

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

In the matter of an application for Writs of
Certiorari and Mandamus under and in
terms of Article 140 of the Constitution.

Accountant Service Association

Sri Lanka Institute of Advanced
Technological Education,

No.18/2, Ward Place,

Colombo 07.

Case No: CA(Writ) 493/2010

Petitioner

For and on behalf of the members below
mentioned

1. Koswatte Gamladdelage Thilakaratne
No.78/15, Wilegoda Road,
Kurunegala.
2. Willora Arachchige Anura
School Lane, Mawala Road,
Wadduwa.
3. Demuni Douglas
"Somiresa", Thotagamuwa,
Hikkaduwa.
4. Bogahawattage Saman Keerthi
No.304/3, Pelanwatta,
Pannipitiya.
5. Kandiah Rajeshwaran

No.79/2, Race Road,
Jaffna.

6. Oboda Mudalige Upul Shantha
No.53, National Housing Scheme,
Hiribura, Galle.
7. Thilakasiri Rathnayakege Mahinda
Rathnayake
Advanced Technological Institute,
Niwela, Weyangoda.
8. Brinda Nedoomaran
No.1, Vivekananda Avenue,
Colombo 06.
9. Sinnathambi Abdul Jiffry
No.199, Alivanniar Road,
Samanthurai.

Vs.

1. Hon. S.B Dissanayake
Minister of Higher Education,
Ministry of Higher Education,
No.18, Ward Place,
Colombo 07.
- 1A M. Kabir Hashim
Minister of Higher Education,
Ministry of Higher Education,
No.18, Ward Place,
Colombo 07.

1B Sarath Amunugama

Minister of Higher Education,
Ministry of Higher Education,
No.18, Ward Place,
Colombo 07.

1C Mahinda Samarasinghe

Minister of Skills Development and
Vocational Training,
Ministry of Skills Development and
Vocational Training,
Nipuna Plyasa,
No.354/2, Elvitigala Mawatha,
Colombo 05.

1D Lakshman Kiriella

Minister of Higher Education and Highways,
Maganaguma Maha Medura,
No.216, Dencil Kobbekaduwa Mawatha,
Koswatta, Battaramulla.

1E Dr. Wijeydasa Rajapaksha

Minister of Higher Education and Cultural
Affairs,
No.18, Ward Place,
Colombo 07.

2. The Secretary

The Ministry of Higher Education,
No.18, Ward Place,
Colombo 07.

3. The Secretary
The Ministry of Finance,
General Treasury,
Colombo 01.
4. Sri Lanka Institute of Advanced
Technological Education,
No.18/2, Ward Place,
Colombo 07.
5. The Director General,
Sri Lanka Institute of Advanced
Technological Education,
No.18/2, Ward Place,
Colombo 07.
6. The Director General
Department of Management Service,
7. The Ministry of Finance,
General Treasury,
Colombo 01.
8. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before: Janak De Silva J.

Counsel:

Razik Zarook P.C. with Rohana Deshapriya, Chanakya Liyanage and Thilak Wijesinghe for the Petitioner

Yuresha Fernando SSC for the Respondents

Written Submissions tendered on:

Petitioner on 05.11.2018

Respondents on 22.02.2019

Argued on: 14.03.2019

Decided on: 24.05.2019

Janak De Silva J.

The Petitioner is a duly registered trade union under section 11 of the Trade Union Ordinance No. 14 of 1935 as amended from time to time bearing registration no. 8007. The Petitioner has filed this application on behalf of 9 members of its trade union who are accountants of the Sri Lanka Institute of Advanced Technological Education.

The Petitioner states that its members from the inception were placed at a higher salary scale than the accountants in the public service as the members of the Petitioner are not entitled to the government pension scheme after retirement and to provide for the deduction of a higher amount from their basic salary for the provident fund.

The complaint of the Petitioner arises from the Management Services Circular No. 30 marked A11 dated 22.09.2006 by which the incremental amounts of the salary scales of the statutory sector were divided into 25 categories. The Petitioner contends that its members were placed on the salary scale of JM-1-2(20490-10x325-18x475-32290-PM) with effect from 01.01.2006 when in fact they should have been placed on the salary scale MM-1-1-2006 (25640-3x665-7x735-

15x925-46955). The Petitioner further states that by the said circular the government accounts were placed at the salary scale 6-2006 SL-1-2006 (22935-10x645-8x790-17x1050-53555).

According to the Petitioner as a result of this restructuring with effect from 01.01.2006:

- (a) The members of the Petitioner were not considered Staff Grade Service
- (b) The higher basic salary scale entitled to them was deprived
- (c) They were not entitled to the privileges and benefits enjoyed by them previously

The Management Services Circular No. 30 further directed the public corporations and statutory bodies to prepare the new salary structures for each of those entities in accordance with the said circular and submit for approval. The approved re-categorisation of the employees of Sri Lanka Institute of Advanced Technological Education is contained in letter dated 20.08.2008 (A15) sent by the Department of Management Services and it is this document that the Petitioner seeks to quash by way of a writ of certiorari.

However, by the time this matter was argued the members of the Petitioner were placed on the salary scale MM-1-1 and accordingly the Petitioner in the written submissions states that the only relief pursued is limited to prayer "d" of the petition which reads:

"issue a mandate in the nature of a writ of mandamus compelling the 1st to 7th Respondents to grant due benefits with all the earned increments with effect from 1st January 2006 applicable to the scale of MM-1-1 salary scale".

The Petitioner contends that the members of the Petitioner had a legitimate expectation of being placed on the correct salary scale with effect from 01.01.2006 and rely on the decisions in *Karuppanapillai and two others v. Visvanathan and seven others* [(2010) 1 Sri.L.R. 240], *Multinational Property Development Ltd., v. Urban Development Authority* [(1996) 2 Sri.L.R. 51] and *Rajakaruna and Others v. Premadasa, Director General, Rubber Development Department and Others* [S.C.(F/R) 32/2014; S.C.M. 16.06.2017].

Scope of Writ of Mandamus

It is trite law that to issue a writ of mandamus there must be a statutory or public duty. [*De Alwis v. De Silva* (71 N.L.R. 108); *Weligama Multi Purpose Cooperative Society Ltd. v. Chandradasa Daluwatte* (1984) 1 Sri.L.R. 195; *Hakmana Multi Purpose Cooperative Society Ltd. v. Ferdinando* (1985) 2 Sri.L.R. 272; *Piyasiri v. Peoples Bank* (1989) 2 Sri.L.R. 47; *Sannasgala v. University of Kelaniya* (1991) 2 Sri.L.R. 193; *Samaraweera v. Minister of Public Administration* (2003) 3 Sri.L.R. 64].

In *Ratnayake and Others v C.D. Perera and Others* [(1982) 2 Sri. L.R. 451 at 456] Sharvananda, J. (as he was then) held:

"The general rule of mandamus is that its function is to compel a public authority to do its duty. The essence of mandamus is that it is a command issued by the Superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. "

In *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd.* [(2005) 1 Sri. L.R. 89 at 93] J.A.N. De Silva J. (as he was then) held:

"There is rich and profuse case law on mandamus on the conditions to be satisfied by the applicant. Some of the condition's precedent to the issue of mandamus appear to be:

(a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought (*R. v Barnstaple Justices exp. Carder*. The foundation of mandamus is the existence of a legal right (*Napier ex parte*).

(b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.

(c) The legal right to compel must reside in the applicant himself (*R. v Lewisham Union*)

- (d) The application must be made in good faith and not for an indirect purpose.
- (e) The application must be preceded by a distinct demand for the performance of the duty.
- (f) The person or body to whom the writ is directed must be subject to the jurisdiction of the court issuing the writ.
- (g) The Court will as a general rule and in the exercise of its discretion refuse writ of mandamus when there is another special remedy available which is not less convenient, beneficial and effective.
- (h) The conduct of the applicant may disentitle him to the remedy,
- (i) It would not be issued if the writ would be futile in its result.
- (j) Writ will not be issued where the respondent has no power to perform the act sought to be mandated."

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:

"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".

Hence it is incumbent on the Petitioner to establish that there is a statutory or public duty on the 1st to 7th Respondents to grant the members of the Petitioner benefits with all the earned increments with effect from 1st January 2006 applicable to the scale of MM-1-1 salary scale.

The Petitioner contends that the entitlement of its members to be absorbed into the MM-1-1 category with effect from 01.01.2006 arises from Management Services Circular No. 30 (A11). This is misconceived both in fact and in law.

Factually the Management Services Circular No. 30 (A11) refers to 01.01.2006 as the starting date for the salary revision of the public service. The members of the Petitioner are not members of the public service but employees of a public corporation or statutory board. The said circular does not specify a date on which the salary revision of the employees of a public corporation or statutory board must take effect.

As a matter of law, a circular not referable to the exercise of any delegated legislative power does not prescribe any duty having statutory potential [*Weligama Multi Purpose Cooperative Society Ltd., v. Chandradasa Daluwatta* (1984) 1 Sri.L.R. 195 at 200]. The Petitioner has not referred to any delegated legislative power by which A11 was made.

Furthermore, in *K.S. De Silva v. National Water Supply and Drainage Board and another* [(1989) 2 Sri.L.R. 1 at 3] G.P.S. De Silva J. (as he was then) held:

"On a scrutiny of the averments in the petition, it is clear that the petitioner is applying for a writ of Mandamus on the 2nd respondent so that he may be admitted to the office of Accountant, Grade IV. It seems to me that the precise question which arises for consideration is whether such office is a public office, for if it is an appointment which is essentially contractual in character, the writ does not lie. The principle is succinctly stated by H. W. R. Wade: "A distinction which needs to be clarified is that between public duties enforceable by Mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by Mandamus which in the first place is confined to public duties ..." (Administrative Law, 5th Ed. Page 635)"

The obligation to pay the salary and other emoluments of the members of the Petitioner arises from the contract of employment between the said members and Sri Lanka Institute of Advanced Technological Education.

In *Rajakaruna and Others v. Premadasa, Director General, Rubber Development Department and Others* (supra) the Supreme Court ordered the back dating in a fundamental rights application and hence that decision is not relevant to this application for a writ of mandamus.

In any event the expectation that the law will protect is only a legitimate expectation and not any expectation. The foundation of the case of the Petitioner arises from the so-called right of their members to be placed on the same level as the accountants in the Sri Lanka Accountants Service. They rely on public administration circulars 2/97 and 2/97(ii) which are not applicable to the members of the Petitioner serving the Sri Lanka Institute of Advanced Technological Education.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal