

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

*In the matter of an application for mandates in
the nature of Writs of Certiorari, Prohibition
and Mandamus in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/004/2022

Devendra Budalge Sudesh Lalitha Perera
68A, Hena Road,
Mount Lavinia.

Petitioner

Vs.

1. Janatha Estates Development Board
No. 55/75, Vauxhall Lane,
Colombo 02.
2. Wg. Cmdr. B. D. Abeysuriya
Chairman,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
3. Parakrama Seneviratne
Deputy Chairman,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
4. Deshbandu Pradeep H. B.
Liyanagedara
General Manager (Acting),
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.

5. Pasan Rathnayake
Board Director,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
6. P. M. S. Jayathilake
Board Director,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
7. G. T. O. Viren Ruberu
Board Director,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
8. J. V. B. Sakalasuriya
Board Director,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
9. Janaka Ranatunga
Board Director,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
10. R. U. P. R. Siriwardhana
Human Resources Manager,
Janatha Estates Development Board,
No. 55/75, Vauxhall Lane,
Colombo 02.
11. Hon. Mahindananda Aluthgamage
Minister of Agriculture
Ministry of Agriculture,
80/5, “Govijana Mandiraya”,
Rajamalwatta Lane, Battaramulla.

12. D. M. I. Bandaranayake
Secretary to the Ministry of Agriculture,
80/5, “Govijana Mandiraya”,
Rajamalwattaa Lane, Battaramulla.
13. S. R. Attygalle
Secretary to the Treasury,
Ministry of Finance,
The Secretariat, Colombo 01.
14. P. A. S. Athula Kumara
Director General,
Department of Public Enterprises,
Room No. 117,
1st Floor, Ministry of Finance,
The Secretariat, Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Suren Gnanaraj with Sakuni Weeraratne for the Petitioner.
Dr. Sunil Cooray with Nilanga Perera for the 1st to 10th Respondents.

Argued on : 01.06.2022, 22.07.2022 and 03.08.2022

Written Submissions: Petitioner - 04.05.2022 and 29.08.2022
1st to 10th Respondents - 06.05.2022 and 06.09.2022

Decided on : 06.10.2022

Sobhitha Rajakaruna J.

The Petitioner is a Senior Superintendent of Hantana Estate and the Regional Manager-Kandy of the 1st Respondent, Janatha Estate Development Board ('JEDB'). The Petitioner's date of birth according to the available documents is 22.08.1966 and accordingly, he reached the age of 55 on 22.08.2021. The Board of Directors of the JEDB has taken a decision to extend the services of the Petitioner by 6 months beyond the age of 55 and also to send him on retirement by 21.02.2022. This decision of the JEDB was communicated to the Petitioner by letter dated 10.12.2021, marked 'P25'.

The Petitioner is seeking, inter alia, for a writ of Certiorari to quash the said decision reflected in 'P25'. A writ of Mandamus is also being sought directing the Respondents to permit the Petitioner to continue his services up to the age of 62 years in terms of Public Enterprise Circular No. 02/2021 dated 14.12.2021 ('PE Circular 02/2021'), marked 'P24'.

The Petitioner's pivotal argument is that the 1st to 10th Respondents ('Respondents') cannot send him on retirement solely based on the conditions relating to the retirement age stipulated in his letter of appointment or on the Public Enterprise Circular No. 01/2013 dated 15.01.2013 ('PE Circular 01/2013'), marked 'P19'. His argument is contingent on the provisions of PE Circular 02/2021 by which the compulsory age of the retirement of employees of Public Enterprises has been increased up to the age of 62 years. By the said PE Circular 02/2021 the optional age of retirement of such employees is 57 years.

As opposed to such argument, the Respondents raise the following arguments;

- (i) the contract of employment between the Petitioner and the JEDB deals with matters relating to the retirement age of the Petitioner,
- (ii) the appointment and the termination of the Petitioner purely governed by the contract of employment and it has no statutory avail; thus, a writ of certiorari does not lie upon the impugned decision 'P25' to retire the Petitioner at the age of 55 years after giving an extension for a period of 6 months;
- (iii) the PE Circular 02/2021 is not a statute and has not been issued under any statutory provision or authority; thus, any act or omission under the said Circular would not attract the remedy of a writ of Certiorari.

Primarily, I must deal with the effect of the PE circular 02/2021 and its applicability to JEDB which has been established in 1976 by virtue of a Gazette Notification published

under the State Agricultural Corporations Act No. 11 of 1972 to manage, at that time, certain plantations vested in the State Under the Land Reform Law No. 1 of 1972.

In terms of Section 2 of the State Agricultural Corporations Act, where the Minister considers it necessary that a Corporation should be established for the purposes of the planning, promotion, co-ordination or development of any agricultural undertaking, the Minister may, with the concurrence of the Minister of Planning and the Minister of Finance, by an "Incorporation Order" published in the Gazette, inter alia, declare that a Corporation shall be established for such purposes as may be deemed necessary. As per Section 6 of the above-mentioned Act, the Minister may, after consultation with the Board of Directors, give such Board general or special directions in writing as to the exercise of the powers of the Corporation, and the Board shall give effect to such directions.

In this context, the JEDB falls within the definition given for the "Public Corporation" in Department of Public Enterprises-PED Guidelines¹. According to the said Guidelines, "Public Corporation" means any Corporation, Board or any other body which was or is established by or under any written law other than the Companies Act, with capital wholly or partly provided by the Government by way of grant, loan or other form. Similarly, "Public Enterprise" means any Public Corporation, Board or other body, which was or is established under any written law, including Companies Act, where the Government has the controlling interest". Public enterprises comprise the following: - 1. Commercial Corporations 2. Government owned Companies 3. Statutory Boards 4. Subsidiaries of 1, 2 and 3 above.

I am aware that the Guidelines issued by the Department of Public Enterprises would not be the 'law' all the time. However, what is pertinent here is to consider whether such Guidelines or Circulars are seasoned with adequate statutory underpinnings.

In addition to the provisions of the special or general Acts of Parliament by which the Statutory Boards such as JEDB has been established, the Government bears the recurrent and/or capital expenditure of such institutions fully or partly by the annual budget. State Owned Enterprises are usually being monitored by the Department of Public Enterprises ('PED') and some of them come under the purview of the Department of National Budget

¹ <https://pedmis.gov.lk/view/public/images/PEDGuidelines.pdf>

under the Ministry of Finance. The Part II of the Finance Act No. 38 of 1971 deals with the financial control of Public Corporations and according to Section 5(1) therein, the provisions of the Part II of the said Act shall apply to every Public Corporation notwithstanding anything contrary in the provisions of any other written law.

It is important to note that the Article 148 and 154 of the Constitution² also refers to public financial management. In terms of Article 148 of the Constitution, the Parliament shall have full control over public finance and no tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law. The Article 154 of the Constitution gives authority to the Auditor General to audit, among other institutions, the Public Corporations.

It is also pertinent to perceive my following observations in reference to the Public Enterprise Department Circular No. 01/2015 in *Tharanga Vishvajith Sembukuttiarchchi vs. Construction Industry Development Authority and others, CA/Writ/40/2022 decided on 29.07.2022;*

“The said PED Circular has been issued by the Department of Public Enterprises of the Ministry of Finance and the signatory to the said Circular is the Secretary to the Treasury. It is no doubt that the above Circular has been issued based on the Government policy on transport facilities for the offices in commercial corporations, statutory boards and state-owned companies.

As per the website of the Ministry of Finance–Sri Lanka, its functions, inter alia, are; providing policy guidance to relevant State Ministries and formulating policies in relation to the subject of Finance in conformity with the prescribed Laws, Acts and Ordinances. Further, the said Ministry has responsibilities in relation to macro-economic policies, annual budget and Appropriation Acts, public financial management etc.

I take the view that a Government formulates its policy such as what is incorporated in the above PED Circular, usually based on several facts & law including constraints upon its

² 1978 Constitution of Sri Lanka/ 2nd Republican Constitution

resources and on social security and public welfare. Hence, those factors need to be taken in to consideration when assaying the question whether the said Chairman or the CIDA has the power to deny the rights of an officer under the said PED Circular 01/2015.”

For all the foregoing reasons the conclusion that can be arrived is that the Circulars of the Department of Public Enterprises (‘PED Circulars’) have the statutory flavour and are issued under due authority to disseminate directions or the policy to which certain Statutes give legal force. Hence, I take the view that the PE Circular 01/2013 and PE Circular 02/2021 should be applicable to JEDB as it is a State-Owned Public Enterprise/ Statutory Board. The Respondents should be bound by the said Circulars which are especially issued due to constraints upon the available resources and on social security & public welfare. I am aware that particularly the PE Circular 02/2021 has been issued by the Public Enterprise Department of the Ministry of Finance as an attempt to overcome financial constraints prevailing in the country. I am compelled to limit my above findings to the PE Circular 01/2013 and PE Circular 02/2021 as the nature and the intention of other PED Circulars have not been examined by this Court.

Despite the aforesaid legal background to the applicability of the PED Circulars to the JEDB, the attention should be drawn to the wordings in the impugned letter ‘P25’. The first paragraph of the said letter reads;

“This refers to your letter of appointment dated 30th July, 2003 and the Public Enterprise Circular No. 01/2013 dated 15th January, 2013 related to the retirement age of the employees in the public enterprises.”

The said letter ‘P25’ which is under the hand of the Chairman of the JEDB unequivocally refer to the PE Circular 01/2013. In the circumstances, I take the view that there is no necessity at all to examine any other evidence to manifest the intention of the JEDB in adopting PED Circulars. The JEDB in the instant application has failed to establish as to why the PE Circular 02/2021 should not be adopted/applicable when the JEDB has selectively and expressly adopted and/or applied PE Circular 01/2013 in the said ‘P25’. This ground itself, in my view, is sufficient to reject the argument of the Respondents that the PE Circular No. 02/2021 has not been issued under any statutory provision.

The other facet of the argument of the Respondents is that the appointment and the termination of the Petitioner are purely governed by the contract of employment and any

act or omission under the above PED Circulars would not attract the remedy of a writ of Certiorari. It is no doubt that there is a contract of employment between the Petitioner and the Respondents and however, in view of my above findings especially the specific category of PED Circulars mentioned earlier including Circular 02/2021 are applicable to JEDB and as such the Respondents are bound by those Circulars.

The general perception is that the contractual and commercial obligations are enforceable by ordinary actions and not by judicial review. However, with the judicial activism within the realm of judicial review, our Courts as well as English courts have deviated in many occasions from the above general rule. As such many Judges have shown a tendency to favour the inclusion of contractual obligations in judicial review in order to disallow administrative power to be escaped from judicial control. The below mentioned passage in *Kumudini Madugalle vs. National Housing Development Authority, CA/Writ/540/2019 decided on 16.06.2020* is very much apt here;

“I must make clear this Judgement shall not be taken to mean that violations based on contracts by public bodies are totally outside writ jurisdiction. There is no such blanket prohibition. Each case shall be treated separately. De Smith in his treatise³ at page 148 states “The existence of a possibility of a private law claim does not by itself however, make judicial review inappropriate.””

Moreover, it has been decided in *R vs. British Coal Corporation ex parte Vardy (1993) ICR 720* that if the dismissal was in breach of statutory restrictions, a quashing order will lie to quash it (also see-*Administrative Law by Wade and Forsyth, (11th Edition) Oxford at page 537*)

The document, marked ‘P3’, is the Petitioner’s letter of appointment to the post of Superintendent and it can be assumed that its’ the relevant contract of employment. As per the said ‘P3’, the Petitioner will be retired from service at the age of 55 years. However, the Board may at its sole discretion extend his service on a yearly basis up to the age of 60 years. In terms of PE Circular 01/2013 (‘P19’), the optional age of retirement of employees in Public Enterprises is also 55 years of age whereas the compulsory age of retirement is also 60 years of age.

³ De Smith’s Judicial Review (8th Edition)

In view of the Clause III of the said PE Circular 01/2013, no employee who is beyond the age of 55 years could be sent on retirement unless the appointing authority is unsatisfied with the efficiency and the performance of the relevant officer. I take the view that such appointing authority has not been bestowed with an unfettered discretion to terminate the services of an employee under such Circulars, unless an appropriate inquiry is held or a proper assessment on efficiency and performance is carried out according to the rules of natural justice and the rule of law. The appointing authority, in my view, under this Circular has been authorized to retire an employee by giving six months prior notice provided that the appointing authority arrives at a fair conclusion after an appropriate inquiry or upon a due assessment that the employee's efficiency and performance is not satisfactory. My said findings are applicable also to Clause III of the Circular 02/2021 which contains similar provisions as in Clause III of PE Circular 01/2013.

The said letter of appointment 'P3' set out on 'termination of appointment' and such provisions, in my view, should always be subjected to the statutory provisions applicable to contracts of employment.

Similarly, the provisions in relations to the age of retirement mentioned in the letter of appointment should eventually be subject to the law of the country. The said law can be imposed by way of an act of Parliament or by way of implementing a policy decision approved by the Cabinet of Ministers, according to law. The PE Circular 02/2021 has been categorically issued in accordance with the provisions of the Appropriation Act for the financial year 2022 approved by the Parliament on 10.12.2021 and upon recommendations of the Cabinet of Ministers (Vide-First paragraph of 'P24'). For the reasons set out above, I take the view that the said PE Circular 02/2021 is deemed to be the current 'law' regulating the retirement age of employees of Public Corporations, Boards etc.

It is important to note that when introducing the minimum retirement age for the employees of the private sector by Act No. 28 of 2021⁴, the legislature expressly overrode any other written law, contract of service, collective agreement or any other form of

⁴ Minimum Retirement Age of Workers Act No, 28 of 2021

contract. This illustrates the Government policy when it comes to the retirement age of employees/workers.

In the circumstances, I reject the Respondent's assertions that the appointment and the termination of the Petitioner purely governed by the contract of employment and it has no statutory avail. In the same vein, I further hold that any act or omission, under the said PE Circular 01/2013 and/or PE Circular 02/2021, committed by the Respondents in pursuant to the terms of the contract of employment are certainly reviewable by a Court exercising the jurisdiction of Judicial Review.

Perhaps, the JEDB is displeased with the conduct and the demeanor of the Petitioner. However, the litigants in cases of this kind in which contract of employment and government circulars are mixed to a certain extent will be misguided by not selecting the proper procedure to terminate the services and also by not selecting the proper forum to canvass public decisions. (Also see- *Administrative Law by Wade and Forsyth, (11th Edition) Oxford at page 575*). Therefore, my findings in this judgement should not be an impediment for the JEDB to take necessary actions against the Petitioner, according to law, if any legitimate reason exists. Furthermore, I make an observation that this judgement should not be an impediment for the Respondents to take appropriate steps in the event the Government policy in relation to PE Circular 02/2021 is changed in future.

Having examined the liability of the JEDB on the PED Circulars and also whether any act or omission under the said Circular would attract the remedy of a writ of Certiorari, I now advert to examine whether the Respondents have specifically breached any of the provisions of the aforesaid PED Circulars.

As observed earlier in this judgement the impugned decision reflected in 'P25' has adopted PE Circular 01/2013 ('P19'). The terms under 'retirement' in the letter of appointment marked 'P3' are more or less similar to the main provisions of the said Circular. Therefore, it appears that the rationale and the criteria reflected in the said PE Circular 01/2013 has been adopted to be followed by the Respondents. However, there is no evidence available to eradicate any possible argument that the Respondents have not followed due process in arriving at a decision on the efficiency and the performance of the Petitioner in view of Clause III of the PE Circular 01/2013 (or Clause III of PE Circular 02/2021). In other words, the Respondents have failed to demonstrate that they have

conducted a reasonable inquiry and also carried out a proper assessment on the efficiency & the performance of the Petitioner.

In contrast to the above, I need to draw my attention to the aftermath of revoking the PE Circular 01/2013. When the Respondents issued the impugned letter 'P25' on 10.12.2021, PE Circular 01/2013 was in full force and however, within four days from the date of 'P25' the PE Circular 01/2013 has been revoked by PE Circular 02/2021 ('P24'). The Ministry of Finance issued the PE Circular 02/2021 ('P24') on 14.12.2021 and it came into effect only from 01.01.2022.

Hence, it can be assumed that the Respondents had authority to issue the impugned letter 'P25' under the PE Circular 01/2013 on 10.12.2021 but later the said source of authority to issue such letter has become invalidated. In such an event, the availability of a 'saving clause' is material in resolving issues when the source of authority gets invalidated while the action therein is still pending. This is merely because the decision taken on 10.12.2021 by 'P25' was supposed to get fully accomplished only on 21.02.2022, the date prescribed for the Petitioner to end his services at JEDB. It appears that no saving clause is embodied in the said PE Circular 02/2021.

In the Indian case of *Keshavan Madhava Menon vs. The State of Bombay, 1951 AIR 128, 1951 SCR 228* the issue on saving clause has been discussed by referring to the following passage from *Wall v. Chesapeake & Ohio Ry., Company (125 N. E. 20)*;

"It is well settled that if a Statute giving a special remedy is repealed without a saving clause in favour of pending suits all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision was rendered. The effect of the repeal is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Pending judicial proceedings based upon a statute cannot proceed after its repeal."

In light of the above, I am compelled to arrive at the conclusion that the impugned letter which is based on PE Circular 01/2013 has become null and void due to the mere reason that the said PE Circular 01/2013 has been revoked before the decision reflected in 'P25' has been fully accomplished.

Based on my above findings and also taking in to consideration all the circumstances of this case, I proceed to issue a writ of certiorari as prayed for in paragraph (c) of the prayer of the Petition and also to issue a writ of Mandamus against the 1st to 10th Respondents to permit the Petitioner to continue to be in service until the date of retirement or the date of termination which should be decided according to law.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal