judicature Act to mean, "the High Court existing at the date of enactment of this Act and deemed to have been created and established by Parliament in terms of Article 105 (2) read with Article 169 (6) of the Constitution;"

Article 105(1) of the Constitution reads as follows:

"Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –

(a) the Supreme Court of the Republic of Sri Lanka,

(b) the Court of Appeal of the Republic of Sri Lanka,

(c) the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish."

The above provisions make it clear that the High Court of the Republic of Sri Lanka is a Court of First Instance, and by virtue thereof, this Court can exercise the jurisdiction conferred on this Court by Article 140 of the Constitution in respect of the High Court of the Republic of Sri Lanka.

In order to consider the aforementioned question that was posed by this Court, it would be necessary to go back in time to 1987. The 13th amendment to the Constitution was introduced in 1987 and brought with it, provisions with regard to the devolution of power and the governing structure in the Provinces. The 13th amendment also saw the introduction of a High Court for each province, by way of Article 154P (1), which reads as follows:

> "There shall be a High Court for each Province with effect from the date on which this Chapter comes into force. Each such High Court shall be designated as the High Court of the relevant Province."

Thus, with the 13th amendment coming into force, there were two High Courts in the country. The first was the High Court of the Republic of Sri Lanka, and the second was the High Court of the Province.[6]

This Court must observe at this stage that the 13th amendment did not specify that the High Court of the Province shall be a "Court of First Instance" nor was an amendment effected to Section 2 of the Judicature Act to include the High Court of the Province as a "Court of First Instance".

It would be appropriate at this stage for this Court to consider the provisions of Article 138 of the Constitution, as it sheds light on the intention of the legislature to keep the identity of the High Court of the Province separate from the identity of the High Court of the Republic of Sri Lanka.

---

[6] A helpful insight into the legislative history of the High Court can be found in the determination of the Supreme Court in SC (SD) 7-13/2018 on the "Bill to amend the Judicature Act No. 2 of 1978". This Bill was gazetted on 6th February 2018 and has been passed by Parliament - vide Judicature Act No. 9 of 2018. The determination of the Supreme Court has been reported in 'Decisions of the Supreme Court on Parliamentary Bills – 2018 – Volume XIV page 17.'

Article 138 as enacted in 1978 read as follows:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by **any Court of First Instance,** tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:".

Article 154P(3)(a) sets out that the High Court of the Province shall *inter alia* exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province; and, as provided for in Article 154P(3)(b), exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province. Thus, the High Court of the Province has been conferred with original and appellate jurisdiction by the 13th amendment.

The conferment of original and appellate jurisdiction on the High Court of the Province meant that Article 138(1) of the Constitution required to be amended. Accordingly, the 13th amendment itself amended Article 138(1), which now reads as follows:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed **by the High Court,**

in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance."

It is clear that the words, "**High Court, in the exercise of its appellate or original jurisdiction**" have been introduced to reflect the conferment of original and appellate jurisdiction on the High Court of the Provinces. The legislature, in its wisdom, has not categorised the High Court of the Province as a Court of First Instance, but instead has proceeded to make a clear distinction between the 'High Court exercising appellate or original jurisdiction' and Courts of First Instance including the High Court of the Republic of Sri Lanka.

This Court must reiterate at this stage that no amendment has been effected to Article 140 to reflect the changes brought about by the 13th amendment.

This Court must observe that in addition to the jurisdiction conferred on the High Court of the Province in terms of Article 154P(3)(a) and (b), the High Court of the Province shall have the power in terms of Article 154P(3)(c) to "exercise such other jurisdiction and powers as Parliament may, by law, provide."

In the above background, this Court will now consider the legal status or nature of the Permanent High Court at Bar. Provisions relating to the Permanent High Court at Bar have been introduced by the Judicature (Amendment) Act No. 9 of 2018. The Constitutionality of the Bill seeking to amend the Judicature Act was challenged in the Supreme Court in SC (SD) Nos.

7/2018 -13/2018. One of the objections taken by the petitioners in the said applications was that there was no provision in the Bill for the establishment of a Permanent High Court at Bar and in law, there is no Court called and known as the Permanent High Court at Bar, and thus, the Bill cannot be enacted.

The Supreme Court, having quoted Clause 12A(1) of the Bill, held as follows:[7]

> "This amending Section is not clear as to whether it establishes a separate High Court or a separate division of the High Court of Sri Lanka, established under Article 105 of the Constitution. .... However, the offences in the 6th Schedule are offences committed within the jurisdiction of a Province and in view of Article 154P(3)(a) these cases are to be tried before the High Court of the Province. If that jurisdiction is to be conferred on the High Court of Sri Lanka, it is inconsistent with Article 154P(3)(a) of the Constitution and an amendment is required to be made to the Constitution to give effect to Section 12(a) and (b) of the Bill. This requires the Bill to be passed by a two third majority. However, if a jurisdiction is conferred on the High Court of Provinces under Article 154P(3)(c) like in Act No. 10 of 1996 and Act No. 54 of 2006, this inconsistency could be removed."

The above Determination of the Supreme Court was acted upon and the answer to the question raised by this Court is found in Section 12A(1)(a) of the Judicature Act, introduced by the Judicature (Amendment) Act No. 9 of 2018. Section 12A(1)(a) reads as follows:

---

[7] Supra.

"Notwithstanding anything in any other written law, **the High Court established by Article 154P of the Constitution for a Province** shall, in terms of sub-paragraph (c) of paragraph (3) of Article 154P of the Constitution hear, try and determine in the manner provided for by written law and subject to the provisions of subsection (4), prosecutions on indictment against any person, in respect of financial and economic offences specified in the Sixth Schedule to this Act, and any other offence committed in the course of the same transaction of any such offence, with three Judges sitting together nominated by the Chief Justice from among the Judges of the High Court of the Republic of Sri Lanka (hereinafter referred to as the "Permanent High Court at Bar")."

It appears to this Court that in terms of Section 12A(1)(a), the Permanent High Court at Bar is established through the High Court of the Province and has been vested with the jurisdiction *inter alia* to try and determine prosecutions on indictment against any person in respect of financial and economic offences specified in the sixth schedule to the Judicature Act, as amended.

The learned President's Counsel for the Petitioner has submitted that the Permanent High Court at Bar is a Court of First instance by virtue of the fact that the Judges nominated to sit on the Permanent High Court at Bar are selected from among the Judges of the High Court of the Republic of Sri Lanka. He submitted further that in terms of Section 12 of the Judicature Act, Trials at Bar are held by the High Court of the Republic of Sri Lanka and as the Permanent High Court at Bar is also a Trial at Bar, it ought to be categorised as a Court of First Instance. This Court is of the view that the said submissions cannot succeed in view of the provisions of Section 12A(1)(a) of the Act.

In the above circumstances, this Court is in agreement with the submission of the learned Senior Deputy Solicitor General that the Permanent High Court at Bar cannot be considered as a Court of First Instance for the purposes of Article 140 of the Constitution as no amendment has been made to the said Article to include the High Court of the Province or the Permanent High Court at Bar. Therefore, the jurisdiction conferred on this Court by Article 140 of the Constitution does not extend to the issuance of Writs against the orders of the Permanent High Court at Bar.

In the absence of jurisdiction to hear and determine this application, this Court cannot consider the merits of the submissions made by the learned President's Counsel and the learned Senior Deputy Solicitor General. Accordingly, this Court does not have a legal basis to issue notices on the Respondents and this application is therefore dismissed, without costs.

Judge of the Court of Appeal

Achala Wengappuli, J

I agree

Judge of the Court of Appeal