

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

Nadarajah Sushatharan
'N Rajah', Mariyamman Kovil Road,
Arayampathy – 2, Batticaloa.

Petitioner

Case No. C. A. (Writ) 413/2017

Vs.

1. Mrs. K. H. A. Meegasmulla
Commissioner General of Excise,
Department of Excise,
No. 353, Kotte Road, Rajagiriya.

1A. Mr. Ranasinghe Semasinghe
Commissioner General of Excise,
Department of Excise,
No. 353, Kotte Road, Rajagiriya.

Substituted 1A Respondent

2. Thamara D. Perera
Additional Commissioner General of Excise
(Revenue Policy and Administration),
Department of Excise,
No. 353, Kotte Road, Rajagiriya.

2A. Mr. B. M. S. Bandara
Additional Commissioner General of Excise
(Revenue Policy and Administration),
Department of Excise,
No. 353, Kotte Road, Rajagiriya.

Substituted 2A Respondent

3. Dharmasena Dissanayake
Chairman,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
4. Prof. Hussain Ismail
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
5. D. Shirantha Wijayatilaka
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
6. Dr. Prathap Ramanujam
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
7. V. Jegarasasingam
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
8. Santi Nihal Seneviratnem
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

9. S. Ranugge
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
10. D. L. Mendis
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
11. Sarath Jayathilaka
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
12. H. M. G. Seneviratne
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.
- 12A. Mr. M. A. B. Daya Senarath
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

Substituted 12A Respondent

13. H. H. D. Jayawardena
Superintendent of Excise (Acting),
Kallady, Batticaloa.

Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

Sanjeewa Jayawardena P.C. with Lakmini Warusevitane for the Petitioner

Milinda Gunathilaka SDSG for the Respondents

Argued On: 19.03.2019

Written Submissions Filed On:

Petitioner on 10.06.2019 and 16.12.2019

Respondents on 17.10.2019

Decided On: 29.05.2020

Janak De Silva J.

The Petitioner is a Superintendent of Excise in the Excise Department. At all times materials to this application the Petitioner was attached to the Superintendent's office in Ampara. In addition, he was acting as Superintendent of Excise-Batticaloa.

By letter dated 10.08.2017 (P15) the Petitioner requested the 1st Respondent to transfer him permanently to the Batticaloa office as it was vacant. The 2nd Respondent by letter dated 22.09.2017 (P17) informed that the request cannot be granted at that point of time.

The Petitioner then submitted a detailed appeal dated 20.10.2017 (P18) to the 1st Respondent. By letter dated 31.10.2017 (P19), the 1st Respondent informed the Petitioner that his request cannot be accommodated since a Superintendent of Excise had been appointed to the Batticaloa office with the approval of the Public Service Commission (PSC).

Upon further representations made by the Petitioner (P21) the 1st Respondent again refused the request made by the Petitioner (P22).

Although the Petitioner has sought several reliefs in the petition, on 19.03.2019 when this application was taken up for argument, the learned President's Counsel for the Petitioner informed that he is limiting the relief claimed to prayers C, D and F of the petition which reads as follows:

- C. Grant and issue a mandate in the nature of Writ of Mandamus, directing the 3rd to 12th Respondents, constituting the Public Service Commission, to duly consider and to thereafter, OBJECTIVELY DETERMINE the Petitioner's requests for transfer to Batticaloa, dated 10.08.2017 and/or the Appeal submitted in this regard dated 20.10.2017, produced marked as P15 and P18 strictly according to law, including principles of Administrative Law and due process and the Rule of Law;
- D. Grant and issue a mandate in the nature of Writ of Mandamus directing the 1st Respondent to forthwith forward to the Public Service Commission, all documents and necessary files and also the Petitioner's appeals and all requests made by him for transfer to Batticaloa, in order to facilitate DUE CONSIDERATION AND OBJECTIVE DETERMINATION of the same, strictly in accordance with the law, by the 3rd to 12th Respondent as constituting the Public Service Commission,
- F. Grant and issue a mandate in the nature of Writ of Certiorari, quashing the decision and/or decisions of the 1st Respondent, as reflected in
 - I. the letter dated 31.10.2017 marked P19,
 - II. the letter dated 02.11.2017 marked P22.

Power of Transfer

In terms of Article 55(1) of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers is vested in the PSC. The PSC is empowered in terms of Article 57(1) of the Constitution to delegate to a public officer its powers of, inter alia, transfer of such category of public officers as are specified by the PSC.

The learned Senior Deputy Solicitor contended that the power of transfer in relation to the Petitioner has been delegated by the PSC to the Secretary to the Ministry of Finance (R14). The learned President's Counsel for the Appellant contended that what has been delegated to the Secretary is limited to making transfers in terms of annual transfer schemes and that all other powers pertaining to transfer is retained with the PSC. This submission is based on the Scheme of Transfer (R15).

I am not inclined to accept this proposition. The relevant column in R14 reads "Transfer according to schemes approved by the Public Service Commission". Transfer is not limited to annual transfers. But all transfers must be in accordance with a scheme of transfer approved by the PSC. This is further corroborated by clause 02. of the Scheme of Transfer (R15) which states that "all transfers will be done by the Secretary to the Ministry of Finance and Planning according to schemes of transfer approved by the PSC". Merely because the PSC has not approved a scheme of transfer does not mean that the Secretary is not vested with the power of transfer. He has the power but cannot exercise it in the absence of an approved scheme of transfer.

Therefore, I hold that the power of transfer of the Petitioner was delegated by the PSC to the Secretary, Ministry of Finance and Planning. However, in the present case, the 1st Respondent has sought to exercise it by P19 and P22 and thereby acted without jurisdiction. Hence the decisions contained letters dated 31.10.2017 (P19) and 02.11.2017 (P22) are ultra vires.

Article 61A of the Constitution

The learned Senior Deputy Solicitor General contended that Article 61A of the Constitution ousts the jurisdiction of this Court to grant any relief in relation to the writs of certiorari sought by the Petitioner.

I am of the view that this constitutional objection to the writ of certiorari must fail.

Undoubtedly, Article 61A of the Constitution is a constitutional ouster and can therefore oust the jurisdiction of this Court created by Article 140 of the Constitution. But it does not cover a situation where the decision maker was not exercising any power delegated by the PSC. This was the *application* of Article 61A that was resorted to by Marsoof J. in *Ratnasiri and Others v. Ellawala and Others* [(2004) 2 Sri.L.R. 180 at 196] when he held:

"In this context, it is relevant to observe that although it is common ground that 1st to 3rd Respondents are public officers, there is no evidence to establish that they have been delegated any authority by the Public Service Commission under Article 56 or 57 of the Constitution. This is important in the context of Article 61A of the Constitution as it only seeks to shut out the jurisdiction of court with respect to any order or decision made by a Committee of the Public Service Commission or any public officer, "in pursuance of any power or duty ...delegated to a Committee or public officer, under this Chapter or under any other law."

Accordingly, I issue writs of certiorari quashing the decision and/or decisions of the 1st Respondent, as reflected in the letter dated 31.10.2017 marked P19 and the letter dated 02.11.2017 marked P22.

Writ of Mandamus

This leaves the question of writ of mandamus sought by the Petitioner to be considered. Here again the learned Senior Deputy Solicitor General contended that Article 61A of the Constitution ousted the jurisdiction of this Court to grant the writs of mandamus sought for by the Petitioner.

The learned President's Counsel for the Petitioner countered by contending that he is not calling in question any order or decision made by the PSC, which is what according to him is prohibited by Article 61A of the Constitution, but seeking relief in the form of a writ of mandamus to compel the PSC to consider and determine the request for transfer made by the Petitioner in law. He relied on *K.T.S.N. De Silva and Others v. Salinda Dissanayake, Minister of Land and Minor Agricultural Export Produce and Others* [(2003) 1 Sri.L.R 52]. Further reliance was placed on (1) *Karavita and Others* and (2) *Welikanna v. Inspector General of Police and Others* [(2002) 2 Sri.L.R. 287], *K.G.C. Priyadarshini v. Commissioner General of Inland Revenue and Others* [CAWA 540/2011, C.A.M. 29.06.2012], *Sisil Wijitha and 27 Others v. N.K. Illangakoon, Dr, Dayasiri Fernando, Chairman, Public Service Commission and 12 Others* [CAWA 75/2013, C.A.M. 13.03.2018].

While reserving my position on whether a writ of mandamus can be granted where the PSC has not taken any decision, this matter can be decided on another fundamental ground.

It is trite law that to issue a writ of mandamus there must be a public or statutory 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 view of my conclusion that the power of transfer of the Petitioner has been delegated to the Secretary, Minister of Finance and Planning, there is no statutory or public duty on the PSC to consider and objectively determine the transfer application of the Petitioner.

There is another reason why the prayer for the writ of mandamus must fail. It is trite law that for mandamus to lie, the administrative body must be called upon to perform the public or statutory duty which it has failed to perform. In other words there must be a demand and refusal [per Sripavan J. (as he was then) in *Kahandawela v. National Housing and Development Authority and Another* (2004) 2 Sri.L.R. 176 at 180].

For all the foregoing reasons, the application is partly allowed to the extent specified above.

Parties shall bear their costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal