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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(F.R.) Application No. 269/2021.

01. Rajaye Thakserukaruwange Sangamaya
රජයේ තක්සේරුකරුවන්ගේ සංගමය
(Government Valuers Association)
No.146/C/3, 4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

02. D. M. Senevirathna
General Secretary,
Rajaye Thakserukaruwange Sangamaya
(Government Valuers Association)
No.146/C/3, 4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

And

218/39, Moragahawatte,
Yakahatuwa,
Horampella,Minuwangoda.

03. K. G. Nevil Indrajeewa
146/C/3,

4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

04. D. Keerthi Abeysekera,
7/6,
Pragathi Mawatha,
Katuwana Road, Homagama.

05. N. S. Lakshman Rajapaksha
No.6A,
G. H. Perera Mawatha,
Raththanapitiya,
Boralesgamuwa.

06. R.L.Jjayantha,
59/12,
School Lane,
Rukmale,
Pannipitiya.

Petitioners

Vs.

1. P. P. D. S. Muthukumarana
Government Chief Valuer,
748, Maradana Road,
Colombo 10.

2. Hon. Mahinda Rajapaksa,
Minister of Economic Policies & Plan Implementation
Ministry of Economic Policies & Plan Implementation

3. Anusha Palpita
Secretary,

Ministry of Economic Policies & Plan Implementation

04. S. R. Attygalle,
Secretary to the Ministry of Finance
Ministry of Finance,
The Secretariat,
Colombo 01.

05. Jagath Balapatabendi
Chairman,
Public Service Commission.

06. Indrani Sugathadasa,
Member,
Public Service Commission.

07. C. R.C. Ruberu
Member,
Public Service Commission.

08. A.L.M. Saleem,
Member,
Public Service Commission.

09. Leelasena Liyanagama,
Member,
Public Service Commission.

10. Dian Gomes
Member,
Public Service Commission.

11. Dilith Jayaweera,
Member,
Public Service Commission.

12. W. H. Piyadasa,
Member,
Public Service Commission.

13. M. A. B. Daya Senarath,
Secretary.
Public Service Commission,

All 5th to 13th Respondents at
Public Service Commission,
No.1200/9,
Rajamalwatta Road,
Battaramulla.

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

Respondents

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BEFORE : **E. A. G. R. AMARASEKARA,** J.
A. H. M. D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Dilrukshi Dias Wickramasinghe, P.C. with Dilumi de Alwis and Thishya Weragoda instructed by Sanjay Fonseka for the Petitioner.
Viveka Siriwardena, P.C., A.S.G. with Nayomi Kahawita S.C. for the Respondents.

ARGUED ON : 08th December, 2021

DECIDED ON : 17th December, 2021

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ACHALA WENGAPPULI, J.

The 1st Petitioner, a registered trade union (**රජයේ තක්සේරුකරුවන්ගේ සංගමය**) and five of its members (2nd to 6th Petitioners) have, by their petition dated 2nd September 2021 supported by an affidavit of the 3rd Respondent, invoked the jurisdiction conferred on this Court by Article 126 of the Constitution, alleging that a series of wrongful, illegal, unlawful and arbitrary administrative/executive actions of the 1st Respondent, the Government Chief Valuer *P.P.D.S. Muthukumarana,* culminated in the publication of a paper advertisement on 17th July 2021 (P46A and B), which meant to favour certain others to score higher marks on seniority whilst having a negative impact on them, are violative of their fundamental rights as guaranteed under Articles 12(1),14(1)(a),(b),(c),(d) and (g) of the Constitution.

It is averred that the 2nd to 6th Petitioners have been recruited to the Department of Valuation as Grade II of Class III Assistant District Valuers and some of them were promoted as Grade I of Class II Assistant Valuers. It is alleged by the Petitioners that when the 1st Respondent sought to amend the Service Minute of the Sri Lanka Valuation Service arbitrarily in 2017, the 1st Petitioner trade union had launched a trade union action opposing the said move in November 2017, which continued for three months. During this period, the membership of the 1st Petitioner Union had refrained from submitting their progress reports as a trade union action but continued to perform other duties that were allocated to them from time to time. The trade union action was duly informed by letters dated 20th November 2017 and the 1st Respondent was informed of further escalation of trade

union action through a series of letters, in view of the fact that no resolution of the dispute was provided by her.

On 5th February 2018, the dispute was amicably resolved after negotiations with the Hon. Minister of Finance, who agreed that resorting to the aforesaid trade union action will not have any effect on their career prospects. However, it is alleged that the 1st Respondent had directed the Regional Valuers of *Sabaragamuwa* and *Uva Provinces* to temporarily suspend the salary increments for a period of six months in relation to certain officers, an act indicative of *mala fide* on the part of the said Respondent. This suspension was made on the basis that those officers have failed to submit their progress reports for the Month of November 2017. This was strongly objected to by the 1st Petitioner Union by its letter dated 17th August 2018 and the Secretary to the Ministry of Finance was kept informed of this development on 21st January 2019.

The 1st Respondent had inquired from the 3rd Petitioner on 20th August 2019 as to why he had failed to submit his progress reports for the months of November and December 2017 and January 2018. The 3rd Petitioner conveyed that the failure was due to trade union action.

The current Service Minute of the Sri Lanka Valuation Service was published by the Public Service Commission in Gazette Extraordinary bearing No. 2142/75 of 27th September 2019 (P18A), substituting the previous Service Minutes. After the publication of the

current Service Minute, Field/Office based officers were absorbed to the relevant grade under Clause 14 thereof and therefore members of the 1st Petitioner Union who were from the batch of 2005 and 2008 and had a service period of well over 10 years were absorbed to Grade I of Class II while others who did not have 10 years were absorbed to Grade II of Class II. The Petitioners claim that there was no notification indicating the membership of the 1st Petitioner Union that their seniority had been suspended/affected by a period of 6 months for resorting to trade union action. The Petitioners further claim that a loss of seniority of 6 months would affect them gravely inasmuch as it would determine the Class they would fall into, namely Grade II of Class II or Grade I of Class II.

At a meeting convened by the 2nd Respondent (Hon. Minister of Economic Policies and Plan Implementation) on 24th February 2020, and held between the concerned officials and the members of the 1st Petitioner Union, a decision was taken to resolve the issue, in relation to the members who have taken part of the trade union action and had their salary increments suspended, in a manner that will not affect their career progression.

On 4th December 2020, officers of the 2010 batch who completed 10 years of service received letters from the 1st Respondent informing them of being promoted to Grade I of Class II, but only after omitting a period of 6 months from the service period for engaging in trade union action, and thereby preventing their promotion to Grade I of Class II.

Most of the membership of the 1st Petitioner Union have lodged appeals to the Public Service Commission against the said arbitrary act.

It is averred that on 3rd March 2021, the Public Service Commission had informed the 3rd Petitioner that his salary increment had been suspended for legitimate reasons and could be excluded when computing the period of satisfactory service, whilst conceding that it had not considered whether the said suspensions made by the 1st Respondent is in compliance with the due procedure (P25). The Public Service Commission, upon an enquiry made by the 3rd Respondent into the identical issue, repeated its view. The 2nd to 6th Petitioners had therefore preferred their appeals against the said decision by the Public Service Commission to the Administrative Appeals Tribunal.

The 1st Respondent, by her letter dated 13th November 2020, had initiated the process of calling for applications for the recruitment for the executive officer post of Valuer in Grade III of Class I of the Sri Lanka Valuation Service on the basis of Service Experience and Merit (P44A to E). The notice of calling applications was published on 16th November 2020. In response, the members of the 1st Petitioner Union, inclusive of 3rd, 4th and 6th Petitioners have applied seeking appointment to the said post.

Whilst the said Petitioners and others were awaiting their interviews, the Public Service Commission published yet another notice in the print media on 17th July 2021, making reference to the said notice of 16th November 2020, causing an amendment to the allocation of marks given for seniority as set out in the table published therein. It is this amendment the Petitioners resist as they claim it favours a certain group of applicants to score higher marks on seniority whilst having a

negative impact on others including the members of the 1st Petitioner Union.

The Petitioners have thereby primarily sought to challenge the proposed interview process and also the legality of the suspension of their increments by the 1st Respondent for engaging in trade union activity and loss of seniority of 6 months. They claim the said suspension of increments had been made by the 1st Respondent, contrary to specific direction of the Hon. Minister and to the provisions of Public Administration Circulars, and thereby frustrating their legitimate expectations. They claim these illegal actions coupled with the amendment introduced to the Service Minute to facilitate the ulterior motives of the 1st Respondent are violative of their fundamental rights guaranteed under the Constitution.

The 1st to 4th and 14th Respondents resisted the Petitioners' application and, in view of the nature of the interim reliefs sought, the Respondents have tendered limited objections setting out the factual basis of their version.

When the instant petition was supported by the learned President's Counsel for the Petitioners on 8th December 2021, learned Additional Solicitor General who appeared for the 1st to 4th Respondents raised preliminary objections as to the maintainability of the same and sought its dismissal *in limine*. Parties were heard extensively on the preliminary objections and afforded a further opportunity to substantiate their respective position by tendering applicable judicial precedents, in addition to the ones already referred to in their respective submissions.

During her submissions, the Learned Additional Solicitor General had articulated three grounds on which she wished to raise her objections as to the maintainability of the instant application. It was firstly contended that the latest of the series of decisions, namely the publication of the notice calling for applications to Grade III of Class I of Sri Lanka Valuation Service was published on 17th July 2021, whereas the petition challenging its validity had been tendered only on 2nd September 2021, well beyond the mandatory '*one month rule*', as laid down in Article 126(2) of the Constitution.

In addition to the said preliminary objection, the learned Additional Solicitor General also contended that the 1st Petitioner, being a trade union, had no *locus standi* to institute proceedings under Article 126, and that the Petitioners have failed to name the necessary parties to their application, who would be adversely affected, if this Court grants relief.

Learned President's Counsel for the Petitioners sought to counter the first of the three objections on the basis that the Petitioners have alleged '*continuous violation*' of their fundamental rights and also have sought intervention of the Human Rights Commission seeking redress to their grievance and therefore, in terms of Section 13 of the Human Rights Commission Act No. 21 of 1996, the petition of the Petitioners could still be entertained by this Court. She invited attention of this Court to the averments contained in paragraph 96 of the petition where the 2nd to 6th Petitioners have specifically pleaded that they have preferred individual complaints to the Human Rights Commission on 15th August 2021 and relied on the *dicta* of *Murdu N.B. Fernando* J in the judgment of this Court in ***Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe and another v Ceylon Petroleum Storage Terminals***

Limited (SC FR No. 244/2017 – S.C. Minutes of 22.02.2019), that " … *in view of the provisions of Section 13(1) of the Human Rights Commission Act, time would not run during the pendency of proceedings before the Human Rights Commission and such time will not be taken into account in computing the period of one month within which an application may be made to this Court in terms of Article 126(2) of the Constitution*."

Since the first of the three preliminary objections refers to the invocation of jurisdiction of this Court, I shall consider the same at the very outset.

Relevant Sections of the Article 126(2) of the Constitution states that any person, who alleges that a fundamental right or language right relating to such person has been infringed or is about to be infringed by executive and administrative action, either he or his Attorney at Law, "… *within one month thereof*", in accordance with such rules of Court as may be in force, apply to the Supreme Court. It is clear from the wordings of the said sub-Article that in order to ascertain the all-important one-month period, the date of the alleged infringement must be taken as the starting point.

The first reported instance of determining the nature and the applicability of the limitation of one month as imposed by Article 126(2) perhaps arose before this Court in ***Ranatunga v Jayawardena and Others*** (1979) 1 Sri L.R. 124, where *Samarakoon* CJ, in upholding the objection raised by the learned Solicitor General on behalf of the Respondents, stated thus;

> "… *no action under Article 126 could have been embarked on prior to 7th September 1978. However, assuming that this was a threatened infringement and it*

> *continued till the 7th of September 1978 it was up on to the petitioner to make this application after the 7th September 1978. But then the time limit of one month for institution of this application becomes applicable, and the application should therefore have been made within one month after 7th September 1978. The application has in fact been filed on the 4th June 1979, which is long after the prescribed period. Counsel for the petitioner sought to get over this provision by stating that words "within one month thereof" in Article 126(2) refers only to an infringement and not to the threatened infringement referred to in that section. I am unable to agree with this contention. The word "thereof" refers to the executive or administrative action complained of and for the purpose of this application must depend on what the petitioner alleges in this petition as the wrongful action."*

Since the promulgation of the 1978 Constitution on 7th September 1979, with the above quoted pronouncement by *Samarakoon* CJ, for over a period of four decades, this Court had consistently held that the one-month period from the alleged infringement, as imposed by the Article 126(2), is a mandatory requirement.

In the instant application, the Petitioners allege that a series of acts and decisions attributed to the 1st Respondent and the Public Service Commission, which culminated with the publication of the notice of amended marking scheme applicable to the candidates to fill 63 vacancies of Grade III of Class I of the Sri Lanka Valuation Service, as per the order of the Public Service Commission, on 17th July 2021 (P46B) had infringed their fundamental rights. Learned President's Counsel for

the Petitioners termed the instant application is in relation to an instance of a '*continued violation'* of their fundamental rights.

In this regard, the *dicta* of *Marsoof* J in the judgment of ***Lake House Employees Union v Associated Newspapers of Ceylon Ltd*** (SC FR Appln. No. 637/2009 – S.C. Minutes of 17.12.2014) is relevant. His Lordship states "… *any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of* ."

It is evident from the factual narration in the preceding paragraphs that the last of the series of acts that allegedly violate their fundamental rights is the said publication of the notice (P 46B) on 17th July 2021. Parties agree that no date had been notified for the interviews of the applicants who responded to the said notice. The Petitioners have had sufficient notice of the said publication since they have lodged complaints to the Human Rights Commission against it. However, the Petitioners have filed the instant application at the Registry of this Court only on the 2nd September 2021. Therefore, the Petitioners invoked the exclusive jurisdiction of this Court conferred under Articles 17 and 126, way past the said mandatory period of one month, reckoned from the date of the last of the series of such acts attributed to the 1st Respondent and the Public Service Commission, which allegedly had infringed their fundamental rights.

In these circumstances, it is necessary to consider the contention advanced by the learned President's Counsel on behalf of the Petitioners that in view of the fact that they have tendered applications seeking redress to the alleged violation of fundamental rights to the Human Rights Commission, and with the operation of the statutory provisions of section 13 of Human Rights Commission Act, whether the preliminary objection that the application is time barred, should be rejected.

Section 13(1) of the Human Rights Commission Act No. 21 of 1996 reads as follows;

> *"Where a complaint is made by an aggrieved party in terms of Section 14 of the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."*

This Court on several instances had the occasion to consider the effect of the said statutory provisions in relation to an application that had been tendered to Court after the mandatory one-month period.

His Lordship *S.N. Silva* CJ, in the judgment of ***Subasinghe v The Inspector General of Police and Others*** (SC Spl. No.16 of 1999 – S.C. Minutes of 11.09.2000) where the Petitioner had relied on section 13 of the Human Rights Commission Act to bring his application within the

time limit imposed by Article 126(2), had rejected that contention on the basis that " *the petitioner has failed to adduce any evidence that there has been an inquiry pending before the Human Rights Commission*."

In a situation where the petitioner had produced the receipt issued by the Human Rights Commission confirming the lodgement of an application for violation of human rights, *Amaratunga* J, in ***Ranaweera and Others v Sub Inspector Vinisias and Others*** (SC FR Appln. No. 654/2003 – S.C. Minutes of 13.05.2008) held that "… *the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore, a party seeking to utilise section 13(1) of the Human Rights Commission Act … is obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.*"

The Petitioners have placed heavy reliance of the already quoted dicta of Fernando J in ***Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe and another v Ceylon Petroleum Storage Terminals Limited*** (supra). But the circumstances that related to the Petitioners' application on applicability of Section 13 are clearly distinguishable from one important factor as referred to in the said judgment. It is stated clearly therein (at p. 15 of the judgment) that the petitioners in that application had declared in the petition that "… *a complaint was made to the Human Rights Commission and that the said complaint was acknowledged by the Human Rights Commission*." In the instant application, what the Petitioners have averred in paragraph 96 of their

petition is "*the Petitioners state that the 1st Petitioner on behalf of its Members and the 2nd to 6th Petitioners have individually preferred complaints to the Human Rights Commission on the 15th August 2021 concerning matters complained hereof.*"

The instant application was filed on 2nd September 2021 and was taken up for support to consider granting of leave to proceed on 8th December 2021. During the said interval of three months the Petitioners could have at least tendered any communication addressed to them by that Commission that their applications were accepted and are pending investigations. But they did not. Thus, the Petitioners have failed "*to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission"* per ***Ranaweera and Others v Sub Inspector Vinisias and Others*** (supra). In this context, it is relevant to note that this Court had frowned on the practice of those petitioners, who seek to '*circumvent*' the limitation imposed by Article 126(2) by resorting to statutory provisions of Section 13(1) of the Human Rights Commission Act. In the judgment of ***Kithsiri v Faizer Musthapha and Others*** (SC FR Appln No. 362/2017 – S.C. Minutes of 10.01.2018) *Aluwihare* J held that in the absence of any material to show that an inquiry into the petitioner's complaint is pending before the Commission and in view of the petitioner's desire not to have his complaint investigated into by the Commission, the preliminary objection raised on time bar is entitled to succeed.

It must also be noted that, despite the mandatory requirement consistently imposed on a petitioner in invoking the jurisdiction under Article 126 within the stipulated period of one month since the alleged

infringement, this Court had however retained its discretion to entertain applications which allege violation of fundamental rights but are filed beyond the said period of one month, if certain conditions are fulfilled.

In ***Gamaethige v Siriwardana*** (1988) 1 Sri L.R. 384, *Mark Fernando* J had held (at p.402) that "… *in exceptional cases, on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.*" His lordship had decided so upon a position that had arisen for consideration in the case of ***Edirisuriya v Navaratnam and Others*** (1985) 1 Sri L.R. 100. The petitioner in that matter had been arrested and detained under a detention order without allowing access to his family or to any lawyer. When access was permitted subsequently his visitors were advised '*not to discuss about the case*'. He complained of violation of his fundamental rights guaranteed under Articles 13(1), (2), 12(1) and (2) of the Constitution. The Respondents have taken up the position that the application of the petitioner is time barred, as he had taken more than a month since his arrest to come before Court.

At the hearing, it was conceded by the learned Deputy Solicitor General, who represented the respondents, that "*if the petitioner had, after he was taken into custody by the Police, been held incommunicado, then the period he was so held without having the opportunity of communicating with his relations and or lawyers and of taking any meaningful steps to invoke the jurisdiction of this Court should not and would not be counted in computing the period of one month referred to in sub-article (2) of Article 126 of the Constitution and that the maxim lex non cogit ad impossibilia would, in such a situation, apply*".

In view of the constraints placed on the said petitioner, *Fernando* J had stated in ***Gamaethige v Siriwardana*** (at p.401) "*the time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to involve the jurisdiction of this court, this Court has discretion, possibly even a duty, to entertain an application made within one month after the petitioner ceased to be subject to such restraint.*"

In order to exempt from the one-month time limit, it is for the Petitioners to satisfy this Court of the existence of unavoidable circumstances that had prevented them from invoking the jurisdiction of this Court. It was also stated in ***Gamaethige v Siriwardana*** (supra) (at p. 401) that it is "*a heavy burden on a petitioner who seeks that indulgence*".

The Petitioners have apparently not relied on this exception, as they have not averred any circumstances that the resultant delay is "*no lapse, fault or, delay on the part of the petitioner*".

In view of the considerations referred to above, I am of the view that the preliminary objection on the time bar raised by the learned Additional Solicitor General on behalf of the 1st to 4th and 14th Respondents is entitled to succeed. The petition of the Petitioners is clearly time barred. Therefore, the necessity to consider the two remaining preliminary objections does not arise.

Accordingly, the petition of the Petitioners is dismissed *in limine* as it had been filed beyond the mandatory one-month period as imposed by Article 126(2) of the Constitution.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT