

KULATUNGA VS. HON LOKUBANDARA

SUPREME COURT

J. A. N. DE SILVA, C. J.

AMARATUNGA, J. AND

IMAM, J.

S. C. (FR) APPLICATION NO. 229/2009

FEBRUARY, 8TH 2010.

Constitution-Articles 12(1), 17 and 126 (2) – Infringement of Fundamental Rights. – If a person alleges that his fundamental rights had been infringed or about to be infringed he shall file his application within one month thereof. – lex non cogit ad impossibilia.

The Petitioner invoked the jurisdiction of the Supreme Court alleging that his fundamental rights guaranteed under Articles 12(1), 17 and 126 of the Constitution had been violated.

At the hearing the Respondent took up a preliminary objection to the effect that the application filed by the Petitioner was out of time in terms of Article 126 of the Constitution and moved for the dismissal of the Petitioner's Fundamental Rights application.

Held

- (1) The rule in Article 126 of the Constitution is applied strictly, however in a fit matter the Supreme Court may allow an application to proceed even though one month has lapsed from the date of the infringement.

Cases referred to:

- (1) *Gamaethige v. Siriwardene and Others* [1988] 1 S.L.R. 384
- (2) *Siriwardene v. Rodrigo* [1986] 1 S.L.R. 384
- (3) *Jayaweera v. National Film Corporation* [1995] 2 S.L.R. 123
- (4) *Ramanathan v. Tennakoon* [1988] 2 CALR 187
- (5) *Edirisuriya v. Navaratnam* [1985] 1 S.L.R. 100

APPLICATION for relief for infringement of fundamental rights.

S. A. Parathalingam, P.C. with Idroos for the Petitioner.

Manohara De Silva, P.C. with Ms. Pubuduni Wickremaratne for the 3rd Respondent.

Nerin Pulle, SSC for 2nd, 4th, 5th, 6th, and 9th Respondents.

Cur.adv.vult.

July 02nd 2010

J. A. N. DE SILVA CJ.

The petitioner in this case was granted leave to proceed on the alleged violation of fundamental rights guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. Thereafter at the request of both parties several dates have been granted to explore the possibility of settling the dispute between the petitioner and the 3rd respondent.

This application relates to the filling of the vacancy of the post of Director of Catering and House Keeping Services of Parliament of Sri Lanka.

The above post became vacant on the 12th November 2005. The 3rd respondent was appointed to act in the said post and he does so even today. The Secretary General of Parliament called for application for the said post by placing an advertisement in the Sunday Observer and Silumina papers.

Several applicants responded to the above advertisement and four people were summoned for an interview on 7/4/2006 including the petitioner and the 3rd respondent. The composition of the interview board was as follows: Former Secretary General of Parliament Mrs. P. Wijesekera – Chairperson. Assistant General Secretary (5th Respondent) Principal

Ceylon Hotel School (7th Respondent) and Chief Executive Officer of the Hotels Corporation (8th Respondent).

The marks had been awarded under the following criteria at the said interview:-

Qualifications	=	20
Additional Qualifications	=	15
Experience	=	20
Personal Profile	=	30
Conduct & Testimonials	=	<u>15</u>
		<u>100</u>

On the basis of marks allotted at the interview, the board has not considered the petitioner to be the most suitable person for the post in question, but has recommended the 3rd respondent for the job. This is evident from the documents marked R 5 and R 5A. The Secretary General, who was the Chairperson in her affidavit, has stated that marks were given purely on merit and not for any extraneous considerations. She has vehemently denied bias or manipulation on the part of the interview board in awarding marks at any stage of the interview process. The petitioner not being satisfied with the interview process and the outcome of the interview petitioned the Presidential Investigation Unit alleging several misrepresentations made by the 3rd respondent in his application. Presidential Investigation Unit has conducted an inquiry and submitted a report to the Hon. Speaker of the House with a copy to the Secretary General. Thereafter the Secretary General once again published a newspaper advertisement in the Sunday Observer and Silumina on the 24th of Sep 2006 calling for fresh applications for the said post.

When this happened the 3rd respondent invoked the jurisdiction of the Court of Appeal by way of a writ of

certiorari quashing the decision of the Secretary General of Parliament to call for fresh applications for the post of Director Catering and Housekeeping Services of the Parliament. This writ application carried the No. CA 1551/2006. In the same application he has also prayed for a writ of mandamus directing the Secretary General of Parliament to appoint him to the post he was selected under Article 65 (3) of the Constitution. The Petitioner in the present application sought to intervene in the said Court of Appeal writ application on the basis that he was a necessary party.

However, on the 5th of December 2006 when the above matter was taken up for support the learned counsel who appeared for the Hon. Speaker and the Secretary General informed the Court of Appeal that there is a possibility of “an administrative adjustment” and moved for an adjournment. On that day Court was informed that there was no settlement and the Court fixed the matter for support on 2nd February 2007. Having heard all the parties the Court of Appeal quashed the decision of the Secretary General of Parliament to call for fresh applications and indicated that the Hon. Speaker of the parliament is free to consider whether approval should be granted or not to appoint the 3rd respondent who was the petitioner in the writ application. When the writ application bearing No. 1551/06 was pending in the Court of Appeal the petitioner in the instant case too filed a writ application bearing No. 69/2007 on the 17th of July 2006 praying inter alia for a mandate in the nature of certiorari quashing the decision of the interview panel from selecting and recommending the 3rd respondent. However, later in view of the decision given by the Court of Appeal in writ application 1551/07 the petitioner withdrew his application (C.A. Writ 69/7) on 2/2/2007.

On 3/7/2007 the petitioner invoked the jurisdiction of this Court alleging the violation of fundamental rights guaranteed under Article 12(1) in terms of Article 17 and 126 of the Constitution. At the hearing of this application all counsel who appeared for the respondents took up a preliminary objection to the effect that the application of the petitioner should be dismissed in limine as the petition of the petitioner falls outside the stipulated time in terms of Article 126 of the Constitution.

Article 126 of the Constitution reads as follows (“Where any person alleges that any such fundamental right . . . has been infringed or is about to be infringed by executive or administrative action, he may. . . Within one month thereof apply to the Supreme Court by way of petition.”) The Supreme Court has constantly held that this one month rule is mandatory. In *Gamaethige vs. Siriwardene and others*⁽¹⁾ Fernando J made the following observation “time begins 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 exists. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of time limit.” This rule has been consistently applied by our Supreme Court in a number of cases. e.g. *Siriwardene vs. Rodrigo*⁽²⁾, *Jayaweera vs. National Film Cooperation*⁽³⁾ and *Ramanathan vs. Tennakone*⁽⁴⁾.

It is to be noted that although this rule is generally applied strictly there are certain very rare instances where Supreme Court may allow an application to proceed even though one month has lapsed from the date of the infringement of the fundamental right of the petitioner. In the Case of *Edirisuriya vs. Navaratnam*⁽⁵⁾ the Supreme Court held that in a fit matter the court would entertain

an application made after the lapse of the stipulated period provided an adequate excuse for the delay could be adduced by the petitioner. Such excuses include a situation where the petitioner has been held incommunicado, where the principle *lex non cogit ad impossibilia* would be applicable. It is clear from the facts narrated above the petitioner in this case knew the historical developments of the events that led to the selection and recommendation of the 3rd respondent to the post in question. The fact that he chose to seek a writ from the Court of Appeal too demonstrate the knowledge on his part. The petitioner withdrew this writ application on 2.2.2007 and subsequently after lapse of almost five months on 3.7.2007 he sought to invoke the jurisdiction of this Court. It is pertinent to note that the petitioner has prayed for identical relief in Court of Appeal application No. 69/2007.

I uphold the preliminary objection that this petition is time barred and the petition is dismissed without costs.

AMARATUNGA, J. – I agree.

IMAM, J. – I agree.

application dismissed.