

**LANKA RAJYA SANSTHA HA PODU SEVAKA  
SAMITHIYA AND OTHERS - SC FR 171/04  
MENDIS - SC FR 193/2004  
IRANGANI DE SILVA - SC FR 387/2007  
v  
BUILDING MATERIALS CORPORATION LTD.**

SUPREME COURT  
DR. SHIRANI BANDARANAYAKE, J.  
AMARATUNGA, J.  
MARSOOF, J.  
SC FR 171/2004  
SC FR 193/2004  
SC FR 387/2004  
MAY 22, 2006  
JULY 6, 2006  
SEPTEMBER 20, 2006  
NOVEMBER 9, 2006  
FEBRUARY 15, 2007  
MARCH 20, 2007  
MAY 9, 2007  
OCTOBER 29, 2007

*Fundamental Rights – Article 12(1) – Age of retirement – 55 or 60 – Conversion of a Corporation to a limited liability company – Applicability of the Public Administration (PA) Circular 5/2002 – Legitimate expectation – Voluntary Retirement Scheme (VRS) – Reasonable classification – Legitimate expectation – Computation of the period to grant compensation –*

**Establishment Code – Cap 5 Section 5.**

The petitioners filed three applications complaining of a decision taken by the 1st respondent – Building Materials Corporation Ltd., (BMC) that they had consented to the accepting the V.R.S. offered by the 4th respondent – Secretary to the Treasury. The petitioners contended that, their letters of appointment did not specify their age of retirement and the P.A.S. Circular 5/2002 dated 23.8.2002 had amended Section 5 of Cap. V of the Establishment Code extending the age of retirement from 55 years to 57 years, and contended that they could have served until the age of 57 years and thereafter could have continued up to 60 years, it was their contention that they had a legitimate expectation of receiving compensation on the VRS taking into account 60 years as the age of retirement.

**Held:**

- (1) It is not disputed that the letters of appointment issued to the petitioners had not specified the age of retirement. The BMC had decided to adopt the rules and regulations of the E Code but since the conversion of the corporation to a limited liability company in 1992 (BMC), BMC has not taken steps to adopt the E Code in situations, where there are no rules and regulations.
- (2) The 1st respondent authority had changed its status to a limited liability company which is not a statutory authority – but only a commercial entity, that falls under the Companies Act, accordingly Government Circulars and the provisions of the E Code had no automatic application to the 1st respondent.BMC.
- (3) At the time the corporation was converted into a limited liability company, the age of retirement stipulated in the E Code was 55. The corporation had taken a conscious decision regarding the age of retirement in July 2000 – would be 55 years, although the age of retirement in the E Code was increased from 55 to 57. the corporation had not taken a decision to change their employees age of retirement from 55 to 57.
- (4) It is apparent that there had been a differentiation between the employees of the 1st respondent and the employees of some of the corporations and statutory bodies, the reasons for the 1st respondent's decision regarding the age of retirement of its employees is not contrary and rests on real and substantial criteria – the classification is based on intelligible differentiation with reasonable relation to the objects that it sought to achieve.

The petitioner cannot complaint that their age of retirement has not been considered as 57 as they are not similarly circumstanced as the others, where age of retirement has been increased to 57 years.

- (5) On a consideration of all the facts and and circumstances it is evident that

neither the Government nor the 1st respondent or its predecessor had made any express representation to the petitioners that the age of retirement would be changed from 55 to 57 years. There had not been any change in the policy of the 1st respondent in respect of the age of retirement of its employees. As there had not been a change of the age of retirement, there could not have been any possibility for the petitioners, to claim that they had a legitimate expectation for the age of retirement to be considered as 60 for the purpose of computing compensation on VRS.

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

**Cases referred to:**

1. *E.P. Royappa v State of Tamil Nadu* AIR 1974 SC 555.
2. *Ram Krishna Dalmia v Justice Tendolkar* AIR 1958 SC 538.
3. *Dayaratne v Minister of Health* 1999 1 Sri LR 393.
4. *Sirimal v Board of Directors of the CWLS* 2003 2 Sri LR 23.
5. *Lorna Gunasekera v People's Bank* SC FR No. 524/2002 SCM 20.6.2007.
6. *Attorney-General of Hong Kong v Ng Tuen Shiu* 1983 2 All ER 346.
7. *Council of Civil Services Union v Minister for the Civil Service* 1986 3 All ER 935.

*Peter Jayasekera with Kosala Senadheera* for petitioners.

*Bimba Jayasinghe Tilakaratne* DSG for respondents.

December 12, 2007

**DR. SHIRANI BANDARANAYAKE, J.**

Thirty (30) petitioners filed three (3) applications complaining of the decision taken by the 1st respondent. Since all applications relate to a single decision taken by the 1st respondent, all Counsel agreed that these applications could be heard together and a single judgment would be applicable to all applications.

Petitioners of all these applications, employees of the 1st respondent Corporation Ltd., had consented to accept a Voluntary Retirement Scheme (hereafter referred to as VRS), which was offered by the 4th respondent. The petitioners' position was that the said VRS was offered to all employees, who were attached to Government Corporations and Companies, which were to be closing or winding up due to various reasons. According to petitioners, for the purpose of payment of compensation in terms of the VRS, the employees were classified into (3) categories, which included,

- (1) employees having ten (10) or more years of service;
- (2) employees who had ten (10) years of service; and
- (3) casual and contract employees.

In terms of the amendment to paragraph 4 of the Circular No. P.E.D. 10 dated 28.05.2003 (P23(b)) provision was made for the payment of compensation taking into consideration the age of retirement. According to the said Circular,

"for the purpose of payment of compensation, the relevant age (as per service agreement) shall be 55 years or 60 years as stated in the letter of appointment."

Learned Counsel for the petitioners contended that their letters of appointment did not specify their age of retirement and the Public Administration Circular No.5/2002 dated 23.08.2002 had amended section 5 of Chapter V of the Establishments Code extending the age of retirement from 55 years to 57 years of age. Accordingly, the petitioners submitted that in terms of the said Circular, the petitioners could have served until the age of 57 years and thereafter could have obtained extensions upto the age of 60 years.

Accordingly, the petitioners stated that they had a legitimate expectation of receiving compensation based on the VRS taking into account 60 years as the age of retirement. The petitioners therefore complained that the compensation given to them on the basis of VRS considering the age of retirement as 55 years as arbitrary and unreasonable and in violation of their fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

It is common ground that all the petitioners were paid and had accepted the compensation package offered to them in terms of the VRS, on the basis of 55 years of age, irrespective of their actual ages, which was considered as the age of retirement. The only question that has to be resolved therefore is whether the age of retirement of the petitioners was 55 years as stated by the respondents or whether it was changed on the basis of the Public Administration Circular No. 5/2002 dated 23.08.2002 as contended

by the learned Counsel for the petitioners in these three applications, to 60 years of age.

Learned Counsel for the petitioners contended that although there was a conversion from the Building Materials Corporation into the Building Materials Corporation Ltd., such conversion had no effect with regard to the terms and conditions of service of its employees. It was also contended that the amendment to Chapter V of the Establishments Code by Public Administration Circular No. 5/2002 dated 23.08.2002 had enabled an employee to remain in employment upto the age of 57 years without any annual extensions of service. In support of his contention learned Counsel for the petitioners referred to the letter dated 20.10.2004 by the Secretary to the Ministry of Housing and Construction Industry, Eastern Province Education and Irrigation Development, where the Corporation and statutory Boards, which came under that Ministry were permitted to adopt the government policy on retirement at the age of 57 years in place of 55 years of age with provision to obtain extension of service upto 60 years of age. Learned Counsel for the petitioners also submitted that that National Housing Development Authority had consequent to the directive of the aforementioned Secretary to the Ministry of Housing and Construction Industry, Eastern Province Education and Irrigation Development Ltd. had adopted 57 years as the age of retirement. Learned Counsel for the petitioners therefore contended that they were similarly circumstanced as other government servants and/or employees of Statutory Boards or Corporations that has adopted 57 years as the age of retirement.

Learned Counsel for the petitioners also contended that the VRS was calculated on a formula based on the number of years between the age of the employee and the age of retirement stipulated by the respondent authority. Learned Counsel for the petitioners contended that since the letters of appointment had not stated the age of retirement, that should be considered on the basis of the government policy and considering the amendment to the Establishments Code by Public Administration Circular No. 5/2002, the petitioners had a legitimate expectation of serving until the age of 57 years and obtaining extensions of service thereafter. Accordingly, he contended that, for the purpose of paying

compensation on VRS, the age of retirement should be taken as 60 years of age and not 55 as has been considered by the respondents.

Accordingly, the complaint of the petitioners was that the 1st respondent had wrongfully and unreasonably fixed the age of retirement of the petitioners as 55 years of age for the purpose of paying compensation on the VRS without considering the amendment to the Establishment Code and the Public Administration Circular No. 5/2002.

At the hearing it was conceded that the actions of the 1st respondent Corporation were executive or administrative within the meaning of Article 126(1) of the Constitution.

The main contention of the learned Counsel for the petitioners was that the Building Materials Corporation as well as the 1st respondent Corporation Ltd. were governed in terms of the Establishments Code and were subjected to the government policy of retirement, which was extended from 55 years to 57 years of age.

It was not disputed that the letters of appointments issued to the petitioners had not specified the age of retirement. It was also not disputed that the Building Materials Corporation in 1992 had decided to adopt the rules and regulations of the Establishments Code 'when no rules or regulations in respect of a matter' were available. The relevant Minute of the Board Meeting held on 29.04.1992 ..... which refers to this position, was as follows:

*"..... where there are no rules and regulations adopted by the board for the Corporation, the rules and regulations laid down in Volumes I and II of the Establishments Code of the Democratic Socialist Republic of Sri Lanka will apply to the Building Materials Corporation."*

However, the Chairman/Managing Director of the 1st respondent Corporation has dearily averred in his affidavit that since the conversion of the Building Materials Corporation to a limited liability Company on 16.10.1992, the Company has not taken any steps to adopt the Establishments Code, in situations where there are no rules and regulations.

It is not disputed that with the conversion which took place on 16.10.1992, the 1st respondent authority changed its status to a limited liability Company, which is not a statutory authority, but only a commercial entity, that falls under the Companies Act. Accordingly the Government circulars and the provisions of the Establishments Code had no automatic application to the 1st respondent, although the 1st respondent had the authority for them to be adopted, modified or varied at the discretion of the Board of Directors acting in terms of the Companies Act. The petitioners however had not submitted any materials to show that the 1st respondent had passed a resolution to this effect.

It is also important to note that at the time the 1st respondent adopted the provisions of the Establishments Code, it was only for the purpose of making provision, where no regulations had been made by the Building Materials Corporation (R3).

Learned State Counsel correctly contended that such decision to adopt the Establishments Code did not fetter the 1st respondent Corporation from making any other rules contrary to the Establishments Code. Thus, the 1st respondent Corporation could have made necessary rules without adopting an amendment that was brought to the Establishments Code.

The decision of the Board of Directors to adopt the provisions of the Establishments Code was taken as referred to earlier, on 29.04.1992. Within a matter of six months in October 1992, the Building materials Corporation was converted into a limited liability Company. At that time the age of retirement stipulated in the Establishments Code was 55 years of age.

Even if we were to take into account that the 1st respondent had taken a decision to adopt the Establishments Code and since there were no further adoption of the said Code by the newly established Corporation Limited that the earlier decision should continue to apply to the latter, it is clearly evident that, the 1st respondent had taken a considered decision regarding the age of retirement of its employees.

As has been stated earlier, the decision of the Board of Directors in April 1992 has to adopt the rules and regulations of the Establishments Code, when there were no applicable rules and

regulations made by the 1st respondent Corporation. Then there was only a limited applicability of the Establishments Code and the discretion was in the hands of the Building Materials Corporation to decide whether to adopt the provisions of the Establishments Code or to make their own rules and regulations.

In fact it is clearly evident, that the Building Materials Corporation Ltd. had taken a conscious decision regarding the age of retirement of their employees in July 2000. The decision of the Board of Directors on 03.07.2000 clearly states that the age of retirement of their employees would be 55 years. The said Board decision (R4) reads as follows:

"Extension of service of the Employees beyond the age of 55 years – Board Papers 92/03 and 92/04.

The Board having perused Board Papers 92/03 and 92/04 made a policy decision that as a matter of principle not to extend the services of employees of BMC beyond the age of 55 years ... with effect from 31.07.2000.

The Board also decided that as recommended by the Board Paper 92/04 those whose services have already been extended will serve upto the approved date of extension."

Although the age of retirement in the Establishments Code was increased from 55 years to 57 years by Public Administration Circular No. 5/2002 dated 23.08.2002, the Building Materials Corporation Ltd., quite evidently had not taken a decision to change their employees age of retirement from 55 years to 57 years. On the contrary, the 1st respondent just prior to the issuance of the Public Administration Circular No. 5/2002 and soon afterwards, had once again reiterated and had reconfirmed their decision that the employees should retire at the age of 55 years. Thus on 03.10.2002 the Board of Directors had referred to the age of retirement as 55 years (R5). The decision stated as follows:

"The chairman said that since the Board decision is not to extend the services of employees who reach the retirement age of 55 years BMC was not in a position to retain an employee even if his services were required as it would be contrary to the decision of the Board."



Similar decisions were taken at the meetings held on 07.11.2002 (R6) and 24.11.2003 (R7), which were as follows:

**"Revision of Section 5 of Chapter V**

The Board resolved to abide by the decision of retiring employees at the optional age of 55 years as proposed by the chairman."

**"Age of Retirement**

The Managing Director stated that there had been a request to change the provisional age of retirement to 57 years. The Board after discussion regretfully decided to abide by the existing policy of 55 years."

It is thus evident that the Building Materials Corporation and the Building Materials Corporation Ltd., which were under no obligation to follow the Establishment Code had taken a policy decision irrespective of the amendments made by the Public Administration Circular No. 5/2002, to maintain the age of retirement of their employees at 55 years of age.

Having said so, the question that arises at this point is whether there had been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution, by the decision of the 1st respondent Corporation to consider the petitioners' age of retirement as 55 years for the computation of the payments on VRS when there have been instances, where some of the Corporations and Statutory Boards had adopted 57 years of age as the age of retirement.

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

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

Equality requires the application of a law equally among similarly circumstanced people without any discrimination. However, it does not mean that the same law should apply identically to all persons and every differentiation is not treated as discrimination. It is thus evident that in these circumstances, classifications could be sustained. A classification to be treated as

valid it should be reasonable and not arbitrary. Equality, as pointed out by Bhagwati, J. (as he then was) in *E.P. Royappa v State of Tamil Nadu*<sup>(1)</sup>, is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. This however does not mean that every classification would become invalid on the basis of arbitrariness. A classification could be valid if it could satisfy the following conditions:

- (a) the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and
- (b) that the differentia must bear a reasonable or a rational relationship to the objects and effects sought to be achieved (*Ram Krishna Dalmia v Justice Tendolkar*<sup>(2)</sup>).

Accordingly, there cannot be any discrimination between two persons, who are similarly circumstanced, which emphasizes the notion that equals cannot be treated unequally and unequals cannot be treated equally.

The many descriptions and explanations given in interpreting the concept of equality refer to classifications, which are not arbitrary or irrational, but are reasonably related to a legitimate objective.

Accordingly, the question that has to be answered in instances such as the one that is under consideration would be whether the classification has been based on reasonable grounds.

Admittedly, the petitioners' allegation is that they have been treated differently as the 1st respondent had taken a decision that their age of retirement is at 55 years for the purpose of computing the payment of compensation on the VRS, whereas some of the other Corporations and Statutory Board had allowed their employees to function until the age of 57 years.

Considering the Circumstances of this case, it is apparent that there had been a differentiation between the employees of the 1st respondent and the employees of some of the Corporations and Statutory Boards. In such a situation the question that has to be answered would be whether this classification is reasonable and could be founded on intelligible differentia that distinguishes the

employees of the 1st respondent from that of the others. Such classification, as has been stated earlier, cannot be arbitrary and should rest on real and substantial criteria. Accordingly it would be necessary to consider the reasons for the 1st respondent's decision regarding the age of retirement of its employees.

The Chairman of the 1st respondent in his affidavit had averred that the 1st respondent had in recent years incurred heavy losses had become a commercially non-viable Company and had ceased to be an on going concern in view of its accumulated losses.

Considering the aforementioned it was absolutely clear that the 1st respondent was not profit making and necessarily needed a restructuring programme to reduce the employees and thereby to reduce the expenditure of the Company. For this purpose the 1st respondent had introduced a Voluntary Retirement Scheme and 625 employees had accepted the said Scheme. The Circular pertaining to the said VRS had clearly stated that the age of retirement is considered as 55 years for the purpose of payment of compensation and the petitioners had accepted the compensation in terms of the said Circular and had retired from service.

When these circumstances are taken into consideration it is quite evident that the 1st respondent Corporation is totally different to other Organizations. The other establishments referred to by the petitioners where the age of retirement was extended from 55 years to 57 years of age had no such financial difficulties as had been encountered by the 1st respondent. Accordingly it is evident that the 1st respondent belongs to a different category. Thus the classification is founded on intelligible differentia with a reasonable relationship to the objects and effects that it sought to achieve. The concept of equality means that persons who are similarly placed could be treated equally and on a consideration of all the circumstances in these applications it is apparent that the petitioners do not belong to the category of employees of other Corporations, where the age of retirement was fixed at 57 years of age. The petitioners therefore cannot complain that their age of retirement has not been considered as 57 years as they are not similarly circumstanced as the others, whose age of retirement has been increased upto the age of 57 years.

Learned Counsel for the petitioners submitted that they had a legitimate expectation for the retirement age to be considered as 60 years as a matter of government policy for the purpose of computing the compensation on the VRS not referred to the decisions in *Dayaratne v Minister of Health*<sup>(3)</sup> and *Sirimal v Board of Directors of the CWEI*<sup>(4)</sup>.

Legitimate expectation, as has been stated in *Lorna Gunasekera v People's Bank*<sup>(5)</sup>, was based on the principles of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. As expressed by David Foulkes (*Administrative Law*, 8th Edition, Butterworths, 1995, pg. 290), it is necessary for the presence of a promise or an undertaking to give rise to a legitimate expectation. Referring to this concept, David Foulkes (*supra*) had stated that:

"The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the authority itself. This action may take one of two, or both forms: a promise (or a statement or undertaking) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the Courts will enforce" (emphasis added).

This position was clearly illustrated by the decision in *Attorney-General of Hong Kong v Ng Tuen Shiue*<sup>(6)</sup> and *Council of Civil Service Unions v Minister for the Civil Service*<sup>(7)</sup>.

As the petitioners have contended that they had a legitimate expectation that the compensation on VRS would be computed considering the age of retirement as 60 years, it could be necessary to examine whether there had been a promise and/or procedure that could have given rise to such an expectation.

On a consideration of all the facts and circumstances of these applications it is evident that neither the Government nor the 1st respondent Corporation or its predecessor had made any express representation to the petitioners that the age of retirement would be changed from 55 years to 57 years of age. Moreover, if one considers the age of retirement that had been applicable to the employees of the 1st respondent including the petitioners, it could

be observed that throughout the years the 1st respondent had maintained that to be 55 years of age. There had not been any change in the policy of the 1st respondent Corporation in respect of the age of retirement of its employees. It is therefore clearly seen that the petitioners' applications are totally different to that of *Dayaratne v Minister of Health (supra)* and *Sirimal v Board of Directors of the C.W.E. (supra)*, where it was accepted that the aggrieved parties had a substantial legitimate expectation.

In *Dayaratne's case (supra)* that question that arose was whether a change in *criteria* for the scheme of training had violated the express representation made and thereby whether that had affected the legitimate expectation of the petitioners. In that case the petitioners in response to a Gazette Notification had sat for the competitive examination and on its results were qualified to follow the training at which stage a decision had been taken effecting a change of policy. In *Sirimal (supra)*, C.W.E. had issued several Circulars stating that extensions would be granted upto the age of 60 years and later had changed their policy and had decided to retire their employees at the age of 55 years without any extensions of service.

A careful consideration of the present case clearly indicates that, as stated earlier, there had been no change of the age of retirement of the employees of the 1st respondent. Accordingly there could not have been any possibility for the petitioners to claim that they had a legitimate expectation for the age of retirement to be considered as 60 years of age for the purpose of computing compensation on VRS.

On a consideration of all the aforementioned facts and circumstances and for the reasons given in my judgment I hold that the petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the respondents.

These applications are accordingly dismissed, but without costs.

**AMARATUNGA, J.** - I agree.

**MARSOOF, J.** - I agree.

*Application dismissed.*