

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

**In the matter of an Application for mandate 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**

1. Subasinghe Arachchige Dasman,
Gangodagama., Weligepola, Balangoda.
2. Manannalage Diyonis,
Peththarakumoura, Weligepola.
3. Rupasinghe Arachchilage Wijedasa,
No. 129, Udakada Road, Kuruwita.
4. Nindakumbura Mohottalalage Mudiyanse,
Wara Yaya, Godakawela.
5. Kiridagala Mudiyanseelage Gunadasa,
Pahala Ellepola, Balangoda.

And 16 others

Petitioners

CA/ WRIT/98/2014

Vs,

1. Dr. Y.D. Nihal Jayathilaka,
The Secretary, Ministry of Health,
'Suwasiripaya', No. 385,
Rev. Baddegama Wimalasara Thero Mw,
Colombo 10.

1A. Dr. D.M.R.B. Dissanayake, Secretary,
Ministry of Health,
'Suwasiripaya', No. 385,
Rev. Baddegama Wimalasara Thero Mw,
Colombo 10.

And 12 others

Respondents

Before

: Vijith K. Malalgoda PC J (P/CA)

Counsel : Asthika Devendra for the Petitioner
Nayomi Kahawita SC, for the Attorney General

Written Submissions On: 30.05.2016, 10.06.2016

Order On: **30.09.2016**

Order

Vijith K. Malalgoda PC J (P/CA)

1st to 13th and 15th to 21st Petitioners and the 14th Petitioner who is the widow of the one Ranpatige Piyasena had come before this court seeking inter alia.

B. Grant a writ of *Mandamus* directing the 1st and/or 2nd and 3rd and/or 4th -9th and/or 10th and/or 11th Respondents to implement the circulars P-1, P-2 and P-4 in the Provincial Public Service of the Sabaragamuwa Province and thereby place/promote the 1st -13th and 15th -21st Petitioners and the husband of the 14th Petitioner namely Ranpatige Piyasena in their respective class in the Middle Level Technical Service and Sri Lanka Technical Service.

C. grant a writ of *Mandamus* directing the 1st and /or 2nd and/or 3rd and/or 4th -9th and/or 10th and/or 11th Respondents to implement the circulars P-1, P-2 and P-4 in the Provincial Public Service the Sabaragamuwa Province and direct the 1st-13th and 15th-21st Petitioners and the husband of the 14th Respondent namely Ranpatige Piyasena be paid back wages from October 2002 to the date of retirement of the respective petitioner.

As admitted by both parties before this court the 20 Petitioners and the husband of the 14th Petitioner namely Ranpatige Piyasena recruited to the Health Department as Public Health Field Assistants on casual basis attached to the Malaria Prevention Campaign.

As revealed before this court they were recruited to the above posts between 10.03.1970-29.09.1985.

In 1977 the Middle Level Technical Service was created and established by circular 237 which is produced by both parties before this court marked P-4A and R-1.

The Public Health Field Assistants were also absorbed to the Middle Level Technical Service backdating their service period initially to 01.09.1992 and subsequently to 02.08.1989 and finally to 01.05.1977. As revealed from the document P-4 /R-2 the final back dating was approved by the Cabinet on 09.10.2002 subject to several Government Circulars which were in operation since 25.05.1977 to 30.11.1990.

However with the establishment of the Provincial Councils, a Provincial Public Service came in to operation and the Petitioners, who were from Sabaragamuwa Province, opted to be attached to the Provincial Public Service of the Sabaragamuwa Province. As revealed before this court, at the time the Petitioners including the husband of the 14th Petitioner opted to be attached to the Provincial Public Service of Sabaragamuwa Province they were still holding their substantive position in Public Health Field Assistants but the Petitioners were silent whether their services were made permanent at that time. The issue of making the Petitioners permanent in their

substantive position was raised during the argument before this court but the Petitioners failed to give any explanation in this regard.

During the same period, the Middle Level Technical Service was re-structured as Sri Lanka Technical Service which came into operation on 01.07.1994. The relevant circulars with regard to the re-structuring are produced before us marked P-1 and P-2. The said circulars had made provisions to absorb the officers already in the Middle Level Technical Service to the new service "Sri Lanka Technical Service"

Whilst referring to the circular P-4 (R-2) by which the Public Health Field Assistants were absorbed in to the Middle Level Technical Service, Petitioners have submitted before the court that the 1st to 13th Petitioners and the husband of the 14th Petitioner were entitled to be in class 1 of the Middle Level Technical Service and 15th to 21st Petitioners were entitled to be in class 11-A in the Middle Level Technical Service at the time the Middle Level Technical Service was re-structured and therefore they were entitled to be appointed to the corresponding position in the Sri Lanka Technical Service.

In this regard the Petitioners have relied on a chart they have prepared to explain the promotions they were entitled from their date of appointment. (This chart is produced at page 10 of the petition under paragraph 17)

As observed above, the question of the Petitioners' appointment to permanent carder is essential to consider the correctness of the above position taken by them.

However in the said chart the Petitioners have considered their date of appointment to the Malaria Prevention Campaign as the date of appointment to the permanent carder when calculating promotions but, the Petitioners have initially accepted the position that their appointment as Public Health Field Assistant in the Malaria Prevention Campaign was made on casual basis.

Even though the Petitioners were silent on their permanent appointment, the Respondents have taken up the following position before this court;

According to the Respondents, on 26th October 2009 the Minister in Charge of the subject of Health in the Central Government had forwarded a Cabinet paper, to consider the casual employment period of the Public Health Field Assistants from 01.05.1977 to 02.08.1989 as confirmed without payment of any back wages and conferring such officers their entitlement for any promotion as per P-4.

However as submitted by the Respondents the said Cabinet Paper was not approved by the Cabinet but later submitted before the Ministry of Finance and Planning in the year 2011 but the said memorandum was turned down on the basis that the said proposal if conceded would tantamount to establishing a bad precedent in the Public Service (Documents R-4-R-6).

As observed by this court the Cabinet paper referred to above, which was produced marked R-4 had an annexure and in the said annexure produced marked R-4A there were 537 names appeared. When the Respondent submitted the above position before this court, the Learned Counsel for the Petitioners whilst challenging the said document took up the position that except for two Petitioners, names of the other Petitioners were not found in R-4A but still the Petitioners have failed to explain the correct position of their employment before this court.

The Petitioners have further relied on a letter issued by the Secretary to the Provincial Health Ministry of the Sabaragamuwa Province which was produced before us marked P-11. As observed by this court the said letter was issued subsequent to a meeting the Petitioners had with the Governor of the Sabaragamuwa Province confirming the decisions reached at the said meeting. Even though no specific references were given to the relevant circulars by the said letter a decision had been reached to give promotions to all the retired public Health Field Assistants subject to two conditions namely, the said promotions are personal to them, and the said

promotions will not become a precedent in future. Even though the said letter refers to the term promotion, in the body of the letter, refers to the absorption of the Public Health Field Assistants to the Middle Level Technical Service, and therefore it is understood that what is ment by promotion in the said letter was in fact not promotions but absorption to the said service. When the said decision was conveyed to the relevant authorities, the said authorities had faced difficulties in implementing the said decision without having carder provisions to make those appointments.

However as revealed before us from the documents forwarded by both parties, the said decision was re-considered by the Provincial Council after receiving instructions from the Ministry of Finance of the Central Government. It was brought to our notice of a decision conveyed to the Chief Secretary of the Sabaragamuwa Provincial Council by the Director General, Department of Management Services of the Central Government which is produced marked R-14 informing that, there is no provision to create new or supernumerary positions for retired Government Servants.

When considering the material revealed before this court, this court is mindful of the following decisions taken by the authorities.

- a) When the Minister in Charge of the Health in the Central Government forwarded a cabinet paper to consider the casual employment period of the Public Health Field Assistants from 01.05.1977 to 02.08.1989 as confirmed without back wages, the said memorandum was turned down on the basis that the said proposal if conceded would tantamount to establishing bad precedent in the Public Service.
- b) When the Petitioners met the Governor of the Sabaragamuwa Province a decision was reached to give promotions to all retired Public Health Field Assistants subject to two conditions namely,

- i. The said promotions will be personal to them
 - ii. The said promotions will not be a precedent in future
- c) When the said decision was communicated to the Department of Management Service of the Central Government, the Director General – Management Services advised the Sabaragamuwa Provincial Council that, there is no provision to create new or supernumerary positions for retired Government Servants.

The Petitioners to the present application are seeking a writ of *Mandamus* to compel the Respondents to implement circulars produced before this court marked P-1, P-2 and P-4. The Petitioners have further taken up the position that they had a legitimate expectation to enter in to the Middle Level Technical Service and from the said service to the Sri Lanka Technical Service when the said circulars were issued by the relevant authorities and they had a legal right to be appointed to the said service.

However as observed in (a) and (c) above, the court observed the fact that the authorities have found out that, it is impossible to implement the said circulars and any attempt to implement the said circulars would tantamount to bad precedent in the Public Service.

When the Governor of the Sabaragamuwa Province made an attempt to implement the circulars subject to two conditions referred to above, that too could not implement since it was impossible to implement the said agreement.

In this regard this court is mindful of the decision in the case of *Wannigama V. The Incorporated Council of Legal Education 2007 SLR 54* where the Supreme Court held that,

“A writ of *Mandamus* will not be issued when it appears that there is an impossibility of performance by reasons of circumstances.....”

This position was further discussed in the case of *Suresh V. Basant AIR 1972 SC 1680* as follows;

“Mandamus will not in general be issued to compel a Respondent to do what is impossible in law or in fact. The relief may be denied when it would introduce and occasion confusion or disorder. This is because the court while issuing the writ should keep in view that the issue of the writ would not be futile.”

As observed above the authorities responsible for the implementation of the said circulars have repeatedly informed their difficulty in implementing the circulars to the Cabinet of Ministers of the Central Government and to the Governor to the Sabaragamuwa Province and in these circumstances granting a writ would not help the Petitioners, since the Respondents will not be able to implement the said directive without the concurrence of the officials of the Central Government including the Director General Management Service who are not before this court as Respondents to the present application.

In these circumstances this court is not inclined to grant relief as prayed by the Petitioners. The Petitioners application for writ of *Mandamus* is refused.

Application dismissed No cost is ordered.

President of the Court of Appeal