

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

In the matter of an application for a Writ of
Mandamus in terms of Article 140 of the
Constitution.

Hemantha Chamindra Ovitigama

No.177, Kalapaluwa,

Rajagiriya.

Petitioner

Case No: CA(Writ) 1009/2008

Vs.

1. Inspector General of Police
Department of Police,
Police Headquarters,
Colombo 01.
2. The Secretary
Ministry of Defence,
Baladaksha Mawatha,
Colombo 03.
3. The Commissioner General of Examinations
Department of Examinations,
Battaramulla.
4. Justice Priyantha Perera
Chairman
5. Gunapala Wickremaratne
Member

6. Prof. M.S. Mookiah
Member
7. Srma Wijeyratne
Member
8. Prof. Mendis Rohanadeera
Member
9. Dr. Bernard Soyza
Member
10. Palitha M. Kumarasinghe
Member
11. Prof. Dayasiri Fernando
Member
12. W.P.S. Jayawardene
Member
All of the Public Service Commission,
No.48, Vauxhall Street,
Colombo 02.
- 4A Sathya Hettige PC
Chairman
- 5A S.C. Mannapperuma
Member
- 6A Ananda Seneviratne
Member
- 7A N.H. Pathirana
Member
- 8A S. Thillanadarajah
Member
- 9A A. Mohamed Nahiya
Member

10A Kanthi Wijethunga

Member

11A Sunil S. Sirisena

Member

12A Dr. I.M. Soysa Gunasekera

Member

All new members of the Public Service

Commission

No.177, Nawala Road,

Narahenpita,

Colombo 05.

4B Dharmasena Dissanayake

Chairman

5B Salam Abdul Wahid

Member

6B Shirantha Wijayathilaka

Member

7B Prathap Ramanujam

Member

8B V Jegarasingham

Member

9B Santi Nihal Seneviratne

Member

10B S Ranugge

Member

11B D.L Mendis

Member

12B Sarath Jayathilaka

Member

All new members of the Public Service

Commission

No.177, Nawala Road,

Narahenpita,

Colombo 05.

13. Neville Piyadagama

Chairman

14. Chandradasa Nanayakkara

15. Ven. Elle Gunawansa

16. Charmaine Madurasinghe

17. M.M.M Majood

18. R Sivaraman

19. Nihal Jayamanna

All members of the National Police

Commission

Rotunda Tower, Level 3,

No.109, Galle Road,

Colombo 03.

13A Senaka Walgampitiya

Chairman

14A Ven. Elle Gunawansa

15A D Dissanayake

16A Charmaine Madurasinghe

17A R Sivaraman

18A M.M.M Mawjood

19A Newton Gunaratne

All members of the National Police

Commission

Block No.9, BMICH Premises,

Buddhaloka Mawatha,
Colombo 07.

13B Prof. Siri Hettige
Chairman

14B P.H Manathunga

15B Savithree Wijesekara

16B Y.L.M Zawahir

17B Anton Jeyanadan

18B Thilak Kollure

19B Frank De Silva

All members of the National Police
Commission

Block No.9, BMICH Premises,
Buddhaloka Mawatha,
Colombo 07.

20. Nimal P Punchihewa
Additional Secretary,
Human Rights Commission,
No.36, Kinsey Road,
Colombo 08.

Respondents

Before: Janak De Silva J.

Counsel:

M.A. Sumanthiran P.C. with E. Tegal and Shanthi Silva for the Petitioner

Suranga Wimalasena S.S.C. for the Respondents

Written Submissions tendered on:

Petitioner on 18.12.2018

Respondents on 06.12.2018

Argued on: 05.03.2019

Decided on: 10.05.2019

Janak De Silva J.

The Petitioner has sought a writ of mandamus compelling the 4th to 19th Respondents to promote the Petitioner to the rank of Assistant Superintendent of Police with effect from 1st January 2003. The 4th to 19th Respondents are members of the Public Service Commission (PSC) and the National Police Commission (NPC).

The learned Senior State Counsel has raised a preliminary objection namely whether in view of the provisions of Articles 61A and 155C of the Constitution this Court has the jurisdiction to grant the relief prayed for by the Petitioner. Parties agreed that this matter can be disposed by way of written submissions already filed by parties.

The wordings in Articles 61A and 155C of the Constitution changed with the 19th Amendment to the Constitution and therefore the question arises whether the preliminary objection must be decided on the provisions as they stand now or as they stood when this application was made in 2008. The Petitioner submits that the relevant provisions are as it stood in 2008 whereas the learned Senior State Counsel has quoted the provisions as they stand now.

The general principle is that the rights of the parties must be determined as at the date of institution of proceedings or action. [*Ponnammah v. Arumugam* (8 N.L.R. 223 at 226), *Silva v. Nona Hamine* (10 N.L.R. 44), *Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Silva v. Fernando et al* (15 N.L.R. 499), *Jamal Mohideen & Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272), *Shariff et al v. Marikkar et al* (27 N.L.R. 349), *Eminona v. Mohideen* (32 N.L.R. 145), *De Silva et al v. Goonetilleke et al* (32 N.L.R. 217), *De Silva v. Edirisuriya* (41 N.L.R. 457), *Lenorahamy v. Abraham* (43 N.L.R. 68), *Kader Mohideen & Co. Ltd., v. Gany* (60 N.L.R. 16), *Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267), *Talagune v. De Livera* (1997) 1 Sri. L. R. 253, *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235, *Lalwani v. Indian Overseas Bank* (1998) 3 Sri. L. R. 197, *Jayaratne v. Jayaratne and another* (2002) 3 Sri. L. R. 331, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341].

However, it is not an immutable principle and courts have recognized certain exceptions to the general rule.

In *Sabapathipillai et al v. Vaithialingam* (40 N.L.R. 107) it was held that a trustee whose term of office expired during the pendency of an action brought by him, is not entitled to continue the action. Similar approach was taken in *Appusinno v. Balasuriya* (16 N.L.R. 385) by Ennis J. when he held that the Buddhist Temporalities Ordinance gave no power to appoint a provisional trustee when the office became vacant by expiration of time, that the plaintiff had no status to continue the action the moment he ceased to be trustee and that the principle that a case must be decided as at the time of the institution of the suit cannot be applied to this case.

In *Thangavadivel v. Inthiravathy* (53 N.L.R. 369) where proceedings by way of summary procedure under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance were instituted by a wife against her husband for the return of certain jewelry, but while the inquiry was proceeding, a decree absolute was entered in a divorce case dissolving the marriage between the spouses, it was held that the plaintiff, having ceased to be the wife of the defendant during the pendency of the inquiry, lost her status to continue the proceedings and the general rule that the claims of the litigants are to be ascertained as at the commencement of the action would not

be applicable in such a case. In *Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others* [S.C. No. 69/92, S.C.M. 05.11.1993] G.P.S. De Silva C.J. held (at page 5) that the general principle of law that the right of parties are determined as at the date of action has no application in the statutory context. In *Master Divers (Pvt) Ltd. v. Karunaratne and others* [CA (PHC) APN 140/2012, C.A.M. 09.08.2018] I held that when entering judgment in a foreign currency the rupee value at the exchange rate prevailing at the date of payment together with legal interest should also be entered therein. Furthermore, I have also held in *Abeywickrema and others v. Mayor, Badulla Municipal Council and others* [CA(PHC) 111/2011; C.A.M. 22.02.2019] that where the rights of the parties have changed as a result of legal proceedings, the general principle has no application.

In the instant case the exceptions do not apply and therefore I agree with the learned Presidents Counsel that the provisions this Court must consider in its deliberation of the preliminary objection is the relevant provisions as they stood in 2008 which reads as follows:

“61A. Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) 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.”

“155C(1) Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission or a Committee, in pursuance of any power or duty, conferred or imposed on such Commission or Committee under this Chapter or under any other law.”

Article 61A of the Constitution

In *Atapattu v. People's Bank* [(1997) 1 Sri.L.R. 208] the Supreme Court held that the jurisdiction of the Court of Appeal set out in Article 140 of the Constitution can only be ousted by a constitutional provision. Article 61A of the Constitution is an example of such an ouster.

The learned President's Counsel for the Petitioner submits that ouster clauses ought to be restrictively approached particularly in situations where it is alleged that fundamental rights have been infringed and relief is sought to protect a fundamental right as is the case in the instant matter. He has cited several local and foreign judgments in support of his contention and in particular *Anthony Leroy Austin v. The Attorney General of Barbados* (No. 2161 of 2003) and *Public Service United Nurses Union v. Minister of Public Administration* [(1988) 1 Sri.L.R. 229].

The approach this Court should take to the constitutional ouster in Article 61A of the Constitution was dealt with in great detail by Marsoof J. in *Ratnasiri and others v. Ellawala and others* [(2004) 2 Sri.L.R. 180 at 190] where he held:

"In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service...I have no difficulty in agreeing ... that this Court must apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

Furthermore, the ouster clause in Article 61A of the Constitution does not insulate the PSC from all forms of judicial supervision as the fundamental rights jurisdiction vested in the Supreme Court by Article 126 of the Constitution is preserved in all its vigour and any party whose fundamental rights are infringed or is in imminent danger of infringement has recourse to that jurisdiction.

The learned President's Counsel further submits that the scope of the ouster clause is limited to the preclusion of an evaluation of merits of the decision and not to the preclusion of the jurisdiction of this Court to review whether the decision is arbitrary, violates natural justice and/or violates constitutional principles. I am unable to accept this position as doing so would be a frontal attack on a clear and precise constitutional ouster of the jurisdiction of this Court. A court cannot do indirectly what it is prohibited from doing directly [*Bandaranaike v. Weeraratne and Others* (1981) 1 Sri.L.R. 10 at 16].

I hold that the writ of mandamus sought by the Petitioner against the members of the PSC cannot be maintained in view of Article 61A of the Constitution.

Article 155C (1) of the Constitution

The wording in Article 155C (1) of the Constitution closely follows the wording in Article 61A and hence the application of Article 61A and its ambit as dealt in *Ratnasiri and others v. Ellawala and others* (supra) is instructive in the application of Article 155C (1) of the Constitution to the instant matter.

In this context it is important to consider Article 155G(1)(a) of the Constitution which states that the appointment and promotion of police officers other than the Inspector General of Police is vested in the NPC. The Petitioner has sought a writ of mandamus compelling members of the NPC to promote the Petitioner to the rank of Assistant Superintendent of Police with effect from 1st January 2003. I hold that this Court is precluded from granting such relief in view of Article 155C (1) of the Constitution.

The Petitioner has in the written submissions alternatively moved Court to refer this matter to the Supreme Court as per Article 126(3) of the Constitution as an infringement of the Petitioner's fundamental rights under Article 126(2) of the Constitution has occurred.

In *Shanthi Chandrasekaram v. D.B. Wijethunga and Others* [(1992) 2 Sri. L. R. 293 at 297] Fernando J. stated:

“Article 126(1) confers sole and exclusive jurisdiction in respect of infringements of fundamental rights, and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from this Court. On the other hand, there could be transactions or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141, and from this Court by a fundamental rights application under Article 126. Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical "causes of action" arising from the same transaction, unless there is express provision permitting joinder. The prevention, in such circumstances, of a multiplicity of suits (with their known concomitants) is the object of Article 126(3).” (emphasis added)

I refuse the said application of the Petitioner.

The preliminary objections raised on behalf of the Respondents are upheld and the application dismissed with costs.

Judge of the Court of Appeal