

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

In the matter of an
application under Article
17 and 126 of the
Constitution of the
Democratic Socialist
Republic of Sri Lanka

1. Sithambiralage Martin Sebastian
PremalalPerera, P.O. Box 14, Ja-ela.
2. ThelgeChithraratnePeris, 219,
VenBaddegamaWimalawansaMawatha,
Colombo 10.
3. WerakkodigeChandrasiriAlwis, 123,
Wattegedera Road, Maharagama.
4. PinnawalaAppuhamilage Dias Karunaratne,
Medical Clinic, Kandy Road, Imbulgoda.
5. NimalGaminiWijethunge, 45/10,
Malwatta Road, Maharagama.
6. AlagapanneShantha Kumar, No. 480/151,
Roxy Gardens, Colombo 06.

PETITIONER

S.C. F.R. Application No. 891/2009

Vs

1. Tissa Karalliyadda, Minister of Indigenous Medi-
cine, Old Kottawa Road, Nawinna, Maharagama.

2. Secretary, Ministry of Indigenous Medicine, Old
Kottawa Road, Nawinna, Maharagama.

2a. Dr. D.M.R.B. Dissanayake, Secretary, Ministry of
Health and Indigenous Medicine, No. 385, Ven.

BaddegamaWimalawansaTheroMawatha,
Colombo 10. - **Substituted 2a Respondent**

3. Homeopathic Council, No. 94, Shelton JayasingheMawatha, Welisara, Ragama.
- 4.G.G.A.Apponso, No. 82, Galle Road, Colombo 04.
5. K. P. Walisinghe, No. 62/60, Dabare Place, Mirihana, Nugegoda
- 6 L.M.S. Alagiyawanna, “Anoma”, Meevitagammana, Urapola.
7. H.M.C.J.Herath, Jethawana Road, Colombo 14.
8. M.I. Latiff, No. 23A, 1/1, AmarasekeraMawatha, Colombo 05.
9. L.A. Madhupali, No. 3/1B, Peelipothagama Road, Badulla.
10. C. Weerasekera, No. 12, Braemore Gardens, Matale Road, Katugastota.
11. H.B.S. Keerthisena, No. 8, Hekitta Lane, Wattala.
12. Hon. Attorney General, Attorney General’s Department, Colombo 12.

RESPONDENTS

13. SalindaDissanayake, Hon. Minister of Indigenous Medicine, Ministry of Indigenous Medicine, Ayurveda Hospital, Borella, Colombo 08. - **Added 13th Respondent.**
- 13.a .Dr. RajithaSenaratne, Hon. Minister of Health and Indigenous Medicine, Ministry of Health and Indigenous Medicine, No. 385, Ven, BaddegamaWimalawansaTheroMawatha, Colombo 10.
Substituted 13 a Respondent.

BEFORE: **S. EVA WANASUNDERA PC, J.**
 B.P.ALUVIHARE PC, J.
 K. T. CHITRASIRI J.

COUNSEL: J.C.Weliamuna with PulasthiHewamanne for the Petitioners.
Sanjay RajaratnamPC , Additional Solicitor General for the 2nd , 12th and 13A Respondents.

ARGUED ON: 08. 03. 2016.

DECIDED ON: 31.03.2016.

S. EVA WANASUNDERA PCJ.

This Court granted Leave to Proceed in this matter for the alleged violation of fundamental rights contained in Articles 12(1), 14(1)c and 14(1)g of the Constitution on the 1st of July, 2010.

On 10. 02. 2016, the counsel for the 3rd and 5th to 10th made an application to get them discharged from these proceedings as all of them have ceased to hold office in 2011. Since it was not objected to by the other parties, court allowed that application and heard only the submissions made by the counsel for the Petitioners and the counsel for the 2nd the 12th and 13A Respondents.

The facts pertinent to this matter are as follows: The Petitioners were the members of the Homeopathic Council established under the Homeopathic Act No. 7 of 1970. They were elected by the Homeopathic practitioners by secret ballot at an election held in terms of Sec. 3(3) of the said Act. The names of the 1st to 5th Petitioners as elected members were published in Gazette No. 1436 dated 10.03.2006. They were appointed for 5 years from that date. The name of the 6th Petitioner and the 11th Respondent were notified as members of the Homeopathic Council later on when two members appointed earlier passed away in 2008 and 2009.

It is to be noted that the said appointments were made as a result of a settlement reached by the parties in the Court of Appeal case No. C.A.Writ No. 492/05. In that case the 1st Petitioner and four others were the Petitioners who came before court to get a writs of Mandamus from the Court of Appeal to compel the 1st Respondent to hold an election to appoint members of the Homeopathic Council in compliance of Sec. 3(3) of the Homeopathy Act No. 7 of 1970. The 1st Petitioner was elected as the President of the Council. The Petitioners plead that due to this reason of having filed action against the 1st Respondent, there existed a continuation of the conflict between the Council and the Minister, the 1st Respondent. Once again, the Petitioners , the members of the Council went before the Court of Appeal seeking a writ of prohibition alleging that the Respondents were usurping their powers with regard to the activities concerning the Homeopathic Hospital at Welisara, against the 1st and the 2nd Respondents in case No. 596/2008/CA . This matter was argued and concluded and the

judgment was pending to be delivered on 27.11.2009. In the mean time, the 1st Respondent, the Minister removed all the Council Members and appointed new members to the Council by orders dated 20.10.2009 and 21.10.2009. which were published in Gazette Notification (Extraordinary Nos. 1624/12 and 1625/12 stating that he is acting in accordance with the powers granted to him by law under Secs. 11 and 10 of the Homeopathy Act.

Sec.11 reads:

- 11(1) The Minister may , without assigning any reason, remove from office, by Order published in the gazette, any appointed or elected member of the Council. In the exercise of his powers under the preceding provisions of this Section the Minister may act either on his own motion or on any recommending made to him by the Council under sub-section (2). Such Order shall take effect on the date of such publication.
- (2) The Council may recommend to the Minister that any appointed or elected member of the Council shall be removed from office on any ground specified in sub-section (4).
- (3) The Council may remove from office any elected member of the Council on any ground specified in sub-section (4). A written notice of the decision of the Council to remove such member shall be served on such member of the Council. No such decision shall take effect-
- (a) where no appeal against the decision is preferred to the Minister under sub-section (5) within the period stated therein, until the expiry of that period; and
 - (b) where an appeal is so preferred, unless and until the decision is confirmed on such appeal.
- (4) The Council may recommend to the Minister under sub-section (2) that any member of the Council shall be removed from office any elected member of the Council under sub-section (3) , on any of the following grounds:-
- (a) that being an advocate or a proctor, he has appeared in any legal proceedings, whether civil or criminal, against the Council;
 - (b) that he has so abused his position as a member of the Council as to render his continuance in office detrimental to the interests of the Council.
- (5) Any member of the Council who is aggrieved by the decision of the Council to remove him from office may, within a period of fourteen days after the service on him of the notice of such decision prefer a written appeal against such decision to the Minister. The Minister may on such appeal, **after giving both the Council and the appellant an opportunity of being heard**, make an order either confirming or rejecting such decision. The Minister shall cause a notice of his order on such appeal to be served on both the appellant and the Council.

Section 10 reads:

Any vacancy in the office of a member of the Council shall be filled by the appointment or election of a member, as the case may be, in accordance with the provisions of this Act. Any person who has vacated his office as a member, **otherwise than by removal by the**

Minister or the Council, shall be eligible for reappointment or re-election as a member, as the case may be.

I observe that when the Minister removes a member of the Council at any time, as has been in this case in hand, **he is debarred** from being reappointed or being re-elected during his life time in his profession. It is a very serious matter where the individual so removed is concerned. Such a provision is enacted by statute because a member who is removed is so removed for a seriously terrible act done on the part of that Council member. I observe that all the members of the Council, when they were removed by the Minister, did not know why they were removed as they were not notified of that fact at any time or they were not charge sheeted or they were not subject to any inquiry or nothing of the sort was done by the person in Authority who was the 1st Respondent, the Minister prior to them being removed by letters sent to them following the Gazette Notification published in the Gazette with the order of removal. The rule in Administrative Law of Audi Alteram Partem has not been complied with by the 1st and the 2nd Respondents.

In the case of **Douglas A. Nethsinghe Vs Ratnasuru Wickremanayake – SC Application 770/99, SC Minutes of 13.07.2001**, Justice Mark Fernando gave the judicial interpretation to the phrase, “ without assigning any reason “ and held that “ such is subject to Article 12 of the Constitution “, and that the Petitioner in that case could not have been removed without assigning a reason. In earlier cases such as **Bandara Vs Premachandra 1994 1 SLR 301, De Silva Vs. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another 1993 1 SLR 283, and Premachandra Vs Major Montague Jayawickrema and another 1994 2 SLR 90** also it was held that the application of the pleasure principle included in many statutes, should be interpreted to mean that such provision made in the statute is subject to Article 12 of the Constitution. The said authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that discretions are conferred on public functionaries in trust for the public, to be used for the good of the public, and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. It is clear that the Supreme Court has held that the discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes and that it should never be exercised unreasonably.

I am of the opinion that the Parliament when enacting this law would never have envisaged of all the members of the council being removed by the Minister at once for whatever reason. The normal course of removal, according to the provisions, seems to be that, if a member is corrupt to the limit of abusing his position in the Council, the Council firstly recommends to the Minister that such a person be removed and then such a member, who is aggrieved by that recommendation of the Council which should be notified to him by the Council, can make an appeal to the Minister who should then give an opportunity for the appellant and the Council to be heard by him, finally after hearing them should make an order of removal. The action taken by the Minister in this instance is on a decision taken on his own for reasons only known to him because it was not notified to any person, the reasons were not given or even entered in writing in any of the records of the Minister.

There is no evidence before this Court as to the reasons for him to have acted when all the members of the Council were removed. It is only when this case was filed that the 2nd Respondent, the Secretary to the Ministry had filed objections by way of an affidavit dated 18th March, 2010, wherein the 'reasons for removal done by the Minister' has somewhat been explained, in paragraph 7 thereof. In sub-paragraphs (a) to (o) of paragraph 7, the reasons given are quite general in nature and I observe that if those are the true allegations against the members of the Council, the 2nd Respondent could have easily called for explanation, issued charge sheets and held an inquiry, prior to removal. No action had been taken prior to removal of the Members of the Council as one whole group which is very surprising and which could never have been contemplated by the legislature at the time of enactment of this piece of law. The Homeopathy Act, I observe had been enacted with the intention of establishing of a Homeopathic Council which would be responsible for carrying out the objects specified in the preamble thereto. The objects were, the promotion and encouragement of the homeopathic system of medicine, the registration of homeopathic practitioners, the recognition of homeopathic institutions, the regulation and control of the importation, sale and dispensing of homeopathic medicines and drugs and other preparations and to provide for matters connected thereto. I also observe that the Homeopathic Council has a lot of powers to reach these goals and some of the reasons given by the 2nd Respondent against the Council members are actions performed within their powers given to them by law. If the members were acting in contravention of the provisions of law, the Ministry should have acted in accordance with the powers vested with them according to law.

I hold that the Minister has acted wrongly in thus removing the members of the Council arbitrarily, and capriciously as the Petitioners were not apprised of the accusations against them, and not heard them before such removal and thus the rule of natural justice, *audi alteram partem* was not adhered to.

Sec. 10 was used by the Minister to appoint a whole set of new members after the aforesaid act of removal of the elected members. According to the wording in this section, 'any vacancy in the office of a member of the council shall be filled by the appointment or election of a member, as the case may be in accordance with the provisions of the Act.' It does not say who should appoint or who should elect. But Sec. 6 states ; " If after having been given an opportunity to do so, there is **default on the part of registered homoepathic practitioners** in the election of a member of a Council, **then**, the Minister may, **in lieu of such election**, appoint a duly qualified person as such member: and the **member so appointed shall be deemed, for all the purposes of this Act, to be a member duly elected by such practitioners.**"

Accordingly, the Minister on his own does not have a right to appoint members to the Council. Only if the practitioners fail to elect a member, then and only then, does the Minister get a chance to appoint such a member and that appointment is done 'in lieu of such election'. Then, it is deemed that 'such member is a duly elected member elected by the practitioners'. Sec. 3(3) provides for the practitioners to elect the members of the Council. In an analysis of Sections 10, 6 and 3(3) I find that there is no authority for the Minister to appoint members

all of a sudden the way he thinks fit because he is doing so only in lieu of an election when the practitioners fail to do so. In the case in hand there was neither an invitation given to the practitioners to elect the new members or an attempt or an opportunity given to the practitioners to elect new members. I hold that the Minister has acted ultra vires his powers granted to him by the Act. He has abused the powers given by the Act in reaching the goals for which the Act was enacted.

I hold that the fundamental rights of the Petitioners enshrined in Articles 12, and 14(1)g have been infringed by the 1st and 2nd Respondents.

In the circumstances, I declare that the removal of the Petitioners from the membership of the Homeopathic Council is null and void. I hold that the appointments of the 4th to 10th Respondents as members of the Council are null and void. Therefore I make order to cancel the said appointments with effect from the date of appointment, even though they have all ceased to hold office by now.

I hold further that the Petitioners should be compensated for the said infringement by the State, at Rs. 250000/- (two hundred and fifty thousand) per person.

The Application is allowed with costs.

Judge of the Supreme Court

Justice B. P. Aluvihare PC

I agree.

Judge of the Supreme Court

Justice K. T. Chitrasiri

I agree.

Judge of the Supreme Court

