

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution

1. A.A. Sarath  
83/15, Wijithapura Mawatha,  
Mahakandara,  
Madapatha.
2. M.L.T. Ananda,  
Pettawatta,  
Korawela,  
Welipenna.
3. S.M.N.Kumarasinghe,  
13, Bulagala,  
Dambulla.
4. Y.A.A.C. Kumara,  
114/1, Madelgamuwa,  
Gampaha.
5. U.S. Liyanage,  
623/6/A, Jaya Mawatha,  
Hospital Garden,  
Homagama.
6. S.Siva Kumar,  
D7/6,  
Thannimale, Undugoda,  
Kegalle.
7. A.T. Jayantha Premakumara,  
174/1/E,  
Sri Dharmawansa Mawatha,  
Weragampita,  
Matara.
8. S.S.B.D.H. Jagath Jayawardana,  
2/20, Nagaha Landa,  
Baduragoda Road,  
Kurikotuwa, Veyangoda.
9. B.K. Gunarathne,  
21, Olugamthota,  
Balangoda.

10. A.R.M.Kiyasdeen,  
Common Road,  
Addalachanai.
11. H.M.A.S.B. Herath,  
'Chandana', Waduressa,  
Bandarakoswaththa.
12. U. Jayawardana,  
Madiliya,  
Udagama,  
Atabage.
13. H.C.S. Nishantha,  
203, Polwatta Road,  
Uduwawala,  
Polonnaruwa.
14. M.V.Shelton Ananda,  
276/2/B,  
Mount Paradise 2,  
Gurudeniya, Kandy.
15. B.W.A.J.B.M. Baranagala,  
A69, Baranagala,  
Moronthota.
16. P.H. Rathnasiri,  
152, Madawela,  
Harispaththuwa.
17. M.N. Mahayaya,  
43, Bohingamuwa,  
Kuliyapitiya.
18. D.D.U.S. De Alwis,  
61, Moragalla Road,  
Nugaliyadda,  
Thalathu-oya.
19. M.D.U.K. Wedanda,  
Kumarapaya,  
Wedanda,  
Demataluwa, Kurunegala.

20. L.R.W. Perera,  
76, Yasarithna Tennekoon Mawatha,  
Kandy.
21. E.G.I. Dharmapriya,  
125, Kannamgoda,  
Hikkaduwa.
22. K.W.K. Jayakody,  
'Sampatha',  
Kahatagahawatta,  
Godakanda, Galle.
23. R.M.S.S. Rathnayake,  
Siyambalangamuwa Watta, Gonagama  
Road, Siyambalangamuwa,  
Maspatha.
24. G.A.M.S. Wijekoon,  
472/2. Hokandara Road,  
Pannipitiya.

*Petitioners*

S.C. (F.R.) Application . 661/2012

Vs.

1. Commissioner General of Excise,  
Department of Excise,  
No. 34, W.A.D. Ramanayake Mawatha,  
Colombo 02.
2. P.W. Rajapakshe,  
Commissioner of Excise,  
(Administration/Human Resources),  
Department of Excise,  
No. 34, W.A.D. Ramanayake Mawatha,  
Colombo 02.
3. W. Withanage,  
Deputy Commissioner of Excise,  
(Administration),  
Department of Excise,  
No. 34, W.A.D. Ramanayake Mawatha,  
Colombo 02.
4. Secretary,  
Ministry of Finance and Planning,

The Secretariat,  
Colombo 1.

5. Secretary,  
Ministry of Public Administration and  
Home Affairs,  
Independence Square,  
Colombo 7.
6. Director-General  
Establishments,  
Ministry of Public Administration and  
Home Affairs,  
Independence Square,  
Colombo 7.
7. Dr. Dayasiri Fernando,  
Chairman,  
7A. D.Dissanayake,  
Chairman,
8. Palitha M. Kumarasinghe, P.C.,  
8A. A.W.A. Salam
9. Sirimavo A. Wijeratne  
9A. V.Jegarajasingham,
10. S.C. Manapperuma,  
10A Nihal Seneviratne,
- 11 . Ananda Seneviratne,  
11A. Dr. Prathap Ramanujam,
12. N.H. Pathirana  
12A. S. Ranugge,
13. S. Thillanadarajah,  
13A. D.L. Mendis,
14. M.D.W. Ariyawansa,  
14A. Sarath Jayathilaka,
15. A. Mohamed Nahiya,  
15A. Dhara Wijayatilleke,

All Members of the  
Public Service Commission,  
No. 177, Nawala Road, Narahenpita,  
Colombo 05.

16. H.M.G. Senevirathne,  
Secretary,  
Public Service Commission,  
No. 177, Nawala Road, Narahenpita,  
Colombo 05.
17. B.R.U. Jayalath,
18. W.R. Ranajeewa,
19. S.Yadavan,
20. R.A.N.T. Ramanayaka,
21. H.M.T.K.S. Bandara,
22. W. Dharmasiri Perera,
23. D.T.H.W.D. L. Bandara,
24. K.M.A.S. Kumarasinghe,
25. K.A.M.B. Divulkumbura,
26. G.H.M.C. Amaranayaka
27. W.A.D.A. Harshanath,
28. K.K.N. Ranjan,
29. G.R.S. Weerasinghe,
30. S.G.P. Nishantha,
31. W.A.P. W.K. Wickramarachchi
32. G.R.S. Ihalagama
33. S. Janananda,
34. K.M. Nishantha,
35. H.L.K. Samantha,
36. W.M.R. Najith Singh,
37. A.G.W. Alwis,
38. K.P.J.S. Karunanayaka,
39. K.A.S. Kumarasiri,
40. N. Logalingam,
41. R.M.A.S. Rathnayaka,
42. V.D.M. Dilshan,
43. S. Yogaraja,
44. P. Sri Bawan,
45. K.H.A.K. Silva,
46. S. Naweswaran,
47. H.S.N. Munidasa,
48. M.D. Marasinghe,
49. H.J.B. Ekanayaka,
50. A.G.A. Rasik,
51. P.G.M. Gunasekara,
52. M.A.S. Sirithunga,
53. M.T.P. Cooray,

54. J.P. Surasena,
55. W.A.B. Lanka,
56. V.A.V.C. Hemapala,
57. P.G. Raveendra Kumara,
58. R.M. Vijaya Bandara,
59. C.P.S. Handavitharana,
60. C.M.S. I.A. Chandrasekara,
61. R.N.A.M.Y. S.B. Warakagoda
62. S.M.A.B. Samarakoon,
63. N.D.U. Gunasekara,
64. T.M.R. Tennakoon,
65. R.M.B. Ranasinghe,
66. T.U. Peiris,
67. K.B. Chandrasiri,
68. R. Nesakumar,
69. S.P. Wijerathne,
70. T. Weerathunga,
71. A.P. Kurukulasuriya,
72. A.M.D. Nilanthi,
73. V.Thiruchelvam,
74. G.W.M.S.B. Walisundara,
75. M.T. Abdeen,
76. M. Sathyaseelan,
77. K.A.D.S. Kothalawala,
78. S.R.L.A.S. Priyadarshani,
79. Y.C. Abeyrathna,
80. M.V. Nilmini,
81. U.B. Chandrasiri,
82. J.P.M. Sandaraj,

All C/o. The Department of Excise,  
No. 34,W.A.D. Ramanayake Mawatha,  
Colombo 02.

83. The Attorney General,  
Attorney General's Department,  
Hulftsdorp Street,  
Colombo 12.

*Respondents*

**BEFORE** : K. SRIPAVAN,C.J.  
S.E. WANASUNDERA, P.C., J.,  
P. JAYAWARDENA, PC.,J.

**COUNSEL** : Sanjeewa Jayawardena, PC. with Nilshantha Sirimanne and Ms. Lakmini Warusawithana instructed by Amarasuriya Associates for the Petitioners.

Rajitha Perera, SSC for the 1<sup>st</sup> – 6<sup>th</sup>, 7a – 15a and 83<sup>rd</sup> Respondents. Mahendra Kumarasinghe for the 17<sup>th</sup> – 67<sup>th</sup>, 69<sup>th</sup>, 71<sup>st</sup>, 72<sup>nd</sup>, 74<sup>th</sup> – 77<sup>th</sup> and 79<sup>th</sup> – 82<sup>nd</sup> Respondents.

**ARGUED ON** : 30/03/2016

**WRITTEN SUBMISSIONS**

**FILED ON** : 29/04/2016 by the Petitioners  
28/04/2016 by the 1<sup>st</sup> Respondent  
29/04/2016 by 17<sup>th</sup> -67<sup>th</sup>, 71<sup>st</sup>, 72<sup>nd</sup>, 74<sup>th</sup> – 77<sup>th</sup> and 79<sup>th</sup> – 82<sup>nd</sup> Respondents

**DECIDED ON** : **14.07.2016**

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**K. SRIPAVAN, C.J.,**

The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were employed as “Excise Guards” in the Department of Excise in 1991 and were promoted to the post of “Excise Corporal” in 1996. The 3<sup>rd</sup> to 17<sup>th</sup> Petitioners have been employed as “Excise Guards” from June 1998 and the 18<sup>th</sup> to 24<sup>th</sup> Petitioners have been employed as “Excise Guards” in the Department of Excise from June 2001. The Petitioners claim that they were confirmed in their posts after completing three years of service from their respective dates of appointment.

The Petitioners seek, inter alia, declarations that :-

- (a) the promotions granted by the 1<sup>st</sup> Respondent to the 17<sup>th</sup> to 62<sup>nd</sup> Respondents and/or 63<sup>rd</sup> to 82<sup>nd</sup> Respondents to the post of “Excise Sergeants” with effect from 19.10.2012 were illegal and null and void; and
- (b) the purported scheme of recruitment and/or amended marking scheme under which the promotions to the post of “Excise Sergeants” were granted by the 1<sup>st</sup> Respondent with effect from 19.10.2012 as contained in Clauses 06 and 07 of **P4** were illegal and null and void.

The Court on 24.01.2013 granted leave to proceed for the alleged violation of the Petitioners’ fundamental rights enshrined in Article 12(1) of the Constitution.

Learned Senior State Counsel and the Counsel appearing for the 17<sup>th</sup> to 67<sup>th</sup>, 71<sup>st</sup>, 72<sup>nd</sup>, 74<sup>th</sup> to 77<sup>th</sup> and 79<sup>th</sup> to 82<sup>nd</sup> Respondents raised an objection of time bar in invoking the jurisdiction of this Court in their written submissions. However, the Petitioners in Paragraph 24 of the Petition states thus:-

*“On or about 22/10/2012, the Petitioners became aware that the marking scheme contained in the draft scheme of recruitment, which had been forwarded in December 2008 for approval by the 1<sup>st</sup> Respondent to the Public Service Commission through the Director-General of Establishments, is not the marking scheme that is contained and/or reflected in the said notice published by the 1<sup>st</sup> Respondent dated 12/05/2011 (P4).*

*A copy of the letter sent by the Director-General of Establishments to the Public Service Commission, dated 12/02/2009, which contains his recommendations in respect of the said draft scheme, is annexed hereto marked P5 and pleaded as part and parcel hereof.”*

The Petitioners invoked the jurisdiction of this Court on 19.11.2012. The Petitioners also challenge the promotions made to the post of “Excise Sergeants” with effect from 19.10.2012. Thus, the Petitioners’ applications filed on 19.11.2012, challenging the promotion is well within the time limit of one month, as the list containing the promotees was published on 23.10.2012.

The 1<sup>st</sup> Respondent in his Affidavit dated 10.06.2013 at Paragraph 26 states as follows:-

- (a) I re-iterate the averments contained in paragraphs 16,18,22 and 23 hereof and state that the marking scheme to referred to in the Notice marked P4 have been duly approved;*
- (b) I further re-iterate that the draft Scheme of Recruitment marked **1R11/P6** was not applied in respect of the said promotions advertised by the said Notice marked P6 as the said scheme has not been approved as yet;*
- (c) In such circumstances there was no requirement to obtain the approval or recommendations of the Director General of Establishments or any other authority to publish the Notice marked P4 to take action thereunder;*



*(d) In view of the **large number of vacancies that had arisen (67)**, it was imperative to take action expeditiously to fill such vacancies in order to avoid a disruption in the work and functioning of the Excise Department.(emphasis added)*

Learned Senior State Counsel in the written submission took up the position that the marking scheme **P4** was duly approved by the Ministry of Finance and Planning which was the duly constituted Appointing Authority at the relevant time as the Public Service Commission was not functioning during that time. The 1<sup>st</sup> Respondent in fact re-iterates this position in Paragraph 16 (e) of his Affidavit as well.

However, the Petitioners at paragraph 19 of their Affidavit state that Applications for the post of “Excise Sergeants” were called for by notice dated 12.05.2011 marked **P4**. At Paragraph 28, the Petitioners state that “they have just become aware and have reasonable cause to believe that the purported marking scheme and/or the scheme of recruitment reflected in **P4** has been neither recommended by the Director General of Establishments nor approved by the Public Service Commission.”

This bare statement of the Petitioners, without indicating with sufficient documentary proof as to how they become aware that **P4** was not duly approved by the Public Service Commission, operates as a bar to challenge the validity of **P4**. In fact, the 1<sup>st</sup> Respondent at Paragraph 23 of his Affidavit states that all applicants including the Petitioners, were duly informed of the applicable marking scheme with the publication of the notice marked **P4** as far back as 12.05.2011. In these circumstances, the Court considers the notice marked **P4** as the valid scheme of recruitment and the notice marked **P4** cannot be challenged in these proceedings as the Petition was filed on 19.11.2012 well after the one month period stipulated in Article 126(2).

It was contended on behalf of the Petitioners in the course of the hearing, that even if the Public Service Commission was defunct at the relevant time, and assuming that the Cabinet of Ministers had duly delegated the functions of the Public Service Commission to a particular official in the Ministry of Finance and Planning, no such document establishing the delegation has been produced by the 1<sup>st</sup> Respondent. The Cabinet of Ministers cannot

certainly delegate the functions of the Public Service Commission to the “Ministry of Finance and Planning” which has several officers. The Court should know the particular official to whom the functions of the Public Service Commission had been delegated, and whether such official had properly exercised the said power or function. The document marked **1R7** on which the First Respondent relies has been signed by the Deputy Secretary to the Treasury, for and on behalf of the Secretary, Ministry of Finance and Planning. A copy of **1R7** has been sent to the Secretary, Public Service Commission for his information. The letter **1R7** was sent pursuant to a request made by the First Respondent as evidenced by **1R5** to the Secretary, Public Service Commission, through the Secretary, Ministry of Finance and Planning.

Learned Presidents’ Counsel for the Petitioners, without prejudice to the foregoing submissions argued that the total number of vacancies that had been approved for promotion by the document dated 20.09.2009 marked **1R7** was limited to a total of 21. (i.e. 15 under the “written examination” category and 06 under the “merit” category) and therefore promoting a total of 67 persons to the post of Excise Sergeant was unlawful and/or devoid of any lawful approval/authority. It is on this basis, Counsel submitted that 46 persons in excess of the purported approval granted by **1R7** had been promoted arbitrarily and in serious violation of the law. Learned Counsel indicated to Court that the Petitioners are more concerned of the promotions made in excess of the approval granted by **1R7**.

By the letter dated 30.04.2009(**1R5**) the First Respondent has informed the Public Service Commission that by notice dated 11.09.2008 applications were called from “Excise Corporals” and “Excise Guards” to fill 21 vacancies in the post of “Excise Sergeants”. Therefore, even if it is assumed, that the purported approval dated 10.09.2009 (**1R7**) was lawful and valid, the said approval was granted by the Deputy Secretary to the Treasury to fill 21 vacancies and no more. The Marking Scheme **P4** provides, inter alia, that 70% of the total number of vacancies in the “Excise Sergeant” cadre to be filled on the basis of marks obtained at a “written examination” and the balance 30% of the vacancies therein to be filled on the “merit” based criteria. Thus, out of the 21 vacancies, 15 vacancies had to be filled in terms of the “written examination” category and the balance 6 vacancies had to be

filled in terms of “merit” category. The approval given by the Deputy Secretary to the Treasury by letter dated 10.09.2009 (**1R7**) confirms this position. Any appointments made in excess of what has been approved by **1R7**, violates the Rule of Law. The Constitution enshrines and guarantees the Rule of Law and Article 12(1) of the Constitution is designed to ensure that each and every authority of the State, acts bona fide within the limits of its power and when the Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the persons who suffered in consequence of abuse or misuse of such power by the State officials. This Court in *Perera Vs. Cyril Ranatunga, Secretary Defence and Others* (1993) 1 S.L.R. 39 at page 51 dealt with the elements of the Rule of Law in the following manner :-

*“.....that the Rule of Law means, inter alia, (a) that everything must be done according to law (b) that Government should be conducted within the framework of recognized rules and principles which restrict discriminatory power.... that the Supreme Court is empowered to review and strike down any exercise of discretion by the Executive which exhibits discrimination and for that purpose has jurisdiction to invalidate any rule which would enable an authority to discriminate **or act arbitrarily.**”* (emphasis added)

Thus, it is well settled that the absence of arbitrary power is the first essential component by the Rule of Law. The Rule of Law from this point of view, means that decisions should be made, based on known principles and rules and such decisions should be predictable whereby a citizen should know where he stands in relation to such decisions. If the action of the Executive is not based on valid relevant principles applicable alike to all similarly situate and is based on extraneous or irrelevant considerations it would be denial of the doctrine of equality enshrined under Article 12(1) of the Constitution. It may even amount to “mala Fide” exercise of power.

Hence, when the approval was given by letter dated 10.09.2009 (**1R7**) to fill 21 vacancies, the First Respondent cannot ignore such approval and proceed to effect 47 promotions under the “written examination” category and 20 promotions under the “merit” category, totaling 67 promotions, on the scheme marked **P4**.

Learned Presidents' Counsel for the Petitioner drew the attention of Court, the case of *Narangoda and Others Vs. Kodituwakku, Inspector General of Police and Others* (2002) 1 S.L.R. 247, where Fernando, J., (with Gunasekere, J. and Yapa, J. agreeing) on 11.02.2002 quashed all promotions made by the Public Service Commission in pursuance of the interviews held in March and May 2000 (other than the 32<sup>nd</sup> Respondent) in view of the serious flaws found in the interview and selection process.

Considering the totality of the circumstances, I am of the view that any attempt to interfere with the process of selection in contravention of the approval granted by **1R7** was neither permissible nor desirable otherwise. I therefore, set aside all the appointments made to the post of "Excise Sergeants" in excess of the quota fixed by the document marked **1R7** dated 10.09.2009.

I therefore declare that the act of the 1<sup>st</sup> Respondent in making promotions contrary to **1R7** violates the fundamental rights of the Petitioners enshrined in Article 12(1) of the Constitution. I further declare that the promotions effected in excess of the quota fixed by **1R7** and contained in the documents marked **P-7(a)** and **P-7(b)** are illegal and null and void. Each one of the Petitioners is entitled for costs in sum of Rs. 5000/- payable by the First Respondent. Thus the Petitioners are entitled to receive a total sum of Rs. 120,000/- as costs. The First Respondent may seek the approval of the Public Service Commission to fill the balance vacancies in terms of the approved scheme of recruitment and to take action to fill such vacancies as expeditiously as possible following a transparent procedure.

**CHIEF JUSTICE.**

**S.E. WANASUNDERA, P.C., J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**P. JAYAWARDENA, P.C., J**

I agree.

**JUDGE OF THE SUPREME COURT**