

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application under and in terms of Article 126 to be read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 418/2015

D.B.D Rajapakshe
“Prashakthi”
Ratmalwala
Petitioner

Vs.

1. Mr. Y. Abdul Majeed
The Director General of Irrigation.
Department of Irrigation,
No.230, Bauddhaloka Mawatha,
Colombo 07.
- 1(a) Mr.S.S.L. Weerasinghe
The Director General of Irrigation.
Department of Irrigation,
No.230, Bauddhaloka Mawatha,
Colombo 07.
- 1(b) Mr. S. Mohanaraja
The Director General of Irrigation.
Department of Irrigation,
No.230, Bauddhaloka Mawatha,
Colombo 07.
- 1(c) Eng.K.D.N. Siriwardana
The Director General of Irrigation.
Department of Irrigation,

No.230, Bauddhaloka Mawatha,
Colombo 07.

2. The Secretary

The Ministry of Irrigation and Water
Resource Management,
No. 500, T.B. Jayah Mawatha.
Colombo10.

3. The Secretary

The Ministry of Public Administration
and Management,
Independence Square,
Colombo 07.

4. The Director Establishment

The Ministry of Public Administration
and Management,
Independence Square.
Colombo 07.

5. The Director General

Department of Management Services,
Ministry of Finance,
Colombo 01.

6. Mr. Dharmasena Dissanayake

The Chairman.

7. Mr. A. Salam Abdul Waid

Member

8. Mr. D. Shirantha Wijayathilaka

Member

9. Mr. Prathap Ramanujan

Member

10. Mrs. Jegarasasingam
Member
11. Mr. Santhi Nihal Senevirathne
Member
12. Mr. S. Ranagge
Member
13. Mr. D.L. Mendis
Member
14. Mr. Sarath Jayathilaka
Member
6th to 14th Respondents of
Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05.
15. Secretary,
Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05.
16. The Regional Director of Irrigation,
The office of the Regional Director,
Irrigation Department,
P.O. Box 44, Kurunegala.
17. Honourable Attorney General

Attorney General's Department,
Colombo 12.

Respondents

Before: Sisira. J. de Abrew J

Murdu Fernando PCJ

Gamini Amarasekara J

Counsel: Rasika Dissanayake with Chandrasiri Wanigapura, Dinuka Cooray and

Shabeer Hussain for the Petitioner

Rajiv Goonatilake SSC for the Attorney General

Written Submissions

tendered on: 6.3.2020 by the Petitioner

15.5.2020 by the Respondents

Argued on : 24.9.2020

Decided on : 12.2.2021

Sisira.J.de Abrew J

The Petitioner, by her petition filed in this court, alleges that her Fundamental Rights guaranteed by Articles 12(1), 12(2), and 14(1)(g) of the Constitution have been violated by the Respondents. This court by its order dated 13.1.2016, granted leave to proceed for alleged violation of Articles 12(1) and 14(1)(g) of the Constitution. The case of the Petitioner may be briefly summarized as follows. The Petitioner who passed the GCE (Ordinary Level) with five distinctions in the year 2000 and the GCE (Advanced Level) with two credit passes and one simple pass in the year 2003, was appointed as Management Assistant in the Department of

Irrigation on contract basis with effect from 21.5.2008 by letter signed by the 1st Respondent dated 7.5.2008. This letter dated 7.5.2008 is annexed to the Petition marked as P3. Thereafter her services were extended till 31.12.2014 by letters marked P4(i) to P4(vi). Thereafter, the Petitioner, by letter dated 17.11.2014 marked as P8, was appointed by the 1st Respondent to the post of clerk with effect from 24.10.2014 acting in terms of Circular No.25/2014 dated 12.11.2014 marked P6. The Petitioner states that she has fulfilled the requirements stated in the said Circular. After the Petitioner assumed duties as a clerk, she was paid salaries from January 2015 to August 2015 on the salary scale stated in the said letter of appointment marked P8 dated 17.11.2014. Her salary scale was, according to P8, is as follows.

MN1-2006-A. Rs 13,120 – 10x145 – 11x170 -10x240 – 10x320 – 22040.

However, by letter (marked P11) issued by the 1st Respondent in August 2015 (the date is not stated in the said letter), the Petitioner's appointment to the post of clerk was cancelled by the 1st Respondent with effect from 17.11.2014 which is the date of the letter of appointment marked P8. The letter of cancelling the Petitioner's appointment was handed over to the Petitioner by letter dated 8.9.2015 marked P12. Thus, she was not permitted to report for duty with effect from 8.9.2015. The Petitioner challenges both P11 and P12 and moves to quash the said letters.

The learned Senior State Counsel (SSC) contended that the Petitioner was not entitled to be appointed to the post of clerk in terms of Circular No.25/2014 dated 12.11.2014 marked P6 since the said Circular (P6) had authorized to appoint Management Assistants to the permanent cadre only if they (Management Assistants) were drawing the salary scale of MN1. The learned SSC contended that the Petitioner was not on the salary scale of MN1 but on the salary scale of MN2.

The Petitioner, as Management Assistant on contract basis, was drawing a salary of Rs.13,990 which, according to R3 produced by the 1st Respondent, is MN2. R3 is a document which indicates the salary scale of MN2. The salary scale of MN1 according to P8, is Rs.13,120. The learned SSC contended that the Petitioner was not entitled to be appointed to the permanent cadre since she was drawing the salary scale of MN2. According to the contention of the learned SSC, if the Petitioner was drawing a salary of Rs.13,120/-, she was entitled to be appointed to the permanent cadre. The difference of the salary was only (13,990 – 13,120) Rs.870/-. In fact, the Petitioner was drawing a higher salary than MN1 scale. Assuming without conceding that the Petitioner was not entitled to be appointed to the post of clerk (the permanent cadre) in terms of Circular No.25/2014 dated 12.11.2014 marked P6, who appointed the Petitioner to the post of clerk (permanent cadre)? It is the Director General of Irrigation (the 1st Respondent) who appointed the Petitioner to the permanent cadre acting on behalf of the Government. Then as contended by the learned SSC if it is a mistake, whose mistake was it? It was the mistake of 1st Respondent who acted on behalf of the Government. The Petitioner cannot be and should not be penalized for the mistake committed by the 1st Respondent. It is an accepted principle in law that no man is permitted to take advantage of his own mistake. This view is supported by the observation made by His Lordship Justice Sansoni in the case of Kanapathipillai Vs Meerasaibo 58 NLR page41 at page 43 wherein His Lordship observed thus “*no man is allowed to take advantage of his wrong.*” In the present case, the Petitioner’s appointment to the post of clerk (permanent cadre) was cancelled on the basis of an alleged mistake committed by the Director General of Irrigation (the 1st Respondent) who acted on behalf of the Government. On this ground alone this

court should quash the letters marked P11 and P12. Further there is no any allegation that the Petitioner committed any wrongful act.

The other matter that I would like to consider is whether the Petitioner had a legitimate expectation in continuing in the permanent cadre of the Government Service until her age of retirement. I now advert to this question. The Petitioner was appointed to the post of clerk with effect from 24.10.2014 by the Director General of Irrigation (the 1st Respondent) by his letter dated 17.11.2014 (P8). The letter of appointment (P8) states that this post is permanent and pensionable. Her salary was Rs.13,120/-. The Government paid her salary (Rs.13,120/-) on the basis that she has been appointed to the post of clerk for eight months and remitted Rs.870/- monthly to the W&OP. This is established by her salary slips marked as P10(i) to P10(viii). The Petitioner gave up her post of Management Assistant on contract basis when she was appointed to the new post. Presently, the Petitioner has lost her earlier post of Management Assistant and her new post of clerk. The Petitioner faces this situation due to the action of the 1st Respondent. When I consider all the above matters, I ask the question whether the Petitioner had a legitimate expectation of continuing in the permanent cadre of the Government Service. In this connection I would like to consider certain judicial decisions. In the case of Dayaratne and Others Vs Minister of Health [1999] 1SLR 393 this court observed the following facts.

By notification in the Gazette dated 10.05.1996 the Ministry of Health called for applications from persons desirous of following a course of training leading to the award of the certificate of competency as Assistant Medical Officers. Fifteen petitioners who were eligible for enrolment to follow the course of training applied in response to the notification and sat a competitive examination conducted on 27.12.1996; and they were so placed

on the results of the examination as to be qualified to follow the course of training. According to the scheme published in the Gazette, the next step was the holding of an interview to check the qualifications, meaning the checking of (1) the birth certificate, (2) evidence of citizenship, and (3) certificates relating to educational qualifications. That interview was not held. Then, on 18.12.1997 the Secretary, Government Medical Officers' Association (GMOA) informed the Minister of Health and Indigenous Medicine that they desired the provision of employment to medical graduates and saw no justification 'to restart the AMP training course'; and that their members 'would not participate in any component of the training programme'. Whereupon, on 11.03.1998 the Minister sought cabinet approval to fill the existing and future vacancies in the cadre of Assistant Medical Practitioners with Medical Graduates and to offer the petitioners the option of following the course for paramedical services/Public Health Inspectors, if they so desire; and by a circular letter dated 20.08.1998, the petitioners were invited to apply for training as Pharmacists, Medical Laboratory Technologists and Public Health Inspectors. The requisite qualifications for such training and the course subjects are less than what are required for the AMP course. Besides, persons serving in Para Medical Services and as Public Health Inspectors are not eligible to seek registration under the Medical Ordinance to practise medicine and surgery whilst Assistant Medical Practitioners are eligible to seek such registration, subject to certain conditions.

This court held as follows. *“On the facts of the case, the petitioners had a legitimate expectation that they would, upon satisfying prescribed conditions, be provided with a course of training for the examination leading to the award of the*

certificate of competency as Assistant Medical Practitioners. The decision effecting a change of policy which destroyed the expectation of the petitioners did not depend upon considerations of public interest. In deciding upon the conflicting interests of Graduate Medical Officers and Assistant Medical Practitioners, the 1st, 2nd and 3rd respondents (the Minister, his Secretary and the Deputy Director General Administration, respectively) considered the views of the GMOA and yielded to their pressure. Neither the views of the Assistant Medical Practitioners nor those of the petitioners were sought. Hence, rights of the petitioners guaranteed by Article 12 (1) of the Constitution were violated.” At page 413, this court whilst holding that the fundamental rights of the petitioners guaranteed by Article 12 (1) of the Constitution have been violated made the following observation. *“It is the duty of this Court to safeguard the rights and privileges, as well as interests "deserving of protection such as those based on legitimate expectations, of individuals.”*

In the case of *Sirimal and Others Vs Board of Directors of the Co-operative Wholesale Establishment and Others* [2003] 2 SLR 23 this court observed the following facts.

“The petitioners complained that the 1st respondent ("The CWE") did in violation of their rights under Article 12(1) of the Constitution stopped extension of their services beyond 55 years and purported to retire them from 31.7.2002, by circular dated 21.6.2002(P6). The previous circular dated 14.11.1995(P5) provided for granting of annual extension from 55 until 60 as in the case of the public sector under Chapter V section 5 of the Establishments Code. The reasons given for the new policy decision were:

(a) *Redundant labour force*

(b) *Heavy losses; and*

(c) *Reorganization of the CWE to make it a profit making organization.*

The applications of all petitioners except Nos. 19 and 20 were recommended by the Service Extension Committee; and no application was sent to the Ministry for decision. The previous practice was to grant annual extension up to 60 years except where medical or disciplinary grounds existed.

This court held as follows.

1. The optional age of retirement in the CWE had been 55 years of age with a right to seek extension up to 60 years of age as in the public sector. The impugned circular seeks to make retirement compulsory at 55 years.

2. The petitioner had a legitimate expectation of receiving extension up to 60 years except where medical or disciplinary grounds were present.

In *Surangani Marapana Vs Bank of Ceylon* [1997] 3 SLR 156 this court observed the following facts.

“The petitioner had an unblemished record of 25 years of service at the Bank of Ceylon. She was fully qualified and had received special training in Banking Law and practice and allied subjects in London, Italy and Singapore. She was the Chief Legal Officer of the Bank from 1.11.88 during which period she had enhanced the efficiency and streamlined the functions of the Legal Department. As she was to reach the age of 55 years on 27.11.96 she applied to the Bank on 25.5.96 for an extension of service for an initial period of one year. Her application was recommended by the

Personnel Department in its draft Board Minute, under exceptional circumstances. The Board of Directors took four months to decide on the application and after lapse of a further month, the petitioner was informed on 22.10.96 that her application had been rejected and she would be retired from 27.11.96. Officers who were of a comparable grade had been granted extensions. But she was refused for no reason. The Board failed to submit to Court its decision. The Chairman of the Bank stated in his affidavit that the refusal to extend her services was done bona fide and unanimously after a careful evaluation of her application and the need of the Bank to increase the efficiency of its Legal Department.”

This court at page 171 held as follows.

“The decision of the Board of Directors not to grant the extension of service sought by the petitioner was arbitrary, capricious, unreasonable and unfair. It was also undoubtedly discriminatory, as the bank has not been evenhanded in the exercise of its discretion in respect of the petitioner. The impugned decision is, therefore, violative of the petitioner's fundamental right to equality before the law and the equal protection of the law, enshrined in Article 12(1) of the Constitution.”

At page 172 the court made the following observation. *“As the petitioner has succeeded in her application, I direct the 1st respondent to restore her to the post of Chief Legal Officer forthwith, for a period of one year from 27.11.96, together with all back wages and other remuneration.”*

In *Pinnawala Vs Sri Lanka Insurance Corporation* [1997] 3 SLR 85, this court observed the following facts. *“The petitioners’ application for the third extension of his services after he had reached 55 years of age was refused by the employer company on the ground that he was found wanting in the discharge of his duties.”*

This court at page 92 held that *the 1st respondent is a 'governmental agency or instrumentality' and the impugned act properly falls within the meaning of the expression 'executive or administrative action' in Article 126 of the Constitution. The petitioner is accordingly entitled to a declaration that the fundamental right guaranteed to him under Article 12(1) has been infringed*".

Considering all the aforementioned matters, I hold that the Petitioner had a legitimate expectation to continue in the permanent cadre of Government Service until the date of her retirement.

Article 12(1) of the Constitution states as follows. *"All persons are equal before the law and are entitled to the equal protection of the law."*

Article 14 (1) (g) of the Constitution states as follows. *"Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;"*

Considering all the above matters, I hold that the Petitioner's fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution have been violated by the Director General of Irrigation (the 1st Respondent) who acted on behalf of the Government. For the above reasons, I quash the letter issued by the 1st Respondent dated August 2015 marked P11 (the letter does not indicate a date) cancelling the Petitioner's appointment and the letter of the 1st Respondent dated 8.9.2015 marked P12 relating to the Petitioner. For the aforementioned reasons, I hold that the Petitioner is entitled to be in the permanent cadre of Government Service on conditions stipulated in her letter of appointment dated 17.11.2014 marked P8 from 24.10.2014. I direct the Director General of Irrigation to permit the Petitioner to continue in the permanent cadre of Government Service on conditions stipulated in

her letter of appointment dated 17.11.2014 marked P8 from the day that she was stopped from reporting for duty. The Petitioner is entitled to receive her salary as stipulated in her letter of appointment dated 17.11.2014 marked P8 and all other remunerations from the date of appointment to the post of clerk. The 1st Respondent is also directed to pay her back wages and other remunerations from the date that she was stopped from reporting for duty. The present Director General of Irrigation is directed to implement the directions given in this judgment within two months from the date of this judgment. I grant a sum of Rs.50,000/- as compensation. The 1st Respondent should pay the aforementioned compensation from the State funds. The Registrar of this court is directed to send a certified copy of this judgment to the Director General of Irrigation.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

Gamini Amarasekara J

I agree.

Judge of the Supreme Court.