

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

S. M. S. P. Sathkumara
No 75/1,
Circular Road,
Malkaduwawa,
Kurunegala.

Petitioner

CA/WRIT/292/2021

Vs.

1. Dr. S. H. Munasinghe
Secretary,
Ministry of Health.
2. Dr. A. K. S. De Alwis
Additional Secretary,
Ministry of Health.
3. Dr. Asela Gunawardana,
Director General of Health
Services,
Ministry of Health.
4. Dr. P. W. C. L. Panapitiya,
Deputy Director General of Health
Services,
Ministry of Health.

All of
"Suwasiripaya"
No.385,
Ven. Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.

5. Dr. Pramitha Shanthilatha
Acting Director,
Teaching Hospital,
Kurunegala.
6. Dr. Chandana Kandagamuwa
Deputy Director,
Teaching Hospital,
Kurunegala.
7. Dr.K. K. Malawige,
Deputy Director,
Teaching Hospital,
Kurunegala.
8. Dr. Lanka Tennakoon
Pediatrician Consultant,
Neonatology Unit,
Teaching Hospital,
Kurunegala.
9. Mr. L. A. Kalukapuarachchi,
Secretary,
Health Service Committee,
Public Service Commission,
No. 1200/09,
Rajamalwatta Road,
Battaramulla.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Saliya Pieris PC with Geeth Karunaratna for the Petitioner.
Milinda Gunathilake PC, ASG with Manohara Jayasinghe, DSG for the
1st to 7th and 9th Respondents.

Supported on : 01.06.2022

Written Submissions : Petitioner - 25.07.2022
1st to 7th and 9th Respondents - 28.09.2022

Decided on : 15.11.2022

Sobhitha Rajakaruna J.

A jurisdictional question has been raised by the 1st to 7th and 9th Respondents ('Respondents') by way of a preliminary objection. The Respondents contend that the Article 61A of the Constitution precludes the jurisdiction, under Article 140 of the Constitution, exercised by this Court in the instant application The Article 61A of the Constitution;

'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 in question any order or decision made by the 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.'

The Respondents relying on the judgements of *Amarasekara vs. Kodituwakku (2005) 1 Sri. L.R. 58*; *Jayantha Kumara and another vs. Thilak Collure and others, CA/Writ/362/2009*; *Jayaweera vs. Commissioner of Agrarian Services (1996) 2 Sri. L.R. 70*; *Pradeshiya Sabhawa, Hingurakgoda and others vs. Karunaratna and others (2006) 2 Sri. L.R. 410* submit that the Petitioner is not entitled to seek a writ of Mandamus with regard to any aspect of an appointment without first challenging the decision of the Public Service Commission ('PSC'). Without any equivocation, I concur with the precedent enunciated in the above judgements. Hence, it is necessary to examine whether this Court could proceed to consider the reliefs prayed for by the Petitioner without first being inquired into or pronounced upon or called in question the alleged decision of the PSC.

The Respondents' above objection is mainly based on the reliefs sought by the Petitioner in paragraph (D) of the prayer of the Petition by which the Petitioner is seeking for a writ of Mandamus compelling the 1st, 3rd and 5th Respondents to appoint the Petitioner as a Consultant to the Neonatology Unit of the Teaching Hospital, Kurunegala ('Hospital'). The contention of the Respondents is that the appointment of the Petitioner to the post of Resident Pediatrician at the Hospital is an appointment made by the PSC and as such any adverse ruling of this Court in respect of the said appointment would amount to calling in question or pronouncing upon the said decision of the PSC.

As opposed to the Respondents' arguments, the Petitioner asserts that no decision of the PSC is being challenged in the instant application and the decisions impugned in this application are completely based on the internal arrangements of the Hospital and Article 61A of the Constitution has no application to this case.

The Petitioner reported to the Hospital on 11.06.2020 to serve as the Resident Pediatrician after annual transfers 2020 of specialist medical officers were duly effected. The 5th Respondent Acting Director (for Director) of the Hospital by letter dated 11.07.2020, marked 'P12', has informed the Petitioner to engage in affairs in the Neonatal Unit of the Hospital on exigencies of duty. The 3rd Respondent Director General of Health has authorized the Director of the Hospital by letter dated 03.02.2021, marked 'P19', to adopt a suitable internal mechanism to obtain the services of the Petitioner effectively. The 3rd Respondent has given such authorization in pursuance to the request made by the Director by 'P18' to employ the

Petitioner on exigencies of service in the Neonatal Unit of the Hospital. Subsequently, the Director has assigned the Petitioner to the Neonatal Unit by his letter dated 10.02.2021, marked 'P20'.

Only at the stage of filing the Statement of Objections, the Respondents took the stance that the decision of the Director reflected in 'P12' is ultra vires and further, the Petitioner cannot place any reliance on the Director's letter, marked 'P20', on the basis that it has no validity in law. The Respondents in paragraph 14 of their Statement of Objections categorically admit the issuance of the letter, marked 'P19', by the 3rd Respondent but abstain from classifying the said decision ultra vires.

The Director after issuing the letter, marked 'P12', has addressed a letter dated 18.07.2020, marked 'P14', to the Deputy Director General-Medical Services and has emphasized about the strong objections raised by 8th Respondent in view of appointing the Petitioner to the post of Resident Pediatrician at the Hospital. In the same communication, the Director has requested to abolish the post of Resident Pediatrician. In the letter, marked 'P19', the 3rd Respondent has emphatically observed that the Petitioner has opted to be appointed as the Resident Pediatrician of the Hospital in alignment with the published Annual Specialists Transfer list and such observations imply that the Petitioner has applied for the said post merely because it was a post that was available in the said Transfer list.

In this context, it appears that the Petitioner has been appointed to a post which, in the opinion of the Director and the other Consultant Pediatricians including the 8th Respondent, is redundant. The Petitioner has applied to the said post as it was a duly created post under the said Annual Transfer list and the PSC has made the Petitioner's appointment after finalizing all such transfers by the Ministry of Health. It is apparent that the PSC has no involvement in creating posts, on its own, at any of the hospitals and such posts are usually created and advertised according to specific requirements which are identified by the health authorities and not by the PSC.

The Petitioner has come before this Court setting out the difficulties she had to undergo after appointing her as the Resident Pediatrician of the Hospital. Declaring the decision of the Director, marked 'P12', ultra vires by the Respondents and authorizing the Director to resolve

the issues through an internal mechanism by the 3rd Respondent clearly amplifies that there is an acute need for this Court to examine the vires of the decisions of the Respondents taken during the preliminary process relating to the specialists' transfers. It cannot be assumed in the pretext of the Constitutional ouster that this Court has no jurisdiction to examine the vires of such decisions of the Respondents who may have assumed a jurisdiction which they don't have or exceeded the jurisdiction which they do have.

It emanates from the letters issued by the PSC on 08.03.2021 and 29.09.2021, marked 'P27' and 'R9' respectively that the PSC has called for observations from the Ministry of Health relating to issues similar to the instant application as well. In the letter, marked 'R9', the PSC has identified a vital question whether the Petitioner who reported to the Hospital as a result of annual transfers could be appointed to another vacant post within the same Hospital. The PSC without arriving at a conclusion primarily has decided to query the 1st Respondent on the said point.

I take the view that this Court is also ought to examine the same question based on the circumstances of this case and such examination cannot be subjected to the ouster clause embodied in Article 61A of the Constitution. In other words, the issue on assigning work in a different unit in the same hospital on exigencies of services should be taken into consideration. Additionally, it cannot be assumed that this Court has a jurisdictional bar to consider the reliefs prayed for in paragraph (E) of the prayer of the Petition. For these reasons, I hold that the preliminary objection raised by the Respondents has no merits and is untenable based on the circumstances of the instant Application. Thus, I overrule the jurisdictional objection and decide to proceed with the hearing of the arguments of both parties.

Having considered the tenability of the jurisdictional objection, now I need to consider the application for the extension of the interim order which is valid up to the date of this Order. The said interim order was issued by this Court on 28.06.2021 after hearing the learned Counsel for the Petitioner as well as for the Respondents and it was not an order made ex parte. The discretion of the Review Court when issuing an interim order is very wide and the court in such instances must assess the strength of the case and the 'balance of convenience'. This Court issued the said interim order based on the material made available to Court as at the date of support and also exercising prudence, discretion and circumspection.

However, the Respondents in their Statement of Objections put forward a strong claim to get the interim order varied or refused based on the contents of those pleadings. The Respondents have taken a radical approach declaring the decision of the said Director to assign the Petitioner to the Neonatal unit ultra vires and also devaluing the decision of the 3rd Respondent in 'P19'. I cannot possibly overlook such assertions and when employing the tests applicable in regard to issuing or extending of interim reliefs, I am convinced that the assessment on the balance of convenience should be revisited. In the circumstances, I use my discretion to dissolve the interim relief issued by this Court on 28.06.2021, leaving an opportunity for the Petitioner to agitate this order (order on the interim relief), if necessary, in due course with additional and fresh evidence.

But the process adopted by the Respondents to agitate the said interim order especially by annexing two additional affidavits is unsatisfactory. The 'R11' and 'R12' are two affidavits affirmed by a Consultant Pediatrician and a Consultant Neonatologist. Both of them are currently serving at Government Hospitals and not parties to this application; or no application has been made on their behalf for intervention to the instant Application. I am conscious of the provisions of Chapter XXXIII of the Establishments Code which deals with legal actions relating to public officers. The Respondents have allegedly annexed those two affidavits to their Statement of Objections only for the purpose of supporting the matters set out therein. (vide- paragraph 32 of the statement of objections).

Anyhow, the affirmant of the affidavit, marked 'R12', making adverse remarks against the Petitioner in several paragraphs of the affidavit states that 'it is absolutely paramount that the Court of Appeal, without delay, varies the interim order and direct the Petitioner be removed from the Neonatology Unit'. I take the view that no person who is not a party to this application has a legal or moral right whatsoever to influence this Court to vary the said interim order in the manner that the affidavit has been affirmed. I make a strong observation that this kind of influence through a Consultant who is not even serving in the Kurunegala Teaching Hospital may lead to contempt of court as it is the paramount duty of the Hospital authorities including all the Respondents to obey any order issued by this Court irrespective of the post held by them or irrespective of their expertise in a particular field of study.

Apart from such observations, I exercise my discretion for the best interest of justice and for the purpose of examining effectively the questions involved in this application to call from the Secretary to the Public Service Commission a copy of;

- i. the report submitted to PSC in response to letter dated 08.03.2021, marked 'P27'
- ii. the letter received by PSC in response to the letter dated 29.09.2021, marked 'R9'

for the inspection and examination by this Court. Thus, the Secretary to the PSC is directed to tender such documentation to this Court through the Attorney General by way of a motion, three weeks prior to the next date of this case. The Registrar of this Court is directed to communicate this order forthwith to the Secretary to the PSC.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal