

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, Mandamus and
Prohibition under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/02/2022

1. Eng. M. R. Ranatunga
No. 30/14, Bungalawatta,
Lewalla Road
Kandy.

Petitioner

Vs.

1. Ceylon Electricity Board
No. 50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
2. M. M. C. Ferdinando
Chairman,
Ceylon Electricity Board,
No. 50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
3. N. S. Illangakoon
Vice Chairman,
Ceylon Electricity Board,
No. 50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02
4. M. M. Nayeemudeen
Member
5. S. D. J. Nilukshan
Member

6. B. Wijayarathne
Member
7. Ruban Wickramarachchi
Member
8. Mr. G. P. N. Mahesh Abeysekara
Member,

The 4th to 8th Respondents,
All being the present Members of the
Ceylon Electricity Board,
No. 50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.

9. Mr. Wasantha Perera
Secretary,
Ministry of Power,
No. 437, Galle Road,
Colombo 03.
10. Hon. Gamini Lokuge
Minister of Power,
Ministry of Power,
No. 437, Galle Road,
Colombo 03.
11. Eng. P. A. J. P. K. Perera
Deputy General Manager
(Personnel)
Ceylon Electricity Board,
No. 50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
12. Eng. Dr. D. C. R. Abeysekera
No. 49A,
Ward Place,
Colombo 07.

13. D. P. Wickremesinghe
Additional Secretary
(Administration
and Procurement),
Ministry of Power,
No. 437, Galle Road,
Colombo 03.

Respondents

Before : Sobhitha Rajakaruna J.

Counsel : Sanjeewa Jayawardena PC with Lakmini Warushavithana and Ridmi Beneragama instructed by Asoka Niwunhella for the Petitioner.

Vikum de Abrew, ASG PC with Amasara Gajadeera, SC and M. Fernando, SC for the 1st to 8th and 11th Respondents.

Shantha Jayawardena with Hiranya Damunupola for the 12th Respondent.

Decided on: 12.01.2022

Sobhitha Rajakaruna J.

The Petitioner who is the current General Manager of Ceylon Electricity Board (CEB) claims that his compulsory retirement age has now been extended to 62 years of age with effect from 01.01.2022, in view of the Public Enterprise Circular bearing No. 2 of 2021. Further, the Petitioner avers that although the retirement age of public officers has now been increased, the provisions of Section 5(4) of the CEB Act has not been amended since year 1969. In terms of the said Section 5(4), the General Manager (GM) of CEB should retire from office on reaching the age of 60 years. Accordingly, he states that a serious anomaly will be created if the GM, who is the senior most electrical engineer in service is required to retire at the age of 60 years whilst other employees are permitted to serve the CEB until they reach the age of 62 years. Furthermore, the Petitioner submits that the relevant Minister has given prior approval to extend the term of office of the Petitioner in terms of Section 5(4) of the CEB Act by way of letter dated 16.11.2021 marked P25. However, by letter dated 15.12.2021 marked P39, the same Minister has cancelled the said prior approval to appoint the Petitioner as the GM.

In terms of the Section 5(4) of the CEB Act, the term of office of the GM may be extended beyond the age of 60 years by the Board of Directors of the CEB with the prior approval of the Minister.

The Petitioner has filed this application seeking, inter alia, for a mandate in the nature of Writ of Certiorari quashing the decision reflected in P39 issued by the relevant Minister purporting to revoke his previous approval to extend the term of office of the Petitioner. The Petitioner further seeks for a mandate in the nature of Writ of Certiorari quashing the purported approval issued by the said Minister to appoint the 12th Respondent as the GM with effect from 13.01.2022, the date on which the Petitioner reaches the age of 60 years.

The said 12th Respondent has filed a separate Writ Application in this Court bearing No. 605/2021 claiming that he has a legitimate expectation to be appointed to the post of GM and that no extension of term of office should be granted to the Petitioner of the instant application as he reaches the age of 60 years on 13.01.2022.

The parties of the said application CA Writ 605/2021 and the parties of the instant application moved that both matters be taken up together for support for this Court to make an order on issuance of notice and interim relief as prayed for in the respective applications. The Petitioner of the instant application is Eng. M. R. Ranatunga and the Petitioner of the CA Writ 605/2021 is Eng. Dr. D. C. R. Abeyssekera. For ease of reference, the Petitioner of the instant application will be referred to in this order as Eng. Ranatunga and the Petitioner in the CA Writ 605/2021 will be referred to as Eng. Abeyssekera.

At the outset the learned Additional Solicitor General (ASG) who appears for the CEB, and the members of the Board of Directors of the CEB including its Chairman and the Vice Chairman took up preliminary objections on a) suppression b) futility & c) laches. The learned ASG submits that Eng. Ranatunga has suppressed two vital documents marked as R2 and R4 and further, the amended Petition dated 10.01.2022 should not be accepted as Eng. Ranatunga has filed the said amended Petition in order to circumvent the objections raised in the limited Statement of Objections filed on behalf of the CEB. In response to the said objections raised by the learned ASG, the learned President's Counsel who appears for Eng. Ranatunga, referring to a copy of the 'Motion Book' of this Court submits that the amended Petition has been filed in the Registry on 10th January 2022, few minutes before the CEB filed their limited Statement of Objections. However, the learned

ASG indicates that the completed set of limited Statement of Objections has been handed over to the Legal Department of the CEB on Friday, the 8th of January. The learned ASG intimates that both Eng. Ranatunga and Eng. Abeysekera are currently serving in senior capacities at the CEB. Accordingly, this Court is mindful of the hardship that the Legal Department of the CEB may go through as the said Department also eventually comes under the general supervision of the GM.

The learned President's Counsel appearing for Eng. Ranatunga raises five questions of law arising out of his application. Those questions are as follows;

- i. has the relevant Minister taken a decision to approve the extension of term office of Eng. Ranatunga?
- ii. has the Minister given reasons when he cancelled such decision by document P39?
- iii. has the Minister become functus once he made an order to extend the term of office of Eng. Ranatunga and was the Minister entitled to revoke his own decision?
- iv. when the Minister approved the extension of the term of office and was pending for one whole month; did it create a legitimate expectation in Eng. Ranatunga?
- v. was Eng. Ranatunga given a hearing before the Minister decided to cancel his original decision in P25?

On an overall conspectus of the submissions made by all learned Counsel, I take the view that this Court should fully consider the facts and circumstances of this case at a final hearing. Moreover, I take the view that the preliminary objections also have to be looked in to only at the merit stage in the circumstances of this case. Hence, this Court is inclined to issue notice on the Respondents.

Having considered the issuance of notice, the question arises whether this Court can grant the interim reliefs that Eng. Ranatunga and Eng. Abeysekera have sought in their respective applications. Now I advert to the facts and circumstances in this application in view of considering the tests applicable to the grant of the interim relief.

The learned President's Counsel who appears for Eng. Ranatunga made submissions on P24 by which the decision of the Board of Directors (Board) of CEB making the compulsory retirement age of Engineers of the Engineering service 61 years (with effect from 02.11.2021) has been notified. His contention is that, after the decision in P24, further steps should be taken to amend Section 5(4) of the CEB Act in view of extending the

retirement age of a GM. However, I am of the view that this Court will not be able take any decision upon a future action of the Legislature which is not known to this Court. No evidence has been placed before this Court in reference to any such intention of the Legislature to amend the said Section 5(4) of the CEB Act.

The learned President's Counsel for Eng. Ranatunga referring to the judgement of ***CA Writ Application No. 152/2018 (decided on 16.11.2020)*** submits that the same Public Authority who makes a decision could not revoke or vary such decisions when such decision affects legal rights of people. On careful examination of the said Section 5(4) it is apparent, prima facie, that the Board has the discretion even to ignore an approval made by the relevant Minister for the appointment to the post of GM. Therefore, an issue arises as to whether the decision that is made by the relevant Minister under the said Section 5(4) comes within the interpretation of a decision of a public authority as discussed in the above judgement.

The learned Counsel who appears for Eng. Abeysekera, referring to Section 18 of the Interpretation Ordinance submits that whether any enactment confers power on any authority to make any order and any such order may be at any time amended, varied, rescinded or revoked by the same authority as prescribed in the said provisions.

The learned Counsel for Eng. Abeysekera submits that Eng. Abeysekera is left only with 11 months to reach the retirement age of 60 years and accordingly grave prejudice will be caused to Eng. Abeysekera if Eng. Ranatunga is permitted to serve for another extended term. The said learned Counsel referring to the seniority list (document marked P16 in CA Writ 605/2021) further submits that not only Eng. Abeysekera but several other most senior Engineers, down the line, will not be able to be appointed as the GM if Eng. Ranatunga's term of office is extended illegally. He emphasized the fact that the Board had not taken a decision upon the letter marked P25. Furthermore, he points out that the said letter P25;

- i. does not refer to any recommendation from the Board in view of appointing a GM;
- ii. has no date stamp to establish the date of receipt;
- iii. the caption of P25 is irrelevant to the issue in hand;
- iv. P25 was not in the possession of the Chairman of the Board at the time of submitting the Board paper marked P20 on 23.11.2021.

The learned ASG further referring to the judgement of *CA Writ Application 327/2013 (decided on 25.05.2020)* submits that any Circular extending the retirement age of the Engineers of the CEB cannot be considered as a Regulation which has a statutory force and therefore, the mandatory retirement age of the GM stipulated in the said Section 5(4) will not be affected. I am of the view that a statutory provision enacted by the Parliament cannot be amended or varied by way of a circular issued by a public authority.

The learned ASG making submissions moved that both applications of Eng. Ranatunga and Eng. Abeysekera be dismissed in limine as the CEB has already taken steps to appoint Eng. Abeysekera as the next GM. His contention is that Eng. Ranatunga has signed the 'Board Memorandum' dated 20.12.2021 (marked R2) and recommended Eng. Abeysekera to be appointed as the next GM of the CEB. Accordingly, he argues that the conduct of Eng. Ranatunga does not warrant him to get any relief in an application for judicial review. He further points out that Eng. Ranatunga was physically present at the Board meeting on 20.12.2021, without raising any objections, when the Board considered the Board Memorandum marked R2 signed by Eng. Ranatunga himself.

Thus, in deciding in whose favour the balance of convenience would lie, in my view, it is not only the damages that would be caused to a party by not issuing an interim relief, be taken into consideration. If the circumstances and the evidence placed before Court provides an opportunity, prima facie, for the Court to consider the 'conduct' and the 'conscience' of a particular party, then the Court should take such 'conduct' and 'conscience' also in to consideration in view of assessing the balance of convenience and also the test to ascertain whether the final order be rendered nugatory if the Petitioner is successful. I am of the view that this is a fit and proper case for this Court to consider the conduct and the conscience of Eng. Ranatunga in deciding on the interim relief sought by him.

Thus, this Court is of the view that although there is a question of law to be looked into in this application, the circumstances and the evidence placed before Court do not warrant this Court to issue any interim relief. The learned Counsel for Eng. Abeysekera making submission on document P19 emphasized the importance of preventing politicization of the post of GM at CEB. Bearing this in mind and on a careful consideration of the whole matter, I have come to the conclusion that by reasons of the special circumstances of this case, I should exercise my discretion not to grant interim relief as prayed for in the prayer

of the respective applications of Eng. Ranatunga and Eng. Abeysekera. However, this Court issues an interim order directing the Board of Directors of CEB not to appoint a GM, on permanent basis, upon the retirement of Eng. Ranatunga (which is due on 13.01.2022), until the date of Argument of this case. This interim order will not impede or obstruct the powers of the Board of Directors of CEB to appoint a suitable person in terms of Section 5(1) of the CEB Act, on temporary basis, enabling such appointment to be made permanent by the said Board of Directors subject to the final determination of this case.

Judge of the Court of Appeal