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

In an appeal under Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (P.H.C.) No. 232/2015

P.H.C. (Kurunegala) No. H.C. (W) 31/2012

Marasinghe Arachchige Mahinda Premalal,
Kolaeliya, Pallama.

PETITIONER

Vs.

1. Tissa R. Balalla
   The Governor of the North-Western Provinces
   Office of the Governor-North Western Province,
   Maligawa, Kurunagala.
   And eight others.

RESPONDENTS

And Now

Marasinghe Arachchige Mahinda Premalal,
Kolaeliya, Pallama.

PETITIONER-PETITIONER

1. Tissa R. Balalla

1A. Peshala Jayarathna,
The Governor of the North-Western Provinces
Office of the Governor-North Western Province,
Maligawa, Kurunagala.
And 08 others

RESPONDENT-RESPONDENTS

Before: **PRESANTHA DE SILVA, J. &**
K.K.A.V. SWARNADHIPATHI, J.

Counsel: Shantha Jayawardena with Dinesh De Silva
(For the Appellant-Petitioner)

Madhubashini Sri Meththo (S.C.)
(For 1st -7th and 9th Respondent-Respondents)

Argued on: 08.10.2021

Decided on: 10.03.2022

K.K.A.V. SWARNADHIPATHI, J.

JUDGMENT

The Petitioner-Appellant had invoked the jurisdiction aggrieved by the judgment dated 29.12.2015 delivered by the High Court of the North Western Province (Holden in Kurunagala). The Petitioner pleads that he was a school principal attached to the Sri Lanka Principal Service. He had started his carrier as a Teacher attached to Sri Lanka Teacher Service in 1989. In the year 2009, after completing the relevant examinations, he was appointed to Class II Grade II of the Sri Lanka Principal Service 2009.

However, before the appointment in 2008, he was served a charge sheet dated 25.09.2008. After an inquiry, he was found guilty for three charges out of eight. As a punishment, two salary increments were stopped. Against the order of the inquiry, he had appealed to the 1st Respondent on 30.12.2011. By a decision dated 08.08.2012, the 1st Respondent dismissed the said appeal. Then Petitioner moved the jurisdiction of the High Court of the North Central Province on the grounds

Mentioned below:

(a) The Petitioner was denied the protection of natural justice, particularly the principle of *Audi alteram partem*, as he was not allowed to call witnesses.
(b) The Petitioner was denied the protection of natural justice, particularly the principle of *Audi alteram partem*, as he was not allowed to produce several documents in evidence.
(c) There was no evidence supporting the guilty finding regarding charges VI, VII and VIII.
(d) The Petitioner's wife's evidence was led against the Petitioner is against the law and public policy.
(e) The disciplinary inquiry and the order are tainted with malice.

On the 29th of December 2015, the High Court order was pronounced dismissing the Petition. In this court, the Petitioner-Appellant argues on

(a) Failure to appreciate the denial of fair hearing
(b) Calling the wife of the Appellant is against public policy.
(c) There was no evidence regarding the three charges he was found guilty of.

At the hearing, both parties placed their respective arguments before this court. The Appellant stresses that the two witnesses he requested were not called. At the inquiry, the inquiring Officer had observed that the two witnesses named were the superior officers of the Appellant. They were in charge of taking disciplinary actions, transfers, promotions, retirement and interdicting of the Appellant.

The two witnesses called by the inquiring Officer were W.M. Indrawathi Manike and M. Karunawathi. M. Karunawathi was a co-teacher attached to a primary school at the time of giving evidence. The other witness W.M. Indrawathi Manike was an acting principal when giving evidence. Bulathsinghalage Ranjith Upali – Assistant Director of Education (Primary) attached to Puttalam Educational Office. M.M.E. Suriya Peris is another teacher, R.D. Sloman - Zonal Director of Education Dhammika Priyadarshini was also a teacher, Grasion was an Administrative

Officer. One can observe that other than R.D. Sollaman and B.R. Upali was not able to speak of the personal records of the Appellant. These two witnesses are indeed the officers from the Education Department, but the refusal to call the Appellant's witnesses are baseless. The inquiring Officer recorded that the senior officers' witnesses named by the Appellant need not be called.

In order to call them, the permission of the Public Service Commission (North Western) must be obtained. There is no denial of calling the witnesses, as the Respondents argued. The Respondents (1-7 and 9) argued that the Appellant had enough opportunity to question the subordinate officers called by the prosecution at the inquiry.

The position of the inquiring Officer was not that he disallowed calling but instructed to get permission from the Secretary of the Public Service Commission, North-Western Province.

The Appellant at the inquiry had requested to call J.P.H. Thilakarathna, [North-Western Province] Assistant Director and P. Padma Wahasala – Zonal Director of Education Puttalam as his witnesses. By written communication, the Secretary of the Public Service Commission (North-Western Province) had informed that special permission is not necessary to call witnesses; therefore, the inquiring Officer should decide.

The learned High Court Judge had observed that there was no need to call the Senior Officers when their juniors were present. The Appellant had the opportunity to cross-examine and establish his defence.

In this country, the measure to find someone guilty in a criminal case is beyond reasonable ground until the prosecution proves that the accused is treated as an innocent party. Even though the domestic inquiries are different and the inquiring officers are not learned in the law, they must have a similar approach when deciding the fate of a fellow citizen. He must be allowed to understand he had a fair hearing. He must be satisfied that his side of the story, too, was heard.

It is up to the Appellant to give evidence or not. His silence without giving evidence himself is not a bar for him to call witnesses. The law requires that if he opts to give evidence, he must give evidence first.

For this inquiry to be fair, the Appellant should have had the opportunity to call his witness and establish his defence. According to the letter of the Secretary, there is no barrier to calling the witnesses; even though they are official witnesses, the decision of calling or not was in the hand of the inquiring officer. This denial is fatal.

As for recording the evidence of his wife should not have been allowed. The Evidence Ordinance has stipulated when a spouse can be called a witness. Though the inquiring Officer is not knowledgeable about the Evidence Ordinance, it is common knowledge that a spouse's evidence is usually tainted. Even though the Respondents (1-7 and the 9th] argue that this is a domestic inquiry, the Evidence Ordinance does not apply. One must keep in mind that there is a punishment at the end of the domestic inquiry. That is why even a domestic inquiry should not only be fair, but it should seem to be fair.
The wife's evidence was indeed limited. Appellant or his representative did not object to her evidence was also stressed on behalf of the contesting Respondents. They argue that the Appellant is now estopped from taking advantage of his wife giving evidence.

Even though a layman was in charge of the proceedings, inquiring Officer should have inquired whether there was an objection to calling the wife.

However, this point was not discussed by the High Court judge. A judicial officer must consider every aspect, especially when they are pleaded. Even if a particular point is not argued, the judge must consider, evaluate, and answer if that point is essential. Calling the wife, especially when a divorce case is pending, should have been considered by the High Court Judge. To the naked eye calling a spouse as a witness against the other spouse in any inquiry is beyond reason. Even in a court of law, a spouse is called only in instances provided for in Evidence Ordinance.

The final ground of not having evidence on the three counts found guilty is vague. Even if I hold with the Respondents on that ground, the Respondents will fail on not having a fair hearing.

For the reasons discussed above, I allow the appeal.

Judge of the Court of Appeal

PRESANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal