

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

SC FR Application No. 457/2008

*In the matter of an application
under and in terms of Article 126
of the Constitution.*

*Poddiwela Hewage Thelma Kumari
Hemachandra,
No. 507/1, Depot Road, Elpitiya.*

Petitioner

Vs.

- 1 *Elpitiya Pradeshiya Sabha,
Elpitiya.*
- 2 *Ranjith Jayasinghe,
The Chairman,
Elpitiya Pradeshiya Sabha,
Elpitiya.*
- 3 *D. Nilantha Jayaruk Panditha,
Acting Secretary,
Elpitiya Pradeshiya Sabha,
Elpitiya.*
- 4 *Provincial Commissioner of Local
Government,
Southern Province,
6th Floor, District Secretariat,
Galle.*
- 5 *Attorney General,
Department of Attorney General,
Colombo 12.*

Respondents

Before: Amaratunga, J.
Ekanayake J.
Imam, J.

Counsel: Upul Kumarapperuma with Suranga Munasinghe
for the petitioner.
Sagara Kariyawasam for the 1st, 2nd and
3rd respondents.
Rajitha Perera S.C. for 4th and 5th respondents.

Argued on: 20.02.2009

Decided on: 31.03.2011

Amaratunga J.

The petitioner, by her application dated 22.10.2008, has sought relief for the alleged violation of her fundamental right by the 2nd and the 3rd respondents by not allowing her to perform the duties and functions of the Secretary of the Elpitiya Pradesheeya Saba, a post to which the petitioner was appointed by the Southern Province Public Service Commission. This Court has granted leave to proceed for the alleged violation of the petitioner's fundamental right guaranteed by Article 12(1) of the Constitution.

According to the averments set out in the petition, the petitioner joined the Public Service in 1993 as a Class 11 (b) Officer of the Government General Clerical Service. In 1996, on the results of an examination she was promoted to Class 11 (a) of the same service. She was absorbed in to the Provincial Public Service of the Southern Province with effect from 19.6.2001. She was absorbed into a Class (II) post in the Southern Province Management Assistants Service from 01.01.2004. On the results of a limited competitive examination held in 2007, the petitioner was promoted to the Supra Grade of the Southern Province Management Assistants Service. The Provincial Public Service Commission, by its letter dated 16.7.2008 (Document P5) appointed the petitioner to the post of Secretary, Elpitiya Pradesheeya Saba with immediate effect. This

appointment letter was copied to the Secretary, Pradesheeya Saba Elpitiya. At the time the petitioner was appointed to the post of Secretary, Elpitiya Pradesheeya Saba, there was no officer holding the substantive post of the Secretary of the said Saba. The 3rd respondent was acting in the post of Secretary until the appointment of a suitable person to that post.

The 3rd respondent Jayaruk Panditha was a graduate trainee recruited by the Government. The Southern Provincial Council has appointed him to a post of Development Assistant (Local Government) of the Southern Province Public Service with effect from 2.10.2000 and attached him to the Elpitiya Pradesheeya Saba. When the post of the Secretary of the Elpitiya Pradesheeya Saba fell vacant in 2006, the Provincial Public Service Commission of the Southern Province has appointed the 3rd respondent to act as the Secretary of the said Pradesheeya Saba from 01.02.2006 until a suitable person is appointed to that post. (Document 3R3 dated 22.02.2002)

When the term of office of the elected members of the Elpitiya Pradesheeya Saba expired on 15.4.2006, the Commissioner of Local Government of the Southern Province, by letter dated 17.4.2006 (Document 3R2) has informed the Secretary of the Elpitiya Pradesheeya Saba that until the members of the Elpitiya Pradesheeya Saba are elected again, the powers of the Pradesheeya Saba would be conferred upon the Secretary and that he should act accordingly. Thus, the 3rd respondent who was at that time functioning as the Acting Secretary of the Elpitiya Pradesheeya Saba from 01.02.2006, commenced to perform the powers and functions of the said Saba from 17.4.2006.

It appears that due to a certain legal problem relating to the electoral process for electing the members of the Elpitiya Pradesheeya Saba, several elected members of the said Saba who were nominated as Chairman declined to accept that office. On 16.6.2008 the Returning Officer for the Elpitiya Pradesheeya Saba acting in terms of section 65A(1) of the Local Authorities Elections Ordinance issued a Gazette Notification declaring that the 2nd respondent Ranjith Jayasinghe has been elected as the Chairman of the Elpitiya Pradesheeya Saba. One month later, on 16.7.2008 the petitioner was appointed to the Post of Secretary of the Elpitiya Pradesheeya Saba.

According to the averments contained in the petition of the petitioner, when she reported at the office of the Elpitiya Pradsheeya Saba on 21.07.2008 to assume duties of her office, the 3rd respondent who was covering up the duties of the Secretary informed the petitioner that he would hand over duties to the petitioner within two days. After two days the 3rd respondent sought further one week's time to hand over duties to the petitioner.

According to the petitioner she was given a table and a chair in the accounts division but she was not given a duty list pertaining to her designated office and she was not given any duty pertaining to her office. The 3rd respondent continued to perform the duties of the Secretary.

Three weeks after her appointment the 2nd respondent informed the petitioner that he would not transfer the 3rd respondent and requested the petitioner to apply for a transfer to the Elpitiya Hospital, but the petitioner refused to accede to this request.

The petitioner has stated that she made a complaint to the Human Rights Commission, Provincial Public Service Commission of the Southern Province and the Ombudsman regarding the conduct of the 2nd and 3rd respondents in not allowing her to perform the duties of the office of the Secretary of the Pradesheeya Saba. The petitioner's complaint is that by their conduct in not allowing the petitioner to perform the duties of the office of the Secretary, the 2nd and 3rd respondents have violated the fundamental right guaranteed by Article 12(1) of the Constitution.

The 2nd and 3rd respondents have filed objections to the petitioner's application. The 2nd respondent, the Chairman of the Pradesheeya Saba in his affidavit having admitted that the petitioner had been appointed as the Secretary of the Elpitiya Pradesheeya Saba and that she reported for duty on 21.7.2008 has stated in paragraph 7 of his affidavit that "the petitioner was clearly informed about the prevailing situation in the Elpitiya Pradesheeya Saba which is stated in the foregoing paragraphs and until the matter is sorted out the petitioner was requested not to assume duties of the Secretary of the Pradesheeya Saba of Elpitiya , which the petitioner initially agreed."

In the 2nd respondent's affidavit, the paragraphs preceding the aforementioned paragraph 7 do not refer to the "prevailing situation" informed to the petitioner for requesting her not to assume the duties of the post of Secretary. Thus paragraph 7 of the 2nd respondent's affidavit, when read with the preceding paragraphs of the affidavit, does not disclose the details of the "prevailing situation" on which the petitioner was requested not to assume duties as the Secretary of the Pradesheeya Saba. Thus the said paragraph 7 of the 2nd respondent's affidavit constitutes a clear admission of the petitioner's allegation that when she reported to the Pradesheeya Saba for duty on 21.7.2008 she was not handed over the duties of her office.

The 2nd respondent in his affidavit has stated that there were several development projects commenced by the 3rd respondent during the time the 3rd respondent discharged the duties of the Chairman of the Pradesheeya Saba and that he (the 2nd respondent) as the new Chairman of the Pradesheeya Saba wanted the assistance and the services of the 3rd respondent to complete those projects and that he made representations to the Provincial Public Service Commission, to the Chief Minister of the Southern Province and to the Governor of the Province to keep the 3rd respondent in the Post of Secretary of the Pradesheeya Saba.

However this is not an acceptable excuse for not allowing the petitioner to exercise the powers and functions of her office and allowing the 3rd respondent to usurp the powers and functions of the petitioner. When the petitioner was appointed to the post of Secretary of the Pradesheeya Saba, the acting appointment given to the 3rd respondent to act in the post of Secretary automatically came to an end as the acting appointment of the 3rd respondent was to act as the Secretary until the appointment of a suitable person to the substantive post.

After the petitioner's appointment the 3rd respondent was not transferred out of the Elpitiya Pradesheeya Saba and he remained in the same institution holding his substantive post of Development Assistant. Thus the 3rd respondent was available in the same Pradesheeya Saba to assist the 2nd respondent to carry out the development projects commenced by the 3rd respondent.

When the documents annexed to the 2nd respondent's affidavit are examined it becomes clear that the 2nd respondent did not like the petitioner's appointment. According to the 2nd respondent's letter to the Provincial Public Service Commission of the Southern Province dated 28.7.2008 (one week after the petitioner reported for duty at the Elpitiya Pradesheeya Saba) requesting the Commission to transfer the petitioner out of the Pradesheeya Saba, he (the 2nd respondent) has stated that the appointment of a woman to attend to the development work and the needs of the people is liable to create problems. It also states that the petitioner has already developed conflicts with the members of the Pradesheeya Saba. This appears to me as a deliberate falsehood. After the petitioner reported for duty at the Pradesheeya Saba on 21.7.2008 she was not given any work and she had to just sit and wait at the table given to her. In such circumstances there is no occasion for her have any conflicts with the members of the Pradesheeya Saba. The 2nd respondent has failed to provide any material to substantiate his allegation against the petitioner.

The 2nd respondent in his affidavit has also stated that he requested the petitioner to get a transfer to the Elpitiya Hospital as the Administrative Officer and the petitioner agreed to that. However the petitioner in her petition, affidavit and in the counter affidavit has denied this and has stated that she did not agree to the 2nd respondent's suggestion to go as the Administrative Officer of the Elpitiya Hospital.

The 2nd respondent has also stated in his affidavit that the Governor of the Southern Province has informed the petitioner not to assume duties till 31.12.2008 and this was stated by the Governor on 19.11.2008 in an interview given to a private broadcasting channel. The 2nd respondent has stated that he would submit to this Court the disc containing the audio recording of that interview. However upto date the 2nd respondent has not submitted the said audio recording or a transcript of that recording. Accordingly there is no proof before this Court to substantiate the 2nd respondent's assertion that the Governor has requested the petitioner not to assume duties till 31.12.2008.

The petitioner with her counter affidavit has produced a document marked P14. It is a letter dated 06.11.2008, addressed to the Secretary, Ministry of Local Government of the Southern Province by the Secretary to the Provincial Public Service Commission of the Southern

Province. The heading of the letter is “Non–handing over of the post of Secretary of the Elpitiya Pradesheeya Saba “. The letter states it has been reported to the Commission that Mrs.Hemachandra (the petitioner) who has been appointed by the Commission to the post of Secretary, Elpitiya Pradesheeya Saba has not been entrusted with the duties of the Secretary of the said Saba. The letter states that on the direction of the Commission it is notified that steps should be taken to handover the duties of the Secretary of the Elpitiya Pradesheeya Saba to Mrs.Hemachandra. The 3rd paragraph of the letter further states that the Governor of the Southern Province, by her letter dated 30.7.2008 addressed to the Chief Secretary to the Southern Province has made a similar order and that the Governor had copied her letter to the Secretary of the Ministry of Local Government, Southern Province and also to the Secretary to the Southern Province Public Service Commission.

Thus this letter produced marked P14 clearly establishes that even the Governor of the Southern Province has directed the relevant authorities on 30.7.2008 to hand over the duties of the office of the petitioner to which she had been lawfully appointed by the proper appointing authority.

In view of what I have set out above I hold that the 2nd respondent has failed to prove his assertion that the Governor of the Southern Province has requested the petitioner not to assume duties as the Secretary of the Elpitiya Pradesheeya Saba till 31.12.2008. On the contrary it is proved by documentary evidence that on 30.7.2008 even the Governor had instructed the relevant officials to ensure that the duties of the post of Secretary, Elpitiya Pradesheeya Saba be handed over to the petitioner, but the 2nd respondent has decided to ignore the lawful appointment given to the petitioner and to keep a usurper (3rd respondent) as the Secretary to the Pradesheeya Saba without handing over the duties of the office of the Secretary of the Pradesheeya Saba. His attitude is reflected in a statement made by him at the meeting of the Pradesheeya Saba held on 23.09.2008. The petitioner has filed a copy of the minutes of the Pradesheeya Saba held on 23.9.2008 marked P12. According to the minutes of the Pradesheeya Saba, when a question was raised as to the propriety of certain payments to the 3rd respondent as the Secretary, the 2nd respondent has boldly proclaimed that “I am the one who is keeping him.” In

his affidavit, the 2nd respondent has not denied the statement attributed to him in P12, the Minutes of the Pradesheeya Saba meeting held on 23.9.2008.

On the material I have set out above in detail and upon a careful examination of the case placed before this Court by the petitioner and the 2nd respondent, I hold that the 2nd respondent, by his arbitrary action in preventing the petitioner to assume the duties of the office of the Secretary, Elpitiya Pradesheeya Saba, to which she had been lawfully appointed by the proper appointing authority has violated the petitioners fundamental right guaranteed to her by Article 12(1) of the Constitution.

As I have already stated, the 3rd respondent was appointed to act as the Secretary until the appointment of a suitable person to that post.(Document 2R3) Thus with the appointment of the petitioner to the post of Secretary, the 3rd respondent's mandate to act as the Secretary of the Elpitiya Pradesheeya Saba automatically came to an end and as such he had no authority to continue to act as the Secretary from 21.7.2008.

In paragraph 23 of the 3rd respondent's affidavit he has stated that he had not done any official duty as the Secretary after 21.10.2008. This amounts to a clear admission that from 21.7.2008 (the date on which the petitioner reported for duty at the Pradesheeya Saba) the 3rd respondent continued to function as the Secretary without handing over the duties to the petitioner up to 21.10.2008.

When the petitioner complained to the Ombudsman about the failure of the 2nd and 3rd respondents to hand over duty to her, the Ombudsman has called for the observations from the Southern Province Public Service Commission on the complaint of the petitioner. The observations of the Southern Province Public Service Commission have been forwarded to the Ombudsman by the Secretary of the said Commission by his letter dated 29.9.2008. A copy of that letter has been produced by the petitioner marked P10. That letter states that after the petitioner was appointed to the post of Secretary, the Commission cancelled the acting appointment given to the 3rd respondent and by letter dated 18.8.2008, the 3rd respondent was informed of the cancellation of the acting appointment given to him.

The 3rd respondent's own admission that he performed the duties of the Secretary till 21.10.2008 shows that even after the specific cancellation of his acting appointment the 3rd respondent had usurped the functions and the powers of the office of the Secretary, Elpitiya Pradesheeya Saba. The 3rd respondent has failed to show on what authority he continued to function as the Secretary Pradesheeya Saba, when he had no lawful authority to perform the duties of that office.

Thus from what I have stated above it is very clear that the 2nd and 3rd respondents, acting in collusion, have by their arbitrary and unlawful conduct prevented the petitioner from exercising the powers and functions of the office to which she was lawfully appointed by the proper appointing authority. By their unlawful conduct they have forced the petitioner to seek the intervention of this Court to assert her right to perform the duties of the office to which she had been lawfully appointed. It appears to me that the 2nd respondent, the Chairman of the Pradesheeya Saba did not like the appointment of the petitioner as the Secretary of the Saba just for the reason that she is a woman!

The 2nd and 3rd respondents have raised three preliminary objections to the petitioner's application. The first objection is that the petitioner has failed to name the Provincial Public Service Commission of the Southern Province as a necessary party to this application. The petitioner has not made any allegation against the said Commission. Thus the said Commission is not a necessary party to this application.

The other objection is that the petitioner had failed to adhere to Rule 45 of the Supreme Court Rules. However the respondents have failed to demonstrate to this Court the manner in which the petitioner has failed to adhere to the said Rule 45.

The 3rd objection is that the petitioner has not filed a proper affidavit. Here again the respondents have failed to adduce any reason to show that the affidavit filed by the petitioner is not a proper affidavit. Accordingly I hold that there is no merit in the three preliminary objections raised by the respondents.

For the reasons set out in the judgment I hold that the 2nd and 3rd respondents acting in collusion have unlawfully and arbitrarily prevented the petitioner from assuming duties as the Secretary of the Elpitiya Pradesheeya Saba and performing the duties of the office to which she had been lawfully appointed by the proper appointing authority. I accordingly grant the declaration that the 2nd and 3rd respondents have violated the fundamental right guaranteed to the petitioner by Article 12(1) of the Constitution.

If the 2nd and 3rd respondents have so far not fully handed over the duty of the Secretary of the Elpitiya Pradesheeya Saba to the petitioner, the 2nd and 3rd respondents are hereby directed to forthwith hand over the duty of the Secretary to the petitioner and allow her to perform her duties as the Secretary of the Elpitiya Pradesheeya Saba. This direction will be effective only if the petitioner is still attached to the said Pradesheeya Saba as Secretary.

I also direct the 2nd and 3rd respondents to personally pay a sum of Rupees 25,000/- each to the petitioner as compensation. The 2nd and 3rd respondents each shall personally pay a sum of Rs.5000/- to the petitioner as costs. The 2nd 3rd and 4th respondents shall deposit a sum of Rs.50,000/- as compensation and Rs.10,000/- as costs with the Registrar of this Court within three months from the date of this judgment. The petitioner is entitled to withdraw the said sum of Rs.60000/- deposited in Court.

Judge of the Supreme Court

Ekanayake J.

I agree.

Judge of the Supreme Court

Imam J.

I agree.

Judge of the Supreme Court