

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

Application under Article 126 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.

**SC (F/R) No. 29/2018**

1. Locomotive Assistants Union,  
Department of Railways,  
Maligawatte, Colombo 10.
2. Pitigala Arachchige Danushka Perera  
President,  
Locomotive Assistants Union  
No. C 22 Railway House,  
Dematagoda, Colombo 09.
3. Rupasinghe Arachchilage Sanka Namal  
Secretary,  
Locomotive Assistants Union  
No. 28, Railway Quarters,  
Danister de Silva Mawatha  
Dematagoda, Colombo 09.
4. Dikmahadu Godage Gunapala,  
Treasurer,  
Locomotive Assistants Union,  
Liyanagedara, Nedurugoda,  
Elpitiya, Thelijjawila.
5. Hewa Heenipallage Ranaweera  
No. 208, Kirikurakkan Hena,  
Komangoda, Tihiyagoda.
6. Weerasinghe Arachchilage Ranga Prasad  
No. 1A/F1/014  
Mihindusevanapura,  
Dematagoda, Colombo 09.

7. Hettiarachchilage Ananda Sarath  
No 22, Tissa Weerasinghe Square,  
Seema Road, Batticaloa.
8. Hittatiya Edirisooriyage Janaka Ranjan  
No. 706/1, Elhena Road,  
Madinagoda, Rajagiriya.
9. Thuwan Nijam Tuwannoor  
No. 105/P/2,  
D.R. Wijewardana Mawatha,  
Colombo 10.
10. Mahabandarage Dishan  
No. B/4/3, Maligawatta,  
Railway Quarters, Colombo 10.
11. Maththumagoda Kankanamalage Samantha  
No. 765/314, National Housing,  
Maligawatta, Colombo 10.
12. Chathura Lakpriya Rambukpota  
No. 13/9, Martis Lane,  
Colombo 12.
13. Rajamunige Prasath Dhanuka  
No. 1A/F2/022,  
Mihindusenpura,  
Dematagoda, Colombo 09.
14. E.D.U.P. Vijithananda  
64/30, Railway Quarters, Maligawatta.

**Petitioners**

**Vs.**

1. S.M. Abeywickrema  
Former General Manager,  
Sri Lanka Railways Department.

- 1A. M.J.D. Fernando,  
General Manager,  
General Manager's Office  
Sri Lanka Railways Department,  
P.O. Box 355, Olcott Mawatha,  
Colombo 10.
2. Nimal Siripala De Silva  
Former Minister of Civil Aviation and  
Transport,  
Ministry of Civil Aviation and Transport,  
7<sup>th</sup> Floor, Sethsiripaya, Stage II,  
Battaramulla.
- 2A. Mahinda Amaraweera,  
Minister of Transport Services Management,  
7<sup>th</sup> Floor, Sethsiripaya, Stage II  
Battaramulla.
3. G.S. Vithanage  
Former Secretary,  
Ministry of Civil Aviation and Transport.
- 3A. H.M. Gamini Seneviratne,  
Secretary,  
Ministry of Transport Services Management,  
7<sup>th</sup> Floor, Sethsiripaya, Stage II  
Battaramulla.
4. Dr. Sarath Amunugama,  
Minister of Special Assignments,  
6<sup>th</sup> Floor, Sethsiripaya, Stage II,  
Battaramulla.
5. Attorney General  
Attorney General's Department,  
Colombo 12.

**Respondents**

6. Railway Locomotive Operating Engineers' Union  
No. 7, T.B. Jayah Mawatha, Colombo 10.
7. D.L.P. Paranavitharana  
President  
Railway Locomotive Operating Engineers' Union  
No. 35/3, Bandaranaike Mawatha, Katubedda, Moratuwa.
8. D.H. Indika  
Secretary  
Railway Locomotive Operating Engineers' Union  
No.29, Mount Mary, Colombo 10.

**Added-Respondents**

**Before:**

Buwaneka Aluwihare, PC. J.  
L.T.B. Dehideniya, J.  
E.A.G.R. Amarasekara, J.

**Counsel:**

Chamantha Weerakoon Unamboowe  
with Lumbini Kohilawatte for the  
Petitioners.

Faisz Mustapha, PC with Ranga  
Dayananda instructed by Lilanthi de Silva  
for the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents.

Dr. Avanti Perera, SSC for 1<sup>st</sup> to 5<sup>th</sup>  
Respondents.

**Argued on:** 16.10.2019 and 04.11.2019

**Written Submissions:** Petitioners on 16. 12. 2019  
1<sup>st</sup> to 5<sup>th</sup> Respondents on 17. 12. 2019

**Decided on:** 16. 07. 2020

**Aluwihare PC. J.,**

The subject matter of this Application concerns whether the non-implementation, by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, of the Scheme of Recruitment (SOR) issued in 2016 for the purpose of effecting new recruitments for the post of ‘Railway Driver Assistants’ in the Sri Lanka Railways Department, amounts to a violation of the Petitioners’ right to equality before the law and equal protection of the law, guaranteed by Article 12(1) of the Constitution.

### **Factual Background**

The Petitioners are office bearers and members of the Trade Union, ‘Locomotive Assistants Union’ (hereinafter sometimes referred to as the 1<sup>st</sup> Petitioner Union), and are employed in the Sri Lanka Railways Department as ‘Railway Driver Assistants’. The Added-Respondents are also employees of the said Department, as well as office bearers and members of the Trade Union, ‘Railway Locomotive Operating Engineers’ Union’ (hereinafter sometimes referred to as the 6<sup>th</sup> Added-Respondent Union). The Added-Respondents have intervened in this Petition representing the interests of the ‘Railway Engine Drivers’ of the Department of Railways.

This Application challenges the alleged non-implementation by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents of the Scheme of Recruitment (hereinafter sometimes referred to as the SOR of 2016) issued in 2016 marked ‘P9’, and claims that their failure to make necessary new recruitments to the post of ‘Railway Engine Driver Assistants’ in terms of the SOR, is a violation of the Petitioners’ right to equality before the law and equal protection of the law as enshrined in Article 12(1) of the Constitution. The Petitioners pray for a

Declaration to that effect, and a direction to the Respondents to take appropriate steps to immediately fill the existing vacancies in the post of 'Railway Driver Assistant', as per the SOR of 2016.

In the sequence of events leading up to the status quo, it is the Petitioners' contention (as per the amended Petition dated 05<sup>th</sup> March 2018) that in 1993, four existing 'Labour grades' in the Department of Railways [Third Enginemen, Second Enginemen, Shed Enginemen, and Shunting Engine Driver] were amalgamated to form the two grades designated as 'Railway Engine Drivers (shunting)' and 'Driver Assistants'. In 1996, these two grades have been taken out of the 'Labour grades' and placed under the 'Major Staff grade' (as evidenced by the letter marked 'P1' and the General Manager's Circular marked 'P21'). With the subsequent establishment of the Sri Lanka Technological Service, these two grades have been assigned the salary scales pertaining to Sri Lanka Technological Services Grades II A and II B, respectively.

Thereafter, effecting a general re-structuring of salaries in the public service, the Public Administration Circular No: 06/2006 (marked 'P2'), brought about a re-categorisation and re-classification of public sector employees with effect from 1<sup>st</sup> January 2006. Under the said Circular, the 'Engine Drivers (Shunting)' and 'Railway Driver Assistants' were once again categorized under 'Labour grades', and in the new classification, they were assigned the salary code PL 2-2006 A (Primary Level- Semi Skilled). This decision appears to have been taken as there was no category, after the restructuring of salaries in the public service by the said Public Administration Circular, to accommodate the 'Major Staff grade'- the grade in which the 'Engine Drivers (Shunting)' and the 'Railway Driver Assistants' were hitherto placed.

Following the protests against the above course of action by the 1<sup>st</sup> Petitioner Union and the 6<sup>th</sup> Added-Respondent Union, the Circular No: 06/2006 was amended in 2007 by, *inter alia*, the Public Administration Circular No: 06/2006 (IV) (marked 'P3'). This amendment had been consequent to a recommendation made by a Committee appointed by the then Secretary to the Ministry of Transport to resolve the issue.

The Cabinet of Ministers had approved a Scheme of Recruitment (SOR) on 03<sup>rd</sup> February 2010 in terms of the above Circular ('P3') for the new Grade of 'Railway Driver Assistants

and Engine Drivers (Shunting)' to take effect from 01<sup>st</sup> January 2010. By virtue of this SOR both the 'Railway Driver Assistants' and the 'Engine Drivers (Shunting)' were placed in the category of 'Management Assistant Technical-Segment 3' and were assigned the salary scale code MT 1-2006(A) (Rs. 14,425-10x145-11x170-6x240-14x320-23,665). The 'Engine Driver (Shunting)' was placed higher in the same salary scale (as per 'P5').

This SOR submitted by the Petitioners marked as 'P5', stipulates the approved cadre for 'Engine Drivers (Shunting)' as 103 and the approved cadre for 'Railway Driver Assistants' as 390, out of which 50% is to be recruited through an open competitive examination, with 10% through a limited examination for internal applicants and 40% through merit. It also lays down the academic and technical qualifications for new recruitments to grade III of 'Railway Driver Assistants' and for the post of 'Engine Driver (Shunting)'.

Meanwhile, the Department of Management Services (DMS), expressing a contrary view by their letter dated 09<sup>th</sup> April 2013 (marked 'IP4-A') had stipulated that the approved cadre of the Sri Lanka Railways is as set out in Annex1 thereto, in terms of which the new recruitments to the post of 'Railway Driver Assistants' should be made under the salary scale PL 3- 2006(A) as opposed to MT 1-2006(A). It conveyed that those Assistants who were already drawing a salary as per the salary scale of MT 1-2006(A) should continue to receive that salary.

The Petitioners submit that around August 2013, the 1<sup>st</sup> Petitioner Trade Union became aware of an **attempt** by the General Manager- Railways (1<sup>st</sup> Respondent) to place the 'Railway Driver Assistants' in a lower salary scale (under salary code PL 3 -2006 A) applicable to the Grade of Primary Level-Skilled Workers which is a 'Labour grade', while the 'Engine Driver (Shunting)' were to remain in the previous higher salary scale stipulated by the SOR of 2010 (namely, salary code MT 1-2006 (A) for Management Assistant Technical- Segment 3). Challenging, *inter alia*, this attempt to thwart the operation of the approved SOR and place them in a lower salary scale, the Petitioner Union of Railway Driver Assistants had filed the Fundamental Rights Application SC FR No. 341/13 on 01<sup>st</sup> October 2013 (Petition marked 'P6') claiming the infringement of their right to equality before the law and equal protection of the law as per Article 12(1).

It is stated by the Petitioners that while the above case (SC FR No. 341/13) was pending, a new Scheme of Recruitment in respect of recruitment of Railway Driver Assistants was approved by the Public Service Commission on 9<sup>th</sup> June 2016 and 29<sup>th</sup> September 2016 (marked 'P9'). This new SOR preserved the *status quo* by placing the 'Railway Driver Assistants' under the same category of 'Management Assistant Technical- Segment 3' and assigning them the salary code MT 1-2006 (A) (Rs. 14,425-10x145-11x170-6x240-14x320- 23,665).

As for the changes brought about by the new SOR of 2016, it increased the cadre of 'Railway Driver Assistants' from 390 to 540; 30% of them was to be recruited through an open competitive examination while the rest 70% was to be selected through a limited examination for internal applicants. The earlier method of recruitment based on merit was done away with. Another substantial change brought about was that it amended the recruitment qualifications for external recruits to the post of 'Railway Driver Assistants' stipulated in the earlier SOR. It removed the academic qualification requirement of securing four passes at the G.C.E. Advanced Level Examination in the Science Stream, and replaced the previous technical qualification of completing a NVQ Level-5 course of not less than 18-month duration (related to diesel engine operation), with the requirement to complete a 2 ½ year technical course recognized by the Tertiary and Vocational Education Commission.

The Petitioners state that they accepted the new SOR of 2016 as a settlement of their grievances. With the Railway Department subsequently commencing calling for external and internal applications for vacancies in the post of 'Railway Driver Assistants' under the new SOR, and publishing a notice in the Government Gazette to that effect dated 23<sup>rd</sup> December 2016, the Petitioners had moved the Court on 13<sup>th</sup> February 2017 to terminate the proceedings of the above case filed by them- SC FR No. 341/13.

Meanwhile, the 6<sup>th</sup> Added-Respondent Union had forwarded proposals to be incorporated in to this new SOR of 2016 to the then Secretary to the Ministry of Transport, the relevant Minister, the Department of Management services and the Ministry of Public Administration and Management ('8R6') on several occasions. In opposition to the Examination for recruitment under the SOR Of 2016 being gazetted,

they had resorted to Trade Union action on 08<sup>th</sup> April 2016, and had threatened such action again on 06<sup>th</sup> October 2016 and 18<sup>th</sup> January 2018 ('8R8').

In view of the fact that the new SOR of 2016 did not include any of their suggested amendments, the Railway Locomotive Operating Engineers' Union had filed a separate Fundamental Rights Application - SC FR No. 76/2017 on 16<sup>th</sup> February 2017 (evidenced by 'P8') challenging the legitimacy of the SOR, and seeking to amend the new SOR of 2016- purportedly to bring it into conformity with the aforementioned Public Administration Circular No: 06/2006 and the Safety Rules of the Department of Railways- which appear to be Rules governing the operation of trains, coming into effect in the year 1983 and are currently applicable.

The Engine Drivers' Union had also sought to intervene in the earlier Fundamental Rights Application filed by the Petitioners (SC FR No. 341/13) on 22<sup>nd</sup> February 2017 (after almost 4 years had passed since the Petitioners had filed the case and after the Petitioners moved to terminate it, as evidenced by 'P7') but the intervention Application was not supported by them.

However, when the Petitioners who had moved to terminate the proceedings of SC FR No. 341/13 were informed that the recruitment process of 'Railway Driver Assistants' which was then underway, had been suspended on the directive of the Senior Assistant Secretary to the Ministry of Transport and Civil Aviation by a letter dated 17<sup>th</sup> January 2017, they opted not to support the motion for termination. But with the Additional General Manager of the Railway Department subsequently informing the Petitioners that the suspension had been cancelled on 10<sup>th</sup> March 2017, the Petitioners were satisfied, and filed a motion to support the application for termination of proceedings. Consequently, the proceedings of SC FR No. 341/13 were terminated on 30<sup>th</sup> March 2017.

Soon after, however, another complication had developed to stifle the recruitment process. The Petitioners had received a letter from the 1<sup>st</sup> Respondent [GM-Railways] dated 23<sup>rd</sup> May 2017 (marked 'P12'), communicating that on the instructions of the Minister of Transport and Civil Aviation (2<sup>nd</sup> Respondent) pursuant to a meeting held by the then Secretary to the Ministry, the recruitments to the post of 'Railway Driver Assistant' have been temporarily suspended for two weeks. The reason had been given as

the need to allow time for 'Railway Engine Drivers' to seek legal relief under the case filed by them, but have stated that this decision does not suspend the written examination. The Petitioners state that the 'Railway Engine Drivers', however, did not take any further steps in the abovementioned Fundamental Rights Application -SC FR No. 76/2017 filed by them (which suffered the fate of being postponed several times until finally being withdrawn a few months later on 25<sup>th</sup> October 2017), nor did they seek any other legal remedy during the two weeks' grace period.

After the two-week period had lapsed with no objections, the Open Competitive Examination for Recruitment to the Post of Railway Engine Driver Assistant- Grade III was fixed for 26<sup>th</sup> August 2017. But after the strike action on 21<sup>st</sup> June 2017 by the 6<sup>th</sup> Added-Respondent Union opposing, *inter alia*, the recruitment of Driver Assistants as per the SOR of 2016 ('P16') the examination was yet again postponed on the instructions of the then Secretary to the Ministry of Transport and Civil Aviation (as per his letter dated 02<sup>nd</sup> August 2017 -marked 'P14(a)').

Two months later, the letter postponing the exam was cancelled by the 3<sup>rd</sup> Respondent (Secretary to the Ministry of Transport) by his letter dated 28<sup>th</sup> September 2017 (marked 'P14(b)') by which he directed the 1<sup>st</sup> Respondent (GM-Railways) to take all necessary steps to hold the said examination without delay. Consequently, the 1<sup>st</sup> Respondent had abided by the instructions and written to the Commissioner General of Examinations to take all necessary steps to conduct the examination. The examination was finally fixed for 23<sup>rd</sup> December 2017.

At this juncture, the 6<sup>th</sup> Added-Respondent Union of Engine Drivers, being aggrieved by the fact that the proposals presented by them to be incorporated in the new SOR of 2016 to purportedly bring it into conformity with Safety Rules and PA Circular No: 06/2006 were rejected, resorted to Trade Union action on 12<sup>th</sup> October 2017 (paragraph 22 XVIII of the affidavit of the 8<sup>th</sup> Added-Respondent). As a consequence of such Trade Union action, an Eight Member Committee was appointed by the Secretary to the President on 12<sup>th</sup> October 2017 to look into the concerns raised by the 'Railway Engine Drivers' regarding the SOR of 2016 and to make recommendations to resolve the outstanding issues ('IP13A'). Subsequent to meeting with the said Committee, the 6<sup>th</sup> Added-

Respondent Union withdrew the FR Application No. 76/2017 filed by them on 25<sup>th</sup> October 2017 ('P13'), as they were given an undertaking by the then Secretary to the Ministry of Transport to suspend the examination until the SOR of 2016 was amended.

Thereafter, the 6<sup>th</sup> Added-Respondent Union had yet again struck work along with the 'Trade Union Alliance of the Department of Railways' on 06<sup>th</sup> December 2017 (paragraph 11 of the Petitioners' written submissions) over salary anomalies, even with the G.C.E. Ordinary Levels Examination looming close. At that point, the President had appointed a Cabinet Sub-Committee chaired by the 4<sup>th</sup> Respondent to resolve the issues of the strikers. While the negotiations continued, the examination was yet again postponed indefinitely on the instructions of the 4<sup>th</sup> Respondent on 20<sup>th</sup> December 2017 ('P15') for the time being. This was, in the sequence of events, ***effectively the fourth time that the recruitment process of 'Railway Engine Driver Assistants' had been halted.***

The abovementioned Cabinet Sub-Committee on 16<sup>th</sup> February 2018 issued a Joint Cabinet Memorandum with their observations on outstanding issues ('IP16-A'). By issue number 02 of the Memorandum, the Committee has identified that, increasing the basic qualifications for Primary Technical Service MN1 level salaried officers to recruit them to MT1 and MT2 level salary scales had created an anomaly, in that MN1 level officers were imposed with a basic qualification of NVQ level proficiency, resulting in no qualified candidates being available for their vacancies, as it exceeded the level of education required by these employees in discharging their duties. However, the Petitioners submit in their written submissions (paragraph 21) that issue number 02 does not concern Driver Assistants who were previously in PL 2 salary scale but only refers to Primary Technical Service (MN 1 level) officers who were subsequently given MT 1 and MT 2 level salary scales. They further state that a number of qualified candidates applied for the competitive examination when it was gazetted to be held in 23<sup>rd</sup> December 2017.

Observation number 3 in the Memorandum, notes the need to "revise salary scales and recruitment schemes of all officers" of the Railway Department. The Cabinet of Ministers made a policy decision dated 9<sup>th</sup> May 2018 ('IP16-B') and granted approval to implement the observations, including observation 3 (as a long-term measure) to resolve the issue, thus allowing for the formulation of a new SOR. The approval however, was "subject to

the Ministry of Transport and Civil Aviation taking action to convert the Department of Sri Lanka Railways to a closed Department in future.”

The Petitioners on the other hand contend that continuous disruptions to the process of recruitment are a result of the Respondent Authorities acquiescing to the strike actions or threats of striking work by the 6<sup>th</sup> Added-Respondent Trade Union of the Engine Drivers, merely for the purpose of gaining leverage to achieve their demands contained in the letter marked “P16”, which includes *inter alia*, the Union’s objections to the SOR of 2016 and the implementation of it.

The Petitioners state that even though the above SOR increased the cadre of ‘Railway Driver Assistants’ to 540, at the moment only 220 ‘Railway Driver Assistants’ are in service, creating more than 300 vacancies, **with the last intake being in 2011, nearly 09 years ago**. They claim that the Railway Department functions were hindered by Railway Driver Assistants being severely understaffed. Due to this, they state, around 140 workers from lower labour grades had had to function as ‘Acting Driver Assistants’, covering the duties since 2010. The 6<sup>th</sup> Added-Respondent Union has concurred that due to the shortage of ‘Railway Driver Assistants’, they are currently engaging in work with labour grade workers, to cover the duties of ‘Driver Assistants’, in their letter to the 2<sup>nd</sup> Respondent on 04<sup>th</sup> April 2016 (‘IP6’).

These difficulties are also evidenced by the letter of the Chief Engineer (Motive Power) addressed to the 1<sup>st</sup> Respondent dated 22<sup>nd</sup> May 2017 (marked ‘P18’), where he communicates the hardships in maintaining services with 300 existing vacancies for Railway Driver Assistants, and requests him to expedite the recruitments.

With such an impasse continuing without a resolution in sight, the 1<sup>st</sup> Respondent had written to the Coordinating Secretary to the President on 04<sup>th</sup> December 2017 (‘P19’), reiterating that currently bare minimum service is maintained by employing Technical Assistants to cover the duties of ‘Railway Driver Assistants’ and re-employing retired Engine Driver Assistants on contract basis. He has thus requested the Secretary to issue instructions to the officials of the Ministry of Transport and Civil Aviation to expedite recruitments, in view of these facts.

Additionally, the Petitioners also state that due to no new recruitments being done, **they have been denied** their usual nine-hour rest after an outstation turn, and **their legitimate expectation of promotion to the post of ‘Engine Driver (Shunting)’** of which 30% of the vacancies are open to the **‘Driver Assistants’** who have completed 5 years of satisfactory service. They submit that this has resulted in both the posts of ‘Railway Driver Assistants’ and ‘Engine Drivers (Shunting)’ being understaffed.

In light of these circumstances, the Petitioners submit that the failure or the refusal of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to act in accordance with SOR of 2016 and to make the recruitments to the post of ‘Railway Driver Assistants’, is an arbitrary and an unreasonable act. They claim that it is a violation of the Fundamental Right to equality before the law and equal protection of the law, of the 1<sup>st</sup> Petitioner Union and of the other Railway Assistants represented by them, as guaranteed to them by Article 12(1) of the Constitution.

### **Competing Interests of the Petitioners and the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents**

The main issue in this Application is whether the non-implementation of the Scheme of Recruitment of 2016 which is currently in force regulating the recruitments to the post of ‘Railway Driver Assistants’ by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, is indeed a violation of the Petitioners’ right to equality before the law and their entitlement to the equal protection of the law.

However, when cumulatively considering the above illustration of the sequence of events that had come to pass, with the affidavit of the 8<sup>th</sup> Added-Respondent and its annexures, as well as the affidavit of the 3<sup>rd</sup> Respondent, it is apparent that the practical implementation of the SOR had been continuously disrupted due to the 6<sup>th</sup> Added-Respondent Union resorting to Trade Union action whenever the Railways Department was poised to conduct the Open Competitive Examination for admitting new recruits for the post of ‘Railway Driver Assistant’, as per the SOR of 2016.

The persistent objections of the 6<sup>th</sup> Added-Respondent Trade Union, against the implementation of the SOR of 2016 are based on the following grounds;

1. The requirement of a 2 ½ years' vocational training course as an entry qualification is unnecessary for Driver Assistants, considering the primary level duties carried out by them;
2. The Driver Assistants who perform 'primary duties' according to Rule 169(c) of the Appendix to Rules and Regulations – Part I (Operating), being classified under the 'Management Assistant' Grade and being placed on Salary Scale MT1-2006(A) is contrary to PA Circular 6/2006;
3. Authorizing the Executive to assign technical and operating tasks to Railway Driver Assistants, by virtue of the General Definition of Assigned Tasks (clause 3.3) and their duties (clause 6) of the SOR-2016, undermines the hitherto exclusive supervision of the Driver Assistants exercised by the Engine Drivers, and is contrary to Rule 157(c) of the Railway Safety Rules, 1983.

These objections hold little legal merit and require mere cursory attention as it is not the subject matter of this application.

It must be noted, that by any stretch of the imagination, over-qualification cannot present an issue for the safety of railway operations. A training of a longer duration can only lead to recruits being better qualified and adept at performing the technical and safety procedures listed in clause 6 of the SOR and the Safety Rules 155, 157, 161-163 and 178, which is only in agreement with the vehement concern expressed by the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents on public safety. The concern over Driver Assistants who perform 'primary duties' being placed in the same salary scale as the Engine Drivers [MT 1-2006(A)] being prejudicial to them too is unsubstantiated as it can be observed that the Engine Drivers were placed higher in the same salary scale since the approval of the SOR of 2010 (as per 'P5'), commensurate with their duties. A perusal of 'P21'- the General Manager's Circular No. 4 for the month of April in 1996- indicates that both these grades come from an amalgamation of four existing grades at the time, and were taken out of the 'labour schedule' together as far back as 1996. The said Circular also notes that future action should be taken in accordance with this change, when effecting appointments, promotions etc. Further, a study of Clause 3 and 6 of the SOR does not indicate that the Driver Assistants being assigned duties by the executive, necessarily deprives the Engine

Drivers of their habitual supervision and control over the Railway Driver Assistants for the operation of the railway services.

Furthermore, as stated before, the 6<sup>th</sup> Added-Respondent Union had forwarded proposals on several occasions to address the concerns itemized in numbers 1, 2 and 3 above, with a view to incorporating them in to the SOR of 2016, to a host of Authorities-the then Secretary to the Ministry of Transport, the Minister of Transport, the Department of Management services and also the Ministry of Public Administration and Management (as evidenced by ‘8R6’). It is therefore clear that the stakeholders involved in the making of the new SOR of 2016 were well aware of these suggestions, and have opted not to incorporate them into the said SOR, which is justifiable.

In this context, it must be noted, as the 8<sup>th</sup> Added-Respondent contended [in his affidavit], **Section 37 of the Railways Ordinance, No. 1 of 1903** places the safety of the public as the overriding concern:

“In the construction to be placed upon this Ordinance, every railway official shall be deemed to be legally bound to do everything necessary for, or conducive to, the safety of the public which he shall be required to do by this Ordinance, or by any rule which shall be made by the Minister, and of which rule such official shall have had notice; and every such official shall be deemed to be legally prohibited from doing every act which shall be likely to cause danger.”  
(emphasis added)

The 1<sup>st</sup> Respondent [GM Railways] writing to the Coordinating Secretary of the President on 04<sup>th</sup> December 2017 (‘P19’) has referred to the hardships faced by the Railway Department owing to the recruitments being halted and has reiterated that currently even the bare minimum service is maintained by employing Technical Assistants who are of the untrained labour grade to cover the duties of ‘Railway Driver Assistants’, and also re-employing retired Engine Driver Assistants on contract basis. The 6<sup>th</sup> Added-Respondent Union in ‘8R-6’ concurs with this fact.

It is therefore illogical, how the Added-Respondents who are railway employees legally bound to give utmost importance to the safety of the commuters and who express

vehement concern over public safety, are agreeable to compromising on safety as well as efficiency by working with untrained labour grade employees and senescent retired employees as replacements for technically-trained Driver Assistants. This is also evident from their protests against the Driver Assistants acquiring any awareness of Safety Rules (as per page 191 of the 6<sup>th</sup> Added-Respondent's letter marked '8R-15'). They are also objecting to the Driver Assistants being authorised to apply the brakes to stop the train, should the driver become incapacitated during the journey (which is in line with Rule 158 of the **Sri Lanka Railway -Safety Rules 1983** and Clause 6 of the SOR of 2016), and they also oppose the Driver Assistants being given the training required for them to pass the competitive test for that purpose (as per page 203 of the meeting minutes marked '8R-15').

It is evident, therefore, that the opposition to the SOR of 2016 harboured by the 6<sup>th</sup> Added-Respondent Union of Engine Drivers aim more towards **maliciously stripping the Driver Assistants of their powers and demoting them to the labour grade by holding the public at ransom through trade union action**, all the while paying lip service to ensuring the safety of the public, which indeed they are legally obligated to ensure.

Nevertheless, it must be emphasized that the object of the present Application is not inquiring into the validity of the SOR of 2016 from the stand point of the rights of the 6<sup>th</sup> Added-Respondent Union, but is delving into the **legality or otherwise of its non-implementation** in the context of the Petitioner's Fundamental Rights. Whether the SOR itself was violative of the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents' Fundamental Rights was the subject matter of a separate Fundamental Rights Application- SC FR No. 76/2017 filed by the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents; but it had been withdrawn by them before the matter could proceed to argument. The present application, therefore, cannot act as a vehicle for the 6<sup>th</sup> Added-Respondent Union to challenge the SOR, which came into force over 03 years ago. Hence, the SOR of 2016 stands unchallenged, until such time it is replaced by a new SOR.

As the learned Senior State Counsel appearing for the 1<sup>st</sup> to 5<sup>th</sup> Respondents submitted, the determination of the present application hinges on the presence or absence of a legal

impediment for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to implement the SOR of 2016 and whether the protection of the law will be achieved through its implementation.

For this purpose, attention should be paid to two main considerations. Firstly, whether there are any legal impediments which hinder the 1<sup>st</sup> to 3<sup>rd</sup> Respondents from implementing the SOR of 2016, Secondly, if no such impediments are present, whether by such non-implementation of the SOR, they [the 1<sup>st</sup> to 3<sup>rd</sup> Respondents] have denied the Petitioners' right to equality before the law and equal protection of the law, enshrined in Article 12(1) of the Constitution.

### **Legal Impediments to the Implementation of the SOR**

As per **Article 55(1) of the Constitution**, the Cabinet shall provide for and determine all matters of policy relating to public officers, relating to schemes of recruitment, codes of conduct for public officers, and the principles to be followed in making promotions and transfers etc. However, **Article 55(3)** vests the authority in the Public Service Commission (PSC) to effect appointments, promotions, transfers and disciplinary control/dismissal of public officers. It states as follows:

*Article 55(3) – “Subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission.”*

**The Public Service Commission Procedural Rules- Volume I on ‘Appointment, Promotion and Transfer of Public Officers’** (published in Gazette Extraordinary No. 1589/30 dated 20.02.2009) issued in terms of Article 61B and 58(1) of the Constitution which came into effect from 02<sup>nd</sup> April 2009, in its Chapter IV- titled ‘Service Minutes & Schemes of Recruitment’ stipulates the following:

*38. The Commission shall have the discretion to approve or approve with revisions or reject or revoke a Scheme of Recruitment or Service Minute or the proposed amendments submitted by a Secretary... (Emphasis added)*

The Public Service Commission, 'Guideline for Preparing Schemes of Recruitment' for streamlining SORs as per P.A Circular No. 06/2006- Section 4 titled 'Submission for Approval' provides as follows:

*I. The Head of Department shall invariably be responsible for the content and the accuracy of a draft scheme of recruitment when it is submitted to the Public Service Commission for approval.*

*II. Since the schemes of recruitment are prepared for a category of service, it is necessary to obtain from the Director General of Management Services, a formal approval pertaining to all posts belonging to such category of service.*

*III. It is necessary to obtain the relevant recommendations of the Director General of Establishments and the National Salaries and Cadres Commission for the draft scheme of recruitment concerned.*

*IV. Thereafter the Head of Department should forward the prepared draft scheme of recruitment embodying the aforesaid recommendations together with the recommendations of the respective Secretary of the line Ministry to the Public Service Commission for approval. (emphasis added)*

In view of the above provisions, the Head of the Department- the General Manger- Railways (1<sup>st</sup> Respondent) bears responsibility for the contents of the draft SOR which is to be forwarded to the PSC after due formal approval by Director General of Management Services together with the recommendations of the National Salaries and Cadres Commission, Director General of Establishments and the Secretary of the line Ministry. The final approval is given by the PSC.

It must be noted that the Scheme of Recruitment in 'P9' bears the signature of the General Manger of Railways-the Department Head, dated 16.11.2016, the signature of the Secretary to the line Ministry, dated 05.12.2016 as well as the signature of the Secretary of the Public Service Commission, dated 17.01.2017 along with a minute stating the following:

“ශ්‍රී ලංකා දුම්රිය දෙපාර්තමේන්තුවෙහි දුම්රිය එන්ජින් රියදුරු සභායක තනතුර සඳහා වන මෙම සංශෝධිත බඳවා ගැනීමේ පටිපාටිය 2016.09.29 වන දින රාජ්‍ය සේවා කොමිෂන් සභාව විසින් අනුමත කරන ලදී.”

Hence, the fact that the SOR of 2016 is founded in law is clear. After coming into force, despite the proposals made by the 6<sup>th</sup> Added-Respondent Union for its amendment, no amended SOR had been submitted to the PSC for approval. The Fundamental Rights Application SC FR No. 76/2017 filed by the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents challenging the SOR and seeking to amend it was also withdrawn by them on 25<sup>th</sup> October 2017. The implementation of the SOR of 2016 was last halted for the time being by the 1<sup>st</sup> Respondent on the instructions of the 4<sup>th</sup> Respondent on 20<sup>th</sup> December 2017 (‘P15’) as the Cabinet sub-Committee discussion was then ongoing. The policy decision made by the Cabinet Sub-Committee on 9<sup>th</sup> May 2018 (‘IP16-B’) in terms of the observations in their Joint Cabinet Memorandum to prepare a new SOR has not yet materialized.

As such, with no amendment or replacement of the SOR of 2016, it continues in force.

This is substantiated by **Section 2:1:1 of Chapter II of the Establishments Code:**

*“The Scheme of Recruitment in respect of a post in the Public Service which has already received approval, will continue to be in force subject to any changes as may be made hereafter.”*

As no subsequent changes in the form of an amendment, as envisaged in the Establishments Code, had been brought to the SOR of 2016, the above provision clarifies that the SOR marked ‘P9’ continues to be the SOR applicable in respect of the post of Railway Driver Assistant, until such time an amendment or a replacement is made. As per *Abeywickrama v. Pathirana and Others* (1986) 1 SLR 120, it is trite law that the Establishments Code by virtue of its constitutional origin acquires statutory force, provided that it’s not inconsistent with any provision of the Constitution. Therefore, it is apparent that the SOR of 2016 remains in force unchallenged since its approval on 29<sup>th</sup> September 2016.

As held by Sharvananda C.J. in *C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986)1 SLR 300 at page 310,

noting that in respect of a violation of Article 12(1), “*To succeed in the plea the petitioner has to establish discrimination in the performance of a lawful act. The doctrine of equality is intended to advance justice according to law, by avoiding hostile discrimination*” (emphasis added). Hence, the SOR of 2016 which springs from a legal source and is currently in force, ought to encounter no legal impediment for its implementation. It must now be inquired into whether such non-implementation of a legally valid SOR is violative of the Petitioners’ rights under Article 12(1) of the Constitution.

### **Violation of Article 12(1)**

In the absence of legal impediments to the implementation of the SOR of 2016, it is observed that what hindered its implementation is the practical obstacle faced by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents due to the trade union action resorted to by the 6<sup>th</sup> Added-Respondent Union as a strategic weapon, whenever the open competitive examination for recruiting Railway Driver Assistants as per SOR 2016 was scheduled to be held. This fact is admitted by the 3<sup>rd</sup> Respondent in his affidavit.

The Petitioners claim that their fundamental right guaranteed by **Article 12(1)** of the Constitution which postulates that “*All persons are equal before the law and are entitled to the equal protection of the law,*” has been violated by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents’ arbitrary and unreasonable decisions to acquiesce to the demands of the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents time and again and to repeatedly postpone the implementation of the SOR of 2016, which has resulted in the following grievances (vide paragraphs 26-29 of the Amended Petition):

- I. due to no new recruitments being done and Driver Assistants being understaffed, they have been overburdened by requiring to be on duty continuously for over a week and denied their entitled off-days and nine-hour rest after an outstation turn,
- II. their legitimate expectation of promotion to the post of ‘Engine Driver (Shunting)’, of which 30% of the vacancies are open to the Driver Assistants with 5 years of satisfactory service, has been denied to them.

When inquiring as to whether the above grievances were caused by the decisions of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to postpone indefinitely and suspend recruitments under the SOR of 2016, the following criteria should be borne in mind;

*“In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.” (C.W. Mackie and Co. Ltd v. Hugh Molagoda (supra) at page 308)*

It can be observed by the 1<sup>st</sup> Respondent’s letter to the Coordinating Secretary of the President on 04<sup>th</sup> December 2017 (‘P19’) and the letter by 6<sup>th</sup> Added-Respondent Union to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents (‘8R-6’) that for maintaining the bare minimum railway services during this period, Technical Assistants had to be employed to cover the duties of ‘Railway Driver Assistants’ and retired Engine Driver Assistants had to be re-employed on contract basis. Thus, the suspension of recruitments and non-implementation of the SOR was prejudicing only the Petitioner ‘Railway Driver Assistants’ who were currently in service.

Not only have the Petitioners been denied promotion and been overburdened in their duties in contradistinction to the other railway employees, but the vacancies in their posts have been filled by *de facto* upgrading untrained labour grade employees to that post and rehiring retired employees through new contractual agreements due to the hesitation and indecisiveness shown by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to go ahead with the implementation of the SOR, without indulging the 6<sup>th</sup> Added-Respondent Union or succumbing to the pressure exerted by them. This satisfies the first limb of the criteria in **C.W. Mackie and Co. Ltd** (supra) that the Petitioners were treated differently from others.

Examining whether the Petitioners have been treated differently from similarly circumstanced persons without a reasonable basis as per the second limb, it must be noted that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have not sought a *proactive and lasting solution* to this impasse created by the competing interests of two grades of its employees who are in the same salary scale. They have instead merely favoured the claims of the 6<sup>th</sup> Added-Respondent Union and yielded to the pressure wielded by the Engine Drivers’ Union,

while compromising the interests of the ‘Railway Driver Assistants’ in an ad-hoc and arbitrary manner. **They have effectively postponed/suspended the examinations four times**, once after scheduling it to be held on 26<sup>th</sup> August 2017 and again on 23<sup>rd</sup> December 2017, even after the candidates had arrived at the examination centre, wasting both time and resources at the tax-payers’ expense (paragraph 26 of the Petitioners’ counter affidavit).

As a result, the recruitment of new Railway Driver Assistants according to the SOR has been arbitrarily and repeatedly suspended since the SOR’s approval on 29<sup>th</sup> September 2016 until the filing of this application on 22<sup>nd</sup> January 2018, and even up to the present day, without a definite and immediate solution in sight. The failure of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to address the concerns of the 6<sup>th</sup> Added-Respondent Union with a considered solution when the disagreement first cropped up, and instead suspending recruitments to the Petitioners’ post in an ad-hoc manner, has resulted in the current impasse.

In their defence, the 3<sup>rd</sup> Respondent affirms in paragraph 8 of his affidavit that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have been compelled to take cognizance whenever the 6<sup>th</sup> Added-Respondent Union struck work (which had assumed the ruse of salary anomalies to interfere where they had no sufficient interest to interfere) “*in order to minimize disruption to railway services and the hardships faced by railway commuters thereby*”. Quite paradoxically, the repeated suspension of the recruitment process of Driver Assistants, due to some of its terms being contested by the 6<sup>th</sup> Added-Respondent Union, has only incurred additional costs and hardship to the Department of Railways and compromised the efficiency of work and safety of the public, merely to sustain the bare minimum service to the public. This course of action is further violative of **Section 37** of the **Railways Ordinance, No. 1 of 1903** which binds all railway officials to do everything necessary for ensuring the safety of the public. Thus, the second limb of the criteria in **C.W. Mackie and Co. Ltd** (supra) is thereby substantiated.

It should also be noted that, although the Cabinet of Ministers’ policy decision dated 27<sup>th</sup> April 2018 (‘**IP16-B**’) granted approval to implement all the observations included in the ‘Joint Cabinet Memorandum’ drafted pursuant to the Cabinet sub-committee inquiring

into this issue, allowing for the formulation of fresh SORs, its approval was “*subject to the Ministry of Transport and Civil Aviation taking action to convert the Department of Sri Lanka Railways to a closed Department in future.*” Furthermore, the Petitioners affirm that these observations were based on misrepresented and one-sided facts, as the Petitioners were only consulted in one meeting, while the sub-committee meetings had continued only with the strikers (Paragraph 28 of counter-affidavit).

At this point it is apt to refer to the case of **The Public Services United Nurses Union v. Montague Jayewickrema, Minister of Public Administration and Others** (1988) 1 SLR 229. This case, akin to the instant one, concerned two rival trade unions. The Petitioner Union struck work demanding increase in salaries, but subsequently the strike was settled and the strikers went back to work without loss of back pay and was taken back unconditionally. However, after the strike, following the urging of the Respondent rival nurses trade Union, the members of whom did not participate in the strike, were granted a special ad-hoc benefit of two salary increments by a Cabinet decision, as a reward for their non-participation and continued service during the strike.

Wanasundera J. stated in the above case that the ad-hoc benefit was especially crafted to benefit members of one trade union to the detriment of those of another, giving one a decided advantage over the other, even though up to now they have been equals. Quoting from **Roshan Lal v. Union of India** AIR 1967 SC 1894, where it was stated that “*The emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee*”, Wanasundera J. opined that while there is no doubt of such unilateral authority, “*there still remains a question of form and procedure as to how it should be done*” (emphasis added).

Thereby, following this argument the Court held in **The Public Services United Nurses Union** (supra) that,

*“...there is no valid basis for granting these far-reaching benefits to a very limited and narrow segment of public officers of the public service of this country, or for imposing a disability or disadvantage on the rest. The matter becomes all the more suspect when we find that the benefits of this proposal*

*accrue primarily to officers of a particular union... The wage structure of the public service is of utmost interest both to the officers concerned and the general public and its importance is seen by the fact that revisions and alterations are made only after the most careful consideration and after a thorough hearing of the views of all categories of public officers.*" (at pages 238, 239, emphasis added)

In the instant case, the Petitioners- 'Railway Driver Assistants' and the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents- 'Engine Drivers (Shunting)' were both placed in the same category of 'Management Assistant Technical-Segment 3' and both were assigned the salary scale code MT 1-2006(A) by the SOR of 2010. The 'Engine Drivers (Shunting)' were, however, placed higher, albeit in the same salary scale, in recognition of and commensurate with the additional level of responsibility on the Engine Drivers. This wage structure pertaining to 'Railway Driver Assistants' was unchanged by the SOR approved by the PSC in 2016. Therefore, it is evident that, in terms of grade and salary scale, the two are equals.

In such a backdrop, the suspension and non-implementation of the legally valid Scheme of Recruitment approved in 2016, by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents places the Petitioners in a disadvantaged position against their equal as well as other railway employees, and frustrate their legitimate expectations of promotion as per the terms of the SOR. As such, the non-implementation of the SOR of 2016 by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents is violative of the Petitioners' Fundamental Right to equality before the law and equal protection of the law.

Until such time as the proposed changes are brought about and fresh SORs are prepared, the prevailing situation, naturally, cannot be sustained without causing serious harm to the safety of the railway commuters, as well as the functioning of the railway service.

I need not state in express terms that the railway service is supported by public funds and at a significant cost to the public. Every railway employee has to bear in mind that they are compensated by the public with the expectation of providing an essential service to them. It is no enigma that it is the masses who mainly rely on the railway system to commute and there is an ethical and a moral duty cast on all the railway employees to

make every endeavour to offer the service to the discerning general public without a disruption, to the best of their ability. It is in that spirit that they are expected to discharge their responsibilities. In the instant case, the 6<sup>th</sup> Added-Respondent Union have left out the paramount duty they owe to the very society that maintain them, which to my mind is unfortunate, to say the least.

In this regard, I wholeheartedly concur with the opinion expressed by Justice F.N.D. Jayasuriya in **Best Footwear (Pvt) Ltd. and Two Others v. Aboosally, Former Minister of Labour & Vocational Training and Others** (1997) 2 SLR 137 at page 151:

*“It is a trite proposition that since the commencement and the continuance of a strike has an adverse effect upon production and upon the industry and because it may ultimately lead to a closure of manufacturing establishments, this weapon of a strike ought to be used as a last resort when all other avenues for settlement of industrial disputes have proved to be futile and fruitless. In the circumstances, Courts of law by their orders ought to discourage the misuse of strikes and to control and minimise the deleterious and harmful consequences of its misuse in respect of industries as far as possible so that the economy of the country would not be adversely affected. I hold that the strike in this case has not been utilised as a last resort and this hasty and ill-considered decision to strike has caused cessation of production, considerable financial loss and detriment to the employer and an adverse effect on the economy of the country for which all blame must be imputed to the trade union in question”* (emphasis added).

Considering the above I hold that the non- implementation of the SOR of 2016 (‘P9’) has resulted in a violation of the Fundamental Rights of the Petitioners and accordingly declare that the Petitioner’s Fundamental Right enshrined in Article 12(1) has been violated in the instant situation by the State. Although 1<sup>st</sup> to 3<sup>rd</sup> Respondents were responsible for implementing the SOR, it appears they were hamstrung in doing so due to various factors beyond their control and as such court does not hold them responsible individually.

I also observe that the implementation of the SOR of 2016 applicable to the ‘Railway Driver Assistants’ does not in any way impinge on the rights of the 6<sup>th</sup> to 8<sup>th</sup> Added-Respondents or the members of the ‘Railway Locomotive Operating Engineers’ Union’

represented by them, as such they should not take any action to hinder the implementation of the SOR of 2016 ('P9').

Earlier in this judgement I have referred to the numerous difficulties the Railway Department is facing as a result of not being able to fill the vacancies of Railway Driver Assistants. Bearing in mind such complications and the disruption caused by this impasse to the public railway transport system- over which the Sri Lanka Railway Department holds a monopoly- the 1<sup>st</sup> to 3<sup>rd</sup> Respondents or their successors are directed to take all necessary steps to implement the SOR of 2016 ('P9') forthwith, and to report the progress of the action taken in that regard to this court on the 30<sup>th</sup> November 2020. This directive, however, is to be carried out subject to any budgetary constraints the State might be facing.

In the circumstances of this case, this court does not award compensation or order costs.

*Application allowed.*

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA.

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA.

I agree.

JUDGE OF THE SUPREME COURT