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

In the matter of an appeal under and in terms of Article 154P of the Constitution read with Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Section 22(2) of part ii of the Court of Appeal (Procedure for appeals from High Courts established by Article 154P of the Constitution) Rules, 1988

R.G. Gunapala,
Nidan Koratuwa,
Daluwaggoda,
Modarawana.

Petitioner-Appellant

Court of Appeal Case No:
CA (PHC) 159/2013

HC Hambanthota Writ
Application No: **HCWA 06/2011**

-Vs-

1. Kumari Balasooriya,
   Governor for the Southern Province,
   Office of the Governor,
   Lower Dickson Road,
   Galle.

1A. Dr. Hemakumara Nanayakkara,
Governor for the Southern Province,
Office of the Governor,
Lower Dickson Road,
Galle.

1B. Marshal Perera,
Governor for the Southern Province,
Office of the Governor,
Lower Dickson Road,
Galle.

2. H.W. Wijeratne,
Chairman,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

3. Jayantha Siriwardena,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

4. Munidasa Halpandeniya,
Member,
Southern Province Public Service
Commission,

District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

4A. Mr. D.K.S. Amarasiri,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

4B. Mr. Samarapala Vithanage,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

4C. Mr. K.L. Somarathna,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

5. Daya Vitharana,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,

6th Floor, Kaluwella,
Galle.

6. Srimal Wijesekara,
Member,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

7. Secretary,
Southern Province Public Service
Commission,
District Secretariat Complex,
6th Floor, Kaluwella,
Galle.

8. Secretary,
Ministry of Education, Land, Land
Development, Irrigation, Road, News, Rural
and State Infrastructure facilities- Southern
Province,
1st Floor,
Talbert Town Shopping Complex,
Dickson Junction,
Galle.

9. R.K. Ariyaratne,
Sisila,
Hennathota,
Dodamdoowa.

10. Zonal Education Director,
    Zonal Education Office,
    Hambantota.
11. The Honourable Attorney General,
    The Attorney General's Department,
    Colombo 12.

Respondent-Respondents

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : Asthika Devendra with Milinda Sarathchandra for the Petitioner-Appellant

Nayomi Kahawita, SC for the Respondent

Written Submissions: By the Petitioner-Appellant on 25/06/2018 and 13/02/2019

By the Respondent-Respondent on 21/08/2018

Argued on : 29/07/2019

Judgment on : **30/08/2019**

A.L. Shiran Gooneratne J.

The Petitioner-Appellant (hereinafter referred to as the Appellant) has preferred this appeal to set aside the decision of the High Court of the Southern Province holden in Hambantota, dated 24/09/2013, *inter alia*, upholding the decision by the 9th Respondent to terminate the employment of the Appellant with effect from 13/03/2009, marked P5.

According to the Petition, the Appellant while serving as a teacher in "Udamaththala School in the Hambantota district along with several other students, teachers and parents had gone to see a film, where it was alleged that the Appellant while watching the film committed sexual abuse to the virtual complainant student who was seated next to him. The Appellant was suspended from his employment on 13/03/2019, and was charged under 3 counts. Consequent to a disciplinary inquiry, the 9th Respondent found the Appellant guilty of the 1st and 3rd counts, which resulted in the termination of his employment. The Appellant thereafter preferred an appeal against the said decision to the Public Services Commission, Southern Province, (7th Respondent). By letter dated 06/05/2011, marked P8, the Appellant was informed that the appeal was dismissed. Against the said decision the Appellant preferred an appeal to the Governor of the Southern Province (1st Respondent), which was also dismissed by the decision reflected in document marked P10.

The Appellant is seeking to quash the documents marked P5, P8, and P10 by way of writ of *Certiorari* and has further sought a writ of *Mandamus* compelling the 8th Respondent to reinstate the Appellant in his position with back wages or legally offer him retirement.

The learned Counsel for the Appellant listed the following grounds for consideration;

1. The learned High Court Judge has taken into consideration the finding of guilt of the Appellant at the disciplinary inquiry by the 9th Respondent, which is illegal and procedurally improper, thus, cannot stand in law.
2. The learned High Court Judge has not taken into consideration whether the decisions reflected in documents marked P8 and P10 are contrary to the principles of natural justice or whether the Respondents have acted ultra vires.
3. The delegation of authority to the 8th Respondent as per Section 5:1 of Chapter 48 in Volume II of the Establishment Code, has not been duly made.

The learned Counsel for the Appellant has drawn attention of Court to the statement made by the virtual complainant student (aggrieved student), marked document No.1, at the preliminary investigation, where she has stated that she was sexually harassed by the Appellant. The aggrieved student was called as a witness on several occasions, but has failed to participate in the disciplinary inquiry. In the absence of the aggrieved student, the statement given by her has been adopted at

the inquiry. The contention of the Counsel for the Appellant is that the adoption and/or admission of the said statement at the disciplinary inquiry is contrary to the provisions of Section 21(13) read with Section 21(3) of Chapter XLVIII of the Establishment Code. (Code).

Section 21:3 of the Code reads as follows;

> *"The Tribunal may, depending on the nature of the charges, arrive at a decision on* ***documentary evidence alone****. Similarly, the tribunal may arrive at a decision on* ***oral evidence alone*** *or on* ***both documentary and oral evidence*** *led before the tribunal."*

Section 21:13 of the Code reads as follows;

> *"Where a witness accepts that a written statement made by him at a preliminary investigation is true, matters contained in such statement will be accepted as evidence led at the formal disciplinary inquiry."*

Section 21:10 of the Code states;

> *"The Tribunal should direct itself by the* ***best evidence*** *which it can procure or which is led before it, whether or not such evidence is admissible in a Court of Law."*

Relying on Section 21:3 and Section 21:10 of the Code, the learned Counsel for the Respondents argued that, the Establishment Code permits the

disciplinary authority to rely on statements made in the preliminary investigation and therefore, the statement given by the aggrieved student is admitted evidence at the hearing which can be relied upon by the Tribunal as best evidence.

Section 21:25 of the Code reads as follows;

> *"The Tribunal **may refer to any document** even though it has not been produced in evidence, which assists it in arriving at a decision. Nevertheless, such a document should not properly be regarded as evidence."*

Therefore, the Tribunal is also empowered to refer to any document even though, it has not been produced in evidence.

Since the aggrieved student did not participate in the disciplinary inquiry, her statement at the preliminary investigation was marked ඇ5, through a witness. In terms of Section 21:13 of the Code, where a witness accepts that a written statement made by such witness at a preliminary investigation is true, matters contained in such a statement will be accepted as evidence. When a statement of a witness is produced in evidence the truthfulness of the contents of the statement would be best known to the person who made the statement. Therefore, it is vital to evaluate the credibility of the contents as contemplated by the said Section, from the person who made the statement, in order to formally adopt the contents as evidence.

In support of the above contention the Appellant has cited ***John Keels Ltd. v. Ceylon Mercantile Industrial and General Workers Union and others (2006) 1 SLR 48, where Sri Skandarajah, J.*** held that,

> *"A charge against a person has to be proved by direct evidence. But the rules of evidence provided in the Evidence Ordinance permit evidence led in a former judicial proceedings to be led in a subsequent judicial proceeding in exceptional circumstances where the witness cannot be found or cannot be brought without unreasonable delay or expenses or the witness is prevented from giving evidence. Even though the Evidence Ordinance is not strictly applicable to inquiries held under the Industrial Dispute Act, the principle behind the admissibility of evidence should be borne in mind in accepting such evidence. The purpose of leading direct evidence is to test the credibility of a witness and to test the truthfulness of the facts given by the witness when giving evidence. If this opportunity is denied to a tribunal then only on exceptional circumstances, it can accept evidence subject to the aforesaid test."*

The charges preferred against the Appellant are very serious in nature. The Respondents relied on the contents of the statement made by the aggrieved student at the disciplinary inquiry and the statement made to the Police, both marked in evidence as incriminating evidence against the Appellant, in the absence of any other evidence, independent or otherwise. The Counsel for the Appellant has

drawn attention of Court to certain inconsistencies in the two statements given by the aggrieved student which questions the admissibility of the said evidence.

As required by the Code, if a witness is not present before the Tribunal it is incumbent upon the Tribunal to be satisfied that the contents of the statement is true, before adopting such evidence at the inquiry. In the instant case, the acceptance of the statement should have been by the aggrieved student, or at the least, by a parent, a guardian or for reasons given by the investigating authority of non-participation of the aggrieved student at the inquiry. The Respondent has failed to call any witness to substantiate the absence of the aggrieved student.

The Appellant has also brought to the attention of Court that the 1st and 7th Respondents have violated the Appellants right to be heard, before the decisions reflected in letter marked P10 and P8, respectively were given, which the Appellant contends are contrary to the principles of Natural Justice.

The 7th Respondent's letter marked P8, reflected the decision given by the Provincial Public Service Commission (PPSC), which dismissed the appeal of the Appellant. Being aggrieved by the said decision the Appellant has appealed to the Governor of the Southern Province, (1st Respondent). As reflected in the impugned document marked P10, the 1st Respondent has arrived at her decision after a discussion with the 2nd to 7th Respondents. The decisions given by the said Respondents were challenged before the 1st Respondent. The Appellant submits

that when a committee formed by the 1st Respondent which includes the 2nd to 7th Respondents, who held against the Appellant, a main limb of Natural Justice, that is, nemo judex in causa sua (No man may be a judge in his own case), the rule against bias has been breached. The Appellant also contends that in the circumstances, the denial of a hearing to the Appellant before the 1st Respondent is contrary to all basic principles of Natural Justice.

Before a judicial or quasi-judicial tribunal, a right to a hearing would normally entail the right to an oral hearing and in certain circumstances even the right to representation (*Fernando v. University of Ceylon (1956) 58 NLR 265*). The underlining presumption is that a person must be given an opportunity to reply to an allegation brought against him.

In the instant case the Appellant appealed to the 1st Respondent against the decision given by the 7th Respondent. The 1st Respondent based her findings contained in document P10, upon consulting a committee consisting of the 7th Respondent among others, of a decision made by the 7th Respondent, reflected in document marked P8, which was based on the findings of the 2nd to 6th Respondents. In the circumstances, the committee formed by the 1st Respondent in appeal, cannot be seen to be above suspicion of not having an interest in the subject matter, which is contrary to the principles of Natural Justice. A mere appearance of bias itself, is sufficient to question the impartiality of a Tribunal.

By way of further written submissions, the Respondents "additionally urging as yet another ground *inter alia*, for dismissing the above styled appeal of the Appellant", for not exhausting an alternate remedy provided by the 13th Amendment to the Constitution which provides the Appellant a right of appeal to the Public Service Commission. It is admitted by the Counsel for the Respondent that the said legal submission is made in addition to the submissions made in the Provincial High Court of Hambantota.

A Court may in its discretion refuse to grant permission to apply for judicial review if an adequate alternate remedy exists. The rule is not a rigid one. If the applicant satisfies the Court that the decision has been made without jurisdiction or in complete disregard of the rules of natural justice, the writs will lie even though an alternative remedy is available. *"A writ of Certiorari was granted to quash the award of an arbitrator made in flagrant excess of his statutory jurisdiction under the Co-operative Societies Ordinance even though an alternative remedy was available under the Ordinance". (**Sirisena v. Kotawera-Udugama Co-operative Stores Ltd. (1949) 51 N.L.R. 262**).*

The Court would generally exercise its discretion taking into consideration, *inter alia*, the time limits, public interest, the extent to which questions of procedural error or breach of natural justice arise or deciding that the merits of the case should be heard at the outset. Therefore, discretion should be exercised by a Court at the initial stage taking into consideration the factual matters in a given

application. However, when exerting discretion of Court *"the position is not as straightforward as the dicta suggest"*. (See Judicial remedies in Public Law 5th Edition, Lewis, at page 431-432).

The Respondents for reasons best known to them, chose not to raise the issue of the availability as an alternate remedy and participated in the proceedings before the Provincial High Court.

The ***Halsbury's Laws of England, 5th Ed, Vol 19*** states as follows:

> *"An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had, and to have submitted to the jurisdiction of the court."*

In ***Talagala v. Gangodawila Co-operative Stores Society Ltd. 48 NLR 472 at 474*** it was held;

> *"Where the question raised for the first time in appeal, however, is a pure question of law, and is not a mixed question of law and fact, it can be dealt with."*

As noted earlier, the question of availability of an alternate remedy is a discretionary remedy exercised, taking into consideration mixed questions of fact and law in each particular case. Therefore, an objection of this nature, which goes to the root of the case should be taken up at the earliest possible opportunity. The Respondents did not raise this issue at any time during the proceedings before the Provincial High Court.

Therefore, by not raising an objection of availability of an alternate remedy before the Provincial High Court and participating in the hearing, the Respondents in the process have acquiesced to waive their right to raise the said objection. Therefore, the Respondents are estopped from raising the said objection at this stage, before this Court.

For all the above reasons, I find that the conviction of the Appellant to the 1st and 3rd charges at the disciplinary inquiry held by the 9th Respondent cannot stand in law due to procedural irregularity and impropriety. Therefore, I find that sufficient grounds exist to quash the decisions given by the Respondents reflected in P5, P8 and P10, due to the Appellant been denied of the rules of Natural Justice.

Since the merits of this case would decide the application before Court, it is not necessary to deal with the 3rd ground of appeal raised by the Appellant.

The grounds for the issuance of a Writ of *Mandamus* as prayed for has not been made out in the Petition nor in the submissions made by the Appellant at the argument stage and therefore, the said relief is denied.

Accordingly, I set aside the order of the learned High Court Judge dated 24/09/2013, and grand relief to the Appellant by issuing a mandate in the nature of Writ of *Certiorari* to quash the determination reflected in P5, P8 and P10 as prayed for in the prayer to the Petition.

Appeal allowed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL