

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

In the matter of an application in terms of
Article 140 of the Constitution for a mandate
in the nature of a writ of mandamus

1. Porowakara Kankanamge Titus Piyaratne
(deceased),
No. 3 Sumudu Pedesa,
Asiri Uyana, Katubedda,
Moratuwa.

1A. Anula Piyaratne,

No. 3 Sumudu Pedesa,
Asiri Uyana, Katubedda,
Moratuwa.

Case No. CA 245/2008 Writ

Substituted 1A Petitioner

2. Singankutti Arachchige Bastian,
No. 379 Vidyala Mawatha,
Batuwatte, Ragama.
3. Piyadasa Siyambalagoda (deceased)
No. 269, "Priyanthi",
Uduwa South, Kuda Uduwa,
Horana.

3A. Uswatha Liyanage Somawathie,

No. 269, "Priyanthi",
Uduwa South, Kuda Uduwa,
Horana.

Substituted 3A Petitioner

4. Warshamana Dewayalage Piyal Ratnasiri
(deceased),
No. 407/2 Ihala Kosgama,
Kosgama.

4A. Assallalage Ranjani,

No. 407/2 Ihala Kosgama,
Kosgama.

Substituted 4A Petitioner

Petitioners

Vs.

1. Secretary,

Ministry of Education,

Isurupaya,

Battaramulla.

2. J.A.D.L. Hemachandra,

Provincial Director of Education-Western
Province,

Western Province Educational
Department,

76, Ananda Cumaraswamy Mawatha,
Colombo 7.

2A. P.N. Illaperuma,

Provincial Director of Education-Western
Province,

Western Province Educational
Department,
76, Ananda Cumaraswamy Mawatha,
Colombo 7.

3. Jayatissa Karumuni,
Zonal Director of Education, Colombo,
Zonal Education, Office,
Withanage Mawatha,
Colombo 02.

- 3A. Jayantha Wickramanayaka,

Zonal Director of Education, Colombo,
Zonal Education Office,
Withanage Mawatha,
Colombo 02.

4. R.A.A. Sumithrarathne,
Zonal Director of Education, - Gampaha,
Zonal Education Office, Gampaha,

- 4A. S.K.Mallawarachhi,

Zonal Director of Education, - Gampaha,
Zonal Education Office, Gampaha,

5. C. Lunuwila
Zonal Director of Education, -
Homagama
Zonal Education Office,
Homagama

5A. Palitha D. Weerasooriya,

Zonal Director of Education, -
Homagama
Zonal Education Office,
Homagama

6. K. K. P.M. Jayathilake,

Zonal Director of Education, - Horana

Zonal Education Office,

Horana.

6A. K.A. Chandrawathie,

Zonal Director of Education, - Horana

Zonal Education Office, Horana.

7. M.B.M. Thennakoon,

Zonal Director of Education,
Sri Jayawardenapura

Zonal Education Office,

Sri Subhoothi Vidyalaya

Battaramulla

7A. Asoka Senany Hewage,

Zonal Director of Education,
Sri Jayawardenapura

Zonal Education Office,

Sri Subhoothi Vidyalaya

Battaramulla.

8. N.W.Perera

Zonal Director of Education- Kalutara,
Zonal Education Office,
Kalutara.

8A. Priyani Mudalige

Zonal Director of Education- Kalutara,
Zonal Education Office,
Kalutara.

9. W.H.Gamage

Zonal Director of Education- Kelaniya,
Zonal Education Office, Kelaniya,
Makola

9A. Kanchana Hathurusinghe,

Zonal Director of Education- Kelaniya,
Zonal Education Office, Kelaniya,
Makola.

10. P.M.Wijesinghe,

Zonal Director of Education- Matugama,
Zonal Education Office,
Matugama,

10A. N.W. Perera,

Zonal Director of Education-
Matugama,

Zonal Education Office,
Matugama,

11. A.A.J.B. Pushpakumara,
Zonal Director of Education,
Minuwangoda,
Zonal Education Office,
Minuwangoda.

- 11A. P. Srilal Nonis

Zonal Director of Education,
Minuwangoda,
Zonal Education Office,
Minuwangoda.

12. M.L.D.N. Titus,
Zonal Director of Education, Negombo
Zonal Education Office,
Negombo.

- 12A. K.A.C. Fernando,

Zonal Director of Education, Negombo
Zonal Education Office,
Negombo.

13. P. Kannangara,
Zonal Director of Education,
Piliyandala
Zonal Education Office,
Piliyandala

- 13A. P.K.D.U.De S. Gunasekera,
Zonal Director of Education,

Piliyandala

Zonal Education Office,

Piliyandala.

Respondents

Before: Janak De Silva J.

Counsel:

Sanjeewa Jayawardena P.C. with Charitha Rupasinghe for the Petitioners

Vikum De Abrew SDSG for the Respondents

Written Submissions tendered on:

Petitioner on 23.05.2019

Respondents on 28.02.2019

Argued on: 21.01.2019

Decided on: 24.05.2019

Janak De Silva J.

This matter was argued on 21.01.2019 and parties were directed to file written submission on or before 28.02.2019. When this matter was mentioned on 05.03.2019 no written submissions were available in the docket and the parties were directed to file written submissions on or before 04.04.2019 and judgment was reserved for 24.05.2019. The Respondents had filed written submissions on 28.02.2019. On 23.05.2019, one day before the judgment was due, the Petitioners had filed written submissions in the registry and a copy of it was delivered to my chambers by the learned counsel for the Petitioners Charitha Rupasinghe who had also argued the matter. However, by that time the judgment was ready to be delivered the next day.

The Petitioners are retired teachers of the Sri Lanka Teachers Service (SLTS) and at the time of their retirement were Class I officers of the SLTS. The SLTS was not in existence when the Petitioners were first appointed as trained/graduate teachers.

The SLTS was created by Gazette notification no. 865/3 dated 3rd April 1995 (P2/R1) (SLTS Minute) and was deemed to have come into force from 06.10.1994. It provided for the establishment of 3 classes in the SLTS, namely Class 3 Grade II, Class 3 Grade I, Class 2 Grade II, Class 2 Grade I and Class I with the entry point at Class 3 Grade II.

When the SLTS Minute became operative there were nearly 200,000 teachers serving in the state sector and they were absorbed to Class 3 Grade II, Class 3 Grade I, Class 2 Grade II and Class 2 Grade I taking into consideration their educational and professional qualifications and the period of service. Part III of the SLTS Minute set out the manner in which the absorption should take place. There were no absorptions to Class I directly.

There is no dispute that the Petitioners were absorbed in to Class II Grade I of the SLTS and placed at the maximum salary step.

Part III paragraph 2 of the SLTS Minute explains the procedure for promotion to Class I for two categories namely:

- (a) Graduate teachers with professional qualifications with 22 years of satisfactory service as trained or graduate teacher
- (b) Trained teachers with 25 years of satisfactory service as a trained teacher

Although the Petitioners contend that they were promoted to Class I with effect from 06.10.1994 since they had obtained sufficient marks to be promoted to Class I in view of their seniority in the service of the SLTS (paragraph 5 of the petition), that position is not supported by any documentation including the letters of appointment of the Petitioners to Class I.

By circular No. 1/99 dated 30.09.1999 (R2) the requirements in the SLTS Minute on the promotion to Class I were made non-applicable to those teachers (a) who had been absorbed into Class 2 Grade I (b) who had reached the maximum salary scale in Class 2 Grade I, and (c) were over 50 years of age and all such teachers were promoted to Class I of the service. The Petitioners were

promoted to Class I on this basis and their promotions back dated to 06.10.1994 and placed in the second salary step of Class I of the SLTS.

The Petitioners were eligible to earn the annual increments due from 1994 by virtue of their promotions being back dated although they were not eligible for back wages.

The Petitioners pray for a writ of mandamus directing the 1st Respondent to issue specific directions to the 2nd to 13th Respondents to implement the scheme/directions contained in P5, P6 and P7 and adjust the Petitioners retiral benefits.

Hence the main issue in this application is to ascertain whether circulars marked P5(R6), P6 and P7 are applicable to the Petitioners.

Suppression and/or Misrepresentation of Material facts

It is established law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi* [77 N.L.R. 131 at 135,6]:

"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigns* Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".

This principle has been consistently applied by courts in writ applications as well. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd. v. Commissioner of Labour* [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jaysinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24].

In *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held:

(1) A Petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.

(2) It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.

(3) If there is anything like deception the Court ought not to go in to the merits, but simply say "we will not listen to your application because of what you have done."

Abdus Salam J. went on to hold:

"Material facts are those which are material for the Judge to know in dealing with the application as made, materiality is to be decided by Court and not by the assessment of the applicant or his legal advisers...

Whether the facts not disclosed are of sufficient materiality to justify or require immediate discharge of the order without consideration of the merits, depend on the importance of the facts to the issues, which are to be decided by Court"

The Petitioners state that the salaries of the 2nd and 3rd Petitioners have been adjusted by placing them at step 13 and 15 in Class I but that the payment of the salary in accordance with the adjustment had been stopped [paragraph 15 of the petition]. The Petitioners imply that P5, P6 and P7 were in fact made applicable to them, which then is an admission on the part of the public authorities that they are in fact applicable to the Petitioners, but later stopped defeating the

legitimate expectations of the Petitioners. The Petitioners relied on documents marked P10 to substantiate their position.

This is a suppression/misrepresentation of material facts in view of documents marked 2R1(A), 2R1(B), 2R2(A) and 2R2(B) which indicates that the letters marked P10 have in fact been cancelled which was suppressed by the Petitioners. The application of the Petitioners is liable to be dismissed in limine on that ground alone.

Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990

The learned SDSC for the Respondents submitted that the Petitioners have failed to comply with Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990 as they have failed to annexe the letters of appointment by which they were promoted to Class I. Rule 3(1)(a) requires every application made to this Court in terms of Article 140 of the Constitution to be accompanied by the originals or duly certified copies of documents material to such application.

The gravamen of the Petitioners case is the retiral benefits of the post of Class I of the SLTS. The letter of appointment is hence a material document and this application is liable to be dismissed on this ground alone.

No Enforceable Legal Right

The right of a retired Government servant to a pension is not one that can be enforced in a Court of law [*Gunawardena v. Attorney General* (49 NLR 359)]. The Minutes on Pensions do not create legal rights enforceable in the Courts [*Attorney General v. Abeysinghe* (78 NLR 361)]. Public servants have no absolute right to any pension or allowance under the regulations of the Minutes on Pension [*Jayarathne v. Wickremaratne and Others* (2003) 2 Sri.L.R. 276].

In *Perera v. National Housing Development Authority* [(2001) 3 Sri.L.R. 50 at 53] J.A.N. De Silva J. (as he was then) held:

“On the question of legal right it is to be noted that the foundation of -mandamus is the existence of the right. (*Napier Ex parte*⁽¹⁾). Mandamus is not intended to create a right, but to restore a party who has been denied his right to the enjoyment of such right.”

The Petitioners are seeking an enhancement of their retiral benefits by way of writ of mandamus which is not possible.

P5, P6 and P7 Not Applicable to the Petitioners

In any event P5, P6 and P7 are not applicable to the Petitioners.

By the time P5 was issued the Petitioners had already been promoted to Class I of the SLTS taking into consideration their period of service after having being placed on the highest salary step after absorption into Class 2 Grade I of the SLTS.

The fact that P5 is inapplicable to the Petitioners is clearly demonstrated by the fact they were placed in the second salary step of Class I with effect from 06.10.1994 and became eligible for salary increments due to Class I teachers from 1994 and were in fact paid increments since 1999 whereas in terms of P5 those promoted were not eligible for back wages and were entitled to be paid their salary together with the increments earned for service in Class I only with effect from 01.01.2005.

The Petitioners in their counter affidavit have sought to rely on a new document CA-8 to obtain relief. This is not the basis of the case pleaded for a writ of mandamus which the Respondents were called upon to answer and the Petitioners are not entitled to rely on it now [*Culasubhadra v. The University of Colombo and Others* (1985) 1 Sri.L.R. 244].

For all the foregoing reasons the application is dismissed but without costs in the circumstances of the case.

Judge of the Court of Appeal