

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

H.M.M. Fashan,
Karaitivu,
Ponparappi,
Puttalam.

Petitioner

SC/FR/487/2011

Vs.

1. S.D.A Borellessa,
Secretary,
Ministry of Home Affairs,
Independence Square,
Colombo 07.
- 1A. J.J. Rathnasiri,
Secretary,
Ministry of Home Affairs,
Independence Square,
Colombo 07
2. K.V.P.M.J. Gamage,
Director General of Combined
Services,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 07.
3. Lathisha P. Liyanage,
Director General of Combined
Services,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 07.

4. Jayantha Wijerathna,
Chief Secretary, North Western
Province,
1st Floor,
Provincial Office Complex,
Kurunegala.
5. N.H.A. Chithrananda,
District Secretary,
District Secretariat,
Puttalam.
6. Ravindra Wikramasinghe,
Divisional Secretary,
Divisional Secretariat,
Wanathavilluwa.
- 6A. Sanjeevani Herath,
Divisional Secretary,
Divisional Secretariat,
Wanathavilluwa.
7. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Priyasath Dep. P.C. J
B. P Aluwihare P.C. J
Priyantha Jayawardena P.C. J

Counsel: Faisz Musthapha PC with Faisar Marker and Oshada Rodrigo for the
Petitioner
Suren Gnanaraj SC for the Respondents

Argued on : 25th April 2016

Decided on : 15th December 2017

Priyantha Jayawardena P.C. J

The Petitioner is a Grade II Watcher of the Office Employees' Service category. He was appointed as a substitute watcher and was attached to the Divisional Secretariat of Wanathavilluwa with effect from 16th February, 2001 by a letter issued by the then Divisional Secretary of Wanathavilluwa which was approved by the then Chief Secretary of the North Western Province. The said letter stated that the appointment would not entitle the Petitioner to be appointed to a casual, temporary or permanent post in the Public Service of the Central Government or in the Wayamba Provincial Public Service and that the Petitioner would be paid a daily wage of Rs. 140/-.

Whilst the Petitioner was serving in the capacity of a substitute watcher, the Director General of the Combined Services issued Circular No.02/2002 dated 02nd December, 2002 (hereinafter referred to as 'Circular No.02/2002') to absorb the employees of the Provincial Public Service attached to the Divisional Secretariats into the Combined Services of the Ministry of Public Administration and Home Affairs (hereinafter referred to as the 'Combined Services').

The said Circular No. 02/2002, *inter alia*, stated that the employees attached to the Divisional Secretariats, other than the following officers, were entitled to be absorbed into the Combined Service:

- a. Field officers;
- b. Officers who had not consented to be absorbed into the Combined Service;
- c. Officers who were not issued formal letters of appointment;
- d. Officers with pending disciplinary inquiries; and
- e. Officers who did not have the required qualifications for the relevant post.

Accordingly, the employees who wished to be absorbed were directed to submit their written consent to the respective Divisional Secretaries before 16th December, 2002. The Petitioner submitted his written consent to be absorbed into the Combined Services by his application dated 17th December, 2002. Since he did not receive a response to his application, the Petitioner continued his service at the Divisional Secretariat of Wanathavilluwa.

Meanwhile, in terms of the Public Administration Circular No.13/2005 dated 28th July, 2005, the Petitioner was appointed to the post of Grade II Watcher of the Office Employees' Service category of the Wayamba Provincial Public Service with effect from 1st July, 2005, as he had completed 180 days of continuous service as a substitute watcher.

Thereafter, the 5th Respondent, the then District Secretary of Puttalam, by his letter dated 06th July, 2006, requested the 6th Respondent, the Divisional Secretary of Wanathavilluwa to take steps in terms of the Circular No. 02/2002 to absorb the Petitioner into the Combined Services. Further, the 6th Respondent sent several reminders to the Director General of Combined Services to absorb the Petitioner into the Combined Services.

In the meantime, a Gazette notification was published by the Director General of Combined Services on 14th May, 2010 calling for applications from junior employees in the Public Service of the Central Government who were interested in sitting for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category. The

Petitioner submitted his application for the said examination and passed the same with 82 marks and was ranked 214.

Thereafter, the Petitioner was called for an interview by the Director General of the Combined Services by the letter dated 27th July, 2011. However, as the applications for the said promotion were called exclusively from the employees in the Public Service of the Central Government and not from those in the Provincial Public Service, the Petitioner was not promoted to the said post.

The Petitioner further stated that it had come to his attention that one D.F.N. Wanigasekera, who was also a Grade II Watcher of the Office Assistants' Service attached to the Mundalama Divisional Secretariat in the same district had been confirmed as an officer of the Combined Service.

Being aggrieved by the decision not to absorb the Petitioner into the Combined Services and the failure to promote the Petitioner to the Class III of the Management Assistants' Service category, the Petitioner has filed the instant application seeking, *inter alia*, the following;

1. a declaration that the 1st to 6th Respondents have violated the Petitioner's Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution, and
2. a direction to absorb the Petitioner into the Combined Services and promote him to Class III of the Management Assistants' Service category with effect from 14th September, 2011.

In their Objections, the Respondents stated that the Petitioner was appointed as a substitute watcher and the Chief Secretary of the North Western Province only approved the contents of the said letter. Moreover, the Respondents submitted that because the Petitioner was engaged as a substitute at the time of the submission of his application for absorption, he was not holding a permanent post in order to qualify to apply under Circular No. 02/2002. Therefore, the Respondents stated that the Petitioner was ineligible to be considered for absorption into the Combined Services in terms of the said Circular.

They further averred that in any event as applications for absorption under Circular No. 02/2002 had to be submitted to the Divisional Secretary before 16th December, 2002, the deadline had lapsed when Petitioner submitted his application on 17th December, 2002.

The Respondents also submitted that by the time the Petitioner was appointed to the post of Grade II Watcher of the Office Employees' Service category of the Wayamba Provincial Public Service with effect from 1st July 2005, Circular No.02/2002 had ceased to operate. In the circumstances, the Petitioner could not have been considered for absorption into the Combined Services under the said Circular No.02/2002.

The Respondents further submitted that as the Petitioner was not absorbed to the Combined Services and thus continued as an employee of the Provincial Public Service, he was not eligible to apply or sit for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category which was solely for the employees of the Central Government.

In response to the Petitioner's allegation that the Director General of the Combined Services had given permanent appointment in the Combined Services to D. F. N. Wanigasekara, a worker who was similarly circumstanced, the Respondents stated that the said employee had opted to relinquish his post in the Wayamba Provincial Public Service and then joined the Combined Services as a Grade II Watcher of the Office Employees' Service category. Thus, he had not been absorbed into the Combined Services in terms of Circular No.02/2002.

Was the Petitioner entitled to be absorbed into the Combined Service in terms of Circular No. 02/2002?

The primary question that needs consideration in this application is whether the Petitioner, as a substitute watcher, was eligible to apply in terms of Circular No. 02/2002 to be absorbed into the Combined Services.

The Effect of the Public Administration Circular No. 02/2002

Circular No. 02/2002 provided for the absorption of officers of the Provincial Public Service into the Combined Services. Paragraph (1) of the said Circular stipulated that only employees falling under the following categories of services of the Provincial Public Service were eligible to be absorbed into the Combined Services:

- i. Provincial Clerical Service;
- ii. Provincial Typists' Service;
- iii. Provincial Stenographers' Service;
- iv. Provincial Shroffs' Service;
- v. Provincial Translators' Service;
- vi. Provincial Book-Keepers' Service;
- vii. Provincial Store-Keepers' Service;
- viii. Provincial Office Employees' Service; and
- ix. Provincial Drivers' Service.

Paragraph (2) of the aforesaid Circular stipulated the persons who were not eligible to apply for absorption into the Combined Services. In particular, paragraph (2)(ii) stated that the Provincial Public Service personnel who had not received a formal letter of appointment from the Provincial Public Service at the time they submitted their applications for absorption to the Combined Services were not eligible to apply.

The Nature of the Petitioner's Appointment

The letter marked as 'P1' to the Petition issued by the Divisional Secretary of Wanathavilluwa stated, *inter alia*, that the Petitioner was appointed as a substitute watcher with effect from 16.02.2001. Moreover, Clause 02 of the said letter stated that the appointment was made under Financial Regulation 95.

The said letter also stipulated that the appointment would not entitle the Petitioner to be appointed to a casual, temporary or permanent post in the Public Service of the Central

Government or in the Wayamba Provincial Public Service. Furthermore, Clause 04 of the said letter provided that the Petitioner would be paid a daily wage of Rs. 140/-.

In this circumstance, it is necessary to consider the nature of the work performed by the Petitioner as a substitute watcher.

Section 2:1 of Chapter IV of Volume I of the Establishments Code defines the term “substitute” as follows:

“A Substitute is a person employed to perform the duties of a post which is substantively filled but whose holder is absent from the post for a limited period e.g., a substitute watcher may be employed when the substantive watcher is on leave. His appointment must be on a purely casual basis and on daily pay”.
[Emphasis added]

Additionally, Financial Regulation 95(3)(a) stipulates the conditions of engagement of the employees engaged as substitutes:

“General Conditions: they should be employed strictly on a casual basis, and on the understanding that they will not be eligible for or have claims to monthly pay or to temporary or permanent status, whatever their period of employment may be, and that they will be discontinued as soon as their services become unnecessary, or as soon as the work or project on which they are engaged is complete. In the case of substitutes they should vacate the post on the resumption of duties by the permanent holder of the post.” [Emphasis added]

Further, Rule 26 of Chapter III of the Procedural Rules of the Public Service Commission states:

“Appointment on a substitute basis shall be made solely on the basis of paying daily wages. The substitute service shall cease once the substantive holder of the post reports back for service. Only those who possess qualifications in terms of the Scheme of Recruitment shall be considered for such appointments.”

It is evident that as the Petitioner was appointed as a substitute watcher, he did not hold a post in the Provincial Public Service. As mentioned above in terms of the Establishments Code, his role was to perform duties of a substantively filled post. Therefore, the letter dated 14th February, 2001 appointing him as a substitute watcher did not entitle him to a post within the Provincial Public Service.

Further, by the deadline for submission of applications under Circular No. 02/2002, the Petitioner did not have a formal letter of appointment appointing him to a permanent post in the Provincial Public Service; therefore, he was not eligible for absorption into the Combined Services.

The Period of Applicability of Circular No. 02/2002

Paragraph 5:1 of Circular No. 02/2002 states that the Provincial Public Service personnel who have been appointed to their posts should give their written consent to be absorbed into the Combined Services before 16th December, 2002. As the Petitioner was appointed to the post of Grade II Watcher on the 1st July, 2005 under Public Administration Circular No. 13/2005, he

could not be absorbed into the Combined Service under Circular No. 02/2002 which was not in operation by that time.

Further, the circumstances of D. F. N. Wanigasekara are not relevant to the instant Application as he had not had been absorbed into the Combined Services in terms of Circular No. 02/2002.

Was the Petitioner Eligible to sit for the Limited Competitive Examination?

Applications were called from junior employees in the Public Service of the Central Government for the Limited Competitive Examination for promotion to Grade III of the Management Assistants' Service by a Gazette notification dated 14th May, 2010.

In terms of paragraph 7.0 of the said Gazette, only junior employees of the Public Service of the Central Government were allowed to sit for the Limited Competitive Examination. Note 8 to the said paragraph further stated that any applicants who sat for the Limited Competitive Examination without complying with the conditions stipulated in the Gazette would not be eligible for promotion despite receiving the required number of marks.

As stated above, the Petitioner was not absorbed into the Combined Services of the Central Government. Therefore, he was not entitled to apply to sit for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category as it was an opportunity only offered to officers of the Public Service of the Central Government.

Moreover, in terms of note 8 to paragraph 7 of the said Gazette the Petitioner's results have no impact on eligibility for the said post, notwithstanding the fact that the Petitioner had passed the Limited Competitive Examination and received 82 marks.

In the circumstances, I am of the opinion that the Petitioner has not established his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution were violated by the acts of the Respondents or by the State. Hence, I dismiss the application of the Petitioner.

I order no costs.

Judge of the Supreme Court

Priyasath Dep, P.C. C.J

I agree

Judge of the Supreme Court

B.P Aluwihare, P.C. J

I agree

Judge of the Supreme Court