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 and Mandamus and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Kurukulasuriya Icinth Fernando (AKA) Himali Fernando
Permanently of;
No. 424/7, Godellawatta Road, Malambe
Presently of;
Via Inganni, No. 3, Milano, Italy.

Petitioner

Vs.

CA (Writ) Application No: 435/2020

1. C.D. Wickamaratne
   Inspector General of Police (Acting)
   Police Headquarters, Colombo 01.

2. Chrishantha Lokuge
   HQI/Officer in Charge of Police,
   Police Station, Moratuwa.

3. Jinadasa Rajapakshe
   Secretary, State Ministry of Foreign Employment et al,
   No. 34, Narahenpita Road, Nawala.

4. Wannakuwattawaduge Suraj Fernando,
   No. 4/7, Bodhiraja Mawata,
   Willorawatta, Moratuwa.

5. Marks Fernando
   Battulu Oya.

6. Mihindukulasuriya Sujith Deshapriya Fernando

49/53, 2nd Cross Street, Aluthwatta, Halawata.

7. Hemantha Fernando
   41/12, Francisco Place, Moratuwella, Moratuwa.

8. Dilrukshi Perera
   No. 92/12, Mullegama, Homagama.

9. Chandrasiri Soysa
   686A, Elhena Road, Gothatuwa, Angoda.

10. Mr. U.V. Sarath Rupasiri
    Controller Immigration and Emigration
    Suhurupaya, Sri Subhuthipura Road,
    Battaramulla.

Respondents

BEFORE : **K. PRIYANTHA FERNANDO, J**

DEVIKA ABEYRATNE, J

COUNSEL : Chrishmal Warnasuriya with A. Selvaraj for the Petitioner.

DATE OF SUPPORT : 19.12.2020

ORDER ON : 13.01.2021

K. PRIYANTHA FERNANDO, J.

01. The petitioner along with another five accused was charged in the Magistrates Court of Moratuwa for offences punishable in terms of sections 403, 386 of the Penal Code in counts 1 and 2 respectively and, an offence punishable in terms of section 64(b) of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 in count No.3. The case in the Magistrates Court initially proceeded and was partly heard in the absence of the petitioner in terms of section 192 of the Code of Criminal Procedure Act, as she was abroad. The petitioner was later arrested when she returned to Sri Lanka, produced before the Magistrates Court and was later released on bail subject to a condition, among others, that her passport was to be impounded preventing her from leaving the country. Applications made by the petitioner before the Magistrates Court to get the passport released to enable her to go abroad were refused by the learned Magistrate on 28th August 2020 and 18th October 2020.

02. The instant application is filed by the petitioner seeking to quash by a writ of *certiorari* the B report bearing BR 1668/15 naming the petitioner an accused in case No.53623 in the Magistrates Court, to quash the orders of the Hon. Magistrate of Moratuwa dated 28th August 2020 and 18th October 2020 respectively, and seeking to issue a writ of *Mandamus* directing the Hon. Magistrate of Moratuwa to inquire and report as to how the proceedings commenced against the petitioner without the sanction of the 3rd respondent in terms of section 62(3) of the Bureau of Foreign Employment Act, and to issue a writ of *Mandamus* directing the 3rd respondent to inquire as to how the proceedings commenced in the Magistrates Court without his sanction as required by the said section 62(3). The petitioner further seeks interim relief to get her passport released by the Hon. Magistrate and/or to direct the 10th respondent to allow her free exit from and entry to the Republic. However, learned Counsel for the petitioner informed this Court at the support stage, that the petitioner would not pursue the application for the writs of *Mandamus*, as count No. 3 of the charge in the Magistrate's Court had been amended. The learned Counsel for the petitioner was heard in support of the application.

03. The main grievance of the petitioner is the order of refusal by the learned Magistrate to release her travel document to enable her to go abroad. Learned Counsel for the petitioner submitted that the learned Magistrate has failed to consider the fact the petitioner did not abscond or avoid appearing in Court, as she was not aware of the proceedings against her. The learned Magistrate has

failed to consider that the petitioner is entitled to free medical treatment in Italy, and that she could not afford expenses for medical treatment in Sri Lanka.

04. The petitioner seeks to quash the orders of the Hon. Magistrate of Moratuwa dated 28th August 2020 and 18th October 2020 refusing the application by the petitioner to leave the island. In these circumstances, there is a clear alternative remedy for the petitioner. That is to make an application to get the order of the learned Magistrate revised by the High Court of the province. The petitioner has not sought that remedy available in the High Court. Application for writ is a discretionary remedy, where an alternative and equally efficacious remedy is available to a litigant, they should pursue that remedy and may not invoke special jurisdiction to issue a prerogative writ, unless there are good grounds to do so.

05. This issue has been discussed in several judgments by this Court, as well as the Supreme Court. In the case of ***Halwan and Others V. Kaleelul Rahuman (2000 3 Sri L.R. 50 at 61)***, Justice Sarath N. Silva (as he then was) stated 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 jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavit 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."

06. In the instant case, the petitioner has failed to establish an excuse for her failure to invoke or pursue her right to revisionary jurisdiction of the High Court against the order of the learned Magistrate, nor has she pleaded such excuse. The petitioner has failed to submit any exceptional circumstances such as, where the learned Magistrate has acted without jurisdiction or contrary the principles of natural justice.

07. The same issue was discussed at length by Justice Arjuna Obeyesekere in the case of ***Wickremasinghage Francis Kulasooriya V. Office in Charge, Police Station Kirindiwela CA (Writ) Application No. 338/2011***, decided on 22.10.2018, where it was held;

"The question that arises for consideration in this application is what should a Court exercising Writ jurisdiction do, when confronted with an argument that an alternative remedy is available to the Petitioner and that such alternative remedy should be resorted to? This Court is of the view that a rigid principle cannot be laid down and that the appropriate decision would depend on the facts and circumstances of each case. That said, where the statute provides a specific alternative remedy, a person dissatisfied with a decision of a statutory body should pursue that statutory remedy instead of invoking a discretionary remedy of this Court. That remedy should be equally effective and should be able to prevent an injustice that a Petitioner is seeking to avert. Furthermore, if the Writ jurisdiction is invoked where an equally effective remedy is available, an explanation should be offered as to why that equally effective remedy has not been resorted to.

08. Justice Obeyesekere further said;
"That brings this Court to the facts of this application once again. The Petitioners complaint is that the learned Magistrate failed to comply with the decision of the Hon. Attorney General and discharge them from the non-summary proceedings. As the Petitioners were dissatisfied with the said decision, the Petitioners could have invoked the revisionary jurisdiction of the High Court of the Province, which is a statutory remedy provided by the Constitution. This Court is of the view that the revisionary jurisdiction is an equally effective remedy that the Petitioners could have resorted to, where the legality or propriety of the order of the learned Magistrate could have been considered. No explanation has been offered by the Petitioners as to why they did not invoke the revisionary jurisdiction, although this Court observes that the Petitioners did in fact file revision applications when the learned Magistrate refused to grant bail. Perhaps, the refusal of bail by the Provincial High Court may have prompted the Petitioners to file this application and seek the interim relief, which would then have the same effect as being released on bail. In these circumstances and given the peculiar facts of this case, this Court is in agreement with the submission of the learned President's Counsel for the 3rd and 4th Respondents.'

09. In this instance, the above remedy of revisionary jurisdiction available in the High Court of the province is equally or more efficacious and adequate. No explanation was offered by the petitioner as to why that equally effective remedy has not been resorted to. There are no exceptional circumstances such as, where

the learned Magistrate acted without jurisdiction or contrary to the principles of natural justice.

10. In the above premise, this court is of the view that the petitioner has failed to establish a prima facie case that warrants issuing formal notice of this application on the respondents.

Hence, the application is dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree.

JUDGE OF THE COURT OF APPEAL