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

In the matter of an appeal in terms of Article 154P of the Constitution read with Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

Lechchami Krishnakanthi,
No. 156/6, Ranawirugama,
Aluwihare,
Matale.

Petitioner-Appellant

Court of Appeal Case No:
CA/PHC/71/2016
HC Kandy Case No:
37/2014 (WRIT)

-Vs-

1. E.P.T.K. Ekanayake,
   Director,
   Provincial Department of Education,
   Central Province,
   Railway Road,
   Kandy.

2. S.B. Beddewela,
   Chairman,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

3. U.A. Bogahapitiya,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

4. Githanjali Dissanayake,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

5. V. Nanda Kumar,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

6. A.J.M.M. Nisthar,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

7. R.M.S. Rathnayake,
   Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

8. Central Provincial Public Service Commission,
   Katugastota Road,
   Kandy.

Respondent-Respondents

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : Kaminda De Alwis for the Petitioner-Appellant.

Rajin Gooneratne, SC for the 1st - 8th Respondent-Respondents.

Written Submissions: By the Petitioner-Appellant on 29/08/2019

By the 1st to 8th Respondents on 01/10/2019

Argued on: 14/09/2020

Judgment on : **16/11/2020**

A.L. Shiran Gooneratne J.

This is an Appeal seeking to set aside an order made by the Provincial High Court of Kandy, arising from an application for a writ in the nature of *Certiorari* to quash the decision of the Provincial Public Service Commission (2nd - 8th Respondents) dated 21/07/2014, as reflected in document marked 'H' and also to quash the decision of the Director, Department of Education Central Province - Kandy (1st Respondent) as reflected in document marked 'E', in terms of paragraph (c) and (d) to the prayer of the Petition. The learned High Court Judge by order dated 26/05/2016, refused to grant the reliefs as prayed for, and dismissed the application.

The facts of this case, briefly, are as follows.

The Appellant joined the Public Service as a trainee teacher and was appointed to Grade 3(1) of the Sri Lanka Teacher Service, on 01/04/1997. The Appellant was the 1st Accused in an indictment dated 27/09/2011, *inter alia*, charged under Section 296 of the Penal Code for committing the murder of one Ismail Shake Mohideen between the period 10/09/2007 and 29/09/2007. In the circumstances, in terms of subsection 27:10 of chapter XLVIII of the Establishment Code, the 1st Respondent by letter dated 22/11/2007, suspended the services of the Appellant pending formal Inquiry.

The Appellant on 14/10/2013, pleaded guilty to the lessor offence of culpable homicide not amounting to murder and was imposed a suspended sentence in terms of Section 303(1) of the Criminal Procedure Code. (CPC) (Vide page 129 of the brief). Thereafter, the 1st Respondent by the impugned letter dated 20/12/ 2013 marked 'E', informed the Appellant that her services were terminated with immediate effect, in terms of Section 28 of chapter XLVIII of the Establishment Code. The Appellant lodged an appeal to the Secretary, Central Provincial Public Service Commission against the said decision which was rejected by the impugned letter dated 21/07/2014, marked 'H'.

In the Application to the Provincial High Court dated 03/11/2014, at paragraph (b) to the prayer, the Appellant sought a mandate in the nature of writ of *Certiorari* to quash the decision of Secretary of Public Service Commission and in

paragraph (c), sought a writ of *Mandamus* for reinstatement in service. In the application before this Court the Appellant seeks writ of *Certiorari* to quash both impugned decisions in documents marked 'E' and 'H'.

Aggrieved by order dated 26/05/2016, made by the learned High Court Judge, the Appellant has invoked the jurisdiction of this Court to challenge the said findings.

When this matter was taken up for argument, the learned Counsel for the Appellant confined his argument to a single ground in appeal, that the Provincial High Court Judge has failed to consider the order discharging the Appellant from the charges leveled against her in the High Court, in terms of Section 303(8) and Section 303(10) of the Criminal Procedure Code, as amended by Act No. 47 of 1999, and thereby erred in law.

The position of the Appellant is that a suspended sentence given in terms of Section 303 of the CPC, is not a ground for termination of employment on the basis that *"sections of criminal procedure code cannot be overridden by the rules of the establishment code"*. It was further contended that the termination of services of the Appellant by the 1st Respondent is illegal, irregular, irrational and unlawful in terms of the procedure set out in Section 303(8) of the CPC, and pleads amenability to a writ in the nature of *mandamus* seeking reinstatement in the teacher service.

At this stage, it would be useful to reproduce the relevant sections of the Establishment Code and the decisions made by the 1st Respondent and 2nd to 8th Respondents, as reflected in the impugned documents marked 'E' and 'H'.

Section 28: 3 of the Establishment Code states,

"On receiving a report from a Court or Statutory Authority in terms of sub section 28:1 above, the Disciplinary Authority may, where the department has not held a formal disciplinary inquiry or where disciplinary proceedings are not contemplated against the officer regarding the incident concerned, make a disciplinary order against the relevant officer without holding a formal disciplinary inquiry taking into consideration the findings of the Court or the Statutory Authority as the case may be."

Section 28:4 of the Code states,

"In making a disciplinary order in terms of sub section 28:3 above, the Disciplinary Authority should base such order on the fact that the officer has been convicted and the seriousness of the offence or offences. It will not be necessary to take note of the punishment imposed by the Court or the Statutory Authority."
(emphasis is mine)

In this context, it is important to note the observations made by Sharvananda J. (as he then was), in ***Elmore Perera vs. Major Montagu Jayawickrama, Minister of Public Administration and Plantation Industries and Others (1985) 1 SLR 285 at 335***, where it was held that,

"The administration of the public service is now an internal matter of the Executive. It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. <u>These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority."</u>
(emphasis is mine)

The impugned document marked 'E' states;

"ඔබට එරෙහිව මහනුවර මධ්‍යම පළාත් බද මහාධිකරණයේ පවරා තිබූ අංක HC 199/11 දරණ නඩුවේ 2013.10.14 දින නීති කෘතිවල දඬුවම සම්බන්ධ නියෝගය සැලකිල්ලට ගෙන ආයතන සංග්‍රහයේ XLVIII පරිච්ඡේදයේ 28 වගන්තියේ විධිවිධාන යටතේ පහත දඬුවම පනවමි.

1. වහාම ක්‍රියාත්මක වන පරිදි ඔබ සේවයෙන් පහ කරමි."

Document marked 'H' states as follows;

"ඔබ විසින් එම අභියාචනය මගින් ඉදිරිපත් කර ඇති කරුණු පිළිගැනීමට සාධාරණ හා යුක්තිසහගත හේතු නොමැති හෙයින් එකී අභියාචනය මෙම කොමිෂන් සභාව විසින් ප්‍රතික්ෂේප කරන ලද බව කාරුණිකව දන්වමි..."

The Appellant seeks to review the exercise of power by the Respondents in terms of Section 28 of the Establishment Code on the basis that the administrative

body has failed to observe the statutory procedural requirements as set out in terms of the Criminal Procedure Code.

In ***M.V. Ranathunga vs. Kaduwela Pradeshiya Sabawa (2010) BLR 87 CA,*** Sri. Skandarajah, J. held that,

"a writ of Certiorari does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and at the same time, has the duty to act judicially when he determines such question;"

The said finding resonates with the famous dictum of Atkin L.J. in R v. Electricity Commissioner (1920) 1 KB 171, where the focus of the issuance of writ of *certiorari* was, on the source of power sought to be reviewed. With the lapse of time, in ***R. v. Panel on Takeovers and Mergers, ex p. Datafin, (1987) 1 QB 815,***the amenability criteria shifted to the source of the power as well as the nature of the function performed by the administrative body in question. (***Saheer and others vs. Board of Governors Zahira College and others, (2002) 3 SLR 405, Harjani and another vs. Indian Overseas Bank and others, (2005) 1 SLR 16.***

The Appellant is seeking to compel the performance of a statutory duty derived from the CPC, to quash the determination made by the 1st Respondent. It is observed that the administrative body when making the said determination was not exercising statutory power derived from the CPC. The 1st Respondent made the said determination exercising power in terms of the Establishment Code and had no duty imposed to do things expressly or impliedly derived from the CPC.

Therefore, the performance of a statutory procedural requirement contemplated in terms of the CPC, is clearly not within the nature of power or the function of the administrative body amenable to the writ. The administrative body had the authority in terms of the Establishment Code, to arrive at a decision taking into consideration the seriousness of the offence and the fact that the officer had been convicted of a serious offence. The *"Courts do not act as a Court of Appeal or encroach on a discretionary power given by statute by forcing it to exercise the power in a particular manner. The Courts go no further than to ensure that the body exercises its discretion to hear and determine the matter according to law"* ***(Fraser (D.R.) & Co. Ltd. vs. Minister of National Revenue (1949) A.D. 24, at p. 36)***

It is observed that in terms of Section 28:3 of the Establishment Code, where a department has not held a formal disciplinary inquiry or where disciplinary proceedings are not contemplated against the officer regarding the incident concern, the disciplinary authority may make a disciplinary order against the officer without holding any formal inquiry considering the findings of the Court or Statutory Authority. Appendix 01 of the Establishment Code provides that the seriousness of an offence must be judged not only by the act itself, but in relation to the office held by the person concerned, and the circumstances surrounding it. Offences are broadly defined in Appendix 1, where improper conduct includes *"doing anything that might seem to compromise his official*

position or any other act which demoralizes the Public Service, or brings the public Service or the office he holds into disrepute".

The Appellant pleaded guilty to culpable homicide, a lessor offence to the offence of murder and was convicted and sentenced by a competent Court of law. In the circumstances, reinstating the Appellant in the teacher service would certainly have a direct impact detrimental to the interest of the student community, in particular and the general public interest at large. "*Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused".* (dicta of Lord Denning M.R. in ***Bradbury vs. Enfield LBC (1967) 3 All E.R 434 at 441).*** The courts nowadays recognize that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the courts remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a deferent decision even if the original decision were quashed". (***Judicial Remedies in Public Law, Clive Lewis 5th Ed. at page 426-427)***

It is well settled law that *"writs are not issued as a matter of course and it is in the discretion of the court to refuse to grant them if the facts and circumstances are such as to warrant a refusal."* ***(P.S. Bus Company Ltd. vs. Ceylon Transport Board (1958) 61 NLR 491).*** In the above circumstances, we find no basis to establish unlawful conduct on the part of the Respondents, when

making the said determination and therefore, we refuse to grant the writs, as prayed for.

At the conclusion of arguments by both parties, the learned State Counsel raised a preliminary objection on the maintainability of this application based on want of jurisdiction. We find that the Appellant was not adequately informed of the said objection at the appropriate time, to respond accordingly. Therefore, we decline to consider the said objection raised by the State.

Nevertheless, for the reasons stated above, we affirm the order of the Provincial High Court and dismiss this application.

Application of the Appellant is dismissed; parties are directed to bear their own costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL