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 of the Democratic Socialist Republic of Sri Lanka.

1. Saundra Marakkala Imasha Lahiruni Upeksha
   No.121/2, Ketantota,
   Ambalangoda.
2. Jasenthu Patebendi Thisari Thuhansa
   No.119/1/D, Ketantota,
   Ambalangoda.
3. Rajapaksa Manikku Asini Arya
   No.109/2, Maha Ambalangoda,
   Ambalangoda.
4. Peduruhewa Sandali Wasana
   No.131/1, Ketantota,
   Ambalangoda.
5. Singappuli Arachchilage Yawindi Yuhansa
   No.98/4, Maha Ambalangoda,
   Ambalangoda.
6. Saundra Marakkala Nishantha Nuwan
   No.121/2, Ketantota,
   Ambalangoda.
7. Jasenthu Patabendi Raveendra Nilanga
   No.119/1/D, Ketantota,
   Ambalangoda.

8. Pubudu Menik Malkanthi Manawadu
   No.109/2, Maha Ambalangoda,
   Ambalangoda.
9. Peduruhewa Hemantha da Silva
   No.131/1, Ketantota,
   Ambalangoda.
10. Charmi Gayum Dawpadri waragoda
    No.98/4, Maha Ambalangoda,
    Ambalangoda.

Petitioners

Case No: CA(Writ) 166/2017

Vs.

1. Hasitha Kesara Weththimuni
   Principal, Dharmasoka College,
   Ambalangoda,
   Chairman,
   Member, Interview and Admissions Board.
2. Dasan Naiduwawadu
   Secretary, Dharmasoka College,
   Ambalangoda,
   Member, Interview and Admissions Board.
3. Sarath Warudura
   Head of Primary Section,
   Dharmasoka College,
   Ambalangoda,
   Member, Interview and Admissions Board.

Members of the Interview Board in relation to admission of students to Grade 1 of Dharmasoka College, Ambalangoda.

4. E.M.S Ekanayake
   Chairman,Appeal and Objection Board.
5. K.S.W.J de Silva
   Secretary, Appeal and Objection Board.
6. D.M.S Nirosh Kumara
   Member, Appeal and Objection Board.
7. Sumith Peththawadu
   Representative, Past Pupils Association,
   Member, Appeal and Objection Board.
8. De. Saman Darshana de Silva
   Representative, School Development Society,
   Member, Appeal and Objection Board.
9. Jayantha Wickramanayake
   Director, Ministry of Education,
   Isurupaya, Battaramulla.
10. Sunil Hettiarachchi
    Secretary, 3rd Floor,
    Ministry of Education,
    Isurupaya, Battaramulla.
11. Sunil Hettiarachchi
    Secretary, Unit to Admit Students to Grade 1,
    Ministry of Education,
    Isurupaya, Battaramulla.

12. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Janak De Silva J.

Counsel:

J.M. Wijebandara with Manori Prasangani Gamage for the Petitioners

Ganga Wakishtaarachchi S.S.C. for the Respondents

Written Submissions tendered on:

Petitioners on 03.12.2018

Respondents on 26.12.2018

Argued on: 05.03.2019

Decided on: 04.04.2019

Janak De Silva J.

The 1st to 5th Petitioners are minors and the 6th to 11th Petitioners are their parents/guardians who submitted applications to Dharmasoka Vidyalaya, Ambalangoda seeking admission of their children to Grade 1 for the year 2017. They failed in their efforts and are seeking the following reliefs from Court:

(a) Order directing the Respondents or any one or more of them to furnish those files pertaining to the Petitioners at the interview board and/or those files pertaining to these Petitioners at the appeal inquiry/inquiries

(b) Make order calling for and thereupon grant and issue of mandate in the nature of certiorari quashing the decisions of Respondents or any one or more of them not to admit these Petitioners to Grade One of the said school,

(c) Issue a mandate in the nature of Writ of Certiorari quashing the decision contained in P12 and P13,

(d) Issue a mandate in the nature of Writ of Mandamus directing 1st, 4th and 9th Respondents to admit 1st to 5th Petitioners as Grade 1 student for year 2017 or to a corresponding Grade on a subsequent year.

The Petitioners applied for admission under the "chief occupant" category identified in the applicable circular (P1) and contend that the authorities erred in applying the relevant clauses in particular clauses 6(f) and 6(III) in P1. In terms of these clauses 5 marks for each school that is closer than the school applied will be deducted on the basis of radius distance provided that there are no 'none-accessible geographical obstacles' such as rivers, lagoons, marshy lands, forest reservations etc., on the way to school from the applicant's residences. The Petitioners contend that although according to Arial map P2, the Arial distance appears to show that the Petitioners residences are closer to Kularatna MV, Ambalangoda and/or Buddadatta MV than Dharmasoka Vidyalaya, Ambalangoda physically it is Dharmasoka Vidyalaya, Ambalangoda that is closer to their residences.

The Respondents deny this assertion and claim that the Petitioners did not obtain sufficient marks to be admitted to Grade 1 of Dharmasoka Vidyalaya, Ambalangoda for the year 2017.

Writs of Certiorari

The Petitioners are seeking two writs of certiorari namely a writ of certiorari quashing the decisions of Respondents or any one or more of them not to admit these Petitioners to Grade 1 of Dharmasoka Vidyalaya, Ambalangoda and a writ of certiorari quashing the decision contained in P12 and P13.

P12 and P13 are respectively the provisional list and the final list of selectees prepared as required by P1. The Petitioners have failed to name those children or their parents/guardians as Respondents to this application.

The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine.[1]

The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application.[2]

While this is the general rule a particular application of this rule in relation to school admission is found in *Gregory Fernando and Others v. Stanely Perera, Acting Principal, Christ The King National School and Others* [(2004) 1 Sri.L.R. 346] where this Court dismissed *in limine* an application which sought a writ of certiorari to quash the temporary list of successful candidates without making the successful children parties to the application.

The application of the Petitioners for a mandate in the nature of Writ of Certiorari quashing the decisions contained in P12 and P13 is liable to be dismissed *in limine* for the failure to add as Respondents necessary parties.

The second writ of certiorari sought namely a writ of certiorari quashing the decisions of Respondents or any one or more of them not to admit these Petitioners to Grade 1 of Dharmasoka Vidyalaya, Ambalangoda can arise only if the decisions contained in P12 and P13 are quashed. Since such relief cannot be granted for the reasons set out above, the Petitioners are in any event not entitled to the second writ of certiorari.

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[1] Amaratunga J. in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258 at 267]
[2] Ibid.

Writ of Mandamus

The Petitioners are seeking a writ of mandamus directing 1st, 4th and 9th Respondents to admit 1st to 5th Petitioners as Grade 1 student for year 2017 or to a corresponding Grade on a subsequent year.

It is trite law that to issue a writ of mandamus there must be a statutory or public duty. [*De Alwis v. De Silva* (71 N.L.R. 108); *Weligama Multi Purpose Cooperative Society Ltd. v. Chandradasa Daluwatte* (1984) 1 Sri.L.R. 195; *Hakmana Multi Purpose Cooperative Society Ltd. v. Ferdinando* (1985) 2 Sri.L.R. 272; *Piyasiri v. Peoples Bank* (1989) 2 Sri.L.R. 47; *Sannasgala v. University of Kelaniya* (1991) 2 Sri.L.R. 193; *Samaraweera v. Minister of Public Administration* (2003) 3 Sri.L.R. 64].

The statutory or public duty regulating admission of students to Grade 1 of Government schools in 2017 is found in P1. In terms of P12 and P13 it has been decided that the Petitioners are not qualified for such admission. Unless those decisions are quashed the Petitioners are not entitled for a writ of mandamus directing 1st, 4th and 9th Respondents to admit 1st to 5th Petitioners as Grade 1 students for year 2017. For the reasons set out above, the Petitioners are not entitled to such relief and hence the issue of a writ of mandamus does not arise.

The Petitioners have also failed to establish any public or statutory duty requiring the 1st, 4th and 9th Respondents to admit the 1st to 5th Petitioners as students for a corresponding Grade in a subsequent year. Hence that application must also necessarily fail.

Fundamental Rights Application

It is not in dispute that the Petitioners filed a fundamental rights application bearing no. SC(FR) 93/2017 on the non-admission of the Petitioners to Grade 1 of Dharmasoka Vidyalaya, Ambalangoda. The petition in that application is dated 23.01.2017. Supreme Court refused leave to proceed on 16.03.2017.

The petition in this application was filed in the registry on 15.05.2017. The question then is whether the Petitioners are entitled to file and maintain this writ application. This requires a consideration of whether the two rules of evidence *res judicata* and *issue estoppel* are applicable to the instant matter.

Res Judicata

The doctrine of *res judicata* prohibits the setting up of a cause of action which has been already determined by a court of competent jurisdiction as between the same parties or their representatives in interest.

Section 40 of the Evidence Ordinance recognizes the doctrine of *res judicata* and the following constituents must be present for it to apply[3]:

(i) The former action must have been a regular action

(ii) The two actions must have been between the same parties or their representatives in interest (privies)

(iii) The previous decision must be what in law is deemed such

(iv) The particular judicial decision must have been in fact pronounced as alleged

(v) The previous judgment must be a final judgment

(vi) The same question or identical causes of action must have been involved in both actions

(vii) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf

(viii) The judgment should not have been obtained by fraud or collusion

(ix) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice

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[3] *The Law of Res Judicata*, G. Spencer Bower & Sir Alexander Turner, 2nd Ed., Section 19, pages 18-19 (1969) Butterworths London

The important question is whether the same question or identical causes of action were involved in both the fundamental rights application and the instant writ application. In the former the Supreme Court will inquire into whether a fundamental right recognized by the Constitution has been or is about to be infringed, while this Court in an application for a writ of certiorari will ascertain whether there is any illegality, irrationality or procedural impropriety in the impugned decision or in an application for a writ of mandamus will ascertain whether a public or statutory duty has not been performed.

Some guidance on this question is found in *Shanthi Chandrasekaram v. D.B. Wijethunga and Others* [(1992) 2 Sri. L. R. 293 at 297] where Fernando J. stated:

> "Article 126(1) confers sole and exclusive jurisdiction in respect of infringements of fundamental rights, and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from this Court. On the other hand, there could be transactions or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141, and from this Court by a fundamental rights application under Article 126. Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of ***virtually identical*** "causes of action" arising from the same transaction, unless there is express provision permitting joinder. The prevention, in such circumstances, of a multiplicity of suits (with their known concomitants) is the object of Article 126(3)." (emphasis added)

Thus, it is possible that there could be transactions or situations where a party can seek remedies both in the Supreme Court, invoking the fundamental rights jurisdiction, and this Court, invoking the writ jurisdiction on virtually identical causes of action. The causes of action in that situation **are not the same causes of action** and hence the doctrine of res judicata does not apply.

Issue Estoppel

There is doubt expressed by some jurists as to whether the doctrine of issue estoppel is covered by Section 40 of the Evidence Ordinance[4]. It appears that the Law Reform Commission recommended the amendment of Section 40 of the Evidence Ordinance by the addition of the clause, "For the purpose of this section, "suit" includes the determination of a question in a previously decided case" due to this reason.

However, the mere fact that Section 40 of the Evidence Ordinance does not provide for the application of the doctrine of issue estoppel does not conclude the duty upon this Court as Section 100 of the Evidence Ordinance requires this Court to examine whether issue estoppel is part of English Law of Evidence and if so to apply it.

In *Thoday v. Thoday* [(1964) 1 All.E.R. 341, (1964) 2 W.L.R. 371, (1964) P. 181] Diplock L.J. stated that if in a litigation on a cause of action, which can only be established by proving that two or more different conditions are fulfilled, any issue whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on an admission by a party, neither party can, in subsequent litigation between them on any cause of action, which depends on the fulfillment of the identical condition, assert the opposite of what has been determined in the first litigation – that the condition was fulfilled or not fulfilled, as the case may be.

A more recent judicial exposition on the ambit of issue estoppel was made by Lord Keith in the House of Lords in *Arnold v. National Westminster Bank plc* [(1991) 2 A.C. 93] in a speech with which all the House concurred. He stated (at page 105):

> "issue may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

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[4] *The Law of Evidence*; E.R.S.R. Coomaraswamy; Vol. I, 550, 2nd Ed., (1989) Lake House Investments Ltd.

While the House of Lords in *Director of Public Prosecutions v. Humphrys* [(1976) 2 All.E.R. 497] held that issue estoppel does not apply in English criminal proceedings the House of Lords in *Mills v. Cooper* [(1967) 2 Q.B. 459] held that the doctrine applied in civil cases.

The application of the doctrine in civil cases is essentially concerned with preventing abuse of process. Accordingly, the decision of the House of Lords in *Arnold v. National Westminster Bank plc* (supra) shows that there are circumstances when a party will be entitled to re-open an issue the subject of an issue estoppel. Lord Keith of Kinkel, with whom all their Lordships agreed said (supra at 109):

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."

A similar approach is replicated in the decision of the Supreme Court of Canada in *Penner v. Regional Municipality of Niagara Regional Police Authority Service Board and Others* [(2013) SCJ No 19] in which Cromwell and Karakatsanis JJ, delivering the majority judgment of the court, said at paragraph 29:

> "The one [doctrine] relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice."

The following conditions must be fulfilled for the doctrine to apply[5]:

(i) Finality of the decision on the issue

(ii) The determination must be fundamental, not collateral

(iii) Identity of Parties

(iv) Same Capacity

(v) Precisely the same and identical issues or questions must have been decided

There is the further requirement that the particular issue should have been determined by a court of competent jurisdiction [*Mills v. Cooper* (1967) 2 Q.B. 459 at 468].

I hold that in the instant matter the doctrine of issue estoppel applies as the Petitioners in this application are impugning the alleged erroneous application of clauses 6(f) and 6(III) in P1 whereas at paragraphs 13, 14 and 20 in the petition filed in the Supreme Court the Petitioners have urged the same grounds. All other requirements for the application of the doctrine of issue estoppel have been fulfilled in the instant matter. I find no special circumstances which necessitates an exception to the doctrine of issue estoppel.

For the foregoing reasons, I dismiss the application but without costs.

Judge of the Court of Appeal

[5] *Supra.* 551