In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

C.A. (PHC) No: 29/2016

H.C. Case No: Writ 01/2015

In the matter of an Application for writs in the nature of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against the order dated 29.03.2016 of the Provincial High Court of Chilaw in action bearing No. HC/Writ 1/2015

Udeni Piyumantha Mahawithana,
No.200, Puttalama Road,
Chilaw

Petitioner- Appellant

VS

H.M. Sirisena,
Maasptha Waththa,
Maaspotha

And Others

Respondent-Respondents

Before: Prasantha De Silva, J
S.U.B. Karalliyadde, J

Counsel: Mr. J.M. Wijebandara, AAL with Mr. K. Pathirage, AAL for the Petitioner – Appellant.
Mr. C. Ekanayake SC for the Respondent – Respondents.

Written Submission tendered by the: Petitioner – Appellant on 15-06-2020.
Respondent – Respondents on 08-11-2019.

Argued on: 25-01-2021.

Decided on: 25-03-2021.

S.U.B. Karalliyadde, J.

By this appeal the Petitioner-appellant (hereinafter referred to as the Petitioner) seek to set aside the order dated 29.03.2015 of the learned High Court Judge of Chilaw in action bearing No. HC/Writ 01/2015. By that order, the learned High Court Judge has dismissed the applications of the Petitioner for writ of Certiorari to quash the decision of the Provincial Public Service Commission of the North Western Province (hereinafter referred to as the PPSC of the North Western Province) to interdict him from the Sri Lanka Teachers' Service and the decision of the Governor of the North Western Province (hereinafter referred to as the Governor) in appeal, to affirm the decision of the PPSC of the North Western Province and a writ of Mandamus directing the PPSC of the North Western Province Provincial to reinstate him. The decisions of the PPSC of the North Western Province and the Governor are marked as පෙ 8 and පෙ 9 respectively.

The Petitioner was a teacher in the Sri Lanka Teachers' Service and while he was serving as the acting Principal of Illippadeniya Vidyalya in Chilaw, he was interdicted on 20.12.2012 alleging that he had committed sexual harassments to the female students of the said school. Thereafter, a disciplinary inquiry was held against him by the PPSC of the North Western Province. Simultaneously the Petitioner was prosecuted by the Police in two actions before the Magistrate's Court of Chilaw under section 345 of the Penal Code (as amended by the Act, No. 22 of 1995) for the alleged sexual harassments. The Magistrate's Court proceedings were concluded on 30.08.2013. by discharging the Petitioner from the charges due to lack of interest shown by the witnesses to give evidence at the trial.

At the disciplinary inquiry held by the PPSC of the North Western Province, the Petitioner was found guilty to all charges against him and he was interdicted by the letter No.

PPSC/විනය/ 1/1/13/20 dated 25-08-2014 (marked as ලඑ – 8). Against that decision, the Petitioner preferred an appeal to the Governor urging to reconsider the decision of the PPSC of the North Western Province. Nevertheless, that appeal was dismissed by the Governor by the letter NWP/Gov.AD4/2/1/48 dated 09-02-09 (marked as ලඑ – 9).

Thereafter, the Petitioner sought reliefs by way of writs from the High Court of Chilaw against the decisions of the PPSC of the North Western Province and the Governor. Before the High Court, the respondent-respondents (hereinafter referred to as the Respondents) took up a preliminary legal objection that the High Court has no jurisdiction to hear and decide the case and sought to dismiss the action. Having considered the submissions made on behalf of both parties, the learned High Court Judge, upholding the objection of the Respondents, dismissed the action. Being aggrieved by the decision of the High Court, the Petitioner preferred this appeal seeking reliefs, to set aside the order of the High Court and quash the decisions of the PPSC of the North Western Province and the Governor by writs of Certiorari and order directing the PPSC of the North Western Province to reinstate him in the Sri Lanka Teachers' Service by writ of Mandamus.

One of the arguments of the learned Counsel for the Petitioner before this Court is that the jurisdictional objection raised by the Respondents before the High Court that the Petitioner is not entitled to have and maintain the applications for writ of Certiorari as he has an alternative remedy of appealing against the decision of the PPSC of the North Western Province to the Public Service Commission (hereinafter referred to as the PSC) should have pleaded as a defence and not raised as a preliminary legal objection. Therefore, the learned Counsel argues that for the reason that the Respondents have not taken up the jurisdictional objection by way of pleadings, it deems that the jurisdictional objection is waved off.

After the statement of objections dated 23.09.2015. of the Respondents were tendered to the High Court, the Petitioner has filed his counter-objections on 20.10.2015. Thereafter, both the Petitioner and the Respondents had addressed the Court on the preliminary legal objection raised on behalf of the Respondents on written submissions and the learned High Court Judge has delivered the impugned order on the written submissions of the parties. Irrespective of the fact whether the position of the Respondents should have taken up as a preliminary legal objection or as a defence, the Petitioner has given an opportunity by the

learned High Court Judge to meet the argument of the Respondents by way of counter-objections and written submissions. Therefore, I am of the view that a prejudice has not been caused to the Petitioner by taking up the position that the High Court is lack of jurisdiction as a preliminary legal objection without stating that in the pleadings as a defence.

The parties are not at variance about the fact that the powers of the Central Public Service Commission (hereinafter referred to as the PSC) regarding the disciplinary control over the Petitioner are delegated to the PPSC of the North Western Province. To substantiate the position of the Respondents that the Provincial High Court has no jurisdiction to decide the application for writs, the learned State Counsel for the Respondents referred to Article 61 A of the Constitution.

Article 61 A of the Constitution states thus;

'Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) 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 (the PSC), a Committee (appointed by the PSC) or any Public Officer (appointed by the PSC), 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.'

Therefore, considering the above stated constitutional provisions, the Court can agree with the argument of the learned State Counsel that the Provincial High Court has no jurisdiction to entertain the writ applications filed by the Petitioner.

Another argument of the learned Counsel for the Petitioner is that the decision of the learned High Court Judge to dismiss the action for the reason that the Petitioner had not exhausted the alternative remedy available to him i.e., lodging an appeal against the order of the PPSC of the North Western Province to the PSC is against the law. That argument of the learned Counsel is based on the assumption that there is no Article in the Constitution and /or any Act of the Parliament, which stipulates that an aggrieved party from a decision of a Provincial Public Service Commission has the appealable right to the PSC. Considering the submissions of the learned State Counsel for the Respondents, the learned

High Court Judge has come to a conclusion that in terms of Appendix III of the Constitution, the Petitioner had an alternative remedy of appealing to the PSC.

The learned State Counsel citing the authorities of *Thennakoon Vs. Director General of Customs and Others* [2004 (1) SLR 53], *Obeysekara Vs. Albert and Others* [1978 (2) SLR 220] and *Rex Vs. Inland Revenue Commissioner ex. Peterson* (1985 AC 260) argues that for the failure of the Petitioner to exhaust the alternative remedy available to him, the writ applications should be dismissed.

Appendix III item 3 of the Constitution states thus;

'The transfer and disciplinary control of all educational personnel, i.e., Teachers, Principals and Education Officers, Officers belonging to a National Service but serving the Provincial authority on secondment will have the right of appeal to the Public Service Commission. Officers belonging to the Provincial Public Service will have a right to appeal to the Public Service Commission against dismissal.'

The learned Counsel for the Petitioner argues that the words 'will have a right to appeal' there should construe that those provisions would operate 'as and when the appealable right and procedure is laid down by the law in the future.' The learned Counsel for the Petitioner also argues that nowhere in a statute stipulate an appellate procedure against a decision of a Provincial Public Service Commission to the PSC and therefore, the argument of the learned State Counsel that the Petitioner has an alternative remedy is without merits.

Article 58 (2) of the Constitution states that;

'Any public officer aggrieved by any order of transfer or dismissal, or any other order relating to a disciplinary matter made by a public officer to whom the Public Service Commission or any Committee thereof has delegated its powers under the preceding paragraph shall have a right of appeal to the Public Service Commission or such Committee, as the ease may be.'

Furthermore, Article 59 (2) of the Constitution provides thus;

'The Administrative Appeal Tribunal shall have the power to alter, vary or rescind any order or decision made by the Commission.'

Therefore, when considering the above stated Constitutional provisions it is clear that a public officer who is dissatisfied with a decision of a Provincial Public Service Commission has a right to appeal to the PSC and from there to the Administrative Appeal Tribunal (the AAT).

By section 3 of the Administrative Appeals Tribunal Act, No. 4 of 2002 powers is delegated to the AAT to hear and determine any appeal preferred to it from any order or decision made by the PSC in exercising its powers under Chapter IX of the Constitution. Furthermore, the Establishment Code stipulates the provisions regarding appeals and appeal procedures against the disciplinary orders. Section 26:5 of the Establishment Code provides that any public officer who is dissatisfied with a disciplinary order could appeal to the PSC and by section 26.10 appeal rights are given to such officers to the Cabinet of Ministers against the decisions of the PSC. Therefore, the above stated Constitutional and statutory provisions have guaranteed the appeal rights of an educational personal against any order of a Provincial Public Service Commission to the PSC and from there to the AAT or to the Cabinet of Ministers.

Hence, in the instant case, the Petitioner had alternative remedies of appealing against the decision of the PPSC of the North Western Province to the PSC and if he was not satisfied with the decision of the PSC, he could have appealed to the AAT or to the Cabinet of Ministers before seeking reliefs from the Provincial High Court by way of a writ. Therefore, the Court cannot agree with the above stated argument of the learned Counsel for the Petitioner.

The learned Counsel for the Petitioner has cited three authorities in his written submissions to substantiate his position. The learned Counsel argues that in the case of Sirisena Vs. Kotawera–Udagama Co-Operative Stores Ltd, (51 NLR 262) the court had issued a writ even if there was an alternative remedy. In that case the decision which was challenged by way of writs had been taken by the authorities exceeding the statutory power conferred on them. Therefore, the facts considered in that case are different to the facts of the case in hand and in the instant case the Petitioner does not challenge that the PPSC of the North-Western Province had exceeded its statutory powers. In the cases of Linus Silva Vs. University Council of Vidyodaya University (64 NLR 104) and Somasundaram Vs. Forbes

and Others which the learned Counsel cited, the writs were issued for the reason that the alternative remedies available to the petitioners were not adequate, effective and satisfactory. But, in the instant case, as stated hereinbefore, the Petitioner had the right to appeal against the decision of the PPSC of the North-Western Province to the PSC and from there to the AAT or to the Cabinet of Ministers. Therefore, I am of the view that the Petitioner in the instant action had adequate, satisfactory and effective remedies and without exhausting those remedies, he is not entitled to seek reliefs from the High Court by way of writs.

The Courts repeatedly refused to exercise its writ jurisdiction when there are alternative remedies. It was held in the case of Tennakoon Vs. DG of Customs (supra) that; "... The petitioner has an alternative remedy, as the Customs Ordinance itself provides for such course of action under Sec. 154. In the circumstances the petitioner is not entitled to invoke writ jurisdiction..."

In Kahapolage Kithsiri Palitha Fernando Vs. The Registrar General and Others, (CA Writ Application No. 43/2012, Decided on 07.07.2015) it was held that; '.... *A mandate in the nature of a writ is being a discretionary remedy, will not grant if alternative remedy is available.*'

It was held in the case of K.A. Gunesekara Vs. T.B. Weerakoon, Assistant Government Agent, Kurunegala) (73 NLR, 621) that; '... *the (writ) application should be refused because... (b) the petitioner had an alternative remedy....*'

In Dedigama Vs. Preventive Officer, Sri Lanka Customs and Others, (2004, SriLR 371) it was held that '... *Availability of an alternative remedy (Sec. 164) prevents the petitioner from seeking relief by way of a prerogative writ.*'

In the case of ***Ishak Vs. Lakshman Perera, DG of Customs and other***, [*2003 (3) SLR 18 at page 22*] it was held that '*Where there is an alternative procedure which will provide the applicant with a satisfactory remedy, the courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so, the court is coming to a discretionary decision. Where there is a choice of another separate process outside the courts, a true question for the exercise of discretion exists. For the court to require the*

alternative procedure to exhausted prior to restoring to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that the Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the court will attach importance to the indication of parliament's intention. ...'

de Smith in 'Judicial Review of Administrative Action' {4th Ed.} states that 'it is (Mandamus) pre-eminently a discretionary remedy' (at page 540) and 'Mandamus has always been awarded as an extraordinary, residuary and suppletory remedy, to be granted only when there is no other means of obtaining justice' (at page 561). For the reason that in the instant case the Petitioner is not entitled for writ of Certiorari, I hold that he is not entitled to a writ of Mandamus sought by him.

Considering all the above stated facts, I hold that the order of the learned High Court Judge dated 29.03.2015. dismissing the application of the Petitioner is according to law, and necessity does not arise for this Court to interfere with that order. Therefore, I affirm the order of the learned High Court Judge dated 29.03.2015 and dismiss this action. The Petitioner should pay Rs. 50 000/= as costs of this Court to the Respondents.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.

JUDGE OF THE COURT OF APPEAL