

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

Shri Lanka Hewage Harsha  
Mohan Lal,  
No. 96/10A, Harindra Mawatha,  
Chilaw.  
Petitioner

**CASE NO: CA/243/2015/WRIT**

Vs.

1. S.M.A.R. Seneviratne,  
Wayamba Provincial  
Commissioner of Ayurveda,  
Department of Ayurveda,  
North Western Province Office of  
Ayurveda Commissioner,  
Kurunegala.
2. The Chief Secretary,  
Chief Secretary's Office,  
North Western Province,  
Provincial Council Office  
Complex,  
Kurunagala.
- 3A. L.H. Thilekerathne,  
Commissioner of Ayurveda,  
Navinna,  
Maharagama.

4. The Secretary,  
Provincial Public Service  
Commission,  
North Western Province,  
Kurunagala.
5. The Secretary,  
Ministry of Provincial Health and  
Indigenous Medicine,  
North Western Province,  
3<sup>rd</sup> Floor, Provincial Secretariat  
Building, Kurunagala.
6. The Secretary of Ministry of  
Health and Indigenous Medicine,  
The Ministry of Health and  
Indigenous Medicine,  
Rev. Baddegama Wimalawansa  
Mawatha,  
Savsiripaya,  
Colombo 10.
7. The Hon. Attorney General,  
Attorney General's Department,  
Hulftsdrop, Colombo 12.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray with Sudarshani Cooray for the  
Petitioner.

Uditha Egalahewa with S. Rajamuni for the 1<sup>st</sup>, 2<sup>nd</sup>,  
4<sup>th</sup> and 5<sup>th</sup> Respondents.

Decided on: 17.10.2018

Samayawardhena, J.

The Petitioner filed this application basically seeking a writ of mandamus against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to immediately give effect to the transfer made by the 3<sup>rd</sup> Respondent—the Commissioner of Ayurveda and the 5<sup>th</sup> Respondent—the Secretary to the Ministry of Indigenous Medicine, transferring the Petitioner from the Anamaduwa Ayurvedic Central Dispensary to the Madampe Ayurvedic Central Dispensary.

Whilst the case was pending, the transfer has been effected. Hence learned President's Counsel for the Respondents submits that the application shall be dismissed on futility. Learned President's Counsel for the Petitioner insists to look into the question whether the refusal to carry out the petitioner's transfer by the 1<sup>st</sup> Respondent—the Provincial Commissioner of Ayurveda of the North Western Province and the 2<sup>nd</sup> Respondent—the Chief Secretary of the North Western Provincial Council was "arbitrary, capricious, unreasonable, ultra vires, erroneous and contrary to law" and if it does, to award costs. The Petitioner does not now seek for damages, although he has pleaded so in the petition.

I do not think that this Court shall necessarily dismiss the application on futility merely because the relief has been granted pending determination of the action—even after filing objections to the petitioner's application. The Petitioner made repeated requests to effect the transfer from the 1<sup>st</sup> Respondent, but he refused to do so by giving various reasons, compelling the Petitioner to file this application. It is at the later stage of the case, the said relief has been granted, may be on legal advice. If not for the filing of this application, the transfer would not have

been effected. If the refusal on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to give effect to the transfer made by the 3<sup>rd</sup> and 5<sup>th</sup> Respondents is “arbitrary, capricious, unreasonable, ultra vires, erroneous and contrary to law”, the Court shall make a finding to that effect and award costs of the action at least to send a message to the other public officers not be swayed by extraneous factors in discharging their professional duties.

In *Sundarkaran v. Bharathi* [1989] 1 Sri LR 46 the main relief sought by the Petitioner-Appellant from the Supreme Court was to quash by way of certiorari the determination of the 1<sup>st</sup> Respondent not to renew the Petitioner-Appellant’s licence for the year 1987. The Judgment of Supreme Court was pronounced in November 1988. However, Justice Amerasinghe on behalf of the Supreme Court at page 62 concluded thus:

*I do not believe that this Court will be acting in vain or that quashing the determination of the 1st Respondent not to renew the Petitioner-Appellant's licences for the year 1987 and requiring that the Petitioner-Appellant be fully and fairly heard before a decision with regard to any future applications for licences are made, will be only a useless formality.*

*For the reasons I have given I set aside the judgment of the Court of Appeal, quash the decision of the Respondents and make order that the Respondents-Respondents do hear and determine according to law i.e. make due inquiry upon its merits any application for a licence to sell liquor by the Petitioner-Appellant may hereafter make.*

*I order that a sum of Rs. 2100 be paid to the Petitioner-Appellant as costs of the proceedings before the Court of Appeal and this Court.*

In *Nimalasiri v. Divisional Secretary, Galewela* [2003] 3 Sri LR 85 at 88 Justice Sripavan (later Chief Justice) in the Court of Appeal followed the above Judgment in quashing a decision by certiorari relevant to a period which had already expired.

There is no evidence to the satisfaction of the Court to grant any relief against the 2<sup>nd</sup> Respondent.

Let me now go into the merits of the matter.

The Petitioner is an Ayurvedic Doctor who is a member of the Sri Lanka Ayurvedic Medical Service in the Department of Ayurveda under the Ministry of Health and Indigenous Medicine of the Government of Sri Lanka. After serving for three years in the North Central Province, the Petitioner has applied for annual transfers by P4 dated 31.08.2010 wherein he has sought a transfer to the Madampe Central Ayurvedic Dispensary of the North Western Province and two other hospitals of the same Province.

Then the Commissioner of Ayurveda has transferred him to the Anamaduwa Central Ayurvedic Dispensary of the North Western Province and the same has been informed to the Petitioner by the Provincial Commissioner of Ayurveda of the North Central Province by P5 dated 27.03.2012.

Thereafter the Provincial Commissioner of Ayurveda of the North Western Province by P6 dated 29.03.2012 has attached the

Petitioner to the Anamaduwa Central Ayurvedic Dispensary with immediate effect.

The Petitioner by P7 dated 04.08.2013 has informed the Commissioner of Ayurveda that he was unjustifiably not given the transfer to the Madampe Central Ayurvedic Dispensary on the basis that there were no vacancies whereas some others got transfers to the said hospital.

He has again applied for an Annual Transfer for 2014 by P8 seeking the transfer to the Madampe Central Ayurvedic Dispensary.

Thereafter by P9 dated 02.12.2013 the Secretary to the Ministry of Indigenous Medicine has transferred the Petitioner to the Madampe Central Ayurvedic Dispensary effective from October 2014.

The Commissioner of Ayurveda by P11 dated 20.08.2014 informed the Provincial Commissioner of Ayurveda of the North Western Province to give effect to the said transfer from 04.10.2014 as doctor Ayesha Bee Bee who worked in the Madampe Central Ayurvedic Dispensary was to retire on 04.10.2014.

As it has not happened, the Petitioner has written P12 dated 03.11.2014 to the Provincial Commissioner of Ayurveda of the North Western Province; and then the Provincial Commissioner of Ayurveda of the North Western Province, referring to the aforesaid P11, has informed the Petitioner by P13 dated 28.11.2014 that until another doctor is attached to Anamaduwa Central Ayurvedic Dispensary, the Petitioner cannot be released to take up duties at the Madampe Central Ayurvedic Dispensary.

On the other hand, the 1<sup>st</sup> Respondent, by R1 dated 11.06.2015 has informed the 2<sup>nd</sup> Respondent with a copy to the 3<sup>rd</sup> Respondent that the Petitioner could not be released to the Madampe Central Ayurvedic Dispensary upon the retirement of doctor Ayesha Bee Bee on 04.10.2014, because there were excess doctors in the Madampe Central Ayurvedic Dispensary even after the said retirement.

It is clear that the 1<sup>st</sup> Respondent had been giving various contradictory reasons not to give effect to the transfer.

Thereafter the Petitioner has sent P14 to the Provincial Commissioner of Ayurveda of the North Western Province emphasizing the unreasonableness with which the said officer was handling this matter.

Then by P15 dated 10.12.2014 the 3<sup>rd</sup> Respondent-Commissioner of Ayurveda has also emphasized the unreasonableness of the 1<sup>st</sup> Respondent by not giving effect to the transfer of the Petitioner to the Madampe Central Ayurvedic Dispensary. The 3<sup>rd</sup> Respondent in that letter has questioned the contradictory positions taken up by the 1<sup>st</sup> Respondent, on the one hand, by informing the Petitioner by P13 dated 28.11.2014 that the Petitioner cannot be released until a replacement is sent, and, on the other, by informing the 3<sup>rd</sup> Respondent by letter dated 01.07.2014 that there are above 22 excess Ayurvedic doctors in the North Western Province. Then the 3<sup>rd</sup> Respondent has asked the 1<sup>st</sup> Respondent to (immediately) release the Petitioner to take up duties at the Madampe Central Ayurvedic Dispensary attaching temporarily one of the said 22 excess doctors, until a permanent doctor is sent on annual transfers (in a few days' time).

P15 reads as follows:

උක්ක කරුණට අදාළව ඔබ පළාත් සභාවට අනුයුක්තව ආණමඩුව ආයුර්වේද මධ්යම බෙහෙත් ශාලාවේ සේවය කරන ආයුර්වේද වෛද්ය නිලධාරී එස්. එල්. එච්. එච් මෝහන්ලාල් මහතා විසින් 2014.12.01 දිනැතිව ඉදිරිපත් කර ඇති ඉල්ලීම හා බැඳේ.

02. දේශීය වෛද්ය ලේකම්ගේ අංක 01/03/20 හා 2013.12.04 දිනැති ලිපිය මඟින් අනුමත කරන ලද 2014 වර්ෂයේ ආයුර්වේද වෛද්ය නිලධාරී ස්ථාන මාරු තීරණ අනුව 2014.10.04 දින සිට ක්රියාත්මක වන පරිදි මෙම වෛද්ය නිලධාරියා මාදම්පේ ආයුර්වේද රෝහල වෙත ස්ථාන මාරු කර ඇති අතර, මෙම දිනයේ සිට මෙම ස්ථාන මාරුව ක්රියාත්මක කරන ලෙස මාගේ අංක 02/02/10/02/2014 හා 2014.08.20 දිනැති ලිපිය මඟින් ඔබ වෙත දැනුම් දෙන ලදී.

02. නමුත් මටද පිටපතක් සහිතව මෙම වෛද්ය නිලධාරියා අමතා ඇති ඔබේ අංක ව/ආයු/කො/ආ08/වෛති/ස්ථාන මාරු හා 2014.11.28 දිනැති ලිපිය මඟින් දැනුම් දී ඇත්තේ 2014.10.04 දින සිට මාදම්පේ ආයුර්වේද රෝහලට අනුයුක්ත කළද එමඟින් පුරප්පාඩු වන ආණමඩුව මධ්යම බෙහෙත් ශාලාවේ වෛද්ය නිලධාරී තනතුරට වෙනත් වෛද්ය නිලධාරියකු ස්ථාන ගත කර නොමැති බැවින්, මෙම නිලධාරියා මාදම්පේ ආයුර්වේද රෝහල වෙත නිදහස් කිරීමට නොහැකි බවයි.

03. ආයුර්වේද වෛද්ය නිලධාරීන්ගේ වාර්ෂික ස්ථාන මාරු 2015 සඳහා 2014.12.31 දිනට වයඹ පළාත් ආයුර්වේද දෙපාර්තමේන්තුව තුළ ඇතිවන පුරප්පාඩු කැඳවීමේදී ඔබේ අංක ආයුකො/ආ06 හා 2014.07.01 දිනැති ලිපිය මඟින් ආණමඩුව ආයුර්වේද මධ්යම බෙහෙත් ශාලාවේ 2014.10.04 දින සිට ඇතිවන පුරප්පාඩුව දැනුම් දී නොමැත. නමුත් දැනට ආයුර්වේද වෛද්ය නිලධාරීන් 22ක් පමණ වයඹ පළාත් සභාවේ අතිරික්තව සේවය කරන බව එම ලිපිය මඟින් දැනුම් දී ඇත.

04. ඒ අනුව 2015 වාර්ෂික ස්ථාන මාරු මඟින් වෛද්ය නිලධාරියෙකු ආණමඩුව ආයුර්වේද මධ්යම බෙහෙත් ශාලාව වෙත ලබාදෙන තෙක් දැනට වයඹ පළාත් සභාවේ සේවය කරන අතිරික්ත වෛද්ය නිලධාරීන් 22න් එක් නිලධාරියෙකු නාවකාලිකව එම ස්ථානය වෙත යොදවා මෙම නිලධාරියාගේ ස්ථාන මාරුව ක්රියාත්මක කරන ලෙස කාරුණිකව දැනුම් දෙමි. (emphasis added)

The 1<sup>st</sup> Respondent has neither replied nor complied with the said direction.



It was held in *City Motor Transport Co. Ltd. v. Wijesinghe (1961) 63 NLR 156* that “a public officer may legitimately be regarded as having refused to do his duty if he withholds a direct answer to a letter requesting him to perform the duty.”

It is interesting to note that the 1<sup>st</sup> Respondent in paragraph 14 of his statement of objections, has admitted that his statement that there were 22 excess doctors in the Province was incorrect.

Paragraph 14 of his statement of objections reads as follows:

*Answering the averments contained in paragraph 16 of the said affidavit, the Respondents state that though the said letter marked P15 states that there are 22 additional doctors in the Department it is not correct situation within Province.*

It is none other than the 1<sup>st</sup> Respondent himself who has informed the 3<sup>rd</sup> Respondent by letter dated 01.07.2014 that there were over 22 excess Ayurvedic doctors in the North Western Province.

Thereafter the 3<sup>rd</sup> Respondent by P16 dated 10.03.2015 has transferred another doctor to the Anamaduwa Central Ayurvedic Dispensary effective from 01.04.2015 and stated that the Petitioner shall take up duties at the Madampe Central Ayurvedic Dispensary (at least by 01.04.2015) according to the 2014 Annual Transfer already made.

As this too has not happened by 01.04.2015, the Petitioner has through an Attorney-at-Law sent P17 dated 10.04.2015 to the 1<sup>st</sup> Respondent demanding to effect the transfer within two weeks and also stating that if he failed to do it, the Petitioner

would invoke the writ jurisdiction to compel the 1<sup>st</sup> Respondent to do it.

Then by P19 dated 21.04.2015 again the 3<sup>rd</sup> Respondent has informed the 1<sup>st</sup> Respondent to effect the transfer immediately as there is absolutely no reason to withhold it.

It is in this backdrop, the Petitioner has filed this application on 05.06.2015 seeking the above relief.

It is abundantly clear that the refusal of the 1<sup>st</sup> Respondent not to give effect to the transfer of the Petitioner to the Madampe Central Ayurvedic Dispensary is arbitrary, capricious and unreasonable.

The 1<sup>st</sup> Respondent does not dispute the above factual matters. He is on technical objections. His main, if not sole, defence or explanation before this Court why he did not give effect to the transfer is that:

*In terms of section 32 of the Provincial Councils Act, No.42 of 1987 read with List 1 of Ninth Schedule to the Constitution, the appointment, transfer, promotion, dismissal and disciplinary control of officers of the Provincial Public Service of each of Province is vested with the Governor of that Province. The Governor of the North Western Province has delegated such powers in terms of section 32(2) to the Provincial Public Service Commission”, (and therefore) “only the Provincial Public Service Commission of the North Western Province which has the power to transfer the Petitioner within the Province.*  
(paragraphs 6 and 7 of the objections)

The Petitioner has tendered a number of documents to say that the appointment, transfer, promotion, dismissal and disciplinary control of the Petitioner or rather the Sri Lanka Indigenous Medical Service to which the Petitioner falls into is an All Island Service and therefore not coming under the Provincial Public Service Commission but under the Sri Lanka Public Service Commission.

I have no doubt to hold with the Petitioner on the point that the appointment, transfer, promotion, dismissal and disciplinary control of the Petitioner or rather of the Ayurvedic Doctors of the Sri Lanka Indigenous Medical Service to which the Petitioner falls into is an All Island Service and therefore not coming under the Provincial Public Service Commission but under the Sri Lanka Public Service Commission.

In any event, the 1<sup>st</sup> Respondent refused to give effect to the petitioner's transfer made by the Secretary to the Ministry of Indigenous Medicine and also by the Commissioner of Ayurveda not on the basis that the said orders came from the wrong Authority and therefore he was not bound to follow, but on different grounds which are contradictory to each other. It was never the position of the 1<sup>st</sup> Respondent at that time that the 3<sup>rd</sup> and 5<sup>th</sup> Respondents did not have power to transfer the petitioner.

I reject the argument of the Petitioner that the necessary parties are not before Court. The Secretary to the Provincial Public Service Commission is a party. There is no necessity to make the Public Service Commission a party.

For the aforesaid reasons, I hold that the refusal of the 1<sup>st</sup> Respondent not to give effect to the transfer of the Petitioner to the Madampe Central Ayurvedic Dispensary was arbitrary, capricious and unreasonable, and accordingly *pro forma* issue the mandamus as prayed for in paragraph (b) of the prayer to the petition (notwithstanding the relief sought by the Petitioner has now been granted).

The Petitioner is entitled to recover incurred costs of this application from the 1<sup>st</sup> Respondent.

Judge of the Court of Appeal