

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC / FR 131 / 2015

Nalin Sandaruwan,  
242 / 5, Dambahena Road,  
Maharagama.

SC / FR 132 / 2015

Sampath Ranasinghe,  
“Ranagiri” Sri Darmarama Road,  
Malamulla,  
Panadura.

SC / FR 133 / 2015

W. H. A. Sanath Chandrakumar,  
“Sinhagiri”, Panamura Road,  
Middeniya.

SC / FR 135 / 2015

Wasantha Kumari Ambulugala,  
Mahahenawatte, Anangoda,  
Walahanduwa, Galle.

SC / FR 157 / 2015

Wanni Arachchi Nevil,  
No 15A, Summit Flats,  
Keppetipola Mawatha,  
Colombo 05.

Petitioners

Vs.

1. Hon. RanjithMadduma Bandara,  
Minister of Internal Transport,  
No 01, D.R. Wijewardena  
Mawatha,  
Colombo 10.
2. Dr. Lalithasiri Gunaruwan,

Secretary,  
 Ministry of Internal Transport,  
 No.1, D.R. Wijewardena  
 Mawatha,  
 Colombo 10.

3. National Transport Commission,  
 No 241, Park Road,  
 Colombo 05.
4. Dr. D.S. Jayaweera,  
 Chairman,  
 National Transport Commission,  
 No 241, Park Road,  
 Colombo 05.
5. Hewawalimunige Wipulasena,  
 Director Operations (Acting)  
 National Transport Commission,  
 No. 241, Park Road,  
 Colombo 05.
6. Hon Attorney General,  
 Attorney General's Department,  
 Colombo 12.

Respondents

BEFORE : PRIYASATH DEP, PC, J. (as he was then)  
 UPALY ABEYRATHNE, J.  
 NALIN PERERA, J.

COUNSEL : Faiz Musthapha PC with Faiza Markar for  
 the Petitioner  
 N. Wigneswaran SSC for the Respondents

ARGUED ON : 28.09.2016

DECIDED ON : 30.05.2017

UPALY ABEYRATHNE, J.

Petitioners are owners of private omnibuses. The 3<sup>rd</sup> Respondent, who is the authority to issue Passenger Service Permit (PSP) in terms of Section 24 of the National Transport Commission Act No 37 of 1991 has issued PSP bearing Nos. NTCT 13748, NTC 13778, NTC 12949, NTCT 13723 and NTCF 13548 respectively, to the aforesaid Petitioners to operate passenger transport services in the Island.

The Petitioners complained that the usual procedure adopted by the 3<sup>rd</sup> Respondent under Section 24 of the National Transport Commission Act in the issuance of PSP is that when granting PSP upon the receipt of an application from a registered owner of an omnibus to operate passenger transport service along the route or routes stated therein, the 3<sup>rd</sup> Respondent would process the application and if satisfied with the application would grant PSP for a period specified therein. Once PSP is granted it is periodically renewed and/or extended. The said periodic renewal/extension is carried out as a matter of formality, unless and otherwise the registered owner has breached any of the terms and conditions set out in Section 30(2) of the said Act which prevents its renewal.

In 2012, with the commissioning of the Southern Expressway the 3<sup>rd</sup> Respondent called for tenders from interested persons to operate private omnibus along the Southern Expressway. At the inception five (5) persons had been granted PSP and thereafter several other persons had been granted with PSP. On or about 08.05.2014 a committee comprised of 05 members had been formed by the Cabinet of Ministers to submit a report on its observations and recommendations regarding the criteria on selecting bus owners and on issuance of permits for buses operating

in Southern Expressway. On 19.09.2014, the Cabinet of Ministers considered the cabinet paper containing the report of the said committee (P 4) and granted the approval for the recommendations stated in the report of the committee to be implemented subject to observation of the Minister of Transport. Consequent to the said Cabinet Approval (P 5) a paper notice (P 6) had been published in several newspapers calling for applications from the interested persons to operate omnibus along the Southern Expressway by the 04<sup>th</sup> Respondent.

By the said advertisement (P 6), published in newspapers addressing the owners holding valid passenger service permits along Matara - Colombo road (Rout No 2), the 4<sup>th</sup> Respondent had called for applications to grant 28 permanent PSPs to operate omnibuses along the Maharagama – Matara Southern Expressway. Accordingly, the persons who already had a valid PSP to operate an omnibus along the Matara – Colombo road (Galle Road) were only eligible to apply.

According to the Petitioners, the 3<sup>rd</sup> Respondent had issued 28 Passenger Service Permits to operate omnibuses between Maharagama – Matara and 15 Passenger Service Permits to operate omnibuses between Kaduwela - Matara along Southern Expressway, valid for a period of 01 year (P 8). Thereafter on November 2014, by P 9, 30 persons were granted with PSP's. In November/ /December 2014, further 26 persons, including the petitioners, were granted with PSP's.

The Petitioners have averred that, to their utmost surprise, shock and dismay the 3<sup>rd</sup> Respondent refused to extend the period of validity of the said PSP's when the PSPs were submitted for renewal/extension upon the expiration of the periods of validity. The Petitioners have complained that the refusal of the 3<sup>rd</sup> Respondent or any one or more of the Respondents to renew/extend the validity of

the Petitioners' PSP's are in violation of their fundamental right guaranteed to them under Article 12(1) and 14(1) (g) of the Constitution, inasmuch;

- No reasons have been given for the said refusal,
- The said refusal/failure to renew/extend the validity of the Petitioners' aforesaid PSP's are *ultra vires* the provisions of the National Transport Commission Act No 37 of 1991,
- The said refusal/failure is not rationally related to any reasonable objective sought to be achieved,
- The said refusal/failure is arbitrary, capricious and unwarranted,
- Then said refusal/failure is in violation of the Petitioners' legitimate expectation to operate omnibus along the route specified in the PSP,
- The Petitioner has expended large sums of money in purchasing the said omnibus obtaining the PSP, enlisting and training its staff and all other incidental expenses thereto and will be adversely affected if the PSP is not extended,
- The Petitioner had to incur additional expenditure in purchasing/leasing an omnibus that as suitable to ply along the Southern Expressway in compliance with the stipulations contained in P 7,
- The Petitioner would not be able to generate an income so as to pay wages of his employees and monthly lease rentals in respect of the omnibus in the event the PSP is not renewed/extended and is unable to operate on the said routes.

When the aforesaid applications were supported for leave to proceed on 12.06.2015, this court granted leave under Article 14(1) (g) of the Constitution.

The 4A Respondent has taken up the position that the said PSP's had been issued contrary to the provisions as stipulated in the National Transport Commission Act No 37 of 1991.

The 4A Respondent in his affidavit dated 13.06.2016, answering to the averments contained in paragraph 14 and 15 of the petitions has stated that;

- As per the document marked as P 9 by the Petitioners, a board paper has been submitted seeking the approval of the National Transport Commission to review the luxury passenger service which existed along certain routes and to allow them to ply along the Southern Expressway, if the need arises, subject to the payment of the relevant charges;
- Permits were granted to the Petitioners to operate omnibuses via the Southern expressway and the said permits had been extended up to April 2015, as reflected in P 11A and P 11 B;
- The Petitioners had been allowed to make the necessary payment by way of instalments in order to ply via the Southern Expressway, contrary to the provisions stipulated in Section 25 of the said Act;
- Section 30 of the said Act had not been followed in granting and/or extending the permit to ply via the Southern Expressway as a permit can only be granted for a minimum period of one year and a maximum period of three years.

As stipulated in Section 24 of the National Transport Commission (NTC) Act, upon the receipt of an application for a passenger service permit, the Commission may having regard to the demand for omnibus services by the public, on the route or routes applied for in the application, either grant or if it is satisfied

that the grant of such, permit would result in the over allocation of omnibus capacity on the route applied for refuse to grant a passenger service permit.

The Respondents have not disputed the fact that by the advertisement in the said paper notice marked P 6, Respondents stipulated that the persons who already had a valid PSP to operate an omnibus along the Matara – Colombo road (Galle Road) were only eligible to apply.

The learned Senior State Counsel for the Respondents submitted that;

- The said PSPs could not have been issued for a period less than one year as Section 25(2) mandates that every passenger permit be in force for such period not less than one year and not more than three years as specified in the permit and, as such, is manifestly illegal.
- No evidence has been placed before this court to demonstrate the basis upon which the publicly stated policy of the NTC in P 6, i.e. the issuance of permit only to persons already plying the Colombo – Matara route; had been change to accommodate the Petitioners.
- No evidence has been adduced to explain how or why the Petitioners would apply for permits when the public advertisement stated that the permits would only be issued to persons who already have a permit for use on the Galle Road (route No 2).
- The Petitioners have also been permitted to make the necessary payments by way of instalments, which is contrary to Section 5 of the said Act, as it does not contemplate the payment of fees on an instalment basis.

According to the averments contained in paragraphs 10, 11, 12 and 13 of the petitions, in terms of the said newspaper advertisement marked P 6 the

Petitioners had not applied for granting of PSPs to them. It is noteworthy that upon the said paper-notice, 58 (fifty-eight) persons had been issued with PSPs to operate omnibuses using the Southern Expressway, valid for a period of one year.

According to the Petitioners in November/December 2014 further 26 persons including the Petitioners were granted PSPs by the 3<sup>rd</sup> Respondent to operate omnibuses using the Southern Expressway, to destinations beyond the reach of the Southern Expressway.

The Petitioners have produced the said PSPs with the petitions, marked P 11 A. Accordingly, on 28.11.2014, the PSP bearing No NTCT-13748 to the Petitioner in case No SC/FR/131/2015 valid from 28.11.2014 to 04.01.2014; on 25.11.2014, the PSP bearing No NTCT-13778 to the Petitioner in SC/FR/132/2015 valid from 25.11.2014 to 24.01.2015; on 23.10.2014, the PSP bearing No NTC-12949 to the Petitioner in SC/FR/133/2015 valid from 23.10.2014 to 22.12.2014; on 30.10.2014, the PSP bearing No NTCT-13723 to the Petitioner in SC/FR/135/2015 valid from 30.10.2014 to 29.12.2014 and on 23.10.2014, the PSP bearing No NTCF-13548 to the Petitioner in SC/FR/157/2015 valid from 23.10.2014 to 07.04.2015, had been issued by the 3<sup>rd</sup> Respondent.

It is apparent that the said PSPs had not been issued in terms of Section 25 of the NTC Act, validating for a period not less than one year and not more than three years. Section 25 reads thus;

- 25(1) No passenger service permit shall be granted by the commission to any person under Section 24 except upon the payment by such person to the Commission of such fee as may be prescribed.
- (2) Every passenger service permit granted under section 24 shall
  - (a) be in the prescribed form; and



(b) unless it is cancelled earlier, be in force for such period not less than one year and not more than three.

According to Section 25 (2) b, a PSP issued in terms of said section, be in force for a period not less than one year and not more than three years. Hence it is apparent from Section 25 (2) b, that any PSP, which has been issued in violation of the said validity period, has no force in law. The Petitioners are now seeking an order from this court directing the Respondents to renew/extend the validity of the said PSPs and/or to grant fresh PSPs valid for a period of 01 year at a time. It must be noted that, the said PSPs, when issued for the first time, had not been issued to be in force for a period not less than one year as required by the provisions contained in Section 25 (2) b of the NTC Act. It is clearly seen that the validity of the said PSPs had been limited to a period less than 04 months from the date of issue. On the face of the said PSPs it is seen that it had been issued in contravention of the Provisions contained in Section 25 (2) b of the said Act. It is therefore clear that the Petitioners are now seeking from this court to validate the PSPs which had been issued in contrary to the provisions contained in the said Act.

It is surprising to note that although the said PSPs had been issued in contravention of Section 25 (2) b of the said Act, none of the Petitioners had made any attempt to challenge the 3<sup>rd</sup> respondent's decision to grant PSPs in the aforementioned style, before a court of law, by way of a fundamental right application or by way of a writ application.

When the circumstances were prevailing as such, according to the Petitioners, the 3<sup>rd</sup> Respondent had extended the period of validity of the said PSP's bearing No NTCT-13748 from 05.01.2015 to 04.04.2015, the PSP bearing No NTCT-13778 from 23.12.2014 to 22.01.2015 and thereafter from 23.01.2015 to 22.04.2015, the PSP bearing No NTC-12949 from 25.01.2015 to 24.03.2015 and

the PSP bearing No NTCT-13723 from 30.12.2014 to 29.03.2015. It is seen that no extension in the period of validity of the PSP bearing No NTCT-13548 had been granted to the Petitioner in SC/FR/157/2015 in which the validity period was to be expired on 07.04.2015. The Petitioners have produced the said renewals of the said PSPs (P 11A) marked P 11B.

The Respondents contended that the said renewals (P11B) of the PSPs are naturally illegal as they are based on PSPs marked P 11A and, furthermore, P 11B has an additional layer of illegality as it contravenes Section 30 of the National Transport Commission Act as well, since a renewal could also only be made for a period not less than one year and not more than three years. Section 30(1) of the said Act stipulates provisions in relation to the renewal of such PSPs as follows;

30.(1) The Commission may subject to subsection (2) and having regard to the availability of adequate omnibus services to meet the demand for omnibus services on the route or routes covered by any passenger service permit granted under section 24 renewal such permit, on application made to it by the holder of such permit for such period not less than one year and not more than three years calculated from the date of expiry of the permit.

It is clearly seen that said renewals marked P 11B had not been made according to the provisions contained in Section 30(1) of the act. It is seen from P 11B that the renewal had been made for a period less than one year. The inequality complained of by the petitioners in the aforementioned cases are only regarding the inequality of Respondents' decision to refuse the renewal of the Petitioners aforesaid PSPs. As I have mentioned above, the issuance of the said PSPs are in violation of Section 25 (1) b of the said Act since it had been issued valid for a

period less than 05 months from the date of issue. On other hand the first renewal of said PSPs too are in violation of Section 30 (1) of the said Act since the same had been renewed for a period less than 03 months. It is emphasized that the Constitution only guarantees equal protection of the law and not equal violation of law.

After the expiration of the said validity periods of the PSPs marked P 11B, the Petitioners had submitted their said PSPs for the renewal of the validity periods for the second time. The 3<sup>rd</sup> Respondent had refused to extend the validity period of the said PSPs marked P 11B. The Petitioners have complained that the 3<sup>rd</sup> Respondent, without providing any reason whatsoever, had refused to renew and/or extend the validity of the said PSPs.

Section 30(2) of the said Act stipulates the circumstances where National Transport Commission can refuse to renew PSPs. Section 30(2) read thus:

30(2) The Commission may refuse to renew any passenger service permit granted under section 24 if it appears to the Commission that the holder of such permit

- (a) has not observed the provisions of this Act or any regulations made thereunder;
- (b) has been convicted of any offence under this Act or any regulations made thereunder;
- (c) has not paid the prescribed fee for the renewal of the permit.

The Petitioners have complained in paragraph 21 of their Petitions that the refusal and/or failure of the 3<sup>rd</sup> Respondent to renew or extend the validity of the Petitioners said PSPs are in violation of the Petitioners' fundamental rights guaranteed to them under article 14(1)g of the Constitution.

Article 14(1)(g) of the Constitution provides that 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.

In the case of *Abeywardene vs. Inspector General of Police and Others* (1991) 2 Sri LR 349, Amerasinghe, J. stated that, "Article 14(1)(g) is based on Article 19(1)(g) of the Indian Constitution which provides that "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business." Although that Article does not expressly confine the occupation, trade or business" to *lawful* activities, the Courts have consistently held that the Constitution only protects the right to lawful occupations. .... One illegality does not justify another illegality".

In the exercise of the powers of the Supreme Court under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to carry out his duty in compliance with the law. When the previous acts of the public authority are in violation of the provisions of the relevant statute, this court cannot issue a direction to the public authority to perform the subsequent act, which emanate from the previous illegal act, in contrary to the provisions contained in the relevant statute. In the present case before me, as I have expressed before, both, the issuance and the renewal of the PSPs marked P 11A and P 11B are in contrary to the provisions contained in the NTC Act. Hence this court cannot issue a direction to NTC commanding it to renew the said PSPs marked P 11B in accordance with the law.

In the case of *C. W. Mackie & Co., Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986) 1 Sri LR 300 (SC)

Chief Justice Sharvananda stated that “The Supreme Court cannot lend its sanction or authority to any illegal act. Illegality and equity are not on speaking terms”.

In the aforesaid circumstances, I am of the view that, acting on constitutional principles, this court cannot give legal recognition to the unconstitutional action of the NTC, in the issuance of the PSPs to the Petitioners and the renewal of the same for the first time, in contrary to the validity period stipulated in the Act. Hence the granting relief to the Petitioners as prayed for in the said petitions would amount to sanctioning and justifying the illegal actions of the 3<sup>rd</sup> Respondent. This court cannot condone any attempt at frustration of the law by the Executive. It is basic to the Constitution that the Executive should carry out the mandate of the Legislature.

Hence, I hold that by refusing the Petitioners applications to renew the said PSPs marked P 11B, the Respondents have not violated the fundamental rights of the Petitioners guaranteed under Article 14(1)g of the Constitution. Therefore, I dismiss the said applications of the Petitioners without costs.

Judge of the Supreme Court

PRIYASATH DEP, PC, J. (as he then was)

I agree.

Judge of the Supreme Court

NALIN PERERA, J.

I agree.

Judge of the Supreme Court