

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

SC/FR/No. 76/2012

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

P.S Manohari Pelaketiya of  
No. 49 Maho Road, Nikaweratiya.

**PETITIONER**

Vs.

1. H. M. Gunasekera,  
Secretatry, Ministry of Education,  
“Isurupaya”, Sri Jayawardhanapura, Kotte,  
Battaramuulla.

1A. W. M. Bandusena  
Secretary, Ministry of Education,  
“Isurupaya”, Sri Jayawardhanapura, Kotte,  
Battaramuulla.

2. Dr. Dayasiri Fernando, (Chairman)  
2A. Dharmasena Dissanayake, Chairman

3. Palitha Kumarasinghe, Member  
3A. A. Salam Abdul Waid, Member

4. Sirimavo A. Wijeratne, Member  
4A. D. Shirantha Wijayatilaka, Member

5. S.C Mannapperuma, Member  
5A. Prathap Ramanujam, Member

6. Ananada Seneviratne, Member  
6A. V. Jegarasasingam, Member

7. N.H. Pathitana, Member  
7A. Santi Nihal Seneviratne, Member

8. S. Thillanadarajah, Member  
8A. S. Ranuhhe, Member

9. M.D.W. Ariyawansa, Member  
9A. D.L. Mendis, Member

10. A. Mohamed Nahiya, Member  
10A. Sarath Jayathilaka

2A – 10A Respondents  
All of the Public Services Commission No. 177,  
Nawala Road, Narahenpita, Colombo 5.

11. Premalal Kumarasiri, Principal,  
Mahanama College, Colombo 3.

12. T.T. Malegoda,  
Mahanama College, Colombo 3.

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

### **RESPONDENTS**

**BEFORE:** K. Sripavan C.J.  
Upaly Abeyrathne J. &  
Anil Gooneratne J.

**COUNSEL:** J. C. Weliamuna with Senura Abeygunawardena for Petitioner  
Rajiv Goonetilleke, S.S.C. for 1<sup>st</sup> – 10<sup>th</sup> & 13<sup>th</sup> Respondents

Chula Bandara for 11<sup>th</sup> Respondent  
with S.L. Samarakoon

12<sup>th</sup> Respondent absent and unrepresented

**ARGUED ON:** 08.07.2016

**DECIDED ON:** 28.09.2016

**GOONERATNE J.**

The Petitioner is a Graduate Teacher, and she was serving as teacher 'Eastern Music' at Mahanama College, Colombo 3, at all relevant times to this Fundamental Rights Application. This is a case of sexual abuse and harassment caused to the Petitioner. This court on or about 25.04.2012 granted Leave to proceed for alleged violations of Articles 12(1) and 14(1)(a) of the Constitution. On the said date court also made an interim Order in terms of prayer (e) of petition suspending the operation of document marked P11 until the final determination of this application. By P11 the Secretary to the Ministry of Education interdicted the Petitioner. I have also noted the contents of paragraph 3(d) of the petition which refer to the 12<sup>th</sup> Respondent's alleged unwanted advances described in a confidential affidavit marked 'X'. However it is recorded in the Journal Entry of the said date that all confidential documents submitted by learned counsel for the Petitioner has not been perused by court and Petitioner to advise himself as to whether it would be filed at a later stage, and documents returned to Petitioner by court.

The Petitioner by letter P5 dated 31.07.2007, was transferred to Mahanama College, Colombo. Petitioner had met the 11<sup>th</sup> Respondent the

Principal of Mahanama College and informed about the transfer by letter P5 and she was requested to report for work on 7<sup>th</sup> August 2007, a day after, school vacation had been declared. As pleaded in paragraph 6 of the petition since the day she met the 11<sup>th</sup> Respondent she had been subject to various harassments. The case of the Petitioner as submitted in her oral and written submissions as well as the pleadings are that the 12<sup>th</sup> Respondent another male teacher who was a close associate of the 11<sup>th</sup> Respondent had on 04.01.20011 made several advances towards the Petitioner. Thereafter on 28.03.2011, the 12<sup>th</sup> Respondent made indecent advances of serious nature on the Petitioner which had been brought to the notice of the school authorities but no action was taken.

The material presented to this court by the Petitioner indicates that she was harassed by the 11<sup>th</sup> Respondent by refusing to approve her due salary increments for the year 2008 to 2010, without a basis, but subsequently approved by the Vice Principal Mr. Kalubowila. It is also stated that on 26.04.2011 the Petitioner was required to be present in the office of the 11<sup>th</sup> Respondent. When the Petitioner entered the office of 11<sup>th</sup> Respondent, she saw police officers and a woman Police Constable seated in the 11<sup>th</sup> Respondent's office. Police party was from the Kollupitiya police who came to record a statement from the Petitioner regarding an anonymous complaint

received by the Women and Children's Bureau of the Kollupitiya Police, regarding the incident stated above that took place on 28.03.2011 in the school premises. Accordingly a statement was recorded from the Petitioner.

It is also the case of the Petitioner that the 12<sup>th</sup> Respondent was temporarily transferred to Prince of Wales College, Moratuwa due to complaints made by the Old Boys' Association of Mahanama College. It is stated that the Education Authorities did not conduct a specific investigation to deal with the 11<sup>th</sup> & 12<sup>th</sup> Respondents based on Petitioner's complaints. The investigation report, it is stated was on multiple allegations made by the Old Boys' Association and had been given to the Education Ministry one day after Petitioner's interview was aired. It was argued on behalf of the Petitioner that no tangible and meaningful results were shown, in any of the investigations, and the Petitioner was subject to various pressures. It is pleaded in paragraph 14 of the petition that several journalists sought interviews from the Petitioner but she declined to be interviewed. It is the position of the Petitioner that since no justice was done to her she decided to openly speak which would get the authorities concerned to move swiftly, and she did so with the sole objective of preventing further recurrences and in the best interest of school administration. As such an interview was given by her to the programme called "Sirasa Vimarshana" on 27<sup>th</sup> November 2011. This interview was telecast on Television

Channel Sisara TV. Such an interview and telecast over the TV channel resulted in the Education Authorities recording Petitioner's statement. Consequently the Petitioner was interdicted by letter P11.

This court directed the Hon. Attorney General to file a copy of the statement made by the Petitioner at an inquiry held on 08.12.2011. The statement dated 08.12.2011 is filed of record. I note the following as recorded in the Petitioner's statement, indicative of alleged violations as suggested by the Petitioner.

1. Improper and undue suggestions made to Petitioner by 11<sup>th</sup> Respondent (Principal) and 11<sup>th</sup> Respondents attitude was to exert pressure on the Petitioner.
2. Due to Petitioner's 'beautiful smile' 11<sup>th</sup> Respondent desire to embrace and kiss the Petitioner, as stated by the 11<sup>th</sup> Respondent.... ଉତ୍ତର ଡିଭିଜନରେ ବିଭିନ୍ନ ଲକ୍ଷଣର ବିଷୟ .....
3. Petitioner having resisted and rejected the above, as such the 11<sup>th</sup> Respondent continued to harass and bring pressure on the Petitioner.
4. Denial of salary increments of Petitioner from years 2007 to 2011.
5. Character assassination done to Petitioner by the 11<sup>th</sup> Respondent involving male teachers and students.
6. In the above circumstances Petitioner made a requests to be transferred from the school but the 11<sup>th</sup> Respondent refused and rejected to endorse her transfer applications.
7. Improper undue advances by 12<sup>th</sup> Respondent from the end of year 2010.

8. 12<sup>th</sup> Respondent's suggestion to Petitioner, of living together with him and he would purchase a separate house for such life. 11<sup>th</sup> Respondent was willing to purchase a house for Rupees eleven million.
9. Petitioner rejected (8) above and complained to another teacher in charge of discipline, namely Cyril Silva.
10. On 28.03.2011, the 12<sup>th</sup> Respondent came to the school music room and made the same suggestion to live together and requested the Petitioner to give in writing that Petitioner would remain single.
11. The above suggestion was rejected and the Petitioner reprimanded 12<sup>th</sup> Respondent. 12<sup>th</sup> Respondent left the music room and re-entered the room after a while and asked the Petitioner whether she is angry about such suggestion and kissed the Petitioner.
12. Petitioner did not complain about (10) & (11) above to 11<sup>th</sup> Respondent as it would be of no avail, but complained to the teacher in Charge of Discipline, Secretary to the Ministry of Education, Minister of Education and to His Excellency the President.
13. Informed about, above to the investigation officer on 11.05.2011.
14. Complained to police about 12<sup>th</sup> Respondent's conduct as stated above, and a case pending against 12<sup>th</sup> Respondent in the Fort Magistrate's Court.
15. Severe pressure brought upon the Petitioner by the 11<sup>th</sup> Respondent due to (10-14) above. 11<sup>th</sup> Respondent went to the extent of informing the Petitioner that he would influence the authorities to discontinue the Petitioner from service.
16. Informed the Teachers' Union about above.
17. Petitioner's view was that no justice was done.
18. Teachers' Union informed the 'Sirasa' TV about Petitioner's complaints.

19.The Teachers’ Union requested Petitioner to be present at the Union Office and the statement Petitioner made was to the effect that, sexual harassment had taken place and it was investigated. However no report had been made available. As such Petitioner requests that wrong doers should be punished.

20.Statement was made by Petitioner to the Media since she was in a helpless state and narrated all her sufferings, she had to undergo.

21.Petitioner mentions that she did not criticise the School, Education Department or any official.

22.Petitioner underwent mental trauma

23.12<sup>th</sup> Respondent continued to harass and abuse Petitioner. He boasted about his success in the Magistrate’s Court case and threatened to file a defamation case,

24.Petitioner states that she is aware that permission should be obtained to make a statement to the Media, but in her case Petitioner states it was her sufferings that was told to the media. Petitioner was in a very weak mental state having suffered continuously and not in a suitable mental state to obtain permission from the authorities concerned.

25.The final remarks of the Petitioner are as follows:

මා විසින් සිරස රජපව්‍යාහිනියේ විමර්ශන විශේෂාංගයට කල දුක්ගැහවිල්ල සිදු කලේ පාසලේ භූමිය තුල නොවේ. ඊට පාසලේ කිසිදු ගුරුවරයෙක් හෝ ගුරුවරියක් උදවු කලේ නැහැ. මාගේ දුක් ගැහවිල්ල ප්‍රචාරය වුනාට පසු ප්‍රේමලාල් කුමාරසිරි විදුහල්පතිතුමා මෙම පාසලේ මව්වරුන්ගේ සංගමය නැමැති සංගමයක ආධාරයෙන් තාමත් මට දිගින් දිගටම අපහසුතාවයට පත්කිරීම් අපහසු කිරීම් සිදුකරනවා. මේ වන විටත් කොළඹ මහෙස්ත්‍රාත් අධිකරණයේ නඩුවක් විභාගවෙමින් පවතින නිසා මා මෙම විදුහලයෙන් ස්ථානමාරුවී යාමට අපේක්ෂා කරන්නේ නැහැ. නමුත් නඩුව නිමාවුවාට පසු



මම ස්ථානමාරුව යාටම අපේක්ෂා කරනවා. 2011 දෙසැම්බර් 01 වන දින ප්‍රෙමලාල් කුමාරසිට් විදුහල්පතිතුමා පාසලේ රඟ ශාලාවේදී පවත්වන ලද රැස්වීමක දී කියා තියෙනවා අධ්‍යාපන ඇමතිතුමා ලවා අද දින ප ව 1.30 වන විට මගේ වැඩ තහනම් කරනවා කියලා.

The position of the 1<sup>st</sup> to 10<sup>th</sup> Respondents and the 13<sup>th</sup> Respondent is that there is no violation of Petitioner's Fundamental Rights as the Petitioner by giving an interview to the media and airing her views of an official inquiry contravenes Section 6:5 & 6:1:4 of Chapter XL VII of the Establishment Code. It is also the position of the said Respondents that relief sought by the Petitioners would set a precedent that disentitles Government Institutions from taking measures to prevent public officers from disclosing information on internal disciplinary matters when it is under consideration and no relief should be granted. The above sections of the Establishment Code Reads thus:

- 6:5 "An officer not specially authorized in that behalf, other the those referred to in Section 6.2, is forbidden to allow himself to be interviewed on, or communicate, either directly or indirectly, any information which he may have gained in the course of his official duties to any person, inclusive of mass media reporters who are not officially entitled to received such information".
- 6:1:4 "The Mass Media should not be used as a means of criticism of the Government or other Government Institutions or to ventilate departmental grievances".

On the same day the police recorded the statement of the Petitioner (26.04.2011) she wrote letter dated 26.04.2011 and informed the 1<sup>st</sup> Respondent of alleged sexual harassment and other forms of harassments

caused to her by the 11<sup>th</sup> & 12<sup>th</sup> Respondents. The 12<sup>th</sup> Respondent was thereafter transferred to Prince of Wales College, Moratuwa on the directive of the Ministry of Education and a formal inquiry against the 11<sup>th</sup> & 12<sup>th</sup> Respondents was commenced. Recording of statements were completed by September 2011. Petitioner was also required to make a statement for the purpose of this inquiry in May 2011.

The above Respondents state that the Petitioner disclosed governmental information through an unauthorised interview by using the mass media and criticised the Government and the Education Department of inaction. During the interview of the Petitioner to the journalist on the “Sirasa Vimarshana” Programme, Facts and Information Petitioner revealed being a part of the investigation against the 11<sup>th</sup> & 12<sup>th</sup> Respondents.

Learned Senior State Counsel submits that Petitioner unequivocally stated that “all allegations of corruption, fraud, and rape/sexual harassment of female staff members of the school were revealed” to the media which was elicited during the inquiry conducted against the 11<sup>th</sup> & 12<sup>th</sup> Respondents. Although the above allegations were raised by the Petitioner she states that the Ministry of Education has not taken measures to punish those responsible. Learned Senior State Counsel argues that such an expression by the Petitioner is strictly prohibited by the provisions of the Establishment Code and such

expressions would mislead the public that the Ministry of Education acquiesced to the misconduct of the 11<sup>th</sup> & 12<sup>th</sup> Respondents. Further it would embarrass and cause significant damage to the reputation of the Ministry of Education. Senior State Counsel also submits that the Petitioner's statement is highly misleading as by 16.11.2011 the investigating officers concluded the inquiry and recommended that 11<sup>th</sup> Respondent be compulsorily retired, and the interdiction of the 12<sup>th</sup> Respondent. A charge sheet against the 12<sup>th</sup> Respondent (R5) was issued, as recommended.

The 11<sup>th</sup> Respondent the Principal of the school was represented in the application before us. In the objections filed of record by the 11<sup>th</sup> Respondent it is pleaded inter alia that the Petitioner failed to make an application for payment of annual increments of salary but the Vice Principal however approved the increments of Petitioner with four others. 11<sup>th</sup> Respondent states that the Petitioner never made a complaint to him during the period mentioned in the Petition. It is also further pleaded that the 11<sup>th</sup> Respondent did not instigate the staff members and the Vice Principal to influence the Petitioner to withdraw the complaints made against the 12<sup>th</sup> Respondent. There is also an affidavit produced marked 11R1 of one Kalubowila, Deputy Principal and another marked 11R2 of Cyril Silva. 11R1 refer to the annual increments which had been subsequently approved by the Deputy

Principal. The affidavit 11R2 deals somewhat with the complaint of the Petitioner. There is no specific denial of the allegation made by the Petitioner, in 11R2. In fact the complaint made by the Petitioner to Cyril Silva is not denied. 11R2 attempts to demonstrate that the matter in question was well known to the staff of Mahanama College and his role was to bring about an amicable settlement to avoid any outside influence which may tarnish the reputation of the School as well of the good will of the teaching staff. A meeting was arranged for this purpose and the Petitioner had agreed to attend the meeting on condition that there is participation of the office bearers of the Old Boys' Association. As the representatives of the Old Boys' Association were not present at the meeting Petitioner left the venue and the meeting was adjourned. 11R2 also demonstrate that the Petitioner never complained against the Principal, 11<sup>th</sup> Respondent about any indecent behaviour.

The material made available to this court by all parties to this application, although the official Respondents (excluding the school authorities) took another line of defence to resist the Petitioner's application having resorted to the Provisions of the Establishment Code, cannot deny the fact that the Petitioner was a victim of circumstances, more particularly a victim of continuous sexual harassment and abuse by the school authorities inclusive of the 11<sup>th</sup> & 12<sup>th</sup> Respondents. This court is more than convinced having regard to

all the facts placed before court that the intolerable and unacceptable conduct and behaviour of the 11<sup>th</sup> & 12<sup>th</sup> Respondents caused the Petitioner to express her sufferings and views quite freely in the hope of availing to herself the protection available under the law.

I observe that continuous abuse and sexual harassment over a period of time would cause physical and mental damage to any human being. It is not possible for a female to resist such abuses unless she is a strong personality who could react and retort to such abuses and harassment and make the abuser to shamelessly withdraw, being exposed to the public at large of his indecency. Continuous threats and abuses could also make a person unwell both physically and mentally. My views expressed on the aspect of abuses would be endorsed by any law abiding citizen, and it should be so. Therefore freedom of expression by the Petitioner of sufferings and the harm done to her by a few public servants is normal and natural even if she has made a mistake by acting contrary to the Establishment Code. Officials should understand that the Petitioner was made to suffer and accept the reality of the issue. This court is mindful that freedom of speech is not absolute or unrestricted, but when this court has to weigh all the facts and circumstances, the pros and cons it is my considered view that greater harm had been caused to the Petitioner by a few public servants. As such the

Petitioner need to be adequately compensated for the loss caused to her life and reputation.

Freedom of speech is essential for the proper functioning of the democratic process. Public opinion plays a crucial role in modern democracy and it is of great importance. The fundamental right to the freedom of speech and expressions enshrine in Article 14(a) of our Constitution is based on the provisions of Amendment 1 of the Constitution of the United States of America and of Article 19(1) of the Indian Constitution and it would be legitimate and proper to refer to decision of the Supreme Court of US and India on freedom of speech and expression - Fundamental Rights in Sri Lanka – Justice S. Sharvananda Pg. 212.

I note the following case law gathered from the above Text Book and from other authorities.

Justice Brennan referred in *New York Times Co. Vs. Sulliwin* 376 US 254 (1964) to “a Profound Rational Commitment to the Principle that debates on public issues should be uninhibited, robust and wide open and it may well include vehement, caustic and sometimes unpleasantly sharp attack on government and public officials”.

“public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities demands the condition of virtually unobstructed access to and diffusion of ideas.

The fundamental principle involved here is people's rights to know. The Freedom of speech guaranteed by the Constitutions embraced at least the liberty to discuss publicly all matters of public concern without previous restraint or fear of subsequent punishments". Thornhill Vs. State of Alabama 310 U.S. 88.

"Criticism of public measures or comment on Government action however strongly worded is within reasonable limits and is consistent with the Fundamental Right of Freedom of Speech and Expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet 'standards of common acceptability' Austin Vs. Keele (1971) 402 U.S. 415, 419.

Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court cannot simply ignore.

Article 12(2) declares that no citizen shall be discriminated against on the ground of sex and Article 12(4) of the Constitution emphasizes that nothing in Article 12 shall prevent special provisions being made by law, subordinate legislation or executive action for the advancement of women, children and disable person.

These constitutional provisions articulate the constitutional imperative of giving due recognition to womenfolk resulting in equality and non-

discrimination among sexes. These rights can only be restricted or limited by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedom of others, or meeting the just requirement of the general welfare of the democratic society- vide Article 15(7) of the Constitution.

Therefore this Court is of the view that sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement of the fundamental rights of the Petitioner and clearly the fact that the Petitioner in this case snapped under the long and prolonged oppressive conduct directed towards her cannot be held against the petitioner in the advancement and enforcement of fundamental rights which this Court is perforce bound to promote and protect.

Sri Lanka has undertaken international obligations to eliminate all forms of discrimination against women by acceding to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 17.07.1998 and in pursuance of these international obligation Sri Lanka has also enacted several to give vent to these global rights in favour of women.

In the circumstances this Court holds that the regime of affirmative rights referred to above cannot be restricted or limited by the provisions of Establishment Code and we are also mindful of comparative jurisprudence such



as the House of Laws decision of *R v. Ireland and Barstow 1998 AC 147* where it was held that silent phone calls to a women amounted to an assault. But here in this instance we are confronted with a continuous course conduct which is quite offensive of Article 12 of the Constitution.

In all the above facts and circumstances of this application and upon a consideration of the acts of continued harassment of the Petitioner, I am of the view that the Petitioner's Fundamental Rights as per Articles 12(1) and 14(1)(a) of the Constitution has been violated. I am unable to accept the argument and position projected by learned Senior State Counsel that Petitioner by giving an interview to the media and airing her views of an official inquiry she acted contrary to the Establishment Code. I state it would not in the context of the case in hand as discussed above contravene Sections 6:5 and 6:1:4 of Chapter XLVII of the Establishment Code. The authorities failed to realise and understand the plight of the Petitioner in the hands and control of indecent public servants within the school premises. Such behaviour and conduct would be unacceptable to any decent society. Therefore this Court grants the declaration only against the 11<sup>th</sup> & 12<sup>th</sup> Respondents as prayed for in sub paragraph (b) of the prayer to the petition, and declare as per sub paragraph (c) of the prayer to petition, document P11 as null and void.

This Court directs the 11<sup>th</sup> and 12<sup>th</sup> Respondents to pay personally as compensation a sum of Rs. 100,000/- each to the Petitioner. This application is allowed as above with costs.

Application allowed.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J.

CHIEF JUSTICE

Upaly Abeyrathne J.

JUDGE OF THE SUPREME COURT