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 in terms of Article 140 of the Constitution.

Jagath Ruwankumara Gajaweera
Arachchige
Attorney-at-Law
No. 91/2D, Udyana Pedesa,
Thalahena, Malabe.

CA/WRIT/290/2022

Petitioner

Vs.

1. Hon. Chanima Wijebandara
   Honourable Learned Magistrate,
   Magistrate's Court,
   Kaduwela.

2. Pallimulla Hewa Geeganage Sanja Nalini
   (wife of the Petitioner and the applicant in the maintenance case No. 50550/22 in the Magistrate's Court, Kaduwela.)
   No. 91/2D,
   Udyana Pedesa,
   Thalahena, Malabe.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : K. Deekiriwewa for the Petitioner.

Hashini Opatha, SC for the 1st Respondent.

Supported on : 15.11.2022

Decided on : 21.11.2022

Sobhitha Rajakaruna J.

This Court refused the Application bearing No. CA/Writ/0290/2022 on 06.10.2022 on the basis that the Petitioner has not submitted a prima facie case which warrants this Court to issue formal notice on the Respondents. A motion dated 27.10.2022 has been filed by the Petitioner to seek leave to appeal therefrom to the Supreme Court in respect of the purported substantial questions of law mentioned therein.

The Petitioner is seeking leave to appeal under Rule 22 (1) of the Supreme Court Rules 1990 published in the Gazette Extraordinary No. 665/32 on 07.06.1991. The Part 1 of the said Rules refer to three types of appeals;

A. Special Leave to Appeal
B. Leave to Appeal
C. Other Appeals

The Petitioner has placed reliance on Rule 22(1) which comes under 'Leave to Appeal'. The category of 'Leave to Appeal' provides two instances when a party can make an application seeking leave to appeal to Supreme Court from a final order, judgement, decree or sentence of the Court of Appeal.

The first option is that an application for leave to appeal to be made under Rule 20(1) when submission is made (by or on behalf of a party to any matter or proceeding in the Court of Appeal) at any time before the conclusion of the hearing by the Court of Appeal that a substantial question of law is involved in such matter and such question of law be

recorded forthwith by the Court of Appeal and grant leave to appeal to the Supreme Court in respect of such question.

The second instance is under Rule 22(1) and it's to make an application to leave to appeal on the day the impugned final order or Judgement is delivered by the Court of Appeal. Significantly such application may be made orally in respect of a substantial question of law. The Court of Appeal after specifying and recording the substantial question of law on the same day may make a determination upon such application forthwith or on any date within 21 days. Similarly, a party may move for time to consider the making of an oral application for such leave. But such application also should be made on the same day the final order or Judgement is delivered.

It is clear that the Petitioner has failed to make an application to this Court for leave to appeal to the Supreme Court on any of the above days. In other words, the Petitioner has not made an application to leave to Appeal either on the day of the Final Order was delivered or any time before this Court delivered the impugned final order. Instead of following the above Rules of the Supreme Court, the Petitioner has made a written application after 3 weeks from the date of delivery of the impugned order. Thus, the said written application made on 27.10.2022 cannot be considered as a valid application for leave to appeal as it has not been made at the appropriate stage and thereby it should be refused in limine.

Having determined the application dated 27.10.2022 made by the Petitioner is not tenable, I should for completeness consider whether the questions raised in the said motion can be considered as substantial questions of law.

The main relief sought by the Petitioner in his Petition dated 09.08.2022 is for a mandate in the nature of a writ of Certiorari to quash the order dated 18.07.2022 ('X7') of the learned Magistrate of the Magistrate's Court of Kaduwela in case bearing No. 50550/2022. It's an application made to the relevant Magistrate's Court under the Maintenance Act No. 37 of 1999 ('the Act').

Considering the circumstances in the said case, the learned Magistrate has made an interim order under Section 11 of the Act for a payment of Rs.30,000.00 to the wife of the Petitioner (2nd Respondent) as a monthly allowance. The learned Magistrate, in terms of the said Section 11 has used her discretion and arrived at a conclusion on the interim order.

The learned Magistrate has fixed a date thereafter to consider the permanent order for maintenance as such interim order, in terms of the said Act, shall remain operative until an order on the main application is made.

Such impugned order has been identified by the Petitioner as an order made by the learned Magistrate resulting in an error of law on the face of record (Vide-paragraph 8 of the Petition). In terms of Section 14(1) of the Act, any person who shall be dissatisfied with any order made by a Magistrate under section 2 or section 11 may prefer an appeal to the relevant High Court established by Article 154P of the Constitution in like manner as if the order was a final order pronounced by Magistrate's Court in a criminal case or matter. This shows that the Petitioner has a statutory remedy against the impugned order made by the learned Magistrate under section 11 of the Act.

However, the Petitioner has invited this Court to exercise the jurisdiction vested under Article 140 of the Constitution to quash the impugned decision of the learned Magistrate. It is no doubt that this Court has the full power and authority to grant and issue, according to law, orders in the nature of writs of Certiorari against the judge of any Court of first instance subject to the provisions of the Constitution.

Moreover, it is important to note that the discussion on the aspect whether the parties should first exhaust other remedies such as appeal before seeking for judicial review has existed for a long time. Lord Justice Bingham recording his impression that the exhaustion doctrine is more often proclaimed than applied (in a lecture printed in [1991] PL 64 (at 72)) has concluded that where unlawful, as opposed to unjustified, treatment is shown, the courts should grant relief regardless of alternative remedies. Notwithstanding the views of Lord Bingham just cited, the judges remain reluctant to allow judicial review when there is an alternative remedy. But Wade and Forsyth state that the focus has fallen upon whether the alternative remedy is an adequate alternative. (Vide-***Administrative Law by H. W. R. Wade and C. F. Forsyth, (11th Edition) Oxford*** **at p. 605**)

It seems that our courts have been following the principle that the certiorari being a discretionary remedy will not ordinarily be granted if the alternative remedy is adequate and efficacious. (for this discussion-Also see ***Obeysekara vs. Albert and others 1978-79 (2) Sri. L.R. 220 (CA); Somasunderam Vanniasingham vs. Forbes and another 1993 (2) Sri. L.R. 362 (SC)***).

Analyzing the jurisprudence developed by Courts in this area, I take the view that it is the duty of the Petitioner who seeks judicial review to establish that the alternative remedy is not adequate and efficacious. Further, I am of the view that if the impugned order is a blatant miscarriage of justice or is ex-facie wrong and if rights of a party are also involved, this Court can entertain an application even when an alternative remedy is available.

The function of this Court in the instant application is to decide whether the impugned order of the learned Magistrate should be set aside on the principles applicable to judicial review including the requirement of exhaustion of other remedies.

In the instant application the right under Section 14 of the Act is a statutory remedy made available to the Petitioner. When the Parliament provides right of appeal, generally the aggrieved party should first exercise such rights before seeking judicial review. Whenever a party is dissatisfied with an order of a Court of first instance, such party cannot seek judicial review as a right against such order without first recoursing to an appeal or revision and that is to avoid the abuse of judicial process. However, if there is an error in the nature of blatant miscarriage of justice as mentioned above, an application may be made for judicial review against the impugned order.

Along with the above observations, attention needs to be drawn to the basic principles involved in judicial review apart from the principles laid down in ***Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 (at p. 408) (GCHQ case*)** by Lord Diplock.

In ***Kalamazoo Industries Limited vs. Ministry of Labour and Vocational Training (1998) 1 Sri. L.R. 235,*** F.N.D. Jayasuriya J. has held that at p.249;

> *"Judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of the decision under appeal. But in judicial review, the court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful . . . judicial review is a fundamentally different operation."*

The main contention of the Petitioner is that the learned Magistrate has made an interim order by virtue of Section 11 of the said Act compelling the Petitioner to pay an exorbitant amount without properly evaluating the income and means of the Petitioner. This Court being the Review Court is unable to assess the income of the Petitioner upon which the

learned Magistrate has arrived at a decision purportedly based on evidence as such is totally within the purview of the learned Magistrate or within the Appellate court and not within the Review Court. Anyhow, no such tenable evidence has been placed before us. In ***Pushpa Rajani vs. Ruhunuge Sirisena, SC Appeal No. 117/2010 SC minutes 08.05.2013*** the Supreme Court held; *"…Section 11 of the Maintenance Act places the burden of proof on the respondent to show cause why the application should not be granted. In other words, the burden of proof of showing that the respondent does not have sufficient means is on the respondent*".

The Court of Appeal in ***Thajudeen vs. Sri Lanka Tea Board and another* (*1981) 2 Sri. L.R. 471*** has referred to CHOUDRI in his book on the 'Law of Writs and Fundamental Rights' (2nd Edition) Vol.2 (at p.381) and highlighted that *"where the facts are in dispute and in order to get at the truth it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses…..*". In the case above the court has further observed that, "*the remedy by way of an application for a writ is not proper substitute for a remedy by way of a suit, specially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the Indian cases of Ghosh v. Damodar Valley Corporation, AIR 1953 Cal. 581 and Parraju v. General Manager B.N. Rly. AIR 1952 Cal. 610.".*

Based on the above findings, I hold that the Petitioner has failed to establish that the alternative remedy available to the Petitioner is not adequate and efficacious. The Petitioner has failed to establish that the learned Magistrate has exceeded her jurisdiction or has pronounced an order which is ex facie illegal. This Court refused the Petitioner's application bearing No. CA/Writ/290/2022 on 06.10.2022 after carefully considering these facets in law.

Thus, the questions set out in the said motion dated 27.10.2022 should be assessed only in the backdrop of above legal perspective. Our considered view is that the Petitioner has not formulated or submitted any substantive question of law that this Court has not drawn attention to or any substantive question of law that this Court has failed to taken into consideration.

For the reasons set out above, this Court refuses the application made by the Petitioner by way of his motion dated 27.10.2022 as;

i. the Petitioner has not made a proper application to leave to appeal either in terms of Rule 20(1) or Rule 22(1);
ii. the questions set forth in the said motion cannot be assessed as substantial questions of law for the purpose of granting leave to appeal to the Supreme Court from the order dated 06.10.2022 of this Court.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal