PINNAWALA
v.
SRI LANKA INSURANCE CORPORATION LTD. AND OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
RAMANATHAN, J. AND
DR. SHIRANI BANDARANAYAKE, J.
S.C. APPLICATION NO. 583/95(FR).
MAY 16, AND JUNE 26, 1997.

Fundamental Rights – Extension of Service – Refusal of Extension – Arbitrary Exercise of the Employer's Discretion – Article 12(1) of the Constitution.

The application of the petitioner for the third extension of his services after he had reached 55 years of age was refused by the employer company on the ground that he was found wanting in the discharge of his duties.

Held:

1. In refusing the petitioner's application for an extension of service there was no valid and proper exercise of discretion vested in the respondents; the discretion was exercised against the petitioner on the basis of findings reached at an *ex parte* inquiry. The exercise of the discretion was arbitrary, devoid of a rational basis and was violative of Article 12(1) of the Constitution.

2. The first respondent company was subject to the control of the state in all important matters of policy and arrangement. It was, therefore, a "Governmental agency or instrumentality" and the impugned act properly fell within the meaning of the expression "executive or administrative action" in Article 126 of the Constitution.

Case referred to:

1. *Rajaratne v. Air Lanka Ltd. and Others* (1987) 2 Sri L.R. 128

APPLICATION for relief for infringement of fundamental rights.

L. C. Seneviratne, P.C. for the petitioner.

Upawansa Yapa, P.C. Solicitor-General with *I. Demuni de Silva, S.C.* for 1st, 2nd and 9th respondents.

E. D. Wickramanayake with *Ms. Anandi Cooray* and *O. A. Najeem* for 3rd to 8th respondents.

Cur. adv. vult.

July 16, 1997.
G. P. S. DE SILVA, C.J.

The petitioner complained that the refusal to grant him his 3rd extension of service beyond the 55th year is violative of the fundamental rights guaranteed to him in terms of Articles 12(1) and 12(2) of the Constitution. The petitioner joined the Insurance Corporation as an Executive in January 1969. In May 1970 he was appointed as the Personal Assistant to the General Manager. In 1975 he was appointed as the Assistant General Manager and in 1980 as the Deputy General Manager. In December 1993, he was appointed as the General Manager. He was granted the 1st and 2nd extensions of service but the period of extension of service was limited to 6 months. His application for the 3rd extension in service commencing from the 15th of September 1995 was refused by letter dated 14.9.95 addressed to him by the Chairman of the Sri Lanka Insurance Corporation Ltd., (2nd respondent). These facts are not in dispute.

In his petition he further avers that a news item appeared in the 'Dinamina' newspaper of 11.1.95 alleging that he had been the "Chairman of a committee of five persons from the Insurance Corporation to collect funds for the UNP election fund." The petitioner had written to the editor of the 'Dinamina' denying this allegation. According to the petitioner, the 2nd respondent summoned him to his office and requested him to resign from his post. He had told the 2nd respondent that the news item was false and requested that an inquiry be held. However, no inquiry was held in regard to this matter.

The petitioner pleads that thereafter most of his functions as General Manager were taken away by the 2nd respondent by sending "memos" marked (L), (M), and (N). The result was that the petitioner was reduced to the position of a "figure head as General Manager" of the Sri Lanka Insurance Corporation Ltd.," (1st respondent).

Mr. L. C. Seneviratne for the petitioner submitted that it is not his case that the petitioner has a right to an extension of service beyond the 55th year. Counsel contended that the petitioner has a right to

make an application for extension of service beyond the 55th year and that he is entitled to have his application considered fairly and properly. It was urged that while the matter was within the discretion of the 1st and 2nd respondents, yet the discretion must be fairly, reasonably and properly exercised. With these submissions I agree.

According to the respondents the allegations contained in the 'Dinamina' newspaper referred to above had nothing to do with the refusal of the petitioner's application for the 3rd extension of service. The 2nd respondent in his affidavit admits that he issued the memos marked (L), (M) and (N). According to the 2nd respondent, these memos were issued by him consequent upon a decision taken by the Board of Directors of the 1st respondent (2R18); the decision to issue the "memos" was pursuant to a loss of confidence in the petitioner "based on several allegations made by the members of the staff and trade unions of his improper exercise of duties and functions." In his affidavit he further avers "this also prompted me to appoint a committee of inquiry" comprising Messrs. Ghazzali and W. M. M. F. P. Perera "to examine and report on these allegations." It is the case for the respondents that the decision to refuse the petitioner's application for the 3rd extension of service was based largely, if not entirely, on the reports of the committee of inquiry comprising Mr. Ghazzali and Mr. Perera (vide the extracts from the minutes of the Board Meetings 2R25 and 2R25(a) and the Board Paper 2R26). Moreover the 2nd respondent specifically avers that the petitioner was not granted his extension of service "not because of his political affiliations but due to the fact that the Board of Directors took the view that he was found wanting in the discharge of his duties and had acted negligently in controlling some areas of work. A detailed account of these matters are given in the Board Paper dated 1.8.95, a copy of which is annexed hereto, marked 2R26 and is pleaded as part and parcel of his affidavit." 2R26 unequivocally states that the committee of inquiry was appointed to report on "the various allegations that are made by the members of the staff at various levels and trade unions...".

The point that needs to be stressed and is of decisive importance is that at no time was the petitioner summoned before the committee of inquiry and questioned in regard to the allegations made against him. His explanation was not called for either by the committee of inquiry or by the 2nd respondent. It was submitted on behalf of the respondents that the conclusions of the committee of inquiry were based on the documents prepared by the petitioner himself; that there was no need to call for an explanation from the petitioner because the 1st and 2nd respondents did not intend to take disciplinary action against him. With these submissions, I am afraid, I cannot agree. If the petitioner was informed of the allegations against him and if he was given a fair hearing he may well have given a satisfactory explanation, or even shown the falsity of the allegations made against him. Admittedly, he was never given an opportunity of being heard on the alleged acts of negligence which according to the respondents, resulted in a loss of confidence. The petitioner was at no time made aware of the reasons for the alleged loss of confidence in him. It is thus manifest that the petitioner was refused his application for an extension of services on the basis of allegations in respect of which he was not heard and of which he was totally unaware. There was no valid and proper exercise of the discretion vested in the 1st and 2nd respondents; the discretion was exercised against the petitioner on the basis of findings reached at an *ex parte* inquiry. Thus the exercise of the discretion was arbitrary, devoid of a rational basis, and was violative of Article 12(1).

It was strongly urged on behalf of the respondents both by the learned Solicitor General and Mr. E. D. Wickremanayake that, in any event, the application must fail for the reason that the act complained of does not constitute "executive or administrative action" within the meaning of Article 126 of the Constitution. Counsel emphasized that the 1st respondent was since February, 1993, a limited liability Company incorporated under the provisions of the Companies Act No. 17 of 1982. It is governed by the Memorandum of Association (2R3) and the Articles of Association (2R4) like any other public company. Mr. Wickremanayake submitted that there was nothing to prohibit the Board of Directors from taking a decision "to go public" at

any time. In short, the submission was that the 1st respondent Company was nothing but a commercial venture and could not be properly called an "organ of the State".

It seems to me, however, that the picture that emerges from a reading of the documents filed of record is entirely different. The Memorandum of Association (2R3) shows that one of its primary objects is "to succeed and carry on the business carried on by the Insurance Corporation of Sri Lanka, established under the provisions of the Insurance Corporation Act No. 2 of 1961." In other words, it is the successor to the public corporation. 2R3 is signed by Secretary to the Treasury. In regard to the issued share capital, the Articles of Association (2R4) provides as follows: "In terms of section 2(3) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987 the entirety of the first issued share capital of the Company will be allotted by the Registrar of Companies to the Secretary to the Treasury (in his official capacity) for and on behalf of the State. Thereafter the Secretary to the Treasury is entitled to sell or dispose the entirety or any part of such shares at any given interval on the basis of a written directive received from the Minister in charge of Finance of the State." It is to be noted that the decision to dispose of the shares is not by the Board of Directors.

2R5 refers to a Special General Meeting of the shareholders held on 5.9.94. The venue was the Ministry of Finance and the shareholders present were (1) The Secretary to the Treasury; (2) The Deputy Secretary to the Treasury; and (3) The Director General (Ministry of Finance). Letter dated 14.12.93 (2R15) sent by the Secretary to the Treasury unequivocally directs the Chairman of the Company to appoint the petitioner as General Manager. The documents Y14, Y15, Y16 and Y17 establish the fact that the Secretary to the Treasury has control over the extension of service and promotion of the employees.

Y18 is another significant letter addressed to the 2nd respondent by the Director General, Ministry of Finance. It gives an indication of the extent of the control exercised by the Ministry in regard to management of the 1st respondent. The letter reads thus:-

"07 April 1994
Ministry of Finance
General Treasury
Department of Fiscal
Policy & Economic Affairs
The Secretariat, Colombo 1.

The Chairman;
Sri Lanka Insurance Corporation Ltd.,
No. 21, Vauxhall Street,
Colombo 1.

Dear Sir,

Audit of the 1993 Accounts of the Sri Lanka Insurance Co. Ltd., and National Insurance Co. Ltd.

I forward herewith a copy of the letter addressed to the Company Secretary conveying a directive of the Secretary to the Treasury as the sole shareholder of the Company.

The Secretary to the Treasury has directed that an AGM be held early in order to appoint an Auditor.

The Secretary to the Treasury has directed that you draft suitable and explicit Terms of Reference for the audit of accounts of SLIC Ltd., for 1993. Please note that the Terms of Reference should cover adequately an analysis of the key financial indicators, including solvency margins and networth which highlight the performance of your company during 1993 and should be similar to the Terms of Reference you drafted to call bids from international auditors for the financial year 1992.

Please forward Terms of Reference of the auditors early for information of the Secretary to the Treasury.

Yours faithfully
Sgd.
Director General."

Y20 is another letter addressed to the 1st respondent by the Secretary to the Ministry of Finance directing the collection of dividends from **"Government owned Companies"** and the transfer of surplus balances to the "Treasury deposit Account."

On a consideration of the aforesaid documents, I am of the view that the 1st respondent is subject to the control of the State in all important matters of policy and management. The documents show the "pervasive character of the control" exercised by the State. The nature of the incorporation is not the decisive test. In *Rajaratne v. Air Lanka Ltd., and others*[1], Atukorale J., considered the meaning of the expression "executive or administrative action" in Article 126. After a careful and exhaustive review of the important decisions of the Supreme Court of India and of this court the learned Judge expressed himself as follows:

> "The expression 'executive or administrative action' has not been defined in our Constitution. It excludes the exercise of the special jurisdiction of this court under Article 126 in respect of the acts of the legislature or the judiciary. Article 4 of the Constitution mandates that the fundamental rights enshrined in Part III 'shall be respected, secured and advanced by all the organs of the government'. An examination of our decisions indicate that this expression embraces actions not only of the government itself but also of organs, instrumentalities or agencies of the government. The government may act through the agency of its officers. It may also act through the agency of juridical persons set up by the State by, under or in accordance with a statute. The demands and obligations of the modern welfare State have resulted in an alarming increase in the magnitude and range of governmental activity. For the purpose of ensuring and achieving the rapid development of the whole country by means of public economic activity the government is called upon to embark on a multitude of commercial and industrial undertakings. In fact a stage has now been reached when it has become difficult to distinguish between governmental and non-governmental functions. This distinction is now virtually non-existent. The rigid and tardy procedures commonly associated with governmental departments and the red

tapism inherent in such slow motion procedures have compelled the government to resort to the device of public corporations to carry on these numerous commercial and industrial undertakings which require professional skills of a highly specialised and technical nature. But by resorting to this device of the corporate entity the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance. In the circumstances I am of opinion that the expression 'executive or administrative action' in Articles 17 and 126 of the Constitution should be given a broad and not a restrictive construction. I am therefore inclined to adopt the test of governmental agency or instrumentality propounded in the later decisions of the Indian Courts as being a more rational and meaningful test than the sovereign power test relied upon by learned President's Counsel."

Having regard to the documentary evidence placed before us by both the petitioner and the 2nd respondent, I hold that the 1st respondent is a "governmental agency or instrumentality" and the impugned act properly falls within the meaning of the expression "executive or administrative action" in Article 126 of the Constitution. The petitioner is accordingly entitled to a declaration that the fundamental right guaranteed to him under Article 12(1) has been infringed.

Mr. Seneviratne submitted that the petitioner does not now claim "reinstatement". He confines his claim to compensation. In his petition he has 'asked for rupees five million as compensation. On a consideration of the totality of the facts and circumstances of this case, I direct the first respondent to pay the petitioner a sum of Rs. 70,000/- (Seventy thousand) as compensation and a sum of Rs. 5000/- (Five thousand) as costs.

RAMANATHAN, J. – I agree.

DR. SHIRANI BANDARANAYAKE, J. – I agree.

Relief granted.