DISSANAYAKE
v
PRIYAL DE SILVA

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
FERNANDO, J.
SOMAWANSA, J.
SC FR 256/2005
OCTOBER 13, 2006
NOVEMBER 8, 2006
FEBRUARY 27, 2007
APRIL 5, 2007
JULY 2, 2007

Constitution – Article 12 (1) – Right to equality – Equal protection of the law and not equal violation of the law – Time frame – Mandatory? – Excellence in sports – Can sports and umpiring be treated as one and the same?.

The petitioner, a Sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department alleged that his fundamental rights guaranteed in terms of Article 12(1) had been violated. He claimed that, he was not given marks for excellence in sports – as he has officiated international and national cricket tournaments. He further alleged that another candidate was given marks for sports, although such was not at the national level.

Held:

(1) The right to equality means that among equals, the law should be equal and should be equally administered and thereby the like should be treated alike. Provisions in Article 12 (1) would only provide for the equal protection of the law and shall not provide for the equal violation of the law.

It cannot be understood as requiring officers to act illegally because they have acted illegally previously.

(2) It is abundantly clear that 'sports and umpiring' cannot be treated as one and the same and if a decision had been taken to allocate marks for 'excellence in sports that cannot be used to adduce marks for umpiring'.

(3) Time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) is mandatory.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Satish Chander* v *Union of India* AIR 1953 SC 250.
2. *Ram Prasad* v *State of Bihar* AIR 1953 SC 219.
3. *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and Others* 1986 1 Sri LR 300.
4. *Gamaethige* v *Siriwardane* 1988 1 Sri LR 384.
5. *Jayasekera* v *Wipulasena and others* 1988 2 Sri LR 237.
6. *R.P. Jayasuriya* v *R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and Others* SC FR 620/97 SCM 30.10.1998.
7. *Jayawardane* v *Attorney-General* FRD Vol. 1 175.
8. *Gunawardane and others* v *E.L. Senanayake and others,* FRD Vol. 1.175.
9. *Thadchanamoorthy* v *Attorney-General* 1979 79 801 Sri LR 154 (SC)
10. *Mahenthiran* v *Attorney-General* FRG, Vol. 1 175.
11. *Namasivayan* v *Gunawardane* 1989 1 Sri LR 394.
12. *Gomez* v *University of Colombo* 2001 1 Sri LR 273.
13. *Karunadasa* v *People's Bank* SC 147/2007 SCM 20.6.2007.

Uditha Egalahewa with *Gihan Galabodage* for petitioner.
Harsha Fernando SSC for respondents.
Bimba Jayasinghe Tillekeratne DSG for respondents.

Cur.adv.vult.

July 25, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a Sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department, alleged that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the non-granting of the promotion to the post of Inspector, for which this Court had granted leave to proceed.

The facts of this application, as submitted by the petitioner, *albeit* brief, are as follows:

The petitioner joined the Sri Lanka Railway Department as a Sub-Inspector of the Railway Protection Force on 02.05.1988 (P1). According to the relevant scheme of promotions, the petitioner's next promotion was to the post of Inspector and the sub-Inspectors were eligible to make their applications for the said promotion on completion of seven (7) years of service in that post. Accordingly, the petitioner became eligible for promotion to the post of Inspector on 02.05.1995. Since the petitioner's initial appointment to the post

of sub-Inspector in 1988, no applications were called for subsequent promotions until 2002 (P2).

Applications were called for the promotions to the post of Inspector from among the sub-Inspectors, who had completed seven (7) years in the said post. The notice calling for applications had stated that there were four (4) vacancies as at the date of calling for applications (P3).

In terms of the notice calling for applications for promotions to the post of Inspector, a competitive examination was held on 19.07.2003. By letter dated 19.11.2003, the General Manager (Operations) had informed the petitioner that he had successfully completed the competitive examination and that the interview will be held on 25.11.2003. The said interview was postponed on several occasions and later was held on 23.09.2004. The results of the examination or the interview were not published until 11.07.2005 (P8).

By letter dated 23.06.2005, four (4) sub-Inspectors were promoted to the posts of Inspector with effect from 19.07.2003 (P7). Upon inquiry, the 1st respondent had informed the petitioner that he had been the 6th in order of merit at the interview and had obtained marks as follows:

Competitive Examination		
	Subject 1	58 marks
	Subject 2	58 marks
Interview		56 marks
Total		172 marks

Upon enquiry the petitioner had become aware that he had not been given marks adequately at the interview and on that basis his allegations against the respondents were mainly two fold.

(a) that he has not been given marks according to the Scheme of Recruitment;

(b) that there were seven (7) vacancies in the post of Inspector as at the date of calling for applications and as such, the

petitioner should have been appointed to the said post of Inspector.

The petitioner along with two others, who obtained the 5th and 7th positions in order of merit at the interview, had appealed to the 2nd respondent through the 3rd respondent. They had referred to the three (3) additional vacancies that were available as at the date of calling for applications for the post of Inspector and had requested that they be appointed to fill the aforesaid vacancies (P14 and P 15).

By letters dated 20.06.2005 and 27.06.2005 the 3rd respondent had referred the aforementioned appeals to the 2nd respondent and had recommended that this matter be looked into (P16 and P17). Thereafter, the 2nd respondent, by his letter dated 27.06.2005 had requested the 3rd respondent to submit details of sub-Inspectors, who had served the Sri Lanka Railway Force as at 27.01.2005. The 3rd respondent had furnished the relevant information by letter dated 05.07.2005 {P18 and (19)}.

Accordingly the petitioner took up the position that the 1st to 3rd respondents have acted arbitrarily in calling for applications for only four (4) vacancies in the post of Inspectors, when in fact seven (7) vacancies had existed as at the date of calling for applications. In support of this position it was further stated that posts in the Sri Lanka Railway Protection Force had ceased to be cadre based and varying numbers have served in the post of Inspector at different points of time.

In the aforementioned circumstances, the petitioner alleged that the petitioner's fundamental right to equality and equal protection of the law guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents.

Learned Deputy Solicitor-General for the respondents contended that the petitioner cannot now challenge the number of vacancies that existed in these proceedings as the notice calling for applications for the post of Inspector was in January 2001 and that it had specifically stated that the said notice was in respect of 'existing vacancies as of now'. Her position was that the number of vacancies, which existed at the time of the calling of the applications, had been only four (4).

The contention of the learned Counsel for the petitioner was that the petitioner was not given any marks for excellence in sports despite the fact that he was engaged in several extra curricular activities during his period of service in the Sri Lanka Railway Department.

In the circumstances let me now turn to consider the main allegations referred to earlier, which were raised by the learned Counsel for the petitioner.

(A) Marks for excellence in sports

Admittedly, the petitioner was not given any marks for excellence in sports. His allegation that he should have been given marks at the interview for excellence in sports was based on the fact that he had officiated international and national cricket tournaments.

The petitioner had stated that he had also played cricket at national level since 1990 and that he had submitted the relevant certificates at the interview, which were submitted marked P32(a) to P32(h). Certificates marked as P32(a), (b), (c), (d) and (f) were issued by the Sri Lanka Sate Service Cricket Association for participants at the Inter-club Tournament and the Annual Tournament and the certificate marked as P32(c) was issued by the Railway Sports Club. The rest of the documents (P32(a), P32(h)) were news items, which stated that the petitioner had been selected as the best umpire from among the cricket umpires examination held in 1994.

Considering these certificates, the 2nd respondent in his affidavit had averred that marks under the heading of 'excellence in sports' was given for national level sports activities engaged in by the officer concerned during his tenure of office, provided that the applicant produces certificates indicating achievements in sports. Further it was averred that umpiring was not considered as a category for which marks would be given, as umpiring was not considered as being 'an engagement in national level sports.'

A careful perusal of the petitioner's bio-data and the certificate submitted by him clearly reveals that most of his achievements are in the field of umpiring. As stated earlier, the criteria stipulated in the

allocation of marks at the interview, specifically stated that upto a maximum of 10 marks could be given for 'excellence in sports'. Based on this criterion, the respondents had decided to allocate marks for participating, in national level sports activities by the officer concerned during his tenure of office. For this purpose, admittedly, it is necessary for the officer in question to produce certificates indicating his achievements in sports. Umpiring was not considered by the respondents, quite correctly in my view, as a category for which marks could be given, as that was not considered being 'an engagement in national level sports'.

It is not disputed that the marks were to be allocated for excellence in sports. The word 'sports' is defined in the Oxford English Dictionary (2nd Edition, Vol XVI, Clarendon Press, 1989 pg. 315) to read as follows:

> "Participation in games or exercises, esp. those of an athletic character or pursued in the open air; such games or amusements collectively."

The words 'umpire' and 'umpiring' on the other hand, have been defined in the following terms [Oxford English Dictionary, *(supra)* Vol. XVIII pg. 836).]

"umpire - One who decides between disputants or contending parties and whose decision is usually accepted as final;-
an arbitrator.

Umpiring -The action of acting as an umpire, exp. of doubtful points in game."

Considering the aforementioned definitions, it is abundantly clear that "sports and umpiring' cannot be treated as one and the same and if a decision had been taken by the respondents to allocate marks for 'excellence in sports' that cannot be used to adduce marks for umpiring. Accordingly, I am of the view that the respondents cannot be found fault with for not allocating marks for the certificates submitted by the petitioner on umpiring.

Learned Counsel for the petitioner also contended that, the respondents had not allocated marks for excellence in sports, although the petitioner had taken part in several cricket

tournaments. As pointed out earlier, the certificates submitted by the petitioner were from the Sri Lanka Railway Association, which cannot be accepted as achievements in sports at the national level.

Learned Counsel for the petitioner, took up the position that the State Counsel, who appeared for the respondents at the commencement of the hearing had produced a certificate issued by the 'Government Service Sports Society Limited' and had stated that it has been accepted as national level sports and that candidate, who was one of the promotees was allocated marks for that certificate. Learned Counsel for the petitioner therefore contended that if the said person was given marks for the said certificate issued by the 'Government Service Sports Society Limited', the petitioner should also be given full marks under the category of 'excellence in sports'. Learned Counsel for the petitioner had however conceded that the said person has been given marks for excellence in sports although he had never taken part in national level sports activities.

Accordingly, would it be possible for this Court to come to a conclusion that, because the other candidate was given marks for sports, although such was not at the national level, that the petitioner also should be given marks for excellence in sports on the basis of an infringement of fundamental rights guaranteed in terms of Article 12(1) of the Constitution?

Article 12(1) of the Constitution, which deals with the right to equality reads as follows:

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

The right to equality in simple terms, means that among equals, the law should be equally administered and thereby the like should be treated alike *Satish Chander* v *Union of India*[1], *Ram Prasad* v *State of Bihar*[2], (Sir Ivor Jennings, Law of the Constitution, 3rd Edition 49). The purpose of the concept of the right to equality is to secure every person against intentional and arbitrary discrimination. However, it is abundantly clear that the provisions in terms of Article 12(1) of the Constitution would provide only for the equal protection of the law and shall not provide for the equal

violation of the law. It cannot be understood as requiring officers to act illegally because they have acted illegally previously. This position was considered by Sharvananda, C.J., in *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and others*(3), where it was clearly stated that,

> "But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."

In *Mackie's* case, the petitioner Company had duly paid the Business Turnover Tax and had complained that the denial of the refund of the said tax paid by it was *mala fide* and constitutes unlawful discretion as the respondents had not collected or enforced the payment of the said tax from other dealers in rubber, who were similarly placed and liable to pay the said tax.

This principle stipulated in *C.W. Mackie (supra)* was referred to and followed in *Gamaethige* v *Siriwardene*(4) where Mark Fernando, J. stated thus:

> "Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong."

This position was considered and affirmed once again in *Jayasekera* v *Wipulasena and Others*(5) without referring to *C.W. Mackie's* case *(supra),* where it was held by G.P.S. de Silva, J. (as he then was) that Article 12(1) cannot confer on the petitioner a right to which he is not entitled in terms of the very contract upon which he found his complaint of 'unequal treatment'.

This question was again considered in *R.P. Jayasooriya* v *R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and others*(6) where reference was made to the decision in *C.W. Mackie (supra)* to hold that Article 12(1) of the Constitution provides only for the equal protection of law and not for the equal violation of the law.

It is to be borne in mind that the petitioner had not made any of the successful candidates respondents nor has he prayed for the cancellation and holding a fresh interview in order to re-evaluate all the candidates.

In such circumstances, it is apparent that the petitioner cannot rely on the provisions of Article 12(1) of the Constitution, which guarantees the right to equality and equal protection of the law to compel the relevant officers to act illegally and add marks under the heading of 'excellence in sports', because it is alleged that they have acted illegally with regard to another candidate.

(B) The number of vacancies in the post of Inspector

Learned Counsel for the petitioner contended that although in terms of the Scheme of Promotion (P2) and the notice calling for applications (P3) had stated that there were only, four (4) vacancies in fact there were seven (7) vacancies in the post of Inspector and accordingly the petitioner, who was placed sixth in order of merit should have been selected for promotion to the post of Inspector.

It is not disputed that the notice calling for applications for the promotions to the Post of Inspector by document dated 07.01.2002, had specifically mentioned that there are only four (4) vacancies to be filled. The said notice had further stated that these four (4) vacancies should be filled on the basis of the highest marks obtained at the written competitive examination, the marks awarded for seniority and at the interview. It was also clearly stated that a waiting list would not be maintained in regard to the said promotions for the post of Inspector.

The contention of the learned Counsel for the petitioner was that prior to the competitive examination, the petitioner and several others had inquired from the administration as to the actual number of vacancies and they had been informed that although six (6) Inspectors were retired, two (2) of them had retired under Public Administration Circular No. 44/90 and as such according to the said circular these vacancies cannot be filled. The petitioner's position is that the said contention is not correct and those vacancies could be filled.

Learned Counsel for the petitioner in his written submissions had clearly stated that by letter dated 14.06.2005 the petitioner had

informed the 2nd respondent that seven vacancies in the post of Inspector were available as at the date of calling for applications. According to the petitioner, two vacancies arose as a result of the cancellation of Public Administration Circular No. 44/90 and the third vacancy was due to one N.W.A.C. de Silva's promotion to the post of Assistant Superintendent being back dated to 15.01.1993.

The 2nd respondent being the Additional General Manager (Administration) in his affidavit had categorically stated that the departmental cadre is periodically reviewed and with regard to the estimates for the year 2002, the approved cadre in the grade of Inspector had been 13 (R3). When applications for the said post were called in 2002, nine (9) officers had been holding the posts of Inspector and accordingly only 4 vacancies had existed at the time of calling for applications as stated in the notice dated 07.01.2002.

The 2nd respondent had further averred that the appeals referred to earlier sent by the petitioner had been considered, but relief could not be granted as the number of vacancies in the posts of Inspector were limited to four (4).

It is to be noted that, the applications for the promotion to the post of Inspector were called by notice dated 07.01.2002 (P3), which as stated earlier, has specifically referred to the number of vacancies as four (4). The applications were therefore called for to fill the said number of vacancies without maintaining a waiting list. In such circumstances it is apparent that if the said number of vacancies had been clearly stated in the notice (P3), the petitioner should have taken up that issue at the time the notice in question was published.

It is now well settled law that the time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) of the Constitution, is mandatory. A long line of cases had considered this matter *Jayawardane* v *Attorney-General and others*[7], *Gunawardane and others* v *E.L. Senanayake and others*[8], *Thadchanamoorthi* v *Attorney-General*[9] and *Mahenthiran* v *Attorney-General*[10] *(supra* 129), *Gamaethige* v *Siriwardane (supra* 385), *Namasivayam* v *Gunawardane*[11], *Gomez* v *University of Colombo*[12] *Karunadasa* v *The People's Bank* [13] .

As correctly submitted by the learned Deputy Solicitor General for the respondents, the question with regard to the number of vacancies now raised by the petitioner cannot be taken up in these proceedings as it is clearly out of time in terms of Article 126(2) of the Constitution.

On a consideration of the aforementioned circumstances I hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents. This application is accordingly dismissed, but in all the circumstances of this case, without costs.

FERNANDO, J. – I agree.

SOMAWANSA, J. – I agree.

Application dismissed.