

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

*In the matter of an application for revision in terms  
of Article 138 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.*

CA/PHC Case No: APN 137/2014

HC Galle Case No: HC/Writ/04/2013

Mohamed Thaha Mohamed Hareed,  
No. 215/11, Arachchiwatta,  
Weliwatta, Galle.

**Petitioner.**

**Vs.**

1. Municipal Engineer,  
Galle Municipal Council, Galle.
2. Municipal commissioner,  
Galle Municipal Council, Galle.
3. Mayor,  
Galle Municipal Council, Galle.
4. Galle Municipal Council,  
Galle.
5. Assistant Commissioner of Local  
Government Galle,  
Office of the Assistant Commissioner of  
Local Government Galle,  
S.H.Dahanayaka Mawatha, Galle.
6. Commissioner of Local Government-  
Southern Province Department of Local  
Government (Southern Province), 6<sup>th</sup> Floor,  
District Secretariat, Galle.
7. Secretary,  
Ministry of Chief Minister,  
Law and Peace, Transport, Water Supply  
and Drainage, Electricity, Health and

Indigenous Medicine and Local  
Government,  
15A, Lower Dickson Road, Galle.

8. Chairman,  
Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6<sup>th</sup> Floor,  
Kaluwella, Galle.
9. K.K.G.J.K. Siriwardane,  
Member,  
Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6<sup>th</sup> Floor,  
Kaluwella, Galle.
10. D.W. Witharana,  
Member,  
Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6<sup>th</sup> Floor,  
Kaluwella, Galle.
11. I.S. Wijesekara,  
Member,  
Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6<sup>th</sup> Floor,  
Kaluwella, Galle.
12. Munidasa Halpandeniya,  
Member,

Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6th Floor,  
Kaluwella, Galle.

13. M.Y.S. Deshapriya,  
Secretary,  
Member,  
Southern Province Provincial Public Service  
Commission,  
Office of the Southern Province Provincial  
Public Service Commission,  
District Secretariat, 6th Floor,  
Kaluwella, Galle.

14. Governor-Southern Province Governor's  
Secretariat, Southern Province, Lower  
Dickson Road, Galle.

**Respondents.**

**NOW BETWEEN**

Mohamed Thaha Mohamed Hareed,  
No. 215/11, Arachchiwatta,  
Weliwatta, Galle.

**Petitioner-Petitioner.**

**Vs.**

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14. Governor-Southern Province Governor's  
Secretariat, Southern Province, Lower  
Dickson Road, Galle.

**Respondent-Respondents.**

**Before: Prasantha De Silva, J.**

**K.K.A.V. Swarnadhipathi, J.**

Counsel: Mr. K. De Alwis A.A.L for the Petitioner-Petitioner.

Mr. C. Wijesooriya A.A.L for the 1<sup>st</sup>-4<sup>th</sup> Respondent-Respondents.

Written Submission

tendered on: 28.10.2021 by the 1<sup>st</sup>-4<sup>th</sup> Respondent-Respondents.  
05.11.2021 by the Petitioner-Petitioner.

Decided on: 06.01.2022

**Prasantha De Silva, J.**

### **Judgment**

This is an application for revision made by the Petitioner-Petitioner [hereinafter referred to as the Petitioner] against the Order of the learned High court Judge of Galle dated 10.07.2014. The Petitioner sought to quash the decision which was informed to the Petitioner by letter 03-4 issued by the 3<sup>rd</sup> Respondent treating the Petitioner having vacated the post and the decisions taken thereafter, by way of writ of Certiorari and Mandamus.

When this matter was taken up for inquiry, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Respondents had raised a preliminary objection that the Petitioner-Petitioner was not entitled to invoke the revisionary jurisdiction of this Court. Since the impugned Order of dismissing the application of the Petitioner by the learned High court Judge is a final Order, Petitioner could have exercised the right of appeal.

It appears that the Petitioner made this application by way of revision on the basis that the impugned Order is an interlocutory Order and not a final Order.

Be that as it may, the Petitioner assuming without conceding stated that the impugned Order of the learned High court Judge was an appealable Order, where the remedy of revision is still available to the Petitioner in view of the Judgment of *Wijesiri Gunawardane and two others Vs. Chandrasena Muthukumarana and five others reported in 2020 BALR 315*, which held that the

revisionary jurisdiction of the Court of Appeal remains intact despite the enactment of the High Court of the Provinces (*Special Provisions*) Act No. 19 of 1990.

In the case of ***Nalaka Dayawansha Vs. OIC, Colombo Crimes Division CA (PHC) 149/13*** decided on 19/10/2018, the Court of Appeal distinguished between the two phrases ‘Order’ and ‘Final Order’ upon a discussion of two analytical approaches (‘Order approach’ and ‘Application approach’) referred in several authorities. Accordingly, the Order of the High Court Judge dated 10.07.2014 does not finally determine the action as decided in ***Salaman Vs. Warner (189) O.B.D 734*** which is cited in ***Nalaka Dayawansa’s*** Case, which relied on the ‘Application approach’ as follows;

*“The question must depend on what would be the result of decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”*

It is seen that in the case of ***Pathirana Vs. Goonerwardena and others [CA (PHC) 16/2016]*** that this Court had dealt with an identical legal issue, whether an Order of a Provincial High Court refusing to issue notice, was a final Order or interlocutory Order. The Court of Appeal observed that the High Court’s Order was made upon an application by the Petitioner to issue notice on the Respondents. It was held that although the Order refusing to issue notice on the Respondents finally determined the matter, if the High Court decided to issue notice, the matter would not have been finally determined. On this basis, the Court of Appeal regarded an Order refusing to issue notice as an interlocutory Order that did not come within the scope of Article 154P (6) of the Constitution.

In such an instant, it is relevant to apply the Application approach test as well as the Order approach test in order to determine whether the impugned Order is a final Order or not.

In this respect, it is noteworthy that the approach taken in the Case of *Pathirana Vs. Goonewardene [supra]* and determine that the impugned Order made by the learned High Court Judge on 10.07.2014 is an interlocutory Order on the basis that if the High Court decided to issue notice, the matter would not have been finally determined. As such, it is relevant to note that the impugned Order is an interlocutory Order.

It is seen that when the instant Case had been taken up for inquiry before the learned High Court Judge, a preliminary objection was raised on behalf of the 1<sup>st</sup>-4<sup>th</sup> Respondents that the Petitioner had failed to lodge an appeal in terms of Chapter XLVIII of Clause 37.1 of the Establishment Code and therefore he was not entitled to proceed with this application.

Apparently, the learned High Court Judge upheld the said preliminary objection and dismissed the application of the Petitioner.

In this instance, it is submitted that assuming the learned High Court Judge overruled the said preliminary objection, the matter would have to proceed further and would not have been determined finally. As such, in view of the said Case *Nalaka Dayawansha Vs. OIC, Colombo Crimes Division [supra]*, according to the application approach test, the impugned Order of the learned High Court Judge is an interlocutory Order.

Thus no appeal shall lie against the impugned Order dated 10.07.2014, by the learned High Court Judge.

As such, I hold that the Petitioner is entitled to invoke the revisionary jurisdiction of this Court against the impugned Order.

However, since the revision is a discretionary remedy and could be exercised only on exceptional circumstances, thus the Court has to ascertain whether a miscarriage of justice is caused to the aggrieved party, which shocks the conscience of Court.



Apparently, the Petitioner had not established his Case by substantiating that any injustice had been caused to him by the Order of the learned High Court Judge.

The Petitioner in this revision application was appointed as an Assistant Painter and thereafter promoted as a Painter and was assigned to Municipal Council of Galle.

It was submitted on behalf of the Petitioner that the 1<sup>st</sup> Respondent-Municipal engineer of the Municipal Council of Galle, had informed the Petitioner to report to a place other than the place where he was working and when the Petitioner asked for a formal letter of internal transfer, the said Respondent had scolded him and put an entry in the attendance register to the effect that the Petitioner should not be permitted to work in the said place from 04.06.2010.

It was further submitted that the Petitioner informed the said incident by telegram to the 1<sup>st</sup> Respondent-Municipal engineer and also sought leave. However, as the Petitioner did not receive any reply and when he inquired about it from the office of the 4<sup>th</sup> Respondent-Municipal Council, he received no reply.

Apparently, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent-Respondents (hereinafter referred to as Respondents) denied the Petitioner's said contention and had taken up the position that the Petitioner had misrepresented the facts thus the Petitioner was aware that he had been given an internal transfer to the Planning Branch, which has not been disclosed in his petition filed in the Provincial High Court.

It is to be noted that the Respondents have stated in their objections that the Petitioner was informed of the said internal transfer through the Technical Officer (Mechanical) and Petitioner had refused to receive the letter of transfer, when it was handed over to the Petitioner by the Technical Officer (Mechanical).

However, the Petitioner stated in his counter affidavit that no such letters had been handed over to him. Since he had left the workplace in the morning of 03<sup>rd</sup> June 2010, there was no way for the 1<sup>st</sup> Respondent or his officials to handover the said letters to the Petitioner.

The Petitioner stated that he attended to work on 03.06.2010, which was established through the attendance register marked and produced as පෙ-17. In this instance, Court observes that the Petitioner did not give any reason why he had left the workplace in the morning.

Furthermore, it is relevant to note that the said attendance register පෙ-17 indicates on 03.06.2010, it is minuted that “හෙට (04 දා) සිට M.T.M. හරීඩ් මෙහි අත්සන් නොකළ යුතුය”.

According to the said minute, M.T.M. Hareed was asked not to sign the attendance register from 4<sup>th</sup> of June onwards. Which substantiates that the Petitioner was conveyed of his transfer to the Planning Branch and further it establishes that the 1<sup>st</sup> Respondent had informed the said internal transfer to the Petitioner.

It was the position of the Petitioner that on 3<sup>rd</sup> and 4<sup>th</sup> of June, he wanted to meet the 2<sup>nd</sup> Respondent and inform him of his grievances but he had not been able to do so.

Hence, it appears that the Petitioner was fully aware of his internal transfer to the Planning Branch but he did not want to accept it. Thus, evading to report for work to the Planning Branch.

However, it was the case for the Petitioner that even though he had made several attempts to meet the 2<sup>nd</sup> Respondent and commence work, he had not been able to do so, until he was informed that he had been treated as having vacated post by letter dated 31.01.2011 marked and produced as පෙ-4.

It is relevant to note that the said letter of vacation of post had been sent to the Petitioner after six months from the date of his internal transfer. It clearly shows that during this period of six months, the Petitioner did not make any attempt to get his transfer cancelled or accept work at the Planning Branch, which amply proves his intention of vacating the post.

Moreover, it is seen that the Petitioner had not exercised his right of appeal against the notice of vacation of post in terms of Item 37 Chapter XLVIII of the Establishment Code.

As such, it is apparent that the Petitioner has slept over his rights. According to the legal maxim “*Vigilantibus Non Dormientibus Jura Subveniunt*”, the law assists only those who are vigilant, and not those who sleep over their rights. The said maxim refers to the obligation of individuals to not only be aware of their rights under the Law, but also to be vigilant while exercising or using the same. The legal process only benefits those who have been careful enough with their rights, instead of being ignorant.

Hence, the Petitioner is not entitled to exercise the remedy of judicial review by moving for writ of Certiorari to quash the decisions which flow from the decision marked as ๑๒-4. Thereby, no writ of Mandamus lies against the Respondents. In view of the foregoing reasons, we see no reason for us to interfere with the Order of the learned High Court Judge dated 10.07.2014. Hence, we are inclined to dismiss the application of the Petitioner dated 25.11.2014 without cost.

**JUDGE OF THE COURT OF APPEAL**

**K.K.A.V. Swarnadhipathi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**