

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 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Anura Gonapinuwala,
180, S.H. Dahanayake Mawatha,
Galle.

Petitioner

SC FR 413/2013

Vs.

1. Sathya Hettige,
Chairman, Public Service Commission.
- 1A. Dharmasena Dissanayaka,
Chairman, Public Service Commission.
2. S.C. Mannapperuma.
3. Ananda Seneviratne.
4. N.H. Pathirana.
5. S. Thillanadarajah.
6. A. Mohamed Nahiya.

7. Kanthi Wijethunga.

8. Sunil S. Sirisena.

9. I.M. Zoysa Gunasekara.

Members of the Public Service
Commission,
177, Nawala Road,
Narahenpita,
Colombo 05.

2A. A. Salam Abdul Waid.

3A. D. Shirantha Wijayatilaka

4A. Dr. Prathap Ramanujam

5A. V. Jegarasasingam.

6A. Santi Nihal Seneviratne

7A. S. Ranugge

8A. D.L. Mendis

9A. Sarath Jayathilaka

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

10. T.H.L.C Senaratne,

Secretary,

Public Service Commission,

177, Nawala Road,

Narahenpita,

Colombo 05.

10A. H.M.G. Senevirathne,
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,

11. J. Dadallage
Secretary,
Ministry of Public Administration,
Provincial Council and Democratic
Governance,
Independence Square,
Colombo 07.

11A. J.J. Rathnasiri,
Secretary,
Ministry of Public Administration and
Management,
Independence Square,
Colombo 07.

12. R.P.P. Jayasingha,
Director Engineering Services,
Engineering Services Office,
Ministry of Public Administration,
Provincial Council and Democratic
Governance,
Independence Square,
Colombo 07.

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

14. H.W. Wijayarathna,
Chairman of the Provincial Public
Service Commission,
Southern Province.

15. K.K.G.J.K. Siriwardana.

16. D.W. Vitharana.

17. Munidasa Halpandeniya.

18. Shreemal Wijesekara.

Members of the Provincial Public
Service Commission, Southern
Province, 6th Floor,
District Secretariat Building,
Galle.

19. U.G. Vidura Kariyawasam,
Secretary,
Provincial Public Service
Commission, Southern Province,
6th Floor, District Secretariat
Building,
Galle.

20. W.K.K. Athukorala,
Chief Secretary – Southern
Province, Chief Secretary Office,
S.H. Dahanayake Mawatha,
Galle.

20A. S.M.G.K. Perera,
Acting Chief Secretary - Southern Province,
Chief Secretary Office.

Respondents

Before : B.P. Aluwihare, PC, J
Priyantha Jayawardena, PC, J
Nalin Perera, J

Counsel : M.U.M. Ali Sabry, PC with Ms. Shehani Alwis for the Petitioner.
Yuresha de Silva, SSC for the Honourable Attorney General.

Argued on : 9th October 2017

Decided on : 15th December 2017

Priyantha Jayawardena, P.C. J.

The Petitioner filed his Petition on 10th December, 2013 under Article 126 of the Constitution and subsequently filed an Amended Petition on 2nd April, 2014. In his Amended Petition, the Petitioner sought, *inter alia*, the following reliefs:

- (i) declare that the new Service Minute of the Sri Lanka Engineering Service published in the Gazette Extraordinary No. 1836/6 dated 11th November 2013 (marked as 'P4' and 'P5') is contrary to law and be declared null and void or no force or avail in law; and
- (ii) make order to promote the Petitioner to Class II Grade II of the Sri Lanka Engineering Service under the previous circular of the Sri Lanka Engineering Service with effect from 22nd November, 2003.

On the 9th of August 2017, this Court had been informed that since the making of this Application, the Petitioner was appointed to Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015 by a letter dated 24th February, 2016 (marked as 'X2').

In his Amended Petition, the Petitioner stated that he joined the Department of Buildings on the 25th April, 1977 as an Administrative Overseer (Grade II) and was absorbed to the Grade III of Mid-Level Technical Service (hereinafter 'MLTS') with effect from 1st May, 1977.

The Petitioner was later absorbed into the Provincial Public Service with effect from 1st January, 1990.

The Petitioner stated that the Public Administration Service Circular 15/91 dated 18th May, 1991 (marked as 'P10') provided that MLTS officers should be granted all promotions and arrears of salary due to them, prior to them being released to the Provincial Service. Therefore, the Circular entitled him to be promoted to Grade II B and subsequently to Grade II A of the MLTS with effect from 25th April, 1982 and 25th April, 1985, respectively.

The Petitioner further stated that he fulfilled the requirements of the Circular as he had passed the necessary examinations and served at the Department of Buildings for nearly 13 years. Nevertheless, the Petitioner was not granted the said promotions due to him until 1995 when he was promoted to Grade II B and to Grade II A in 1997.

Public Administration Circular No. 27/94 dated 25th July, 1994 (hereinafter 'Circular No. 27/94') amended the Minutes of the MLTS to restructure the MLTS with effect from 1st July, 1994. Accordingly, the MLTS was re-designated as the Sri Lanka Technological Service (hereinafter 'SLTS') and other changes included the revision of grades and salary scales.

The Petitioner stated that the Minute of the SLTS was published in the Gazette Extraordinary No. 915/18 dated 22nd March, 1996 which was subsequently amended by Gazette Extraordinary No. 1094/2 dated 23rd August, 1999.

Due to the restructuring, the Petitioner was promoted to Grade II B of the MLTS with effect from 1st January, 1990 by letter dated 25th September, 1995.

The Petitioner stated that he was then promoted to Grade II A of the MLTS with effect from 1st January 1993 by a letter dated 26th June, 1997. By a letter dated 1st July 1997, the Petitioner was subsequently promoted to Grade I of the SLTS with effect from 1st July, 1994 in terms of the Circular No. 27/94.

Further, the Public Administration Circular No. 01/2000 dated 10th January, 2000 (hereinafter 'Circular No. 01/2000') set out the government decision to promote qualified officers of the MLTS who served from 1st May, 1977 to 1st July, 1994.

In terms of Circular No. 01/2000, the Petitioner's promotion to Grade II B was backdated to 1st January, 1983 by letter dated 29th August, 2000. Further under the aforesaid Circular, the Petitioner's promotion to Grade II A of the MLTS was also backdated to 1st January, 1986 by a letter dated 22nd December, 2000.

The Petitioner's promotion to Grade II B was further backdated with effect from 25th April, 1982 and his promotion to Grade II A too was backdated to 25th April, 1985 by two separate letters dated 2nd June, 2003.

After the Petitioner was promoted to Grade I of the SLTS with effect from 1st July 1994, he was promoted to the Special Grade of the SLTS with effect from 22nd November, 2003 on a supernumerary basis by a letter only dated September, 2007. He was later appointed to the Special Grade on a permanent basis with effect from 6th February, 2007 by a letter dated 28th February 2008.

In terms of Engineering Service Circular No. 31 dated 5th August 1997 (hereinafter 'Circular No. 31'), the officers in the Special Grade of the SLTS were eligible to be promoted to Class II Grade II of the Sri Lanka Engineering Service.

The Petitioner stated that he applied for the promotion to Class II Grade II of the Sri Lanka Engineering Service under Clause 3(3) of the said Circular and he was called for interview on the 25th of June, 2009 for the said post. However, he did not secure the said appointment as he had not completed the required five years of service, since he was promoted to the Special Grade on the 6th of February, 2007.

Later by a letter dated 18th July 2012, the Petitioner's appointment to the Special Grade of SLTS was backdated with effect from 22nd November, 2003 which was the date that he was promoted to the Special Grade on supernumerary basis.

Further, the Public Service Commission issued a new Service Minute No. 1836/6 dated 11th November, 2013 (hereinafter the 'New Service Minute') for the Engineering Service with effect from 1st January, 2006.

Thereafter, interviews were not held for appointment to Class II Grade II of the Sri Lanka Engineering Service until the Petitioner applied and was called for an interview for the post in the Engineering Service on 2nd March, 2015. Thus, the Petitioner complained that the belated backdating of his promotion to the Special Grade deprived him of his due appointment at the interview held on 25th June, 2009 and deprived him of several benefits.

Filing objections to the Application, the 1A Respondent stated that the Petitioner could not have been appointed to the Sri Lanka Engineering Service in 2009 because at the time of the interview, the Petitioner did not possess the required five years of experience in the Special Grade category.

The 1A Respondent further stated that the Petitioner was appointed to Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015 and it is not a ‘promotion’ as stated by the Petitioner but a fresh appointment.

The Respondent further stated that in terms of Section 1.9 of the Establishment Code (Chapter II) and Section 30 and 31 of Chapter II of the Procedural Rules promulgated by the Public Service Commission, an appointment cannot be antedated for any reason and the date of the letter of appointment or the date on which the officer assumes duties, whichever comes later, is deemed the effective date of appointment.

The Respondents contended that antedating the appointment to the Sri Lanka Engineering Service beyond the date of his appointment cannot be effected in light of the abovementioned provisions as per Sections 1:10:2 and 1:10:3 of the Establishment Code. Moreover, the antedating would place the Petitioner over officers appointed before him and disturb the seniority in the Sri Lanka Engineering Service.

The Petitioner in his counter affidavit stated that he had a legitimate expectation that promotions would be given to him on time and that he would be appointed to Class II Grade II of the Sri Lanka Engineering Service.

Can the Petitioner’s Promotion/Appointment to Grade III of the Sri Lanka Engineering Service be Backdated?

Now I will consider whether it is possible to backdate the promotion/appointment given to the Petitioner.

The Petitioner was promoted to Grade II B of the MLTS with effect from 1st January, 1990. Later, in terms of Circular No. 01/2000, his promotion was backdated to 1st January, 1983. By the same Circular, his promotion to Grade II A with effect from 1st January, 1993 was also backdated to 1st January, 1986.

Thereafter, the Petitioner was promoted to the Special Grade of the MLTS on supernumerary basis with effect from 22nd November 2003 and later, his appointment to the Special Grade

was made permanent with effect from 6th February, 2007. This was subsequently backdated to 22nd November, 2003 by a letter dated 18th July 2012.

The Petitioner applied for the post of Class II Grade II of the Sri Lanka Engineering Services in terms of Circular No. 31 dated 5th August 1997 and the interview was held on 25th June, 2009. When the Petitioner faced the interview, he was serving in the Special Grade and at that time the date of his promotion to the said Grade was effective from 6th February, 2007. Thus, he did not possess the required criteria of 5 years of experience in the said post. Therefore, he did not satisfy the threshold criterion for the said post.

However, his promotion to the Special Grade was subsequently backdated to 22nd November, 2003 by letter dated 18th July, 2012. As it was backdated after the interviews were held and the appointments were made, the Petitioner could not place this material relating to the backdating of his appointment to the Special Grade before the panel of interviewers.

The said interviews for the post of Class II Grade II of the Engineering Services were not held again until 2nd March 2015. By that time, the New Service Minute was issued consequent to an order made by this Court and the Engineering Service Circular No. 31 dated 5th August 1997 was no longer in force.

The Petitioner applied for the said post as an internal candidate and he was interviewed on 2nd March, 2015. He was appointed to the post of Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015. The Petitioner's main claim is to have the said appointment backdated to 22nd November, 2003 which was the date he faced the first interview for the said post.

As stated above, the Petition did not possess the required number of years in the Special Grade when he faced the interview for the post of Class II Grade II on the 25th of June, 2009. Since his promotion to the Special Grade was backdated to 22nd November, 2003 by letter dated 18th July 2012, it could not have been considered by the panel of interviewers. Thus, the Petitioner was not considered for the said post due to the fact that he failed to meet the threshold criteria.

In that context, I am of the opinion this Court cannot substitute the decision of the said panel of interviewers not to grant the promotion to the Petitioner with the decision to appoint him to the said post.

There is no material before this Court that the Petitioner made a request to consider the period that he served in the said post on a supernumerary basis. Moreover, in *Dalpat Abasaheb*

Solunke v B S Mahajan AIR 1990 SC 435, the Court stated that it does not have the expertise to decide a candidate's suitability for a position.

In any event, at the time he went for the interview in 2009, he did not possess the required experience. Further, he did not contest the selection to the said post until he filed this case on the 10th of December, 2013 i.e. after 4 years. I am of the opinion that this Court cannot step into the shoes of an interview panel that was constituted in the year 2009 to appoint persons to the Sri Lanka Engineering Service and substitute their decision with a decision of this Court.

Can the New Service Minute be Declared Null and Void?

Now I will consider whether the New Service Minute should be declared as illegal, null and void.

The Petitioner filed this application on the 10th of December, 2013. While this Application was pending, the Petitioner had applied for the post of Grade III of the Sri Lanka Engineering Service in terms of the New Service Minute No. 1836/6 as stated above and faced the interview on 2nd March, 2015. Later, he was appointed to the said post with effect from the 24th of February, 2015.

By applying for the said post under the New Service Minute, the Petitioner has acquiesced to the New Service Minute, therefore he cannot now move the Court to quash the said New Service Minute and/or declare it as null and void. He is estopped from seeking such a relief.

In any event, if the said Minute is declared null and void and quashed by the Court, the appointment given to the Petitioner as an Grade III officer of the Sri Lanka Engineering Service with effect from the 24th of February, 2015 will also become invalid.

The said interview for his appointment to Grade III for the Engineering Service was held in terms of the New Service Minute No. 1836/6. Therefore, there are no grounds whatsoever to backdate the aforementioned promotion to 22nd November, 2003. Further, the other candidates who were appointed to the post of the Engineering Service (Grade III) are not parties to this application and it is not tenable in law to make such an order as such an order would affect their appointments too.

Moreover, I have considered the material placed before this Court and I am of the opinion that the post in the Engineering Service (Grade III) is not a promotion given to officers of the

Sri Lanka Technical Service but a fresh appointment provided to advance their career prospects. In this context, I agree with the aforementioned submissions made by the learned Senior State Counsel that it is not possible to backdate the appointment given to the Petitioner due to the restrictions imposed by the Establishments Code and the Procedural Rules promulgated by the Public Service Commission.

I am also of the opinion that the judgment of the Supreme Court in *Adam Bawa Issadeen v Director General of Customs* SC FR 248/2011, relied upon by both the Petitioners and the Respondents, has no applicability to this case as the principle discussed in the said case is quite different to the facts and circumstances of the instant Application.

In any event, as stated in the judgment of *W.K. Samarakoon and Others v National Water Supply and Drainage Board and Others* SC FR No. 284/2013, the Court cannot intervene where the relevant authority has not violated the circular. Therefore, since there was no violation of Circular No. 31 relating to appointments to the post of Class II Grade II of the Sri Lanka Engineering Service, there is no cause for the Court to intervene.

In the circumstances, I am of the opinion that the Petitioner failed to establish a case of violation of his Fundamental Rights guaranteed under Article 12(1) and 14(1) (g) of Constitution.

I order no costs.

Judge of the Supreme Court

B.P. Aluwihare, PC, J

I agree

Judge of the Supreme Court

Nalin Perera, J

I agree

Judge of the Supreme Court