

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

*In the matter of an application in terms
of Article 126 read with Article 17 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

SC FR Application

No. 54 / 2019

- 01 S M Halpe,
No 117/10,
Hendala Road,
Hendala,
Wattala.

- 02 D T Panduwawela,
No 4,
Chitra Lane,
Gampaha.

- 03 K P K Marapana,
No. 75/17,

Sirinanda Jotikarama Road,
Kalalgoda,
Pannipitiya.

PETITIONERS

-Vs-

01 Dr. Anil Jayasinghe,
Director General of Health Services,
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

02 Director General of Health Services
(acting),
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,

Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

03 Hon. Dr. Rajitha Senarathne,
Minister of Health, Nutrition and
Indigenous Medicine,
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

04 Secretary to the Ministry of Health,
Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and
Indigenous Medicine,
Suwasiripaya,
No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

05 Sri Lanka Medical Council,
No. 31,
Norris Canal Road,

Colombo 10.

06 Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Ten others who intervened as
respondents,

1ST TO 10TH ADDED RESPONDENTS

Fifty Seven others who intervened as
respondents,

11TH TO 68TH ADDED RESPONDENTS

Nine others who intervened as
respondents,

69TH TO 78TH ADDED RESPONDENTS

Before: Buwaneka Aluwihare PC J

L. T. B. Dehideniya J

P. Padman Surasena J

Counsel:

Upul Jayasuriya PC with Laknath Senevirathna, Chandana Perera instructed by Sampath Wijebandara for the Petitioners.

Suren Gnanaraj SSC for the 1st - 4th and 6th Respondents.

Manohara de Silva PC for the 5th Respondents.

M U M Ali Sabry PC with Ruwantha Cooray and Noomiq Nafath for the 1st - 10th Added Respondents.

Sanjeewa Jayawardena PC for the 58th Added Petitioner.

Saliya Peiris PC with Thanuka Nandasiri instructed by Sivanantham Associates for the 69th - 78th Added Respondents.

Ravindranath Dabare with M C S V Kumara instructed by Prabhani Samaraweera for the Intervenient Party, Government Medical Officers Association.

Argued on : 27-03-2019, 02-04-2019, 09-05-2019,. 28-05-2019.

Decided on: 30-07-2019

P Padman Surasena J

Petitioners are citizens of Sri Lanka and are medical graduates of the South Asian Institute of Technology and Medicine of Sri Lanka (hereinafter referred to as SAIMT). They state that they belong to a group of 83 medical graduates who have passed out from SAIMT.

The Petitioners state that they have duly completed the requisite period of study at the SAIMT, sat for the requisite examinations and accordingly obtained the MBBS degrees from SAIMT.

After obtaining their MBBS degrees from SAIMT the Petitioners have tendered their applications for provisional registration as medical practitioners with the 5th Respondent (Sri Lanka Medical Council, hereinafter referred to as SLMC), in terms of section 29 of the Medical Ordinance.

It is the position of the Petitioners that the Court of Appeal in C A Writ Application No. 187 / 2016, filed by a similarly circumstanced Medical Graduate of the SAIMT (namely Dhilmi Kasunda Malshani Suriyarachchi), has issued a Writ of Mandamus compelling the 5th Respondent to provisionally register (under section 29 of the Medical Ordinance), the Medical Graduate Petitioner in that case. The Supreme Court in the appeal¹ pertaining to the

¹ SC Appeal No. 184/2017.

said judgment of the Court of Appeal,² by its judgment dated 21-09-2018 has decided that the Petitioner in that case is entitled to provisional registration as a medical practitioner, under section 29(2) of the Medical Ordinance. It would suffice to reproduce the following two paragraphs from the said judgment of the Supreme Court to demonstrate this decision.

“ ... In the light of the aforesaid facts and circumstances and the determinations of the questions of law considered above, there is no doubt that the petitioner was and is entitled to obtain provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance and that the SLMC has an imperative duty to provisionally register the petitioner under section 29 (2). ”³

“...As held earlier, under and in terms of and by operation of the provisions of the Medical Ordinance and the Universities Act, the petitioner is entitled to provisional registration as a medical practitioner under section 29(2) of the Medical Ordinance and the SLMC is required, by the law, to forthwith grant that provisional registration to the Petitioner. It follows that, thereafter, the SLMC is obliged to accord to the petitioner, without restriction or delay, all the rights which ordinarily flow from provisional registration as a medical practitioner under section 29 (2) of the Medical Ordinance....”⁴

The Petitioners complain that the 5th Respondent in gross and blatant violation of the above judgment, has willfully refused to grant the Petitioners

² C A writ Application No. 187 / 2016.

³ Last paragraph of page 52 of the judgment.

⁴ Second paragraph of page 54 (last page) of the judgment.

and the other 82 similarly circumstanced SAIMT medical graduates, the said provisional registration under section 29, despite the fact that the Petitioners have fulfilled the criteria set out in law for the eligibility of the said provisional registration.

Petitioners also complain that the 1st and / or 2nd Respondent has also subsequently taken steps arbitrarily to exclude the Petitioners and other 82 similarly circumstanced medical graduates of SAIMT from eligibility for the provisional registration although they have satisfied the eligibility criteria, in terms of the prevailing law.

It is on that footing that the Petitioners complain that the Respondents have infringed the fundamental rights guaranteed to them by Article 12(1) of the Constitution denying them the equal protection of law and also the fundamental rights guaranteed by Article 14 of the Constitution denying them their right to engage in any lawful occupation, profession, trade, business or enterprise.

This Court having heard the submissions of the learned President's Counsel for the Petitioners, learned Senior State Counsel for the 1st to 4th and 6th Respondents and the learned President's Counsel for the 5th Respondent, by its order dated 26-02-2019, has granted leave to proceed in respect of the alleged violation of fundamental rights guaranteed by Article 12 (1) and 14 (1) (g) of the Constitution.

It is on that day that the learned President's Counsel for the Petitioners informed Court that he would be taking steps to file an amended petition and to file additional documents. The Court has given the opportunity for the Petitioners to file an amended petition and additional documents subject to the objections of the Respondents.

The Petitioners thereafter has taken steps to file the amended petition dated 01-03-2019 to which the 5th Respondent has filed objections.

This Court having considered the objections of the 5th Respondent had made order on 02-04-2019 accepting the amended petition filed by the Petitioners.

The arguments the Respondents have chosen to advance to counter the claim of the Petitioners that they are entitled to provisional registration as medical practitioners under section 29(2) of the Medical Ordinance could be identified under three broad categories. They could be described as follows.

- (i) The Petitioners cannot seek relief for the parties who are not before Court.
- (ii) The Petitioners' application is time barred.
- (iii) Petitioners have not established that their degrees are from a recognized Degree Awarding Institute.

As I would deal with the first argument above at an appropriate later point in this judgment, I shall now begin to consider the second argument of the 5th Respondent that the Petitioners' application is out of time. The dates on which the three Petitioners had submitted their first set of applications are as follows.

- (i) The 1st Petitioner had made the application on 21-10-2016 [**P 5 (a)**] to the SLMC. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.
- (ii) The 2nd Petitioner had made an application [**P 5 (a)**] to the SLMC on 25-10-2016. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.
- (iii) The 3rd Petitioner had made an application [**P 5 (a)**] to the SLMC on 21-10-2016. The said application was rejected by the 5th Respondent by letter dated 28-11-2016 with a refund of Rs. 4,000 deposited by the 1st Petitioner for provisional registration.

Accordingly the learned President's Counsel for the 5th Respondent took up the position that the Petitioners' application which was filed on 14-02-2019 is out of the one month period stipulated in Article 126 (2) as the refusal to grant provisional registration to the Petitioners which had given rise to the alleged infringement of fundamental rights of the Petitioners had taken place on 28-11-2016.

The 5th Respondent has also taken up the position that any subsequent applications made by the Petitioners for provisional registration do not create fresh violations and pursuing other remedies judicial or administrative do not prevent or interrupt the running of the said one month time period specified in Article 126 (2) of the Constitution.

In order to ascertain whether the Petitioners' application is out of time, it would be opportune at this juncture to apply the principles laid down in the judgment of His Lordship Justice Prasanna Jayawardena PC in the case of Demuni Sriyani de Zoysa and others Vs Chairman, Public Service Commission

and others. ⁵ (This case has also been adverted to, in the written submissions⁶ filed on behalf of the 5th Respondent.)

When applying the aforesaid principles, one has to sequentially ask the following questions:

- (i) (a) When did the alleged infringement occur?; or, if Petitioners claim they became aware of the alleged infringement only sometime after it occurred, when did they become aware of it or when should they have become aware if it?
- (b) If the alleged infringement is in the nature of a continuing one which the Petitioners were aware of, till when did it continue?;
- (ii) If the application has been filed more than one month after the latest date determined when considering (a) and (b) above, have the Petitioners established that, they were unable to invoke the jurisdiction of this Court due to circumstances, which were beyond their control and that, there has been no lapse, fault or delay on their part?

⁵ SC FR 206 / 2008 decided on 09-12-2016.

⁶ Paragraph 28 & 33 of the written submissions filed by the 5th Respondent.

(iii) If so, have the Petitioners filed this application within one month of any such disability ending?

As has been held in that judgment, 'the date determined in answer to the first subset of questions will determine the date on which the one month period stipulated in Article 126 (2) commences to run. Quite obviously, if the petition has been filed within one month of that date, it is within time'.

A similarly circumstanced student of the SAITM Dhilmi Kasunda Malshani Suriyarachchi had challenged the refusal of her application dated 6th June 2016 submitted to SLMC for provisional registration by way of a writ application filed in the Court of Appeal on 14-06-2016.⁷ After conclusion of the argument in that case, the Court of Appeal by its judgment dated 31-01-2017 had issued, as has been prayed for, by the Petitioner in that case,

(i) a writ of certiorari quashing the said decision of the SLMC refusing to provisionally register the Petitioner in that case as a medical practitioner.

⁷ The Supreme Court judgment (SC Appeal No. 184 / 2017) pertaining to the appeal of the said Court of Appeal case (C A Writ Appn No. 187 / 2016) produced by the 5th Respondent marked **5R 2**.

(ii) a writ of Mandamus compelling the SLMC to provisionally register the Petitioner in that case as a medical practitioner.

(iii) a writ of Prohibition preventing the SLMC from refusing to provisionally register the Petitioner as a medical practitioner.

Being aggrieved by the said Court of Appeal judgment, the SLMC appealed to the Supreme Court. Upon the conclusion of the said appeal, the Supreme Court by its judgment dated 21-09-2018 dismissed the said appeal by the SLMC and affirmed the judgment of the Court of Appeal.

It is the position of the Petitioners that although the SLMC had refused their application for provisional registration as medical practitioners, with the pronouncement of the judgment by the Supreme Court, they became entitled as of a right, for provisional registration, as the Supreme Court had conclusively decided that Dhilmi Kasunda Malshani Sooriyarachchi who is a similarly circumstanced student of the SAITM is entitled for provisional registration as a medical practitioner.

It is the position of the Petitioners that it was under those circumstances that they had once again submitted their applications in the year 2017 together with a sum of Rs. 4,000 to SLMC to obtain provisional registration

on the strength of the Supreme Court judgment. The SLMC had neither rejected nor refused this set of applications. It has also not so far refunded the said sum of money, as opposed to the refunding of the deposit made by the Petitioners when it rejected their applications submitted for provisional registrations in 2016 as referred to earlier.

Thus, it can be seen that the Petitioners submitted the second set of applications with a fresh hope that the SLMC would comply with the law at least at this stage. It is worthwhile to reproduce the wording⁸ used by this Court in its judgment,⁹ when it vindicated the right of the said Petitioner in that case for provisional registration. i.e. "...there is no doubt that the petitioner was and is¹⁰ entitled to obtain provisional registration as a medical practitioner....". This means that this Court has concluded in that judgment that the said Petitioner's right vindicated by this Court in that case is a continuing right. The Petitioners of the instant case being similarly circumstanced Medical Graduates of SAITM are therefore justified in claiming a similar right on the basis that they are also similarly circumstanced. Thus,

⁸ In the previously quoted paragraph.

⁹ SC Appeal No. 184 / 2017.

¹⁰ Emphasis is mine.

it would be for justifiable reasons that they have entertained a fresh hope in the backdrop of this Court's above conclusions.

The SLMC has neither contested the fact that the said judgment has vindicated that Petitioner's right for provisional registration as medical practitioners under section 29(2) of the Medical Ordinance nor contested the fact that the Petitioners in the instant application are also entitled on the same basis as the Petitioner in the previous Writ Application.¹¹ All what the SLMC states is that the Petitioners' application is time barred and that the said judgment of this Court is per incuriam.

Perusal of the said judgment makes it clear that this Court, in the said judgment of the said previous Writ Application,¹² has decided in unequivocal terms on 09-12-2016, that the Petitioner in that case is entitled to provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance and the SLMC is required, by law, to forthwith grant that provisional registration to the said Petitioner. This means that the Petitioner in that case, after the said judgment, has become entitled as of a right, for

¹¹ Ibid.

¹² Ibid.

provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance.

I think this is an appropriate stage to consider the first argument advanced on behalf of the 5th Respondent. That is, the argument that the Petitioners cannot seek relief for the parties who are not before Court.

All what the Petitioners have stated in their petition is that they are amongst the eighty three Medical Graduates of SAIMT and the Petitioners have preferred the instant application on behalf of all of them whom the Petitioners state in their petition 'are innocent and helpless victims of grave prejudice and discrimination by the SLMC'. This Court cannot prevent itself from considering the case of the Petitioners for the mere reason that the Petitioners have referred to in their petition about many others who are also facing the same situation. Indeed, one must not forget the fact that the Petitioners in the instant application are three Medical Graduates of SAIMT amongst those who are eagerly waiting for provisional registration as medical practitioners with fresh hopes after the Supreme Court pronounced the decision in the previous case filed by a Medical Graduate of SAIMT. When

the Petitioner in that case¹³, after the said judgment, becomes entitled as of a right, for provisional registration as a medical practitioner, under section 29 (2) of the Medical Ordinance, this Court cannot see as to how the SLMC being a statutory body, can refuse provisional registration to the other similarly circumstanced Medical Graduates of SAITM. What the Petitioners have done in this instance is to bring that situation to the attention of Court. Further, one must understand that it was necessary for the Petitioners to highlight that situation in order to convince this Court that there has been a clear discrimination, which has deprived the Petitioners of the equal protection of law guaranteed by Article 12(1) of the Constitution. In those circumstances, the argument that this application is misconceived on that account, must fail.

The Petitioners of the instant case are similarly circumstanced MBBS graduates as the Petitioner of the previous Writ Application.¹⁴ Thus, it stands to reason that all those who are similarly circumstanced, become entitled to the same right as the said Petitioner in that case. This is because, this Court

¹³ SC Appeal No. 184 / 2017 pertaining to the appeal of C A Writ Appn No. 187 / 2016.

¹⁴ Ibid.

in that case has decided that SAIMT is a Degree Awarding Institute as per the relevant legal provisions. Moreover, the Petitioner in that case was not the only student of SAIMT who passed out as a MBBS graduate. It follows that, the Petitioners and all those who are similarly circumstanced, are entitled for provisional registration as medical practitioners, under section 29 (2) of the Medical Ordinance and the SLMC was required, by law, to forthwith grant such provisional registrations to each one of them. This entitlement was positively established only on 09-12-2016 with the pronouncement of the Supreme Court judgment.¹⁵

As has been stated before, the Petitioners had submitted their second set of applications in the year 2017 together with a sum of Rs. 4,000, which is the requisite fee to the SLMC to obtain provisional registration. This had happened after the Supreme Court judgment. The SLMC, so far, has neither rejected nor refused these applications. It has also not so far refunded the monies deposited by the Petitioners. Further, as has been mentioned above, according to the judgment of this Court, the rights the SAIMT Medical Graduates for provisional registration are continuing rights. Therefore, the

¹⁵ SC Appeal No. 184 / 2017.

fact that the SLMC has not yet granted them provisional registration would be a continuing infringement of their rights.

The entitlement of the Petitioners and those who are similarly circumstanced, for provisional registration as medical practitioners, under section 29 (2) of the Medical Ordinance flows from the law of the country. They will therefore continue to have that entitlement. That entitlement cannot be taken away by the SLMC. Therefore, the Petitioners and those who are similarly circumstanced shall be entitled to continue to enjoy the said right. Since the SLMC has not so far refused the applications for provisional registration, the SLMC continues to deprive them of their due registration. Thus, the SLMC is denying them the equal protection of law and their right to engage in any lawful occupation, profession, trade, business or enterprise. This no doubt would be a continuous infringement of the fundamental rights guaranteed to them by Article 12(1) and 14(1) (g) of the Constitution. Further, the said infringement continues to date. The said continuous infringement shows no signs of abating. Thus, the argument by the Respondent that the Petitioners' application is out of time cannot succeed.

In addition to the above, it must be noted that the Petitioners in the instant application, which was filed on 14-02-2019, have also challenged the notice / circular dated 29-01-2019 produced marked **P 6**.

The operative part of **P 6** is as follows.

“... The batch of Medical Graduates recruited to local universities for the academic year 2010/ 2011 (Repeat batch) Medical Graduates of Sir John Kotalawela Defence University and Medical Graduates of foreign universities, who are provisionally registered at SLMC will be given internship appointments in due course...”

One of the compulsory requirements **P 6** has insisted on foreign medical graduates is the requirement to submit a copy of the letter granting approval for the degree by the SLMC.

The Petitioners in challenging this document (**P 6**) have prayed from this Court, declarations to annul the said notice/circular. Prayers (e) and (f) of the amended petition¹⁶ are to this effect and are as follows,

e) Declare and direct that the purported decision of the 1st and/ or 2nd Respondent and/ or the 3rd Respondent to exclude the 82 medical graduates of the South Asian Institute of Technology and Medicine Sri Lanka, including the Petitioners from being awarded internship appointments as Medical Officers as reflected in the notice/circular

¹⁶ This Court having considered the objections of the 5th Respondent had made order on 02-04-2019 accepting the amended petition filed by the Petitioners.

*dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;*

*f) Declare and direct that the portion of purported decision of the 1st and/or 2nd Respondent and/ or the 3rd Respondent to exclude the 82 medical graduates of the South Asian Institute of Technology and Medicine Sri Lanka, including the Petitioners from being awarded internship appointments as Medical Officers as reflected in the notice/circular dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;*

As the Petitioners have filed this application on 14-02-2019 and the notice/circular under challenge in the above prayers was issued on 29.01.2019 (**P 6**) the application of the Petitioners is not out of time.

Despite the fact that the complaint of the Petitioners to this Court in the instant application is the failure on the part of the SLMC not affording them the equal protection of law on the strength of the judgment in SC Appeal 184 / 2014, the 5th Respondent has unsuccessfully attempted to paint a picture before this Court that the application of the Petitioners is time barred as the violation of the right had taken place on 28-11-2016. For the above

reasons this Court decides to reject the argument of the 5th Respondent that the Petitioner's application is time barred.

What remains to be considered is the second argument advanced by the respondents that the SAIM is not a 'Degree Awarding Institution' in terms of section 29 of the Medical Ordinance.

As has been already stated before, it is not in dispute that this Court by the judgment in SC Appeal 184 / 2014 has positively decided that the SAIM is a Degree Awarding Institution and that the SLMC is obliged to grant the Petitioner in that case, the provisional registration as a Medical practitioner. The argument advanced by the learned President's Counsel for the 5th Respondent in the instant application is that the decision contained in the above judgment is per incuriam for the reasons set out in his objections and subsequently in his written submissions. It is on that basis that the 5th Respondent argues that the judgment in SC Appeal 184 / 2014 should not be considered as a correct judgment.

The Petitioners have brought to the notice¹⁷ of this Court that the 5th Respondent has not so far granted the provisional registration to Dhilmi

¹⁷ Paragraph 23 of the amended petition.

Kasunda Malshani Sooriyarachchi, the Petitioner who filed the writ application¹⁸ in the Court of Appeal. The Petitioners have further brought to the notice of this Court that the Petitioner in that case has filed in the Court of Appeal, Contempt of Court proceedings¹⁹ against the 5th Respondent and that the Court of Appeal has directed the 5th Respondent to show cause as to why it should not be punished for Contempt of Court for noncompliance of its order. It is in that backdrop that the Petitioners have complained to this Court that the 1st - 5th Respondents have unlawfully, illegally, without any justifiable grounds and in blatant and gross contempt of Court, has failed to process the applications submitted by them and the other similarly circumstanced 80 Medical Graduates of SAIMT. It is this failure (on the part of the 5th Respondent) that infringes the fundamental rights of the Petitioners and those who are similarly circumstanced.

It is the position of the Petitioners that the SLMC, in gross violation of their fundamental rights (guaranteed by Article 12 (1) and 14 (1) (g) of the Constitution), has taken steps to grant provisional registration to some other candidates while denying the same to the Petitioners who also have fulfilled

¹⁸ C A Writ Application No. 187 / 2016.

¹⁹ Contempt of Court Application No. CC / 09 / 18.

the legal requirements for such provisional registration as per prevailing law. The 5th Respondent has not stated that it is not so.

The sole defence raised by the 5th Respondent to justify the alleged infringement by it, is just raising an issue that the judgment²⁰ of this Court is per incuriam. In other words, the SLMC is not prepared to comply with the said judgment because it thinks that the decision of the Supreme Court is per incuriam.

Thus, the question arises as to whether it is open for the 5th Respondent to take up such a position.

According to Article 127 of the Constitution, the judgements of the Supreme Court shall be final and conclusive. The said Article is as follows.

Article 127 (1) - The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance,

²⁰ SC Appeal No. 184 / 2017 decided on 21-09-2018 (CA writ application No. 187 / 2016 decided on 31-01-2017).

tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

In the case of Jayraj Fenandopulle Vs. Premachandra de Silva²¹ a bench of five Judges of this Court has unanimously held that 'when the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other judges to be called upon to review or revise a matter.'²² His Lordship Justice Amerasinghe in the said judgment went on to state as follows.

" ... However, as we shall see, the Court has inherent power in certain circumstances to revise an order made by it on the basis that one division of the Court may do what another may do, it would be competent for one division, in the exercise of that power, to set aside an order of another division of the Court. This must be so, for there may be circumstances in which it may not be possible for the review to be undertaken by the same bench: For instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason. E.g. *see Palitha O.I.C. Police Station Polonnaruwa and Others*,²³

²¹ 1996 1 Sri L R 70.

²² *Ibid*, at page 86.

²³ 1993 (1) Sri L R 161.

Justice cannot be denied because one or more of the Judges are not available. However, where they are available, such matters should be considered by the same Bench of Judges. ...”

It is of paramount importance to observe that the SLMC despite being the appellant at whose instance this Court had entertained the said appeal, has ever taken any step to bring to the notice of this Court that the judgment of that case is per incuriam. The SLMC has not made any application so far seeking any correction of any such error in the said judgment. Further, the SLMC has not made any application so far to have such error brought to the attention of His Lordship Justice Prasanna Jayawardena PC who pronounced that judgment. This is despite the fact that His Lordship Justice Prasanna Jayawardena PC continues to sit on the bench as a Judge of this Court to date. This amply demonstrates that the 5th Respondent in the instant case, who stood as the primary respondent in SC Appeal No. 184 / 2017 has had no such complaint since the time of pronouncement of that judgment i.e. 21-09-2018. It was in the objections filed by the 5th Respondent in the instant case that it has raised such a ground. This is also not with a view of seeking any correction of any error in the said judgment but as a defence for not

carrying out the decision contained in the said judgment of the Supreme Court.

Although this Court, in view of the decision of Jayraj Fenandopulle's case²⁴ cannot consider the correctness of the said judgment of the Supreme Court to ascertain whether it is per incuriam, in order to demonstrate the fallacy of the above argument, the paragraph (h) of the statement of objections filed by the 5th Respondent setting out the basis for the said judgment to be per incuriam, is worthwhile being reproduced. It is as follows.

Paragraph (h)

“The judgment entered in CA writ 187/2016 and SC Appeal 184/2017 have been made per incuriam in as much as

- (i) In the SC Appeal 184/2017, there were several vital documents which has been considered in the judgment, being introduced by the State after the hearings were concluded through their written submissions and denied the 5th Respondent from responding to the said vital documents,

²⁴ Supra.

(ii) The 5th Respondent state that the Petitioners of the instant application cannot seek relief under the judgment of the SC Appeal 184/2017, and the 5th Respondent reserves the right to collaterally challenge the application of the judgment of SC Appeal 184/2017 to the Petitioners.

The 5th Respondent annexes herewith marked '**5 R 1**' the written submissions filed by the State in SC Appeal 184/2017 and '**5 R 2**' the judgment of SC Appeal 184/2017 and respectfully pleads that same be considered as part and parcel of these statement of objections. ... "

The written submissions referred to above (**5 R 1**) is dated 19th October 2017. However, the next document the 5th Respondent has filed, the Supreme Court judgment in SC Appeal No. 184/2017 (**5 R 2**) amply demonstrates that it was on 29-09-2017 that the Supreme Court (upon the application by the 5th Respondent), by the majority decision, had granted special leave to appeal. Thus, it is clear that the written submission referred to above by the 5th Respondent is a written submission filed not very long after this court had granted special leave to appeal in the said case.

This was so confirmed by the firm submissions made by Senior Additional Solicitor General Sanjaya Rajaratnam PC who specifically appeared before this court to clarify that particular issue.

Hence, the argument advanced by the 5th Respondents that the said judgment by this Court in SC Appeal No. 184/2017 is per incuriam on the basis that state introduced several documents with their written submissions after the hearings were concluded denying the opportunity of the 5th Respondent of responding to the said vital documents, is manifestly a frivolous argument.

It is not in dispute that this Court has held that the said Petitioner in the previous case is entitled to the provisional registration as a medical practitioner and the SLMC is obliged to grant such registration to that Petitioner. Therefore, the SLMC cannot have any discretion to deviate from the said direction of the above case. The SLMC must grant provisional registration to the Petitioner in that case. When the SLMC is obliged under law to grant to that Petitioner, provisional registration without any restriction, it cannot in law, treat the Petitioners of the instant application and everyone else who is similarly circumstanced in a different way. Doing

so would be a gross and blatant violation of their fundamental rights guaranteed by the primary law of the land itself.

As stated above, the 5th Respondent is not entitled to challenge the validity of the judgment of this Court. There is a general rule in the construction of statutes that what a Court or a person is prohibited from doing directly, cannot be done indirectly or in a circuitous manner.²⁵ What the 5th Respondent has done in the instant case is exactly that.

The above decisions clearly indicate that the present Bench cannot reconsider the judgment pronounced in the above case. It must be observed that the validity of the said judgment was questioned by the 5th Respondent as justification for defiance when its very compliance was in issue in the instant case. The reason as to why the Petitioners relied on the said judgment is rather simple. It is just their innocent expectation that the SLMC being a statutory body would in all probabilities have respected the conclusions of the apex court of the country. Unfortunately for them that turned out not to be the case.

²⁵ Bandaranayake Vs. Weeraratne & others 1981 (1) Sri L R 10 at 16.

As has been decided by this Court in that case,²⁶ the SLMC is not exempted from obeying the statutory provisions of the Medical Ordinance and the Universities Act. The SLMC is a creation of the Medical Ordinance and must confine itself to the powers vested in it by the Medical Ordinance.

It has no powers outside those expressly conferred on it by the provisions of the Medical Ordinance.

Thus, when considering the totality of the circumstances relating to the instant case it is not difficult for this Court to conclude that the actions and the conduct of the 5th Respondent being a council created by the statute has amounted to taking the law into its hands with a deliberate intention to flout the law and violate the order made by this Court as well as the Court of Appeal.

The interim order staying and/or suspending the award of any internship appointments as Medical Officers to the Medical Graduates stipulated in the notice/circular dated 29.01.2019, produced marked **P 6**, issued by this Court at initial stages, was vacated by this Court on 02-04-2019 subject to the condition that the seniority of the Petitioners and their placements will not

²⁶ At page 53 of the judgment of SC Appeal 184/2017.

be jeopardized in the event the Petitioners become successful in this case and that the seniority of the Petitioners should be considered on par with the 278 Interventient Petitioners who intervened into this case. Therefore, this Court needs to be mindful of that fact when granting relief to the Petitioners.

For the foregoing reasons, this Court decides;

- a) to declare that the 5th Respondent has infringed the Petitioners' fundamental rights to equality and equal protection of law guaranteed by Article 12(1) of the Constitution;
- b) to declare that the 5th Respondent has infringed the Petitioners' fundamental rights to the freedom to engage in their preferred lawful occupation or/and profession, guaranteed by Article 14(1)(g) of the Constitution;
- c) to direct the 5th Respondent to provisionally register the Petitioners as medical practitioners in terms of Section 29(2) of the Medical Ordinance forthwith,
- d) to declare that any decision by the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to exclude the Medical Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, from being eligible for the award of internship appointments as Medical Officers on the sole basis that they are Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, as reflected in the

notice/circular dated 29.01.2019 produced marked **P 6** is illegal, null and void ab initio and of no force or avail in law;

- e) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to include in the notice/circular dated 29.01.2019 produced marked **P 6**, the Medical Graduates of the South Asian Institute of Technology and Medicine Sri Lanka, as being eligible for the award of internship appointments as Medical Officers;
- f) to direct the 5th Respondent to pay as compensation Rs. 200,000/= each to each of the Petitioners separately;
- g) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to include the Petitioners and those who are entitled for provisional registration as medical practitioners in terms of Section 29(2) of the Medical Ordinance on similar basis, in the same list in which the names of Intervient Petitioners appear as provisionally registered medical practitioners as per the notice/circular dated 29.01.2019 produced marked **P 6**
- h) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to ensure that the seniority of the Petitioners and their placements will not be jeopardized due to the arbitrary decision on its part to exclude them from being granted the provisional registration as medical practitioners in terms of Section 29(2) of the Medical Ordinance,
- i) to direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to ensure that the seniority of the

Petitioners to be considered on par with the other 278 Interventient Petitioners who intervened into this case,

- j) To direct the 1st and/or 2nd and/or 3rd and/or 4th and or 5th Respondents to take all necessary steps to comply with the directions given in this judgment within three weeks from the date this judgment is pronounced.

The Petitioners are entitled to the costs of this application.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree,

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT