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

In the matter of an application in the nature of writs of certiorari and mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Kandegedara Sanjaya Darmasiri,
No.50, 6th Mile Post,
Ovilikanda,
Matale.
And 5 Others
Petitioners

CASE NO: CA/WRIT/322/2014

Vs.

M.A.S. Weerasinghe,
Commissioner General of Agrarian Development,
Department of Agrarian Development,
No. 42,
Sir Macus Fernando Mawatha,
Colombo 7.
And 120 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Senany Dayaratne with Nishadi Wickremasinghe for the Petitioners.
Anusha Fernando, D.S.G., for the 1st-33rd Respondents.
Upul Kumarapperuma for the 34th-38th, 40th-42nd, 44th-47th, 49th, 51st-53rd, 55th, 58th-59th, 61st, 62nd, 67th-69th, 71st-74th, 76th-80th, 82nd, 83rd, 87th-94th, 98th, 99th, 101st-103rd, 105th-107th and 109th Respondents.
J.C. Weliamuna, P.C., with Senura Abeywardena and Thilini Vidanagamage for the 86th Respondent.

Decided on: 28.01.2019

Samayawardhena, J.

The six petitioners filed this application seeking to quash by way of certiorari the Agrarian Development Officer appointments given to the 34-38, 40-42, 44-47, 49, 51-53, 55, 58, 59, 61, 62, 67-69, 71-74, 76-80, 82, 83, 86-94, 98, 99, 101-103, 105-107 and 109 respondents (hereinafter "the contesting respondents") by the 1st respondent-Commissioner General of Agrarian Development; and to compel the 1st respondent by way of mandamus to appoint the petitioners to the said post.

It is common ground that the petitioners and the said contesting respondents were employees in the Department of Agrarian Development/Services at the material time, but the position of

the petitioners' is that the said respondents were not, according to the scheme of recruitment marked 33R2, holding "Departmental Posts" in the Department of Agrarian Service to be eligible to be appointed as the Agrarian Development Officers.

By looking at the early journal entries and the proceedings, it is absolutely clear that the petitioners were about to withdraw the application upon the 1st respondent agreeing to appoint the petitioners also as the Agrarian Development Officers as there were existing vacancies.[1] However, it appears to me that, upon the advice of the State, unfortunately, this undertaking has later been withdrawn by the 1st respondent.[2]

The State has filed "*The statement of objections of the 1-29th, 33rd and 121st Respondents*" dated 11.06.2016 to the application of the petitioners. However, in the body of the said purported "statement of objections", they support the application of the petitioners and state that grave prejudice has been caused to the petitioners by the said appointments because the contesting respondents at the material time belonged to a different Service known as Development Officers' Service, whose appointing authority is the Director General of Combined Services, and therefore did not hold Departmental Posts in the Department of Agrarian Services as required by the Scheme of Recruitment. But, in the prayer to the statement of objections the said

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[1] Vide the journal entries dated 02.07.2015, 04.09.2015, 08.10.2015, and the proceedings dated 23.10.2015, 19.11.2015. Also see the motion of the Attorney-at-Law of the petitioners dated 06.10.2015 whereby the Attorney-at-Law has moved to withdraw the application on that undertaking.

[2] Vide the motion of the Attorney-at-Law of the 1-3, 30-33 respondents dated 16.11.2015 and the attachment thereto marked X.

respondents pray "*to make an order which is appropriate having regard to the facts and circumstances of this case*"!

Notwithstanding these purported objections have been filed by the State on behalf of 1st-29th, 33rd and 121st Respondents, I do not find (subject to correction) in the docket a single proxy being filed by or on behalf of any of those respondents.

Further, in terms of Rule 3(7) of the Court of Appeal (Appellate Procedure) Rules of 1990, although "*A statement of objections containing any averments of fact shall be supported by an affidavit in support of such averments*", only the 33rd respondent-the Secretary to the Public Service Commission-has filed an affidavit only on his behalf and not on behalf of himself and the other respondents.

In the said purported statement of objections and the affidavit of the 33rd respondent, it has *inter alia* been accepted that the appointing authority for the post of Agrarian Development Officer is the Public Service Commission, and the Public Service Commission had delegated the power of appointment to the 1st respondent under Gazette Extraordinary bearing No. 1733/52 dated 25.11.2011.

According to the said statement of objections and the affidavit of the 33rd respondent, prior to issuing the letters of appointment to the contesting respondents, the 1st respondent has sought clarifications both from the Public Service Commission and the Director General of Combined Services (as there was an uncertainty) whether the contesting respondents can be regarded as officers holding Departmental Posts in the

Department of Agrarian Services to be accommodated under "the 40% category". However, the Public Service Commission has not replied to that letter but the Director General of Combined Services has by 33R7 informed the 1st respondent that as the contesting respondents have not been absorbed to the Development Officers' Service, the positions held by the contesting respondents in the Department of Agrarian Development shall be considered as Departmental Posts and only those to whom letters of appointment had been issued by the Director General of Combined Services shall be taken as belonging to the Combined Service.

Then in paragraph 28 of the purported statement of objections, it is stated that "*Accordingly, the 1st respondent had based on this view expressed by an appointing authority to a different service, issued letters of appointment to the 53 respondents*." This is reiterated by the 33rd respondent in paragraph 31 of his affidavit. As I stated earlier, the 1st respondent has neither filed a proxy nor filed an affidavit confirming the fact that he issued the impugned letters of appointment only based on the view expressed in 33R7, which he now thinks erroneous. The 33rd respondent cannot in his affidavit affirm that "*the 1st respondent had based on this view expressed by an appointing authority to a different service, issued letters of appointment to the 53 respondents*", which is hearsay. An affidavit cannot contain hearsay evidence.[3] If that is the stern position of the State, I cannot understand why the State did not take an affidavit from the 1st respondent to that effect.

[3] Gunasinghe Banda v. Navinna [2000] 3 Sri LR 207, Damayanthi Abeywardena v. Hemalatha Abeywardena [1993] 1 Sri LR 272 at 278

Then in paragraphs 30 and 31 of the purported statement of objections it is stated that:

> *Since the appointing authority for the post of Agrarian Development Officer is the PSC, this matter was referred to the PSC for its views after this application was filed.*
>
> *The PSC had called for observations from the 121st respondent (the Secretary of Ministry of Agriculture) and the 1st respondent and had also held discussions with both Respondents prior to confirming the position that the 53 Respondents did not qualify as "Departmental Officers" in terms of clause 7.3.2 and that their appointment by the 1st Respondent had been made contrary to the applicable SOR.*

Is this course of action correct and permissible? I think not.

Firstly, there is no point in getting views from the Public Service Commission "after this application was filed" as the case has to be decided according to the *status quo* prevailed at the time of the institution of the action.

In this regard, I must also add that, I fail to understand why the views of the Director General of Combined Services, whom the respondents state is the appointing authority of the contesting respondents[4], were not taken in this regard.

It is also significant to note that the petitioners who have taken extra troubles to make every conceivable party as respondents to this application, did not make the Director General of Combined

[4] Vide paragraph 24 of the purported statement objections, and pages 3, 6 of the written submissions of the petitioners.

Services a party to this application despite the petitioners stating that the said decision/view of the Director General of Combined Services is wrongful.[5]

Secondly, and more importantly, according to Article 60 of the Constitution, once the powers are delegated (such as in this case), the Public Service Commission shall not, while such delegation is in force, exercise or perform its functions or duties in regard to the categories of public officers in respect of which such delegation was made.

The Public Service Commission cannot sit in judgments on the decisions made by such officer to whom powers have been so delegated unless there is an appeal to it by an aggrieved public officer in respect of an order relating to a promotion, transfer, dismissal or disciplinary matter (sans appointments).[6] The issue here is regarding appointments, and also there was no such appeal from the petitioners as aggrieved public officers.

This leads me to consider the valid preliminary objection taken up by the learned President's Counsel for the 86th respondent, Mr. Weliamuna, that the impugned decision of the 1st respondent is immune from judicial review under Article 140 of the Constitution in view of the ouster clause contained in Article 61A of the Constitution, and therefore this Court lacks jurisdiction to look into the complaint of the petitioners necessitating to dismiss the application of the petitioners *in limine*.

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[5] Vide page 4 of the written submissions of the petitioners.
[6] Vide Article 58 of the Constitution.

Article 61A of the Constitution reads as follows:

> *Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call into question any order or decision made by the [Public Service] Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

When this objection was stressed during the course of the argument by the learned President's Counsel for the 86th respondent, the learned Deputy Solicitor General appearing for the respondents remained silent. When the Court insisted that the Court wishes to know the standpoint of the State in that regard, the learned Deputy Solicitor General in the limited written submissions filed on behalf of "the 1st to 33rd Respondents" states that "*these Respondents state that since the jurisdiction of Your Lordship's Court has been ousted by Article 61A, Your Lordship's Court has no jurisdiction to determine the matter. Accordingly, the application of the Petitioners may be dismissed in limine*."

It is the contention of the learned counsel for the petitioners that there is no blanket immunity and the power or duty referred to in Article 61A shall be lawfully exercised if it is to be protected by Article 61A. The learned counsel says that according to Article 57(1) of the Constitution, when delegating powers of the Public Service Commission, the delegated authority shall

exercise such powers subject to such conditions and procedure as may be determined by the Public Service Commission, and the decision of the 1st respondent is violative of the Rules 16, 17 and 29 of the Procedural Rules of the Public Service Commission published in Gazette Extraordinary No. 1589/30 dated 20.02.2009.

Rule 16 states that any acts or decisions made in excess of the limit of delegation shall be null and void. Rule 17 says that the decisions made by the delegated authority on the instructions or influence or orders of any one other than the Commission shall have no effect. Rule 29 states that all appointments in the public service other than casual and substitute appointments shall be made in accordance with the service minute or scheme of recruitment of the respective post.

Assuming that the 1st respondent has exceeded his powers and acted in violation of the Rules 16, 17 and 29 of the Procedural Rules of the Public Service Commission, who can look into that matter and grant reliefs? In terms of Article 61A of the Constitution, only the Supreme Court in the exercise of the Fundamental Rights jurisdiction in terms of Article 126 can do it.

The learned counsel for the petitioners has cited *Ratnasiri v. Ellawela*[7] and *Katugampola v. Commissioner General of Exercise*[8] to argue that even if a party is duly vested with delegated power by the Public Service Commission, if the said party proceeds to act outside the authority given, those acts are not protected by

[7] [2004] 2 Sri LR 180
[8] [2003] 3 Sri LR 207

Article 61A, and therefore this Court has jurisdiction to look into the matter. I am unable to agree.

In *Ratnasiri v. Ellawala* (*supra*) Marsoof J.[9] stated:

> *Our courts have held that Article 55(5) [which was replaced by Article 61A after the 17th Amendment] would be of no effect if the order is made by an officer who does not have legal authority to do so. In such cases our courts have held that the decision of the relevant authority is null and void and the preclusive clause in the Constitution is no bar to review. For instance in Abeywickrema v Pathirana [1986] 1 Sri LR 120 in the context of the alleged termination of service through acceptance of a letter of resignation, the Supreme Court observed at page 155 of the judgment that if the particular officer to whom the letter was addressed had no legal authority to make an order with respect to it, Article 55(5) did not bar a challenge of the order made by that officer. In Gunarathna v Chandrananda de Silva [1998] 3 Sri LR 265 where a public officer was sent on compulsory leave by the Secretary to the Ministry of Defence, and the power to do so was vested in the Public Service Commission which had not delegated such power to the Secretary to the Ministry of Defence, the Court of Appeal held that the purported order of compulsory leave was ultra vires and could be reviewed by court despite the ouster clause. In Kotakadeniya v Kodithuwakku and others [2000] 2 Sri LR 175 the Court of Appeal once again held that the ouster of jurisdiction by Article 55(5) was of no effect to shut out the*

[9] At 199-200

> *jurisdiction of court to review an order of transfer of a Senior Deputy Inspector General of Police made by the Inspector General of Police, as the latter had no power or authority delegated by the Public Service Commission to transfer an officer belonging to that rank.*

In *Katugampola v. Commissioner General of Exercise* (*supra*) Tilakawardena J.[10] stated:

> *This aforesaid Article 55(5) and 61A of the said amendment precluded the correctness of a decision being investigated into upon except by the Supreme Court of Sri Lanka, which had sole jurisdiction to inquire into this matter. No claim has been made in this case by the petitioner to the fact that the person who made the promotion had no legal authority to make such decision. In other words, the only grounds upon which the writ jurisdiction could be sought under circumstances where a challenge was being made regarding the promotion (and/or appointment, transfer etc.) was where the person who made the impugn decision did not have any legal authority to make such decision. (Abeywickrema v. Pathirana [1986] 1 Sri LR 120, Gunaratne v. Chandrananda de Silva [1998] 3 Sri LR 265, Kotakadeniya v. Kodituwakku [2000] 2 Sri LR 175) In considering the writ jurisdiction of this Court, it is important to observe that Article 140 of the Constitution stipulates that the Court of Appeal may issue writs "subject to the provisions of the Constitution". Therefore the ouster clauses contained in ordinary legislation would not effectively*

[10] At 210-211

restrict or preclude the jurisdiction granted by Article 140 of the Constitution. Nevertheless the restriction contained in Article 55 (5) and the Amended Article 61 A as these are ouster clauses stipulated in the Constitution itself, the powers of this Court would be restricted by these provisions contained in the Constitution. It was held in the case of Atapattu v. People's Bank [1997] 1 Sri LR 208, Bandaranayake v. Weeraratne [1981] 1 Sri LR 10 at 16 that the ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the Constitution and would therefore such ouster clause adverted to above would be a bar to the entertaining of writ applications to invoke the writ jurisdiction by this Court.

Accordingly, this Court holds that the ouster clause contained in Article 61 A of the Constitution precludes the jurisdiction of this Court and grants exclusive jurisdiction to the Supreme Court to hear and determine all such matters envisaged within the scope and ambit of such Article. In these circumstances, the person aggrieved by the decision would have to invoke the jurisdiction of the Supreme Court to inquire into the matter in terms of Article 126 of the Constitution as a violation of a fundamental right.

What was decided in those two cases and many other cases[11] was that the preclusive clause contained in Article 61A of the

[11] Vide also *inter alia* Chandrasiri v. Attorney General [1989] 1 Sri LR 115, Migultenne v. Attorney General [1996] 1 Sri LR 408, Wijayananda v. Post Master General [2009] 2 Sri LR 318, the recent Judgment of the Supreme Court in Ranasinghe v. Secretary, Ministry of Agricultural Development and Agri Services (SC Appeal 177/2013, SC/CA/SPL/LA/44/2013 decided on 18.07.2018.

Constitution is no bar if and only if the impugned order has been made by a public officer who had no legal authority to make such a decision.

The complaint of the petitioners is not that the 1st respondent did not have legal authority to make those impugned appointments but in doing so the latter exceeded his authority or acted outside his authority. This they ought to have been canvassed by invoking the fundamental rights jurisdiction of the Supreme Court, and not by invoking the writ jurisdiction of this Court.

I uphold the preliminary objection taken up by the learned President's Counsel for the 86th respondent and dismiss the application of the petitioner but without costs.

Judge of the Court of Appeal