

DR. I. GUNATILAKA
v.
VICE-ADMIRAL TISSERA,
COMMANDER OF THE NAVY AND OTHERS

SUPREME COURT
FERNANDO, J.
GUNASEKERA, J., AND
WEERASURIYA, J.
SC APPEAL No. 76/2001
CA APPLICATION No. 366/99
11TH NOVEMBER, 2002

Writ of certiorari - Purported reduction of rank of Surgeon Lieutenant, Navy-Navy Commander's competence to effect such reduction- Power of the court to quash such order.

The petitioner-appellant (the petitioner), a Medical Graduate of a Russian University obtained temporary registration as a Medical Officer under section 31 of the Medical Ordinance ("The Ordinance"). Section 31 provides that a person who is not qualified to obtain "full registration" under section 29(1), is entitled, on production of a certificate from the Director of Health Services that he is in employment of the Government as a Medical Officer, to temporary registration for the period of his employment under the Government.

The petitioner responded to an advertisement by the Navy calling for applications for the post of Surgeon Lieutenant. The advertisement states, *inter alia*, that full registration at the SLMC (Sri Lanka Medical Council) viz. under section 29(1) of the Ordinance, was a requirement. It also states that "those who have temporary registration may also apply"

After interview, the petitioner was informed by a message on 16.01.1997 from the Navy Headquarters that he had been recruited to the Navy as a commissioned medical officer under the rank of Surgeon Lieutenant. He took his oath of allegiance and office on 16.01.1997 and assumed office. Thereafter, another message was sent dated 06.02.1997 to "correct" the original message by specifying his rank as "Acting Surgeon Lieutenant". Five days later a Navy identity card was issued to the petitioner describing his rank as "Surgeon Lieutenant".

In consequence of inquiries by the petitioner he received a copy of a letter dated 03.09.1998 from the Commander stating that he was recruited in an acting capacity as he could not be confirmed as "Surgeon Lieutenant" as he had not passed the swimming proficiency test. When the petitioner's lawyers threatened legal action, the Commander by a letter dated 09.03.1999 notified that according to a memorandum dated 07.05.1996 issued by the Commander, persons with temporary registration could only join as Acting Lieutenant and those having full registration under section 29(1) of the Ordinance were appointed Surgeon Lieutenant; and that a clerical mistake in the first message had been corrected by the second.

Held :

1. There is no rank of 'Acting Surgeon Lieutenant' in the Navy; consequently, the respondents were unable to produce a commission appointing the petitioner to such rank.
2. Under section 161(1)(a) of the Navy Act, it is only the Minister who can make regulations in regard to appointments and promotions in the Navy. Accordingly the Commander's memorandum of 07.05.1996 had no binding force.
3. The advertisement invited doctors to join as "Surgeon Lieutenants" including those who may have "temporary registration". There was no indication that "temporary registration would be given lower priority or a lower rank or that full registration must be obtained later. Only a further "medical test" was stipulated.
4. The petitioner was entitled to a quashing of the impugned message of 09.02.1997, the decision dated 09.03.1999 and the Commander's memorandum of 09.05.1996.

Per Fernando, J.

".....the principal relief sought by the petitioner was not to grant an appointment or a commission but the quashing of the purported "correction (which would automatically "restore" his rank of Surgeon Lieutenant). The Court of Appeal erred in refusing that relief on the ground that it had no power to give appointments to the Armed Forces."

APPEAL from the judgment of the Court of Appeal.

Cases referred to :

1. *Dissanayake v Kaleel* (1993) 2 Sri LR 135, 187-192
2. *Weerasinghe v Gamage* SC 681/2001 SCM 19.9.2002

Sanjeewa Jayawardena for petitioner-appellant.

Harsha Fernando, State Counsel for respondents.

December 9, 2002

FERNANDO, J.

This is an appeal against the judgment of the Court of Appeal refusing an application for Certiorari by the Petitioner-Appellant ("the Petitioner") to quash an order of the 1st Respondent-Respondent who was then the Commander of the Navy ("the Commander"), which order, according to the Petitioner, effected a reduction in his rank. The present Commander was later added as a Respondent.

The Petitioner, having obtained a medical degree from a Russian University, obtained "temporary registration" under section 31 of the Medical Ordinance from the Sri Lanka Medical Council ("SLMC") in July 1996. In September 1996 he responded to an advertisement by the Navy calling for applications for recruitment as "Surgeon Lieutenant":

"If you are a MBBS or equally qualified Doctor, here's your chance to achieve the highest recognition in this noblest of professions. Come join us as a Surgeon Lieutenant....."

Vacancies for Medical Officers/Dental Officers

ELIGIBILITY

- a.....
- b.....
- c.....
- d. Full registration at the SLMC as a
Medical/Dental practitioner

PAY

- 1.....
- 2.....
- 3.....
- 4.....
- 5.....
- 6.....
- 7.....
- 8.....

OTHER FACILITIES

- a.....
 - b.....
 - c.....
 - d.....
 - e.....
- Those who have
TEMPORARY REGIS-
TRATION MAY ALSO
APPLY
- Selected candidates will
be required to pass a
Medical Fitness Test to
the satisfaction of the
Commander of the Navy
Closing date....."

The Petitioner was interviewed, and was thereafter informed by a message dated 16.1.97 from Navy Headquarters that he had

been recruited to the Navy as a commissioned medical officer and that his rank was Surgeon Lieutenant. He took his Oaths of Allegiance and Office on 16.1.97 and assumed duties.

Shortly thereafter another message dated 6.2.97 purported to "correct" the original message, by specifying his rank as "Acting Surgeon Lieutenant".

It had therefore to be assumed that a commission *had* been issued in respect of the Petitioner prior to 16.1.97. Indeed even in the written submissions filed on behalf of the Respondents in this case it has been submitted that the Commander did not interfere with the commission of the Petitioner; that there has been no withdrawal of the commission nor an appointment to another rank; and that the original message contained a typographical error which was corrected within a month. The Petitioner's position is that no commission could have issued in respect of an appointment to the rank of Acting Surgeon Lieutenant, and the Respondents do not claim that any such commission had been issued.

Despite the second message, four days later a Navy Identity Card was issued to the Petitioner describing him as "Surgeon Lieutenant".

The Petitioner was not informed of the reason for this "correction". He claimed that he made inquiries orally from higher officers, but that no reason was given for the move to reduce his rank. In May 1998 he wrote to the Commander asking for the reason for the reduction to "Acting Surgeon Lieutenant"; he received no reply. He wrote again in July and August, adding that he had been assured at the interview that he would be enlisted as a Surgeon Lieutenant: again, there was no reply or denial. He then received a copy of a letter dated 3.9.98 from the Commander stating that he had been recruited as Acting Surgeon Lieutenant and that he could not be confirmed as Surgeon Lieutenant as he had not passed the swimming proficiency test; by letter dated 18.9.98 he protested that he had already been appointed to that rank, and drew attention to his previous letter. That letter as well as letter dated 31.12.98 from his attorneys-at-law received no response, and by letter dated 3.2.99 his attorneys-at-law threatened legal action if there was no response within ten days. It was only then that the Commander, by letter dated 9.3.99, disclosed

the reason: that he had only "temporary registration"; that according to a memorandum dated 7.5.96 issued by the Commander he could only join as an Acting Lieutenant; and that a clerical error in the first message had been corrected by the second. According to that memorandum, the procedure for the direct enlistment of medical officers was that those having "temporary registration" could be enlisted as Acting Lieutenant, and those having "full registration" as Surgeon Lieutenant. "Full registration" means registration under section 29(1) of the Medical Ordinance.

The Petitioner applied for Certiorari to quash the decisions of 6.2.97 and 9.3.99 as well as the memorandum of 7.5.96, or in the alternative for Mandamus to compel the Respondents to restore the Petitioner's rank of Surgeon Lieutenant.

In its judgement delivered on 29.5.2001 the Court of Appeal held:

"The Petitioner in this case in response to an advertisement.... calling for doctors to join the Navy as Surgeon Lieutenant applied and was given the appointment. In terms of the advertisement the Petitioner was originally appointed as a Surgeon Lieutenant by document marked P3. However, shortly thereafter he had been informed that his rank had been changed to acting Surgeon Lieutenant. The Petitioner has written several letters protesting and demanded the reason....The Respondents have not even bothered to reply the Petitioner until he wrote to them through his Attorneys.....Subsequently the Navy Commander has written.....stating that the first appointment was given due to a mistake and according to the regulation they could give only [an] acting appointment. It is to be noted that the advertisement...nowhere stated that the initial appointment would be only an acting appointment. In the circumstances it is not fair to call professionals to take appointments and to give them acting appointments and keep them in suspense. We are mindful of the fact that *this Court has no power to give appointments to Armed Forces*. However.... we are of the view that *the Navy has acted unreasonably* and that this conduct has forced the Petitioner to seek the intervention of this Court. *For the reason stated earlier* we dismiss this application [but] order the 1st Respondent to pay a sum of Rs. 10,000 to the Petitioner as costs." [emphasis added]

I must straightaway observe that the principal relief sought by the Petitioner was not the grant of an appointment or a commission, but the quashing of the purported "correction" (which would auto-

matically “restore” his rank of Surgeon Lieutenant). The Court of Appeal erred in refusing that relief on the ground that it had no power to give appointments to the Armed Forces. But for that mistake it is clear that relief would have been granted.

Learned Counsel for the Petitioner submitted that the impugned “correction” was fatally flawed for several reasons:

- (1) There was no rank of “Acting Surgeon Lieutenant” provided for in the Navy Act and the regulations made thereunder, and the “correction” was therefore illegal and invalid, being an appointment to a non-existent rank; no commission could have been issued on the basis of that “correction”, and if issued would patently be a nullity;
- (2) Even if there had been such a rank, the Petitioner’s rank of “Surgeon Lieutenant” could not have been altered to his detriment after he had assumed duties, without disclosing the reason for such change and without first giving him an opportunity of being heard;
- (3) The Petitioner had initially been given no reason; and 18 months later the reason alleged was the lack of proficiency in swimming. It was only after two years that an entirely different reason – the need for “full registration” – was given. That reason was untenable because it was based on the assumption that the memorandum of 7.5.96 was binding, although it had no legal basis. Wider eligibility criteria had been lawfully stipulated in the September advertisement; and
- (4) “Temporary registration” under section 31 of the Medical Ordinance entitled the Petitioner to practise medicine whilst in the service of the Government – which included the Navy. Accordingly, it was both lawful and proper to stipulate that as one of the criteria.

Learned State Counsel on behalf of the Respondents was forced to concede that the Navy Act and the regulations made thereunder did not provide for the rank of “Acting Surgeon Lieutenant”. “Acting” appointments were authorized in regard to the rank of Lieutenant-Commander and above, and to the rank of Sub-Lieutenant, but not to the rank of Lieutenant. He argued, however, that the Commander had in fact appointed the Petitioner to the rank of “Surgeon Lieutenant” although on an acting basis pending “full registration”. He persisted in this submission although it was pointed

out to him in the impugned message it was clearly stated that the Petitioner's (corrected) rank was "Acting Surgeon Lieutenant". The Commander's affidavit, too, repeatedly referred to the Petitioner's rank in the same way. It is because there is no such rank that the Respondents have been unable to produce a commission appointing the Petitioner to that rank. The Commander has ventured the explanation that there had been a clerical error. That implies that a decision had been taken to give the Petitioner an "acting" appointment; that such decision was correctly recorded in one document or another; but that in the commission there was an inadvertent omission of the reference to "acting". Had there been any such error, that would have been clear upon an examination of the original commission and the antecedent correspondence leading up to the issue of that commission. The Respondents have failed to produce those documents, and the inference is that they do not disclose a clerical error.

Learned State Counsel concedes that the Petitioner had been denied natural justice, but argued that since the "correction" had been made within a month the Petitioner had not suffered any prejudice; and that in any event his remuneration was the same. The lack of a hearing would not be fatal if a hearing would have been a useless formality which could not possibly have made a difference (see *Dissanayake v Kaleel*⁽¹⁾). That is hardly the case here: if given a hearing the Petitioner could have pointed out the legal position, and could have relied on the representations which he said had been made to him at the interview. In any event, pecuniary loss is not the sole test of prejudice. The Petitioner had to choose between staying on in a lower position and leaving; if he had left the Navy on account of the apparent reduction in rank, any prospective employer would have asked him why he had been reduced in rank, and would hardly have believed that the Navy had reduced him in rank without reason, and might well have suspected that there had been some shortcoming or non-disclosure on his part. A short period of employment without a good reason is generally a blot on a *curriculum vitae*. As I had occasion to point out in *Weerasinghe v Gamage*⁽²⁾, an employer must exercise his powers with due care and restraint, for just as it is implicit in every contract of service that the employee shall be loyal, shall treat his superiors with due respect, and shall guard the reputation of the employer, so also it is implicit that the employer in his treatment

of employees shall have care for their dignity and reputation and shall not cause them unnecessary personal distress and prejudice. Often distress and prejudice cannot be avoided, but where it can be avoided, it must be avoided. The Petitioner was entitled in law to a full explanation, and as a matter of courtesy to an expression of regret for the alleged error. The impugned message was hardly the kind of signal which builds morale and inspires loyalty and dedication, especially in those called upon to risk their lives in the course of duty; and the prolonged failure to disclose a reason would have added to the Petitioner's stress and frustration, liable to result in poor performance of duties to the detriment of the Navy.

Under section 16(1)(a) of the Navy Act, it is only the Minister who can make regulations in regard to appointments and promotions in the Navy. Accordingly, the Commander's memorandum of 7.5.96 had no binding force. But learned State Counsel contended that the Navy was entitled to insist upon "full registration", because, he argued, "full registration" was all that had been specified under "Eligibility". The advertisement taken as a whole does not bear out that submission: all medical doctors were invited to join as Surgeon Lieutenants, including those who only had "temporary registration", and there was nothing which even hinted at the possibility that "temporary registration" would be given lower priority or might result in a lower rank or position, or that "full registration" must be obtained even later. Only a future "Medical Fitness Test" was stipulated. There was thus no ambiguity in the advertisement. Had there been an ambiguity, that would have had to be construed *contra proferentem*, and in favour of the Petitioner. A notice calling for applications for employment must be a clear guide for the honest applicant, and public institutions and their advisers must not resort to strained constructions in order to convert them into devious snares for the unwary.

Finally, learned State Counsel submitted that medical officers with "temporary registration" employed in the Department of Health come under the supervision of the Director of Health Services, while those in the Navy do not, and that accordingly the Navy was justified in taking such officers on an acting basis, until they obtained "full registration". Section 31 of the Medical Ordinance, as amended by Act No: 30 of 1987, provides that a person who is not qualified to obtain "full registration" under section 29(1), is entitled, on production of a

certificate from the Director of Health Services that he is in the employment of the Government as a medical officer, to "temporary registration" for the period of his employment under the Government. No condition or restriction is stipulated. If the Navy wished to impose any condition, it should have done so in the advertisement or at the state of appointment. Not having done so, it could not lawfully do so under the guise of "correcting" an error.

I therefore allow the appeal and set aside the order of the Court of Appeal in so far as it dismissed the Petitioner's application. I grant the Petitioner Certiorari to quash the impugned message 9.2.97, the decision contained in the letter dated 9.3.99, and the Commander's memorandum of 9.5.96. The Navy and its Commander will accordingly treat the Petitioner, for all purposes, as having been a commissioned medical officer holding the rank of Surgeon Lieutenant from 16.1.97, and will furnish to the Petitioner within one month a true copy of the commission referred to in the message of 16.1.97 and of the Gazette in which it was published. The Petitioner will be entitled to costs in this Court in a sum of Rs. 40,000 payable by the State.

GUNASEKERA, J. – I agree.

WEERASURIYA, J. – I agree.

Appeal allowed.

Writ of Certiorari granted.