

**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 and Mandamus
in terms of Article 140 of the Constitution.*

CA/WRIT/478/2021

S. H. S. Padmini
No. 9, Sri Gnanendra Mawatha,
Rathmalana.

Petitioner

Vs.

1. Sri Lanka Ports Authority,
2. Capt. Nihal Kappetipola
Chairman,
Sri Lanka Ports Authority,
- 2A. Dr. Prashantha Jayamanne
Chairman,
Sri Lanka Ports Authority,
- 2B. Dr. Sarath Obesekara
Chairman,
Sri Lanka Ports Authority,
3. Dr. Prashantha Jayamanne
Vice Chairman,
Sri Lanka Ports Authority,
- 3A. Mr. G. U. K. Algewattege
Vice Chairman,
Sri Lanka Ports Authority,
4. Mr. Upul Jayatissa
Managing Director,
Sri Lanka Ports Authority,

5. Maj. Gen. G. V. Ravipriya (Rtd.)
Director representing Customs,
Sri Lanka Ports Authority,
6. Ms. J. C. Wiligamage
Director representing Treasury,
Sri Lanka Ports Authority,
- 6A. Mr. P. A. S. Athula Kumara
Director representing Treasury,
Sri Lanka Ports Authority,
7. Mrs. N. A. A. P. S. Nissanka
Director representing Fisheries,
Sri Lanka Ports Authority,
8. Mr. J. R. U. De Silva
Director,
Sri Lanka Ports Authority,
9. Dr. M. L. Christo Fernando
Director,
Sri Lanka Ports Authority,
10. Mr. H. Isuru Balapatabedi
Director,
Sri Lanka Ports Authority,
- 10A. Mr. P. B. S. C. Nonis
Director,
Sri Lanka Ports Authority,
- 10B. Dr. Ajith Mendis
Director,
Sri Lanka Ports Authority,
- 10C. Mr. K. K. Nawarathna
Director,
Sri Lanka Ports Authority,
11. Mr. Susantha Abesiriwardhna
Addl. Managing Director – Technical,
Sri Lanka Ports Authority,

12. Mr. Nalin Aponso
Chief Operating Officer
(Human Resource Development),
Sri Lanka Ports Authority,
13. Mr. H. J. K. U. Kumara
Chief Human Resource Manager,
Human Resource Division,
Sri Lanka Ports Authority,
14. Mr. Rohitha Abeygunawardena
Hon. Minister of Ports and Shipping,
Ministry of Ports and Shipping,
- 14A. Mr. Nimal Siripala De Silva
Hon. Minister of Ports, Naval and
Aviation Services,
Ministry of Ports, Naval and Aviation
Services;

The 1st to 14A Respondents all of;

No. 19,
Chaithya Road,
Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Saliya Peiris PC with Anjana Rathnasiri for the Petitioner.

Sanjeewa Jayawardena PC with Lakmini Warusawithana and Ridmi
Baneragama for the 1st to 13th Respondents.

Vikum De Abrew PC, ASG with Sabrina Ahmed, SC for the 14th
Respondent.

Argued on :16.09.2022 & 03.10.2022

Decided on : 09.11.2022

Sobhitha Rajakaruna J.

The Petitioner is an employee of the 1st Respondent Sri Lanka Ports Authority ('SLPA'). As per the statutory provisions which were applicable at the time of filing of this application, the Petitioner was due to retire on 26.11.2022 upon completing 60 years. While serving as the Chief Human Resources Manager of SLPA, the Petitioner has been transferred, by virtue of the letter dated 23.09.2021, marked 'P27', to Mahapola Ports and Maritime Academy ('Academy') to serve as the Chief Training Manager with effect from 23.09.2021, on exigencies of service.

In the instant application the Petitioner is seeking, inter alia, for mandates in the nature of Writs of Certiorari to quash the decision of one or more or all the 1st to 10th Respondents to transfer Petitioner to the said Academy and to appoint her to the post of Chief Training Manager.

Human Resources Circular No. 297.

The Petitioner's main contention is that the said transfer is contrary to the current employee transfer policy of SLPA which is set out in Human Resources Circular No. 297 dated 23.03.2021, marked 'P25'. In view of the said Circular the employees who are due to retire upon reaching the age of 60 years will be exempted from transfers during the two years leading up to such retirement. Therefore, the Petitioner asserts that she shouldn't have been transferred since she was due to retire on 26.11.2022.

The contention of the 1st to 13th Respondents ('Respondents') with regard to the said Circular, marked 'P25', is that only the non-executive grade employees would be subjected to the said Circular and not the Petitioner who falls within the category of an executive grade employee. According to the Respondents, the Petitioner does not belong to the specific classes of executives to which 'P25' applies and only Rule 30(II) of the Manual of

Administrative Procedure ('R16') applies to executive employees who are not subjected to 'P25'.

On a careful perusal of the first paragraph of the said Circular 'P25' which is in the nature of a preamble, it clearly indicates that the said Circular is applicable only to the non-executive employees. Anyhow, the body of the Circular refers to certain categories of executive officers. Whilst the first paragraph of 'P25' sets out the background, the sub-paragraph (iii) & (v) of item No. 02 of the Circular refer to certain non-executive employees. The Respondents sought in argument to explain the classes/grades of so-called executives of the SLPA who are subjected to 'P25'. This provides the context for an assessment of the applicability of the Circular and to examine which category of employees are subjected to the Circular.

The Manual of Administrative Procedure, marked 'R16', stipulates provisions for the transfer of employees of SLPA. The Clause 30(II) provides that the employees can be transferred between Divisions of SLPA by the Manager-Human Resources with the concurrence of the Heads of Divisions/Units. It specifically provides that the prior approval of the Chairman is necessary when transferring employees of Executive Grade. The Clause 30(III) recognizes a category called 'graded employees' and it stipulates that such graded employees can be transferred only with the prior approval of the Chairman.

Similarly, the sub paragraph (v) of the item 02 of 'P25' refers to the executive officers of the Administration sector who are in the level of "JLM/MLM2" (presumably the Junior Level Management/Medium Level Management). The executive officers referred to in sub paragraph (iii) under the said item 02 are not from the Administration sector but from the Divisions of Finance, Supply Service, Supply and Security etc. The said sub paragraph (v) exclusively referred to the executive officers in the level of "JLM/MLM2" and accordingly, it reflects the fact that out of the executive officers of the Administrative sector, only the officers in the level of "JLM/MLM2" are subjected to 'P25'. This clears the ambiguity on the applicability of the Circular 'P25' to the Petitioner as it is undisputed that the post assigned to the Petitioner falls within the level of SLM-1. It appears that the level SLM-1 is common to all Heads of Divisions including the Petitioner who was holding the post of Chief Human Resources Manager.

Within the above framework, the Petitioner undoubtedly cannot be benefited by the provisions in 'P25' pursuant to the grace period of two years prior to retirement. Even if I am to presume that the procedure adopted by the Respondents was irregular by them infiltrating certain categories of executive officers also into 'P25' which is on the face of the record dedicated to non-executive employees, I will be compelled to accept the Respondents' argument based on the expressed exclusion of the executives in the 'SLM' category of the Administrative sector in 'P25'.

Transfers on Exigencies of Service.

The label of "exigencies of service" is often used by employers as a rampart to safeguard their decisions to transfer employees as they wish. The Circular 'P25' as well as the Manual of Administrative Procedure ('R16') enshrined with the words "exigencies of service". The Circular 'P25' emphatically articulates that the criterion prescribed in 'P25' are not applicable for transfers based on exigencies of service. What is disclosed in Clause 30(I) of 'R16' is that the employees are being transferred generally on exigency of service.

The impugned transfer order reflected in letter marked 'P27' has been issued on exigencies of service based on the recommendations made by the transfer committee on 22.09.2021. It is important to note that if the Respondents will be successful with their perspective in regard to the ground for transferring the Petitioner, the aforesaid issue whether 'P25' is applicable to the Petitioner would not arise at all. Then the question that arises is whether an appropriate procedure has been followed when the SLPA transferred the Petitioner on exigency of service.

In this regard, I need to draw my attention to the criteria adopted by the Public Service Commission of Sri Lanka in transferring public officers on exigencies of service although relevant regulations are not directly applicable to this case. The rationale followed therein is utilitarian in examining the exigency claimed by the Respondents. The Rule 218 of the Procedural Rules of Public Service Commission of Sri Lanka (published in Gazette Extraordinary No. 1589/30 dated 20.02.2009);

"A Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons:

- (i) Where the services of an officer is no longer needed at his present station;

- (ii) Where an officer is needed for service in another station or that particular officer himself is needed;
- (iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable”

The Managing Director of SLPA affirming an affidavit has submitted to this Court that the post of Chief Training Manager and Deputy Chief Training Manager of the Academy, have been vacant; and as such in order to ensure the smooth and efficient functioning of the Academy and in light of the said 2 vacancies which have arisen in senior management positions, the Management was urgently required to fill the said vacancy of the post of Chief Training Manager. The said Managing Director further states that having considered the Petitioner’s long-standing service, capabilities, experiences and leadership during her tenure at the SLPA and in recognition of the same and also following the recommendations of the Transfer Committee, the Petitioner’s transfer to the post of Chief Training Officer was approved with effect from 23.09.2021.

The Petitioner has not raised a strong opposition to disbelieve the above contention of the Managing Director. The Respondents, according to the material submitted to this Court, have taken into consideration the seniority and the experience of the Petitioner when taking the decision to transfer her. The transfer has not been made on grounds such as discipline or incompetence. The Petitioner is liable to being posted to any Division/Unit as per the terms of the letter of appointment. Thus, I am of the view that the above reasons given by the Respondents can be taken as sufficient grounds to justify the exigencies of service.

The capability of the Petitioner to hold the existing post.

Additionally, the Petitioner set out another argument based on the Scheme of Recruitment, marked ‘P28’ that she has not fulfilled basic requirements and was not eligible to be appointed to the post of Chief Training Manager. As opposed to such assertions, the Respondents submit that the Scheme of Recruitment to the post of Chief Training Manager, marked ‘P28’, is applicable to external applicants and not to transfers within the Divisions of SLPA.

The attention of this Court was drawn to the *‘Scheme of Recruitment for Top level Management; including inter alia Chairman, Vice Chairman, Managing Director, Additional Managing Director,*

Directors and Heads of Divisions, marked 'R24', which is the applicable Scheme of Recruitment according to the view point of the Respondents. The 'R24' under sub-heading 'NOTE' declares;

“Applications are not invited to fill the above senior position in the permanent cadre and it is purely a discretion of the Board of Directors to select a capable person for that post within the cadre. If the Board of Directors observes the capability, experience and leadership of in house officer are insufficient, external recruitments could be considered in terms of approved S/R of HOD first category. Canvassing for the post is a disqualification.”

The Respondents' reliance on the contents of 'R24' indicates that the Chief Training Manager should be considered as a head of a Division. It is observed that the position the Petitioner was holding immediately prior to the transfer as a head of a Division and also the emoluments relating to the said post have not been changed or substituted due to the impugned decision reflected in the letter 'P27'.

There is a clear distinction between a transfer on exigencies of service and an appointment to a post. The definition given to the term 'transfer' in the definition clause in Chapter I of the Establishments Code is apt here. According to such definition, 'transfer' means, 'the moving of an officer from one post to another post or from one station to another station in the same service or in the same grade of the same Ministry or Department with no change in salary.'

It is observed that the Petitioner's work place has been changed by the impugned transfer order and she has been assigned with the title of 'Chief Training Manager'. It seems that no selection process has been followed in terms of a particular Scheme of Recruitment to appoint the Petitioner to the said post but only a transfer order has been issued after a due evaluation of the experience and the seniority of the Petitioner. When the SLPA takes such decision based on the capability and experience of an officer, such decision cannot be challenged collaterally in this application unless it is ex-facie ultra vires, unlawful or arbitrary.

Even in the year 2017 the Petitioner has been transferred to the said Academy (vide 'P16') to serve as the Deputy Chief Manager (Admin.). The Petitioner alleges that she was suitable at that time to serve as a Deputy Chief Manager but currently she is not qualified to serve as the Chief Training Manager at the Academy. This argument, to my mind,

creates a reasonable puzzle on this point as to how the Petitioner will not be suitable to hold the post of the head of the Division of the Academy after effecting the impugned transfer on exigencies of service.

I am satisfied that the Petitioner's status, emoluments and the seniority have not been affected due to the impugned transfer. In other words, the Petitioner's legal rights have not been affected other than getting posted to a different place. Perhaps, the impugned transfer is being challenged by the Petitioner on parallel issues although her basic rights have not been affected. However, the jurisdiction of the Review Court can be invoked, if such transfer orders are found in contravention with the transfer policy or the guidelines of the public authority or sufficient grounds are available to establish a plea of mala fides.

It is the contention of the Petitioner that she was transferred due to external influences and/ or collateral reason at the behest of the 14th Respondent since the Petitioner, on several occasions, has refused requests made by/on behalf of the 14th Respondent to grant appointments/promotions to certain persons connected to the 14th Respondent. Such assertions of the Petitioner require careful consideration of this Court. Anyhow, the Petitioner has conceded to release the 14th Respondent from these proceedings due to the reason that no relief has been sought against the said 14th Respondent against whom the Petitioner has raised the purported allegations. It is important to note that when the relevant Minister (14th Respondent) has ceased to hold office, a substitution has been effected and as such it appears that there are no allegations on personal basis against the 14th Respondent. This, in my view, disables the Court from examining effectively any violation of Rule of Law and failure in good governance on the part of the 14th Respondent.

This Court has consistently taken the view that the plea of mala fides should be substantiated with adequate proof to the satisfaction of Court and merely raising a doubt would not be sufficient. The assertions on mala fide should be specific, direct and precise in order to sustain the plea of mala fides.

Conclusion.

In view of the foregoing, I am of the view that the Petitioner has failed to establish that the decision of the SLPA giving effect to the transfer order reflected in 'P27' is ultra vires, unlawful or arbitrary. The Petitioner is not entitled to challenge the purported appointment

to the post of Chief Training Manager in isolation, as it is, in my view, a position assigned to the Petitioner as a result of the transfer carried out on exigencies of service.

For the reasons set out above there is no necessity for this Court to deal with the appointment of the 13th Respondent to the post of Chief Human Resources Manager.

In the circumstances, I proceed to dismiss this application. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal