

RANASINGHE AND ANOTHER

Vs.

CEYLON PETROLEUM STORAGE TERMINALS LTD AND OTHERS

SUPREME COURT
ALUWIHARE, J.
DEHIDENIYA, J.
FERNANDO, J.
SC/FR/244/2017
JUNE 13, 2018

**Fundamental rights—Article 126(2) of the Constitution—Time bar—Human Rights
Commission of Sri Lanka Act, No. 21 of 1996, section 13(1) — Burden of proof**

The petitioners alleged that their fundamental rights had been infringed by the respondents' failure to grant the promotions that the petitioners claimed they were duly entitled to. When the matter was taken up for support, a preliminary objection was raised by the respondents that the application had been filed four months and eight days after the alleged violation, and hence was time barred in terms of Articles 17 and 126 of the Constitution. The petitioners' position was that they had filed a

complaint with the Human Rights Commission of Sri Lanka (HRC) prior to coming before the Supreme Court, and that in view of section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, time freezes and therefore the application was not time barred. The petitioners also alleged that up to date there had been no formal notification of the date of the promotions that triggered the violation of their fundamental rights, and that they had complained to the HRC based on an assumption that the promotions were made on a particular date. There was no evidence that an inquiry by the HRC was going to be held, or had been held, at the time of the application to the Supreme Court.

Held:

1. The time period of one month prescribed in Article 126(2) is mandatory. However, in an exceptional or appropriate case, the court has a discretion, or even a duty, to entertain an application made out of time.
2. The petitioners had gone before the HRC well within the stipulated period of time to obtain relief for themselves. There was no evidence to suggest that the petitioners went before the HRC with the desire of invoking the jurisdiction of the Supreme Court, or to circumvent the period of limitation in Article 126 or for any other intention or ulterior motive.
3. What is material is the aggrieved party had made a complaint to the HRC within the mandatory period. The acknowledgement of the complaint by the HRC would trigger and set in motion the mechanics and workings of the HRC, culminating in a communique pertaining to the findings on the complaint. An aggrieved party has no say or control over the proceedings before the HRC and cannot be faulted for the delay or non-holding of an inquiry by the HRC, which may be for good and justifiable reasons.
4. In the absence of any material that the HRC had come to a finding pertaining to the petitioners' complaint, the court has to assume that the matter is still pending before the HRC and that the HRC is taking steps with regard to the complaint within the four corners of the Human Rights Commission Act. The petitioners are entitled to the benefit of section 13(1) and their application to the Supreme Court is not time barred.

Cases referred to:

1. Gamaethige v. Siriwardana [1988] 1 Sri LR 384 at 401- 402
2. Alawala v. IGP (SC/FR/219/2015, SC Minutes of 15. 02. 2016) at 8
3. Romesh Coorey v. Jayalath [2008] 2 Sri LR 43
4. Alles v. Road Passenger Services Authority (SC/FR/448/2009, SC Minutes of 22. 02. 2013)
5. Kithsiri v. Faiszer Musthapa (SC/FR/362/2017, SC Minutes of 10. 01. 2018)
6. Manoranjan v. Chandrasiri (SC/FR/261/2013, SC Minutes of 11. 09. 2014)
7. Ranaweera v. Siriwaradana [2008] 1 Sri LR 260
8. Kariyawasam v. Southern Provincial Road Development Authority [2007] 2 Sri LR 33
9. De Zoysa v. Dissanayake (SC/FR/206/2008, SC Minutes of 09. 12. 2016) at 13

APPLICATION under Article 126 of the Constitution for infringement of Fundamental Rights.

Harsha Fernandowith Chamith Senanayakeand Ruvendra Weerasinghe for the Petitioners.

Sanjeeva Jayawardena, P. C., for the 1st- 4th and 6th- 12th Respondents.

Yuresha De Silva, S. S. C., for the Attorney General.

February 22, 2019

M. N. B. FERNANDO, J.

cur. adv. vult.

This order is in respect of the preliminary objection raised by the 1st to 4th and 6th to 12th respondents (the respondents) that the petitioner's application to this Court is time barred.

The respondents raised the above preliminary objection, when this application in which the petitioners alleged that their fundamental rights were infringed by the respondent's failure to grant the promotion which the petitioners alleged they were duly entitled to, was taken up for support, on the premise that Articles 17 and 126 of the Constitution require a fundamental rights application to be filed within one month of

the alleged violation but the present application had been filed in this Court four months and eight days after the alleged violation.

The petitioner's response was that prior to coming before this Court, a complaint was filed with the Human Rights Commission and in view of the provisions of Section 13(1) of the Human Rights Commission Act, No. 21 of 1996, time freezes and thus, this application is not time barred.

In the extensive written submissions filed before this Court substantiated by judicial authority, the respondents take up the position that a mere filing of a complaint is not sufficient and that the petitioners should place material before Court to demonstrate that an inquiry is pending, whilst the petitioners take up the position that up to now, no formal notification has been published indicating the date of promotion of 9th to 12th respondents and by the inaction of the respondents an artificial lacuna has been created in ascertaining the exact date from which the 30 day time period begins to run and in any event the complaint to the Human Rights Commission has been made within 30 days on the assumption that the promotions were made on a given date, which is in line with the position taken up by the respondents in their written submissions.

In order to consider the time bar objection, certain dates are material and this Court will place reliance only on documents tendered to Court supported by affidavits.

- date of interview - 20- 01- 2017

- date of filing the complaint before the HRC - 23- 03- 2017 and 24- 03- 2017 (by the two petitioners)

- date of acknowledgement by the HRC - 29- 03- 2017

- date of the fundamental rights application - 14- 07- 2017

The grievance of the petitioners before this Court is arbitrary denial of a promotion despite being duly qualified but there is no documentation before Court to ascertain the exact date of promotion. The petitioners' position is that up to date no formal notification had been published and becoming aware on or about 03- 03- 2017 that promotions have been made, complained to the Human Rights Commission within the stipulated time of one month.

The respondents on the other hand take up the position that on the date the petition was filed before this Court viz. 14- 07- 2017, there was no

pending inquiry at the Human Rights Commission and thus the petitioners cannot rely upon Section 13(1) of the Human Rights Commission Act, No. 21 of 1996. No documents have been produced by either party before this Court supported by an affidavit to demonstrate that an inquiry is being held or was held before the Human Rights Commission, excepting the original complaint filed before the Human Rights Commission by the petitioners.

Article 126(2) of the Constitution reads as follows: -

Where any person alleges that such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive and administrative action, he may himself or by an Attorney-at-Law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court . . .

Section 13(1) of the Human Rights Commission Act, No. 21 of 1996 reads as follows: -

Where a complaint is made by an aggrieved party in terms of Section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry in to such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.

The above Sections clearly and precisely state that within one month of an infringement, any person may come before the Supreme Court or make a complaint to the Human Rights Commission. Thus, the keyword in the above Section is the word 'infringement' in order to ascertain the time period of one month for a party to come before the Supreme Court or the Human Rights Commission. The documents produced before this Court do not indicate the date of promotion which the petitioners alleged, infringed their fundamental rights. The petitioners' position is that up to date no formal notification had been published and on or about 03- 03- 2017 becoming aware of the infringement, the two petitioners went before the Human Rights Commission on 23- 03- 2017 and 24- 03- 2017 respectively, which is within one month of having knowledge of the infringement.

This position is not controverted by the respondents. No documents up to now have been produced before this Court to indicate the date of promotion and or notification of such date of promotion. However, the written submissions of the respondents have been filed upon the basis that promotions to the 9th to 12th respondents were given on 03- 03- 2017 to be effective from 01- 02- 2017. The applications before the Human Rights Commission had been filed by the petitioners on 23- 03- 2017 and 24- 03- 2017 respectively and acknowledged by the Human Rights Commission on 29- 03- 2017.

In the above circumstances, the petitioner's contention that they went before the Human Rights Commission within the stipulated period of one month is accepted.

The next question that this Court is called upon to answer is whether the petitioners' application dated 14- 07- 2017 filed before this Court is time barred or not in view of the provisions of Section 13(1) of the Human Rights Commission Act, which stipulates that if a complaint is made to the Commission within one month of the alleged infringement, then the period within which such inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution.

The time limit of one month prescribed by Article 126(2) has been considered by this Court in many instances and consistently the said provision has been treated as mandatory.

Mark Fernando J. in *Gamaethige v. Siriwardana*¹ stated as follows: -

The time period of one month prescribed by Article 126(2) has been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioners fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to invoke the jurisdiction of this Court, this Court has discretion, possibly even a duty to entertain an application made within one month after the petitioner ceased to be subjected to such restraint. The question whether there is a similar discretion where the petitioners failure to apply in time is on account of a third party or some nature or man-made disaster, would have to be considered in an appropriate case when it arises . . .

*Three principles are thus discernible in regard to the operation of time limit prescribed by Article 126(2); Time being to run when the infringement takes place; if knowledge on the part of the Petitioner is required. . . . time begins to run only when both infringement and knowledge exist . . . ; the pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.*

Thus in very clear terms, this Court has held that one month time period is mandatory, but in an exceptional case or in an appropriate case, Court has a discretion, possibly even a duty to entertain an application made out of time.

Human Rights Commission Act, No. 21 of 1996 was enacted subsequent to the said pronouncement of Fernando J. in *Gamaethige v. Siriwardena*.

Aluwihare J. in *Alawala v. IGP2* referring to the provisions of Article 126(2), stated that:

An exception to this rule, however is found in the Human Rights Commission Act. This Act empowers the Human Rights Commission to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution.

In the light of Section 13(1) of the said Act, it is evident that the petitioners could avoid the time bar, if the application to the Human Rights Commission was made within one month of the alleged infringement. By virtue of the aforesaid provision time would not run during the pendency of proceedings before the Commission. This view was fortified in the case of Ramesh Coorey v. Jayalath (2008) 2 SLR page 43.

In the above referred case, viz *Ramesh Coorey v. Jayalath*,³ Shirani Bandaranayake J. (as she then was) held, that although the petitioner in the said case had come before the Supreme Court five months after the alleged infringement, since the petitioner had complied with the provisions of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his fundamental right and the inquiry before the Human

Rights Commission was pending, it was quite clear that the petitioner has filed the fundamental rights application before the Supreme Court within the stipulated time and overruled the preliminary objection pertaining to time bar raised by the respondent.

Similarly, in the case of *Alles v. Road Passenger Services Authority*⁴ Marsoof J. relying upon the above referred case of *Ramesh Coorey v. Jayalath*, overruled the preliminary objection raised by the respondents with regard to the time bar. The petitioners in the said case had taken up the position that upon being aware of the alleged violation of fundamental rights, a complaint was promptly preferred to the Human Rights Commission and even when the petitioners invoked the jurisdiction of this Court the complaint was pending before the Human Rights Commission.

In the case presently before us, the petitioners have promptly gone before the Human Rights Commission upon being aware of the alleged infringement of fundamental rights. Thus, based on the above referred line of judicial authority, as the petitioners have gone before the Human Rights Commission promptly and the matter is pending before the Human Rights Commission and during the pendency of the matter before Human Rights Commission time freezes, the petitioners' contention that the application before the Supreme Court has been filed within the stipulated time is accepted. However, the question raised by the respondents is that filling a complaint is not sufficient and an inquiry should commence for the petitioners to rely on the provisions of Section 13(1) of the Human Rights Commission Act.

The respondents heavily relied upon the Judgment of *Kithsiri v. Faizer Musthapa*⁵ to buttress their argument.

In the said case, the application was filed by the petitioner against the Minister of Provincial Councils and Local Government, Speaker of Parliament and the Election Commission alleging infringement of the petitioner's and such other similarly circumstanced persons' fundamental rights by introducing amendments to the Local Authority Elections (Amendment) Bill, in violation of the procedure established by law, particularly in terms of the Constitution. In the said case on behalf of the respondents it was pointed out, referring to the dates of the said Bill being published in the gazette, placed in the Order Paper of Parliament, debated in Parliament, Speaker's certification and the Bill coming into force as a Law, that the application was time barred. Although the petitioner relied on the application he made to the Human Rights Commission to get over

the time bar objection it was established that the petitioner was very much aware of the impugned acts and had gone before the Human Rights Commission not to have an inquiry conducted by the Human Rights Commission but with the desire of invoking the jurisdiction of this Court and thus, upheld the preliminary objection pertaining to time bar raised on behalf of the respondents.

Aluwihare J. (with Malalgoda J. agreeing) further held that the petitioner in his complaint to the Human Rights Commission in his own handwriting had stated his intention of going before the Supreme Court in the future and relied on the said complaint to circumvent the period of limitation referred to in Article 126(2) of the Constitution and thus, the petitioner had not filed the said application with the intention of pursuing it before the Human Rights Commission in seeking redress but only to obtain an advantage by bringing the application within the provisions of Article 126(2) of the Constitution.

The case before us can easily be distinguished from the case *Kithsiri v. Musthapa* referred to above, as the two petitioners in the present case had gone before the Human Rights Commission well within the stipulated period of time to obtain relief for themselves. There is not even an iota of evidence before this Court, to suggest that the petitioners went before the Human Rights Commission with the desire of invoking the jurisdiction of this Court or to circumvent the period of limitation or for any other intention or an ulterior motive. Thus, Kithsirts case referred to above, has no bearing on the present case as the petitioners in the present case went before the Human Rights Commission in good faith and well within the stipulated time period.

The respondents also placed much reliance on the dicta of Wanasundera J. in the case of *Manoranjan v. Chandrasin*.³ The facts of the said case are vastly different to the case before us and can be distinguished. In Manoranjan case, the petitioner who was serving in Jaffna was initially transferred out of the workstation he was serving to another workstation in Jaffna itself and the petitioner complied with the said transfer. Four months thereafter he was transferred again to Mannar and he made an appeal requesting that he be authorized to resume duties at his original workstation. He went before the Human Rights Commission against the second transfer and then came before this Court. The Court upheld the preliminary objection raised by the respondents that the application made to this Court was time barred, placing reliance that the infringement took

place when the petitioner was initially transferred out of his original work station four months earlier and the application made to the Human Rights Commission based on the second transfer was not within the stipulated time period of one month from the alleged violation as specifically provided for in the Human Rights Commission Act, among other reasons. Thus, the dicta of Wanasundera J. made in *obiter*, should be viewed under the circumstances pertaining to the said case.

In the case before us the petitioners have established that they went before the Human Rights Commission within the stipulated period of one month and thus the application falls within the provisions of Section 13(1) of the Human Rights Commission Act. The said Section clearly states the period within which the matter is pending before the Commission should not be taken into account in computing the period of one month for a person to come before the Supreme Court in terms of Article 126.(2) of the Constitution. Therefore, I am inclined to accept the position taken up by the petitioners, that the present application to this Court is not time barred as the complaint of the petitioners to the Human Rights Commission clearly falls within the four corners of Section 13(1) of the Human Rights Commission Act.

In the written submissions filed before this Court, much emphasis is placed on the English and Sinhala terms ‘complaint’, ‘inquiry’, and ‘investigate’. I do not think it is necessary to analyze the said terms and or to come to a finding with regard to the workings of the Human Rights Commission, definition of ‘pending’ viz-a-viz inquiry and investigation and the effect of Section 15(1) of the Human Rights Commission Act at this juncture, as the petitioners in the case before us, have clearly established that the petitioners’ complaint to the Human Rights Commission is well within one month of becoming aware of the alleged infringement of the fundamental right unlike in the two cases referred to earlier, where the complaint was made to the Human Rights Commission in order to circumvent the period of limitation laid down by Article 126(2) of the Constitution and way outside the stipulated time frame given in Section 13(1) of the Human Rights Commission Act respectively.

In my view, what is material is for an aggrieved party to make a complaint within the mandatory period. The acknowledgement of the complaint by the Human Rights Commission would trigger in and set in motion the mechanics and workings of the Human Rights Commission, culminating in a communique pertaining to the findings on the complaint. An aggrieved

party has no say or control over the proceedings before the Human Rights Commission and cannot be faulted for the delay or non-holding of an inquiry by the Human Rights Commission which may be for good and justifiable reasons. The manner and speed of the working of the Human Rights Commission is not within the purview of an aggrieved party and an aggrieved party cannot be penalized for the delay, if any at the Human Rights Commission. The 3rd case relied on by the respondents, is the case of *Ranaweera v. Siriwaradena*.⁷ In the said case the petitioner challenged the actions of a fiscal who executed a writ of possession issued by the District Court. Ameratunge J. overruling the objection raised by the respondents held that an execution of a writ is purely a ministerial act done with judicial sanction and although the Civil Procedure Code sets out the protection available to an officer executing process issued by Court and limits of such protection, that there was no justification to exclude all such acts from the purview of fundamental rights jurisdiction of the Supreme Court. He further went on to state that the plea of time bar is available to the respondent and when the petitioner is put on notice the petitioner has to adduce material before this Court to show that an inquiry is pending before the Human Rights Commission. In Ranaweera's case since the respondent in its objections raised the plea of time bar and the petitioner failed to place any material before Court that an inquiry was pending at the Human Rights Commission, Amaratunga J. upheld the time bar objection raised on behalf of the respondent.

In the present case before us (unlike in the above case and the two cases referred to earlier and heavily relied upon by the respondents) the plea of time bar has been raised at the stage of supporting for leave to proceed as a preliminary objection and the petitioner as well as the respondents have had no opportunity to place material before Court to show that an inquiry into the complaint has been held by the Human Rights Commission or that an inquiry is still pending. In the said circumstances, I re-iterate the words of Amaratunga J. in the above said Ranaweera's case, that

in exercising the fundamental rights jurisdiction this Court is under a duty to act in compliance with the letter and the spirit of Article, 4(d) of the Constitution.

I am also mindful of the dicta of Amaratunga J. in the case of *Kariyawasam v. Southern Provincial Road Development Authority*⁸ where dismissing the respondents 'objection that the petitioners' application to the Supreme

Court was time barred, he stated that since the petitioners' application to the Human Rights Commission was within the mandatory period of one month and the Human Rights Commission by calling for a report from the respondent has set in motion the process of holding of an inquiry into the petitioners' application, 'the petitioner is entitled to claim the benefit' conferred by Section 13(1) of the Human Rights Commission Act.

When considering the above referred judicial authorities, it is clearly established in a long line of cases this Court has consistently held, that when a matter is promptly referred to and pending before the Human Rights Commission, the time freezes and the said time period is not taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution. The three cases relied on by the respondents, analyzed and considered in detail by me, are unique in nature and in facts and circumstances and can be easily distinguished from the present application before this Court. In the matter before us, where non-granting of a promotion is being challenged, petitioners went before the Human Rights Commission well within time whereas in the aforesaid three instances respectively, the complaint to the Human Rights Commission was made to circumvent the provisions of the Act, the complaint made was not within the stipulated period of one month as laid down in the Act and the petitioner had failed to place material to rebut the objection raised by the respondent before this Court.

Thus, considering the facts of the case presently before us, I am inclined to take the view that the petitioners are entitled to claim the benefit conferred by Section 13(1) of the Human Rights Commission Act.

In the case of *De Zoysa v. Dissanayake*⁹ Prasanna Jayawardena J. considering the one-month rule enunciated in Article 126(2) of the . . . Constitution, traced the history and the development of the law pertaining to time bar and whilst holding that it is mandatory, went on to state that

this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose fundamental rights have been infringed by executive and administrative action, requires Article 126 (2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied

by rote and the Court remains blind to facts and circumstances which have denied a petitioner of an opportunity to invoke the jurisdiction of Courts earlier.

For completion of the analysis of the one-month rule, Jayawardena J. (at page 13) referred to Section 13(1) of the Human Rights Commission Act and stated, that it is a statutorily created interruption but did not delve into greater detail on the provisions of the Human Rights Commission Act, as the Human Rights Commission and a complaint made to the Human Rights Commission were not matters in issue in the said case.

Nevertheless, the rationale referred to in the above quotation that a Court would fail to fulfil its guardianship, if it remains blind to facts and circumstances, and also the dicta of Fernando J. in Gamaethige case, whether the Court has a discretion where the petitioners' failure to apply in time (on account of a third party or some nature or man-made disaster) would have to be considered in an appropriate case when it arises, should be borne in mind when considering the time bar objection raised before this Court.

In the present case, the petitioners complained to the Human Rights Commission within one month of becoming aware of the promotions being given to the 9th to 12th respondents and came before this Court for alleged violation of fundamental rights after obtaining additional information under the Right to Information Act, No. 12 of 2016 and declaring in the petition that a complaint was made to the Human Rights Commission and that the said complaint was acknowledged by the Human Rights Commission.

In the absence of any material adduced before this Court to indicate that the Human Rights Commission had come to a finding pertaining to the complaint made by the petitioner, this Court has to assume that the matter is still pending before the Human Rights Commission and the Human Rights Commission is taking steps with regard to the complaint within the four corners of the Human Rights Commission Act. This Court refrains from commenting on the mechanics and the workings of the Human Rights Commission specifically with regard to the complaint of the petitioner, in view of paucity of documentation before same.

In the above circumstance, I hold that the complaint made by the petitioners to the Human Rights Commission under Section 14 of the Human Rights Commission Act is within the stipulated time period and in view of the provisions of Section 13(1) of the Human Rights Commission

Act, time would not run during the pendency of proceedings before the Human Rights Commission and such time will not be taken into account in computing the period of one month within which an application may be made to this Court in terms of Article 126(2) of the Constitution. Thus, the petitioners' application filed before this Court is not time barred.

For the reasons aforesaid, the preliminary objection raised on behalf of the 1st to 4th and 6th to 12th respondents is overruled.

ALUWIHARE, J. - *I agree.*

DEHIDENIYA, J. - *I agree.*

Preliminary objection overruled.

Judgment by: Murdu Fernando, PC, J.

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