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

Mohamed Ismail Wahabdeen
369A/1, O. P. P. Road,
Kalmunai-12.

CA/WRIT/468/2021

Petitioner

Vs.

1. His Lordship Jayantha Jayasuriya
   Hon. Chief Justice and Chairman,
   Judicial Service Commission,
   Colombo 12.

2. His Lordship Buwaneka Aluwihare
   Member, Judicial Service Commission,
   Colombo 12.

3. His Lordship Sisira de Abrew (Retired)
   Ex-Member, Judicial Service Commission,
   Colombo 12.

4. His Lordship L. T. B. Dehideniya
   Member, Judicial Service Commission, Colombo 12.

5. The Secretary
   Judicial Service Commission,
   Colombo 12.

6. Hon. Gihan Kulatunge
   (Inquiry Officer)
   High Court Judge,
   Colombo.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:** Faiz Musthapha PC with N. M. Shaheed for the Petitioner.

Nerin Pulle, ASG with Amasara Gajadeera, SC for the 5th Respondent.

Supported on **:** 08.03.2022

Written Submissions : Petitioner - 17.06.2022

5th Respondent - 15.06.2022

Decided on **:** 08.08.2022

Sobhitha Rajakaruna J.

The Petitioner who was a judicial officer has filed this application seeking, *inter alia*, for a mandate in the nature of a writ of Certiorari quashing the disciplinary order of the Judicial Service Commission ('JSC') reflected in the document marked 'P17'. The JSC following an inquiry held against the Petitioner has decided by 'P17' to dismiss the Petitioner from service. The said inquiry was conducted by an Hon. High Court Judge who is the 6th Respondent.

The Petitioner's main argument is that the power over judicial officers exercised by the JSC is limited to disciplinary control in view of Article 111H (1) of the Constitution[1] and it does not extend to the correction of judicial orders. The Petitioner's contention is that the impugned disciplinary order 'P17' has been issued following a disciplinary inquiry conducted in respect of the orders made by the Petitioner on 09.11.2017 in case Nos. B/6512 to 6528/F/17 of District/ Magistrate's Court Pottuvil while he was exercising official duties as the Judge/Magistrate of the said District/Magistrate's Court Pottuvil. Thus, the Petitioner argues that the impugned disciplinary order has been totally made without jurisdiction as it relates to, if any, a judicial error. As such, the Petitioner asserts that the impugned order cannot be considered as a disciplinary order as contemplated by Article 111H (1)(b) of the Constitution and also that the JSC has the power to dismiss judicial officers only by exercising disciplinary control and not by scrutinizing judicial orders. In line with the said argument the Petitioner further asserts that the impugned order has been made by JSC without jurisdiction.

The Petitioner relies on an observation made by S. N. Silva CJ in ***A. M. E. Fernando vs. the Attorney General (2003) 2 Sri. L.R. 52,*** wherein it is stated - *"The JSC informed that it had no power to grant relief as it was a judicial order in respect of which relief should be sought before a higher court."*

Thus, the questions which has to be examined in this case are:

(a) whether the JSC has the power to dismiss the Petitioner based on the orders made by the Petitioner on 09.11.2017 in the aforesaid cases and
(b) whether the acts or the conduct of the Petitioner reflected in the charge sheet marked 'P13' amounts to a conduct which warrants disciplinary control by the JSC against the Petitioner.

The learned Additional Solicitor General ('ASG') who appears for the 5th Respondent raised several preliminary objections and moved that the Petitioner's application be dismissed in limine. Those objections are;

i. "This Court is denuded of jurisdiction in as much as the jurisdiction is constitutionally precluded by Article 111K of the Constitution;

[1] The Second Republican (1978) Constitution of the Republic of Sri Lanka

ii. A writ of Mandamus will not lie against the 1st to 5th Respondents in their exercise of discretion under Article 111H(1)(b) of the Constitution;

iii. A writ of Mandamus will not lie as the;

    a) judicial review cannot be sought against the 1st to 5th Respondents in the exercise of discretion.

    b) Petitioner has failed to establish a legal right to the performance of a duty and a corresponding legal duty on the part of the 1st to 5th Respondents.

iv. The Petitioner has failed to mention the 5th Respondent in person despite seeking writs of Mandamus and as such the proceedings are misconceived;

v. A writ of Certiorari will not lie in as much as the Petitioner has failed to establish any cognizable legal basis for the exercise of judicial review."

As the jurisdictional question raised by the learned ASG is in dispute, this Court must necessarily resolve such objection first. The learned ASG contends that Constitutional immunity is being conferred on the JSC in terms of the constitutional ouster clause stipulated in Article 111K of the Constitution and accordingly, no <u>suit or proceeding</u> shall lie against the JSC for any lawful act done in good faith.

The said Article 111K reads as follows;

> 'No suit or proceeding shall lie against the Chairman, Member or Secretary or Officer of the Commission for any lawful act which in good faith is done in the performance of his duties or functions as such Chairman, Member, Secretary or Officer of the Commission'.

Further, the learned ASG contends that the Petitioner has not specifically alleged malice in the Petition and therefore, the immunity conferred by the Constitution operates as a constitutional ouster on the jurisdiction of this Court.

The learned President's Counsel for the Petitioner argues to the contrary and submits that the power of the JSC is limited to dealing with judges for misconduct and not for judicial errors and therefore, the impugned order has been made without jurisdiction. He further contends that the present application is in the nature of relief by way of a writ and accordingly, the term <u>'suit or proceeding'</u> embodied in Article 111K does not encompass writ applications. Accordingly, he asserts that the said preclusive clause reflected in Article 111K has no application to the instant case which is an application for a prerogative writ.

On a plain reading of the text in the said Article 111K, it appears that there are two main limbs in those provisions which needs to be accomplished in order to strike at such immunity. In other words, there should be an unlawful act by the JSC (done in the performance of duties and functions) and similarly, such act should be in bad faith for one to confront the said immunity. It seems to be that the learned President's Counsel for the Petitioner is not very much keen on addressing the issue of malice as he has placed all his arguments on the basis that the JSC had taken a decision without jurisdiction or assuming a jurisdiction which it does not have.

The perceptual consideration of Shirani Tilakawardane J. (P/CA) (as she was then) (***Katugampola vs. Commissioner General of Excise and others (2003) 3 Sri. L.R. 207***) in reference to the ouster clause in Article 61A of the Constitution is that the writ jurisdiction could be sought when the person who made the impugned decision did not have any legal authority to make such decision. The consideration in the instant application is whether the legal authority has taken a decision without jurisdiction or assuming a jurisdiction which it does not have. Tilakawardane J. in the said case has held as follows;

> *"The only ground upon which the writ jurisdiction could be sought under circumstances where a challenge was being made regarding the promotion and/or appointment, transfer etc., was where the person who made the impugned decision, did not have any legal authority to make such a decision."*

Hence, in the context of the two questions I have identified earlier relating to the instant application, I take the view that what is necessary at this stage is to assess whether the writ jurisdiction of this Court comes within the ambit of the term 'suit or proceeding' set down in Article 111K.

The Petitioner, in this regard heavily relies on the judgement in ***Wickremasinghe vs. The Monetary Board of the Central Bank of Sri Lanka and another (1989) 2 Sri. L.R. 230.*** In the said judgement Anandacoomaraswamy J. has carefully considered judgements in several other cases[2] on the point and has drawn attention, among other, to the decision of

[2] Government of Madras vs. Vasappa AIR 1965. Re Goonesinhe 44 NLR 75. Silverline Bus Co. Ltd. vs. Kandy Omnibus Co. Ltd. 58 NLR 193, 197, 203, 206. Kudakanpillai vs. Mudanayake 54 NLR 350. H.E. Tennakoon vs. P.K. Duraisamy 59 NLR 481. Colombo Apothecaries Ltd. vs. Wijesuriya 71 NLR 258. Maliban Biscuits Manufactories Ltd. vs. Subramaniam 74 NLR 76,78,79.

Basanayake CJ., (in ***Silverline Bus Co. Ltd vs. Kandy Omnibus Co. Ltd 58 NLR 193*** - bench of five judges; Basnayake CJ. with Gunasekara J., Pulle J., De Silva J. agreeing and Sansoni J. dissenting) who has held that proceedings in certiorari do not fall within the category of proceedings known as **suits or actions**. Anandacoomaraswamy J. has set forth in his judgement the reasons given by Basanayake CJ for above decision as follows;

> *"The words "civil suit or action" in Section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.*
>
> *Basnayake, C.J., gave three reasons for his view:-*
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> *a) Proceedings for certiorari are not suits or actions as in them the Court exercises its supervisory functions and is not called upon to pronounce judgments on the merits of the dispute between the parties before the inferior tribunal - page 197, 2nd paragraph;*
> *b) Such an application does not fall within the definition of action in section 6 of the Civil Procedure Code - page 203, 3rd paragraph;*
> *c) a "civil suit or action" must be construed to be a proceeding in which one party sues for and obtains something from another in regular civil proceedings and an application for certiorari therefore does not fall within that expression - page 206, 2nd paragraph."*

Anandacoomaraswamy J. made the following observations after assaying several other judgements in which such reasoning of Basnayake CJ. has been discussed;

> *"The Court was construing the particular words appearing in particular statutes, namely the Charter of Justice and Privy Council Ordinance and gave a wide definition having regard to the historical sequence. On the other hand in the present instance, these words have been traditionally used as conferring only civil and criminal immunity and not ousting the writ jurisdiction."*

Moreover, in ***Maliban Biscuit Manufactories Ltd vs. R. Subramaniam 74 NLR 76***, the Supreme Court (Samarawickrama J. with Panditha Gunawardane J. agreeing) held that an application to the Supreme Court for writ of Certiorari is not a civil suit or action.

The learned ASG objecting to the contention set forth by the Petitioner, drew our attention to the order of the Court of Appeal in the case of ***Bandaranayake vs. Judicial Service Commission (2003) 3 Sri. L.R. 101*** where Sripavan J. (as he was then) has refused to issue formal notice on the Respondents including the JSC. Sripavan J. in the said case has discussed to a certain extent on laches and mala fides and subsequently has held that the members of the JSC are immune from legal proceedings. It appears that he has arrived at such conclusion without any analysis of the provisions of Article 111K of the Constitution. It is observed that Sripavan J. in the said order has not contemplated the term 'suit or proceeding' and also has not given reasons for his such decision on immunity under the said Article.

The orders/judgement in the said cases of ***Bandaranayake vs. Judicial Service Commission*** and ***Wickremasinghe vs. The Monetary Board of the Central Bank of Sri Lanka and another*** have been issued by a single judge bench of the Court of Appeal. The instant application is being heard by two judge bench of this Court. The Supreme Court judgement in the said case of ***Maliban Biscuit Manufactories Ltd vs. R. Subramaniam*** has been pronounced by Samarawickrama J. with Panditha Gunawardane J. agreeing.

When considering the aspect whether this Court is bound by the said order of Sripavan J. (***Bandaranayake vs. Judicial Service Commission***), I am mindful of Basnayake CJ.'s statement on the cursus curiae that developed over the years in this country. He has observed in ***Bandahamy vs. Senanayake 62 NLR 313 (p.345)*** as follows;

> *"Two Judges sitting together also as a rule follow the decisions of two Judges. Where two Judges sitting together find themselves unable to follow a decision of two Judges, the practice in such cases is also to reserve the case for the decision of a fuller bench, although the Courts Ordinance does not make express provision in that behalf as in case of a single Judge*."

Now, I advert to examine the intrinsic underpinnings of the phrase 'immunity' articulated in Article 111K and other provisions of our Constitution. The legislature has conferred immunity from legal proceedings not only to the JSC but also to Public Service Commission ('PSC') as well as to the National Police Commission ('NPC') by the Constitution.

At this juncture, it is important to make a comparative analysis of the immunity conferred on JSC with the other Commissions, i.e., Public Service Commission (PSC)/National Police Commission (NPC)/Election Commission.

The Article 61A of the Constitution deals with the immunity from legal proceedings upon the PSC. The said Article 61A reads;

> *'Subject to the provisions of Article 59 and 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, a Committee, or any public officer, 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.'*

On a careful perusal of the provisions of the said Article 61A, it is apparent that a wider spectrum of indemnity has been conferred to the PSC precluding even the issuance of prerogative writs against the PSC by the Court of Appeal in as much the said article specifically spell out the words "no court or tribunal". Therefore, it appears that the legislature has made a clear distinction between Article 111K and 61A. However, in terms of the said Article 61A, the jurisdiction of the Supreme Court under Article 126 (along with the jurisdiction of AAT[3]) has not been precluded. Identical provisions can be seen in Article 155C of the Constitution which deals with immunity in reference to NPC, which was introduced by the same 17th Amendment to the Constitution.

The immunity conferred on the Election Commission is stipulated in Article 104A(b) of the Constitution and the said Article reads as follows;

> *'no suit or prosecution or other proceeding shall lie against any member or officer of the Commission for any act or thing which in good faith is done or purported to be done by him in the performance of his duties or the discharge of his functions under the Constitution or under any law relating to the holding of an election or the conduct of a Referendum as the case may be.'*

It is noted that amendments have been effected by the 19th Amendment[4] to Article 61A which was originally introduced by the 17th Amendment. The Article 155C which was

[3] Administrative Appeals Tribunal
[4] Certified on 15.05.2015

also introduced by the 17th Amendment has been amended subsequently by 19th and 20th [5] Amendments to the Constitution whereas the provisions of Article 111K remains unchanged since the time it was introduced by the 17th Amendment. Moreover, it appears that the legislature has not intended to introduce any amendment to Article 111K when the scope of the provisions in respect of immunity in Articles 61A and 155C have been expanded or amended subsequently.

The cogent comparison that could be made in view of those provisions of the Constitution is that any party aggrieved by a decision of the PSC or NPC is privileged to apply to the Supreme Court under Article 126 of the Constitution by a way of a fundamental rights application although the Constitutional ouster on immunity reflects in the said Articles 61A and 155C. Even the Article 104A which deals with finality of decisions and immunity from suits in respect of the Election Commission, is subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, Article 4H and Article 130 and on the Court of Appeal by Article 144 and the jurisdiction conferred on any court by any law to hear and determine elections petitions or Referendum petitions.

In light of the above, a crucial question arises as to whether the legislature has connoted to bestow exclusive immunity on the JSC, completely depriving the access to justice even through a fundamental rights application filed by an aggrieved party. The Judicial control over public power has been expanded immensely over the years by judicial activism. The courts have developed and refined their control by stretching traditional legal concepts, launching new ideologies and establishing new techniques of interpretation. In the circumstances, I am of the view that the legal concept relating to immunity embraced in our Constitution has developed to an extent of providing a mechanism for an aggrieved party, amidst a preclusive clause, at least to recourse to the Supreme Court by way of a Fundamental Rights application. In that sense it is not reasonable for any public power, even in the presence of a Constitutional preclusive clause, to get drifted without being reviewed, when required, by an appropriate Court of law at some stage during the process.

My attention again shifts at this stage to the observations made by Anandacoomaraswamy J. in reference to the Amendment Act No.18 of 1972 by which an amendment was effected to Section 22 of the Interpretation Ordinance. The proviso to Section 22 of the said

[5] Certified on 29.10.2020

Ordinance sets out that the main provisions of Section 22 shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the matters mentioned therein. Anandacoomaraswamy J. in the aforesaid case discussing the effect of '**civil** or criminal proceedings/ **suit** or prosecution' based on the formula introduced by the said Section 22 of the Interpretation Ordinance has held as follows;

> *"It cannot be, that the Legislature which is well acquainted with this formula should have chosen another wording which has traditionally being construed to mean immunity only from civil and criminal proceedings if it intended to exclude the writ jurisdiction. In fact, even where the writ jurisdiction is expressly excluded, the proviso to Section 22 referred to above has preserved the writ where the attack is on the ground of ultra vires or natural justice."*

The manner in which the same word i.e., '**civil case**' has been embodied in Article 111K should be observed now. The provisions of the Article 111K of the Constitution have been introduced by its 17th Amendment, certified on 03.10.2001. Before the said 17th Amendment such immunity from '**civil case** or proceeding', was conferred on the JSC in terms of Article 117 of the Constitution. (*See*-the Sinhala text of the said Article 117). The phrasing of the English text of Article 111K introduced by the said 17th Amendment is meant to confer immunity from a '**suit** or proceeding'. However, the Sinhala text[6] of the said Article 111K has been phrased with words '**civil case** or proceeding' (සිවිල් නඩුවක්) and it is somewhat contrary in the literal sense to the words 'suit or proceeding' which is spelled out in its English text. It is noted that in terms of Article 29 of the 17th Amendment to the Constitution, the Sinhala text will prevail in the event of any inconsistency between Sinhala and Tamil texts of the said Act.

Therefore, based on the Constitutional implications and the analysis given in the judgements discussed above, I take the view that the writ jurisdiction exercised by this Court under Article 140 of the Constitution does not fall within the ambit of such 'suit/civil case or proceeding'. Hence, the objections of the learned ASG on jurisdiction

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[6] 111ඒ. කොමිෂන් සභාවේ සභාපතිවරයා විසින් හෝ කොමිෂන් සභාවේ සාමාජිකයකු හෝ ලේකම්වරයා හෝ නිලධරයකු විසින් ඒ සභාපතිවරයා, සාමාජිකයා, ලේකම්වරයා හෝ කොමිෂන් සභාවේ නිලධරයා වශයෙන් ස්වකීය කාර්ය හෝ කර්තව්‍ය ඉටු කිරීමෙහි ලා සද්භාවයෙන් කරන ලද යම් නීත්‍යානුකූල ක්‍රියාවක් හේතුකොට ගෙන ඔහුට විරිද්ධව කිසිදු සිවිල් නඩුවක් හෝ නඩු කටයුත්තක් පවරනු නොලැබිය යුත්තේ ය.

fails. I am aware that only the Supreme Court has the sole and exclusive jurisdiction relating to the interpretation of the Constitution. Accordingly, the scope of my above findings evince that this Court has not attempted to intrude into such jurisdiction of the Supreme Court.

The learned ASG on 07.04.2022 tendered under confidential cover only for the perusal of both of us, a copy of the inquiry report issued by the 6th Respondent. This Court observed that the 6th Respondent in his report has addressed a vital question when arriving at his final conclusion. The question raised by the said 6th Respondent is whether the making of an erroneous order would amount to misconduct and such issue, in my view, is very much pertinent to the two questions identified by Court earlier in this order.

Therefore, I take the view that there are strong questions to be determined than the issues raised by the learned ASG, such as on 'malice'. The said questions identified by this Court outweigh even the other points taken up by the learned ASG as preliminary objections and however, such objections eventually can be taken in to consideration at the merit stage of this case. In the circumstances, this Court takes the view that the Petitioner has satisfied that there is a proper basis for claiming judicial review and vital questions exist on which the case can properly proceed.

In the circumstances, I am inclined to issue formal notice of this case only to the 5th Respondent. I have come to the said conclusion exercising my discretion after a careful consideration of the whole matter and by reason of the special circumstances of this case. This Court is of the view that apart from the Petitioner, hearing the Attorney General who represents the Secretary to the JSC is sufficient and efficacious in arriving at a final conclusion upon the questions identified in this case for the best interest of justice.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal