

**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

1. Palitha Victor Mendis
Rajakaruna
Wathuru Villa,
Kahaduwa.
2. Hakmana Kodithuwakkuge
Jayathissa
22/4, Guru Pura Rd.,
Mathugama.
3. Herath Mudiyansele
Panchananda Athula Bandara
Herath
Kuruvee Kotuwa
Kengalla, Kandy.
4. Chaminda Pasquel
Dilanka,
32, Meddegoda Rd.,
Mathugama.
5. Rathnayake Mudiyansele
Upananda Bandara
Rathnayaka
22/8, Udaperadeniya,
Peradeniya.
6. Sri Lanka Nidahas Ruber
Inspectors'
Union,
96/6, Mollamure Avenue 2,
Kegalle.

S.C. F/R No: 32/14

Petitioners

~ Vs~

1. R. B. Premadasa
Director-General,
Rubber Development
Department,
No.55/75, Vauxhall Lane,
Colombo 2.
2. Mrs. Sudharma Karunaratne
Secretary,
Ministry of Plantation
Industry,
55/75, Vauxhall Lane,
Colombo 02.
- 2A. Anura M. Jayawickrema
Secretary,
Ministry of Plantation
Industry,
11th Floor, Sethsiripaya
2nd Stage, Battaramulla
- 2B. Mr. Upali Marasinghe
Secretary,
Ministry of Plantation Industry
11th Floor, Sethsiripaya
2nd Stage, Battaramulla.
3. Dr. Dayasiri Fernando
(Former) Chairman,
Public Service Commission.
4. Palitha M. Kumarasinghe, PC.
5. Mrs. Sirimavo A. Wijeratne
6. S.C. . Mannapperuma
7. Ananda Seneviratne
8. N. H. Pathirana
9. S. Thillanadarajah
10. M. D. W. Ariyawansa
11. A. Mohamed Nahiya
All (Former)Members of the
Public Service Commission.
12. Mrs. T. M. L. C. Senaratne
(Former) Secretary,

Public Service Commission,
No.177, Nawala Road
Narahenpta.

- 12A. H.M.G.Seneviratne
Secretary,
Public Service Commission,
177, Nawala road,
Narahenpita
13. Neville Piyadigama
(Former)Co-Chairman,
National Salaries and Cadre
Commission
14. Ravi Dissanayake
(Former)Co-Chairman
National Salaries and Cadre
Commission
Room 2-G 10, BMICH,
Buddhaloka Mawatha,
Colombo 07.
15. D. Godakanda
Director-General,
Department of Management
Services, Ministry of Finance
and Planning,
General Treasury, Colombo 01
16. Attorney-General,
Attorney-General's
Department,
Colombo 12.
17. Neville Piyadigama,
(Former)Co-Chairman,
National Pay Commission.
- 17A. K.L.L.Wijeratne
Chairman,
Salaries and Cadre
Commission,
BMICH,
Buddhaloka Mawatha,
Colombo 07.

18. J. R. Wimalasena Dissanayake,
(Former)Co-Chairman,
19. Wimaladasa Samarasinghe,
(Former) Member,
20. V. Jegarasasingham,
(Former)Member,
21. G. Piyasena,
(Former) Member,
22. Rupa Malini Peiris,
(Former) Member,
23. Dayananda Vidanagamachchi
(Former)Member,
24. S. Swarnajothi,
(Former) Member,
25. B. K. Ulluwishewa,
(Former) Member,
26. Sujeewa Rajapakse,
(Former) Member,
27. H. W. Fernando,
(Former) Member,
28. Prof. Sampath Amaratunga,
(Former) Member,
29. Dr. Ravi Liyanage,
(Former) Member
30. W. K. H. Wegapitiya,
(Former) Member,
31. Keerthi Kotagama,
(Former) Member,
32. Reyaz Mihular,
(Former) Member,
33. Priyantha Fernando,
(Former) Member,
34. Leslie Shelton Devendra,
(Former) Member,
35. W.W.D.S.Wijesinghe,
(Former) Member,
36. G. D. S. Chandrasiri,
(Former) Member,
37. W. H. Piyadasa,

(Former) Member,

18th to 37th Respondents all of
the (Former) National Pay
Commission,
Room No. 2-116, B.M.I.C.H.
Bauddhaloka Mawatha,
Colombo 7.

38. Justice Sathya Hetige PC,
(Former) Chairman,
Public Service Commission.
- 38A. Dharmasena Dissanayake,
Chairman,
Public Service Commission,
- 39 S.C.Mannapperuma
(Former) Member
- 39A. Prof. Hussain Ismail
Member
40. Ananda Seneviratne
(Former) Member
- 40A. Santi Nihal Seneviratne
Member
41. N.M.Pathirana
(Former) Member
- 41A. D. Shirantha Wijayathilaka
Member
42. S.Thillanadarajah
(Former) Member
- 42A. V. Jegarasasingham
Member
43. A. Mohamed Nahiya
(Former) Member
- 43A. S. Ranugge
Member
44. Kanthi Wijetunge
(Former) Member
- 44A. D. L. Mendis
Member
45. Sunil S. Sirisena

- (Former) Member
45A. Sarath Jayathilake
Member
46. Dr. I. M.Zoysa Gunasekera
(Former) Member
46A. Dr. Parathap Ramanujam,
Member
All of Public Service
Commission,
No.177, Nawala road,
Narahenpita, Col. 5.

RESPONDENTS

BEFORE: Buwaneka Aluwihare PCJ
Priyantha Jayawardena PCJ
Upali Abeyrathne J

COUNSEL: Mrs. Chamanta Weerakoon with Oshadi Premarathne
and Ms. Lumbini Kodituwakku for Petitioners.
Mrs. Shahida Barrie, SSC for Respondents.

ARGUED ON: 10.09.2015

DECIDED ON: 16.06.2017

Aluwihare PC.J

In the main, the grievance of the Petitioners is that; although they were eligible to be promoted to the post of Rubber Development Officers- Grade 1, way back in the 1990s, their promotions were granted only with effect from 2nd August, 2013 and the executive and/or administrative action on the part of the Respondents, in fixing the date 2nd August, 2013 as the date for the promotions is unreasonable and arbitrary and had infringed the rights guaranteed under Article 12 (1) of the Constitution.

The 1st to the 5th Petitioners who are Rubber Development Officers in the Department of Rubber Development had filed this application on their

behalf as well as on behalf of 30 other such officers who are members of the 6th Petitioner Trade Union.

The facts are as follows:

Some of the Petitioners along with others, whose names are reflected in the document marked and produced as P1 (a) had joined the then Rubber Control Department, which had been established by the Rubber Control Act No.11 of 1956, as Rubber Inspectors-Grade II. Sometime in the year 1994, Rubber Control Department and the Advisory Services Department that came under Rubber Research Board had been amalgamated, consequent to a Cabinet Memorandum which had received Cabinet approval to form the Rubber Development Department and the Rubber Control Department ceased to exist.

Thereby, with effect from 1st July, 1994 Rubber Inspectors in the Rubber Control Department, as well as Rubber Extension Officers of Advisory Services Department of the Rubber Research Board became employees of the Rubber Development Department. The Petitioners submit that both these categories of officers were designated as Rubber Development Officers and retained the same grades they had been in, under their former employers.

It was also contended that by the date of formation of the Rubber Development Department, 13 Rubber Inspectors under the Rubber Control Department had been selected to be promoted to Grade- I. Giving effect to the said decision the 13 officers who were selected had been promoted as Rubber Development Officers Grade-I, after the Rubber Development Department was formed.

The Petitioners submit that although they were informed about the change in the designations by the letter dated 31st October,1994 (P4) under the hand of the Director General of the Rubber Development Department, the said designations had not been approved by the Management Services Department even up to the point this application was filed in 2014.

Furthermore there had also not been any change in the salaries and they continued to draw the salary scale applicable to the Clerical and equivalent grades-11A.

Although it may not be directly relevant to the present issue before us, the Petitioners also have averred that the Rubber Extension officers, were absorbed to the Rubber Development Department from the Advisory Services Department, an arm of the Rubber Research Board, became entitled to draw the same benefits, namely salary increments, salary revisions and allowances as their former colleagues in the Rubber Research Board by virtue of an order made by this court in the Fundamental Rights Application No. SC FR 961/97.

Petitioners have drawn the attention of this court to the fact that since the formation of the Rubber Development Department in 1994, no promotions were effected in the post of Rubber Development Officers, save for the 13 officers who were promoted to Grade-I, a decision that had been taken when the Rubber Control Department existed and implemented after the formation of the new Department.

If what the Petitioners claim is correct the Department had not taken any steps to effect promotions to officers employed as Rubber Development Officers Grade II up to 2013, July when applications had been called to fill vacancies of Rubber Development Officers Grade-1 which was almost 20 years since the formation of the Rubber Development Department.

The Petitioners have in their Petition referred to numerous instances where they had made efforts to make representations to the relevant authorities with regard to anomalies of the salary scale they were placed. I do not see any necessity to dwell into those matters as they have no bearing on the matter at hand.

The learned counsel for Petitioners contended that the Rubber Development Officers who were promoted to Grade I had service periods varying from 17 years to 29 years and fixing a common effective date for promotion i.e. 2nd August, 2013 is arbitrary and by this action, the Public Service Commission, had virtually wiped off the period of service of the affected Rubber Development Officers.

In terms of the annexure to the document marked and produced as P9(a), a Rubber Inspector Grade-II is required to have 10 years satisfactory service in that Grade and is also required to complete the Efficiency Bar Examination to become eligible to be promoted to Grade-I. The Petitioner

and all other affected officers, save for one, had in fact completed both these requirements having passed the Efficiency Bar examination in 2001. It was pointed out that the said examination had not been held since then, for Grade II Rubber Development officers.

Interviews had been held on 1st August, 2013 after calling for applications to fill vacancies of Grade-1 from Grade II Rubber Development Officers who have qualified for promotion.

The Petitioners as well as the other affected officers had been informed by the Director General (The 1st Respondent) that they have been promoted as Grade- I Rubber Development Officers with effect from 2nd August, 2013.

The Petitioners complain, that fixing the date of promotion as 2nd August, 2013 is unreasonable, arbitrary, discriminatory and as a result, the petitioners' fundamental rights guaranteed under Article 12 (1) had been infringed.

To illustrate their argument further, it is pointed out that subsequent to the promotions the 1st Petitioner who had served 29 years as a Grade- II officer, and the 4th Petitioner who has only 17 years' service, are on par as being of the same seniority.

It was the contention of the Petitioners that the fixing of the effective date of promotion to 2nd August, 2013 is arbitrary as it effectively wiped out the period of service of the affected officers.

It was also contended on behalf of the Petitioners that further prejudice was caused to them, by fixing the date of promotion to 2nd August, 2013, as they are required to serve a further period of 6 years in order to become eligible to be promoted to Special Class and as most Petitioners and the affected officers have almost reached the retirement age, they would never be in a position to be promoted to the Special Class.

The table below depicts the dates on which the affected officers joined the former Rubber Control Department and the years of service they have put in, by August 2013.

	Name	Date of Birth	Age As at 2. 8. 2013	Date of Appointment	Years Of Service	Efficiency Bar Completed year
01	A.V.C Ranaweera	1956.02.17	57	1983.12.01	29	1993-12-06
02	R.A.D Sisira Kumara	1959.08.06	53	1983.12.01	29	1990-11-24
03	N.M.G Senarath Bandara	1956.07.08	57	1983.12.01	29	1989-13-26
04	R.A Sarath Kumara	1956.12.09	56	1983.12.01	29	1990-11-24
05	W.V Karunaratne	1962.01.24	51	1983.12.01	29	1990-13-26
06	P.V.M Rajakaruna	1959.05.24	54	1983.12.01	29	1990-11-24
07	W.S Devananda De Silva	1961.06.05	52	1983.12.01	29	1990-11-24
08	W.K Jinadasa	1957.09.30	55	1985.03.15	27	1990-11-24
09	R.A.I Wijesinghe	1959.03.24	53	1985.03.15	27	1990-11-24
10	E.W Laxman Rathnasiri	1955.10.31	57	1985.03.15	27	1993-12-26
11	G.H.H.B Wijewardene	1959.06.01	54	1985.03.15	27	1990-11-24
12	B.G Ranawaka	1961.10.14	51	1985.03.15	27	1990-11-24
13	R.W.D. Chandrapala	1958.10.31	54	1985.03.15	27	1993-12-26
14	P.R.H Ariyaratne	1961.03.01	52	1985.03.15	27	1993-12-26
15	G.K.M Jyawardene	1957.11.02	55	1985.03.15	27	1990-11-24
16	J.A.A.D Jayakodi	1959.03.07	54	1985.03.15	27	1990-11-24
17	H.K. Jayatissa	1957.10.13	56	1985.03.15	27	1990-11-24
18	M.A Kasunathilaka	1962.01.17	55	1985.03.18	27	1990-11-24
19	M.W.G Weeragoda	1963.05.09	51	1986.04.16	26	1993-12-26
20	A.M.J.G. Alahakoon	1963.05.09	50	1986.04.16	26	1990-11-24
21	J.M. Mettananda Gamini	1964.01.03	49	1986.04.16	26	1989-03-26
22	L.D. Withanarachchi	1960.03.17	53	1986.04.16	26	1989-03.26

23	W.S. Sumathipala	1958.02.07	55	1986.04.16	26	1990-11-24
24	H.R.A.A. Jayathilaka Bandara	1960.11.03	52	1986.04.16	26	1990-11-24
25	R.I.B Kumarasinghe	1957.10.30	52	1986.04.16	26	1989-03-26
26	U.M.D Udugoda	1957.07.20	56	1986.04.16	26	1990-11-24
27	S.Subawikrama	1957.07.20	56	1986.04.21	26	1990-11-24
28	P.A.B Herath	1958.06.24	55	1986.04.21	26	1990-11-24
29	M. Ranjith	1962.08.15	51	1996.06.03	17	2001-11-17
30	N.C Palihawadana	1968.05.17	45	1996.06.03	17	-
31	W.J Liyanage	1972.07.24	41	1996.06.03	17	2001-11-17
32	Sunanda Rajapakse	1972.11.30	40	1996.06.03	17	2001-11-17
33	K.A.G Sirisena	1968.05.14	45	1996.06.03	17	2001-11-17
34	R.M.U.B Rathnayake	1967.11.24	45	1996.06.03	17	2001-11-17
35	C.Pasquel	1969.06.27	44	1996.06.03	17	2001-11-17

The Petitioners have pointed out that, the 1st Respondent, the Director General of the Rubber Development, had sought approval of the Public Service Commission to make the promotion effective from the date that each officer became eligible for promotion.

It was contended on behalf of the Petitioners that at the time the promotions to grade-1 were made, there were 52 vacancies in the said Grade, and as such, all 35 affected officers could have been promoted.

The 38th Respondent, the then Chairman of the Public Service Commission in his affidavit had averred that the 1st Respondent sought approval of the Public Service Commission to promote 41, Grade II Rubber Development Officers to Grade 1, which clearly indicates that there had been more than 35 vacancies at that point of time. The 38th Respondent also admits that the 1st Respondent, the Director General of Rubber Development Department, made a request to consider back dating the promotions to the year 1996.

The 38th Respondent states that the Public Service Commission called for proof of approved cadre that existed in 1996 from the 1st Respondent. It is further averred by the 38th Respondent that of the staff schedule submitted by the Department of Management Services, in respect of the year 1996, indicate only an estimated cadre and for that reason it was not considered as the actual number of posts existed as of 1996. The Chairman, Public Service Commission had further averred that there was no documentary proof of approval by the Department of Management Services for the changing the designation of the Petitioners from “Rubber Inspector” to “Rubber Development Officer”.

It was the position of the Public Service Commission, according to the 38th Respondent that, as there was no proof acceptable to the Public Service Commission as to the cadre that existed in 1996, promotions cannot be given from 1996.

To my mind, it is up to the relevant authorities, in the exercise of its powers vested in them to obtain all details relevant to consider the promotions. An employee cannot be penalized or deprived of his entitlements as a result of ineffectiveness or inability on the part of the authorities to obtain the necessary information or statistics with regard to the cadre of grade-1 officers of the relevant post.

The Petitioners have averred that no Efficiency Bar Examination had been held since 2001. This application was filed in 2014. Therefore, it appears that the relevant authorities have lamentably failed in their duty towards the employees.

Having considered the facts of the case I am of the view that, in the context of the 35 officers referred to in document marked and produced as P1 (a), the decision of the then Chairman and the members of the Public Service Commission to fix the date of promotion to Grade I with effect from 2nd August, 2015 is both arbitrary and unreasonable.

The Petitioners have sought a declaration from this Court to the effect that the administrative action on the part of the Respondents, have infringed the fundamental rights of the Petitioners of equality before the law and equal protection of the law guaranteed under Article 12 (1) of the Constitution.

Equality before the law in Article 12 of the Constitution envisages right to equal treatment in similar circumstances, without discrimination between persons who are similarly circumstanced. As per Justice Sharvananda (Fundamental Rights in Sri Lanka, “A commentary”) equal protection guarantees protection from both legislative and executive by way of discrimination. Justice Sharvananda goes on to say that “the guarantee of equality is directed against arbitrary discrimination”.

In the case before us I doubt whether the Petitioners could say that they have been discriminated, in the true sense of its meaning, in that they were treated differently among persons who are substantially in similar circumstances. On the other hand going by the strict wording in Article 12, one might argue that the Petitioners have failed to establish that the Petitioners were subjected to inequality, when it came to the application of the law.

In the course of governance, discretionary power has to be conferred on officers who are vested with administrative functions as well as other state organs that carry out similar functions. As held by the Supreme Court of India in the case of *Air India Vs. Nagesh Meerza 1981 S.C 1829*, a law conferring absolute or uncontrolled discretion in an authority, negates the equal protection because such a power can be exercised arbitrarily so as to discriminate between persons similarly situated without reasons.

In the case of *Breen v. Amagalamated Engineering Union and others 1971 AER 1148*, Court of Appeal (England), rejected the concept of unfettered executive discretion. Lord Denning, signifying the duty to exercise the discretion according to law stated (at pg. 1153).

“The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand, no matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside.”

The issue as to whether arbitrariness encapsulates Article 14 and 16 of the Indian constitution was considered in the case of Royappa v. State of Tamil Nadu 1974 AIR SC 555 by a five judge bench of the Indian Supreme Court.

The article 14 of the Indian Constitution, which is similar to the Article 12 of our constitution, reads thus:-

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India...”

In the said case, the Supreme Court of India held, as per Justice Bhagawati:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be, cribbed, cabined and confined within the traditional doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sold enemies; one belongs to the rule of law in the Republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article 14 and if it affects any matter relating to public employment..... Articles 14 and 16 strikes at the arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid, relevant principles applicable alike to all similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant, but is extraneous and outside the area of permissible considerations, it would amount to Mala fide exercise of power and that is hit by articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice; in fact the latter comprehends the former. Both are inhibited by articles 14 and 16”

The Supreme Court went on to hold that:

“The ambit and reach of Article 14 and 16 are not limited to cases where the public servant affected has a right to a post...” (emphasis added)

In the instant case the decision of the Public Service Commission, not to backdate the date of the promotions of the affected officers, on the basis that there were insufficient proof as to the availability of vacancies, in my view is arbitrary and lacks fairness, and would be violative of article 12 of the Constitution applying the rationale in the case of *Royappa v. State of Tamil Nadu (supra)*.

Furthermore, fixing a common date of the promotions to the Petitioners and the other affected officers had been done disregarding the dates of appointment of each officer and the said decision in my view is, a decision outside the permissible area of consideration’.

I hold that the action of the 38th respondent and 39th to 46th Respondents, the former Chairman and former members respectively, of the Public Service Commission, by their decision not to backdate the promotion to Grade I of the 1st to 3rd Petitioners have infringed their fundamental rights guaranteed under article 12 (1) of the Constitution.

This court directs the present Chairman and the members of the public Service Commission to back date the appointment of the Petitioners and the other affected officers whose names appear in the table in this judgment with effect from the date each of them became eligible to be promoted to the post of Rubber Development officer Grade-I if the officers concerned have satisfied the criteria referred to, in the letter of the Director General of Rubber Development dated 08-07-2013 reference, No.RDD/1/5/1/3/recruitment (P10).

This must be done upon ascertaining the number vacancies that existed in the said post, from the 1st Respondent.

This court further directs the 1st Respondent, the Director General, Rubber Development Department to furnish the Public Service Commission, the number of vacancies that existed on the respective dates each of the Rubber Development Officers (whose names appear in the table of this judgement) became entitled to be promoted as Rubber Development Officer Grade- I

In view of the circumstances of the case and the relief granted, I do not wish to make an order as to compensation.

JUDGE OF THE SUPREME COURT

Justice Priyantha Jayawardena P.C

I agree

JUDGE OF THE SUPREME COURT

Justice Upaly Abeyrathne

I agree

JUDGE OF THE SUPREME COURT