

**RANATUNGA**  
**v.**  
**JAYAWARDENA AND OTHERS**

**SUPREME COURT**  
**SAMARAKOON C.J., ISMAIL J., AND WANASUNDERA J.**  
**S. C. NO. 27/79**  
**JULY 30, 1979**

*Fundamental rights - Infringement prior to promulgation of Constitution - Infringement and threatened infringement - Calculation of one month - Article 126(1) of the Constitution.*

Infringement prior to promulgation of Constitution on 07.09.1978 is not justiciable under s. 126(1). Assuming it was a threatened infringement which continued until 07.09.79 the application should have been made within one month after 07.09.1978. The application filed on 04.06.1979 is out of time.

**APPLICATION** Under Article 126 of the Constitution.

*N. Senanayake with K.P. Guneratne, Miss. S.M. Senaratne, S. Mathew and Mrs. A.B. Dissanayake for petitioner.*

*G.P.S. de Silva, Additional Solicitor General with S. Ratnapala, State Counsel for 1st, 2nd and 4th respondents.*

*Nihal K.M. Perera for 5th respondent.*

Cur. adv. vult.

August, 3, 1979

**SAMARAKOON, C.J.**

In this application the petitioner complains of the violation of a fundamental right inasmuch as the steps set out in the petition "consisted of a measure of discrimination on account of the opposing political opinion of the petitioner and the 3rd respondent." The facts shortly are these -

On the 23rd of September, 1971, the petitioner was appointed the Acting Sub-Postmaster of Mugunuwatawana Post Office in the District of Chilaw consequent on the permanent Postmaster being interdicted. The petitioner continues to act in that capacity up to date. For the purpose of running the Post Office the petitioner took on rent the premises in which the Post Office is being run. He alleges that on the 9th of March, 1977, public notices were posted in various Post Offices in the district calling for applications for the permanent post of Sub-Postmaster, Mugunuwatawana. In response to this advertisement the petitioner made a formal application on the 10th of April, 1977, to the Divisional Superintendent of Post Offices in Chilaw. The petitioner was the only applicant for the said post. Nothing appears to have materialized, and on the 17th of November, 1977, a second public notice was published calling for applications for the same permanent post. The Petitioner states that he then forwarded a second application dated 30th November, 1977. On this occasion the 5th respondent also applied for the said post and the two of them were called for an interview on the 25th April, 1978, at the office of the Divisional Superintendent of Post Offices, Chilaw. They were interviewed by a panel of officers of the Postal Department. By letter dated 27th June, 1978, (filed of record marked 'B') the petitioner was informed by the Divisional Superintendent of Post Office, Chilaw, that he had not been selected for appointment, that another suitable applicant had been selected for appointment, and that that applicant would after training for 4 weeks take up appointment as Sub-Postmaster, Mugunuwatawana.

The petitioner then found on inquiries that the person who was selected for appointment was the 5th respondent. He alleges that the 5th respondent did not have the necessary residential qualification of 10 years in the locality of the postal delivery area, and that the 5th respondent could only have been considered if there were no applicants from the area with 10 years' residence. In this case as the petitioner was so qualified the 5th respondent should not have in any event been considered. He alleges that this is a political manoeuvre by the 1st to the 3rd respondents to deprive the petitioner of what was his by right. The petitioner states that the 5th respondent was a political supporter of the 3rd

respondent who is the Member of Parliament for Chilaw, and for that reason the residency rule has not been followed so that the 5th respondent could be selected and appointed. The document 1R2 by which the Grama Sevaka of Mugunuwatawana certifies that the 5th respondent had been a resident of Mugunuwatawana since his birth appears to have been issued on the 25th September, 1977, and it states that the purpose for which it was issued was to enable the petitioner to obtain employment. It is significant that this date was long prior to the second advertisement on the 11th of November, 1977, and also long after the 1st advertisement. This fact lends colour to the petitioner's allegation that the 2nd advertisement was for the purpose of merely appointing the 5th respondent. Added to this is the fact that the 1st respondent states no facts as to why he considered the first public advertisement insufficient, although in his affidavit he states that he had reason to believe that the 1st advertisement "had not received sufficient publicity." He does not state why he had reason to so believe. On the facts as appearing on the affidavit I am unable to state that the allegations made by the petitioner of wrong doing on the part of one or more of the respondents for political reasons is unjustified. However, I do not propose to delve into these allegations as I am of opinion that this application can be disposed of on the preliminary objection taken by the Additional Solicitor-General.

Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka grants every person a remedy in case of infringement or imminent infringement by executive or administrative action of a fundamental right to which such person is entitled under the provisions of Chapter II of the Constitution. The procedure for enforcing that right is by application to this Court in terms of Article 126(2) of the Constitution. The Solicitor-General took up objection that the fundamental right if any which the petitioner alleges was violated did not exist at the time for the alleged executive or administrative action. That fundamental right is set out by the petitioner in paragraph 30 of the affidavit which reads as follows:

"I state that the deprivation of a fundamental right under the Constitution consists of an improper selection of non-qualified candidate on account of political favoritism and discrimination on account of my political sympathies."

It is clear from document B which is annexed to the petition that this selection of the non-qualified candidate, namely, the 5th respondent, was made and notified to the petitioner on the 27th of

June, 1978. I must state here that Counsel for the petitioner categorically stated that he does not allege that that fundamental right has in fact been infringed. He stated that his allegation was that there was threatened infringement of a fundamental right. If so it must refer to the action of selecting the 5th respondent for appointment which the petitioner became aware of on the 27th of June, 1978. No such fundamental right existed at that time, because these fundamental rights which are now recognized and enforceable by Article 126 came into existence after the promulgation of the Constitution on the 7th of September, 1978.

Therefore, no action under Article 126 could have been embarked on prior to 7th September, 1978. However, assuming that this was a threatened infringement and it continued till the 7th of September, 1978, it was up on to the petitioner to make this application after the 7th September, 1978. But then the time limit of one month for institution of this application becomes applicable, and the application should therefore have been made within one month after 7th September, 1978. The application has in fact been filed on the 4th of June, 1979, which is long after the prescribed period. Counsel for the petitioner sought to get over this provision by stating that words "within one month thereof" in Article 126(2) refers only to an infringement and not to the threatened infringement referred to in that section. I am unable to agree with this contention. The word "thereof" refers to the executive or administrative action complained of and for the purpose of this application must depend on what the petitioner alleges in this petition as the wrongful action. In that view of the matter the preliminary objection must succeed. The application is therefore refused. In all the circumstances of this case I think a fair order would be that each party bears his own costs.

ISMAIL, J. — I agree.

WANASUNDERA, J. — I agree.

*Application dismissed with no costs.*