

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

In the matter of an application in the nature of
a writ of Certiorari in terms of Article 154 P of the
Constitution of the Democratic Socialist Republic
of Sri Lanka.

CA (PHC) 153/2008

Kegalle High Court: 2832/ Writ

Rajapakse Nandana Anura Kumara Rajapakse,
"Lilani"
Deewela, Pallegama,
Kegalle.

Petitioner

Vs.

01. R. Abeysinghe,
Zonal Director, Education,
Kegalle.
02. H.A. Hemawathie Hamine,
Assistant Educational Director (Planning),
Kegalle.
03. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

And Now

Rajapakse Nandana Anura Kumara Rajapakse,
“Lilani”
Deewela, Pallegama,
Kegalle.

Petitioner- Appellant

Vs.

01. R. Abeysinghe,
Zonal Director, Education,
Kegalle.
02. H.A. Hemawathie Hamine,
Assistant Educational Director (Planning),
Kegalle.
03. Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

Respondent- Respondents

**Before : H.C.J. Madawala , J
&
L.T.B. Dehideniya, J**

**Counsel : Appellant is absent and unrepresented
Chaya Sri Nammuni, SC for the State.**

Argued On : 27 /05 /2016

Decided On : 08 /12 /2016

H. C. J. Madawala , J

The Petitioner has preferred this appeal to set aside the order of the Learned High Court Judge dated 30/4/2008 and further relief as prayed in the petition and for issue an order of writ of certiorari to quash the order of transfer as communicated by P8 and for writ of mandamus compelling the 1st and 2nd Respondent to cancel the transfer as stated in P8 with cost.

Notice were issued to both parties and the Appellant was absent and unrepresented. While Respondent was present and was represented by counsel. Both Appellant and Respondent has paid their brief fees. However when this case was mentioned on 27/5/2016 the Appellant was absent and unrepresented and argument concluded and order has been reserved by Mrs. Walgama J, who ordered the Respondent to file written submissions. When this matter came up before the present bench on 25/7/2016 the Appellant was absent and unrepresented. The Respondent agreed to dispose this case by way of written submissions which he has failed to comply with.

The Petitioner's position was that he was appointed as a substitute teacher by letter dated 1992/5/4 marked as P1 by the Deputy Director Education, Kegalle. He was appointed to Malawita / Kegalle and was thereafter transferred to Kegalle/ Panakawa Vidyalaya and served at the latter school till 2006-10-16. While serving at Panakawa Vidyalaya as an English teacher, without any reason, the Director of education transferred the Petitioner to Palapoluwa Kanishta Vidyalaya. Thereafter he pointed out the error of the transfer to the 1st and 2nd Respondent the same was cancelled the said transfer.

The 2nd Respondent had by letter dated 2006-01-30 sought to propose a 10% allowance to special education teachers and that by letter dated 2006-02-07 marked P7 the Principal Panakawa Vidyalaya had commended the Petitioner's satisfactory service. Further the Petitioner was confirmed in service on 2002-01-08 by the Director at education Kegalle by his letter marked P5. That he attended a seminar designed for special education. That his students had received scores which revealed a high standard of education and that his work was commended by the Principal at Panakawa Vidyalaya. He stated that without reason and arbitrarily the 1st and 2nd Respondents by letter marked P8 and in non-compliance with the annual transfer procedure as stated in circular dated 2006-10-16 marked P9 the Petitioner was transferred to Algama Madya Maha Vidyalaya with immediate effect.

The Petitioner states that P8 is,

- a. Contrary to the Principles of Natural Justice,
- b. Unreasonable and arbitrary,
- c. Contrary to the general procedures adopted in relation to transfers,
- d. Contrary to law and
- e. Contrary to the regulations as contained in chapter III of the establishment Code.

He also states that by his letter dated 2006-10-22 that he had appealed against P8 to the Provincial Education Director, but had not received a reply and that on numerous occasions the Petitioner had requested the Principal Panakawa Vidyalaya and on one occasion requested the 1st and 2nd Respondents to invalidate the unlawful transfer. The Petitioner also averred that the Petitioner had dispatched a reminder dated 2006-12-10 to the 1st Respondent referring to his appeal. Hence, the Petitioner seeks to have P8 quashed by way of a writ of Certiorari.

The Respondent version was that a situation had arisen at Panakawa Vidyalaya where various complaints of sexual misconduct had been reported. The 1st and 2nd Respondents having authority over the educational institution in question are duty bound to act in the interests of the students. Also, the alleged acts of misconduct as were in relation to year 7 female student. Therefore such complaints have to be investigated as the same amounts to an offence under the Penal Code. It is for this reason that the Petitioner was transferred to Palapoluwa Kanishta Vidyalaya.

The Respondents further add,

- a . That P7 as tendered by the Petitioner is a forgery and that the Principal, Panakawa Vidyalaya denies ever issuing the said certificate,
- b. That the above position is manifest when P7 is compared with P4 ; the signatures do not match,
- c. That the Petitioner was transferred not in accordance with the annual transfer procedures and instead in terms of section 3:05 of the circular marked P9,
- d. That the reason behind the transfer was the in light of sexual misconduct of the Petitioner with a year 7 student and also in view of the opposition of the parents had towards the unbecoming conduct of the Petitioner.

Sec 769(2) of the Civil Procedure Code read as follows,

“ 769 (1)....

- (2) If the Appellant does not appear either in person or by an attorney-at-law to support his appeal, the court shall consider the appeal and make such order thereon as it thinks fit.”

Accordingly as the Appellant absent and unrepresented we Act under Sec 769(2) and peruse the order dated 30/4/2008 with the relevant document V1 to V9.

The Petitioner had stated that the transfer given to him has not been recommended by the teacher transfer board and that notice of 2 weeks should have been given to him and there was the teacher transfer board existing in the school. However the said transfer had been given arbitrarily and unlawfully in violation of the regulations.

His Lordship had stated as follows,

“ Even accepting that the 4th Respondent did have power to make the impugned transfers, an essential pre requisite for the exercise of that power was the recommendation of the teacher transfer board. His failure to obtain those recommendations vitiated the transfer orders, which were, therefore in violation of the petitioner’s fundamental rights under Article 12(1)

Per Fernando J,

“While powers in respect of education have been devolved to provincial councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that subject.”

The transfer letters did not allege “exigencies of service” it is not open to the respondents to allege one reason in the transfer letters and to rely upon another when they come to court. Apart from anything else, that would be stultifying the appeal procedure.”

The Petitioner contended that the Zonal Education Director of Kegalle and the Assistant Education Director of Kegalle(Planning) without any reason or inquiry has by letter dated 16/10/2006 කැ/කැග/අධ්‍යා/සැල/1/ල.ස්.ම has unlawfully using the administrative power transferred the Petitioner. They have violated 2/8/2002 Sabaragamuwa Province CM/DE/01/01/09 and they have failed to comply with the Ministry Circulars 2002/01 teachers and principal annual transfer's regulations and hence given the Petitioner transfer to Algama Madya Maha Vidyalaya.

Accordingly Petitioner prays for relief prayed in the petition be granted to him.

The Respondents has placed the following evidence before the High Court. Document marked R1 is a complaint made by the 9 teachers of Panakawa Vidyalaya who allege that the Petitioner is guilty of the following,

- i. Making advances on a year 7 student which could have led to sexual abuse of the said student,
- ii. Outsiders are in the habit of entering the school premises at night at the instance of the Petitioner and that the said outsiders have caused damage to school property,
- iii. Consumption of alcohol within school premises,
- iv. For having used the school premises do carry out business transactions,
- v. For abusing a contractor who was working on the construction of a school building and
- vi. For physically abusing a student.

Document marked R2 is an excerpt from the Sunday Newspaper Silumina dated 19/10/2003. As highlighted, the petitioner out an advertisement to sell a motor cycle and has given his contact details as Panakawa Vidyalaya. This itself shows the lack of respect shown to an educational institution. The Petitioner is utilizing the school

property as a business place for his personal transactions. Such conduct is detrimental to the reputation of the school.

Document marked R3 this is a document dated 05/10/2006 which a complaint is made by a year 7 student alleging sexual harassment. It was contended that the conduct by the Petitioner is unbecoming and cannot be tolerated in an educational institution where parents leave their children with the faith that their children are in good and capable hands.

Document marked P4 is a statement made by the Principal, Panakawa Vidyalaya on 12/02/2007. Whereby he states that the order marked P8, the Petitioner had not vacated his quarters at the school and that inquiries were made by parents and past pupils as why steps were not taken to have the Petitioner evicted from the premises. It was submitted that the Petitioner's refusal to leave the quarters displays his arrogance, contempt for authority, and sheer indiscipline.

Document marked P5 is a petition dated 19/01/2007 signed by 85 parents against the conduct of the Petitioner. It was contended that the said error is typographical and that the same be pleaded as part and parcel of the statement of objections.

It was also submitted that the said R1, the parents of students at Panakawa Vidyalaya have petitioned the Zonal Director of Education against the Petitioner alleging that his conduct impedes the progress and development of the school and have stated the following reasons for removal from the school.

The complaint states that,

- a. The Petitioner has made various indecent proposals to his students,
- b. The Petitioner threatens the parents,
- c. That he is using the teachers quarters to carry out his business and,
- d. That he is admitting unauthorized persons to the school premises in the evenings.

When consider the above evidence placed before court we are of the view that the Appellant has been reprimanded for misconduct and for complaint about the Petition has been made by a child of 7 years for sexual harassment and the Appellant misconduct has been placed before court, We find that the Appellant has failed to reveal these facts that his conduct has been questionable. The Respondents on the other hand have in authority over the educational institution in question are duty bound to act in the interest of the students.

The Respondent further states that the Petitioner has not come before this court uberrima fides in light of many unmeritorious acts committed by him. It has been submitted that the Petitioner as a teacher is responsible for the many students who come under his care. It is he who has the duty of instilling good values and inculcating discipline and decorum. A female child has complained of sexual misconduct to her teachers. It is the duty of the school to protect her from further harm and in the meanwhile ascertain the truth of the allegation. Hence, the statement by the Petitioner that the 1st and 2nd Respondents had transferred him without reasons is an absolute falsehood when in fact the Petitioner was informed that the transfer was as a result of his misconduct.

In the light of the facts and circumstances of this case and regulation 3.05 of the circular marked P9 the inquiry will take place after the transfer. Hence the transfer is in order to facilitate the inquiry and was done in the best interest of all parties concerned.

The Respondent submitted that the Petitioner has also tendered to document P7 which is forgery is clear indication of the Petitioner's lack of uberrima fides. Hence we are of the view that on this ground alone the Petitioner ought to be dismissed. The Petitioner in his application have sought a writ of mandamus to compel the 1st and 2nd Respondents cancel the order marked P8. This remedy is an alternative to the relief sought (a) and (b) of the prayer. The Respondent contended that there is no statutory duty on the part of the Respondents to cancel P8 and therefore, prayer (c) of the petition cannot be granted.

Having considered above submissions made by both parties the Learned High Court Judge has stated that the Petitioner Appellant has been transferred in order to facilitating the inquiry and was done in the best interest of all parties concerned. The Petitioner is able to face an inquiry and prove his inn ounce. The Petitioner has failed to disclose all material facts in this case and has shown lack of uberrima fides on his part. Any party who misleads court, misrepresents facts to court or utters a falsehood in court will not be entitled to obtain redress from court.

In Sarath Hulangamuwa V. Siriwardena, Principal, Vishaka Vidyalaya 1986 1 SLR 275 and others, that a Petitioner who seeks relief by writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised. Accordingly the Petitioner must be dismissed for lack of ubberima fides.

Accordingly we are of the view that the Learned High Court Judge has arrived had a correct decision we see no reason as to why we should interfere with the said order of the Learned High Court Judge of Kegalle.

Hence we dismiss this appeal with cost of Rs. 10,000/-.

Judge of the Court of Appeal

L.T.D.Dehideniya, J

I agree.

Judge of the Court of Appeal