

DAYAWATHIE AND OTHERS

v.

DR. M. FERNANDO AND OTHERS

SUPREME COURT.

RANASINGHE, C.J., ATUKORALE, J., AND TAMBIAH, J.

S.C. APPLICATION No. 37 OF 1987.

NOVEMBER 30, 1987, JANUARY 20, 1988.

AND FEBRUARY 08, 1988.

Fundamental Rights - Article 12(1) and 12(2) of the Constitution - Equality - Classification.

The petitioners complained of inequality of treatment and discrimination on account of their political opinion in the selection for post-basic training course for nurses. Those who had obtained less marks than the petitioners had been selected.

Held—

For a permissible classification there are two essential ingredients: (a) an intelligible differentia and (b) a rational relation between such differentia and the object sought to be achieved by such differential treatment.

The ground that those who defied an Essential Services Order cannot be relied upon thereafter to be entrusted with supervisory duties of a responsible nature while similar defiance by Doctors and Dental Surgeons did not bring on them such disqualifications was not a good reason for the discrimination.

The classification relied on by the respondents to justify the admitted unequal treatment adopted by the administration in the selection of nurses for the said post-basic training course, has not been done bona fide. The petitioners assertion of not being equally treated and of being discriminated against is entitled to succeed.

Fresh selections should be made on the basis of the marks obtained by those who presented themselves (including the petitioners and added petitioners) for the examination, without any disqualification being imposed upon them on the ground of participation in any trade union action between 18.3.86 and 17.4.86.

APPLICATION under Article 126 of the Constitution.

P. A. D. Samarasekera, P.C. with *Mahanama de Silva* for 2nd, 6th 7th and 8th petitioners.

Faiz Mustapha, P.C. with *H. Vithanachchi* for 1st, 2nd, and 3rd petitioners.

S. Mahenthiran with *Jayampathi Wickremaratne* for 4th and 5th petitioners.

Prins Gunasekera with *Mahanama de Silva* for 9th and 10th petitioners.

R. K. W. Goonasekera with *Mahanama de Silva* and *Miss Weerasuriya* for intervenient petitioners 1st to 40th added petitioners.

M. S. M. Aziz, D.S.G. with *A. Kasturiarachchi, S.C.* for 1st, 2nd and 3rd respondents.

Rajith de Silva with *George Rajapakse* for 39th, 49th, 59th, 112th, 120th, 122nd, 126th, 143rd and 145th respondents.

Cur. adv. vult.

April 25, 1988.

RANASINGHE, C.J.

The Petitioners, who are nurses in the State services and are also members of the Public Service United Nurses Union, have come into court complaining of violations of the Fundamental Rights guaranteed to them under Articles 12(1) and 12(2) of the Constitution: their rights to equal protection of, and equality before the law and also to non-discrimination on the ground of political opinion.

The Petitioners state: that their Union had, for several years prior to March 1986, been campaigning for several demands: that, in the course of their agitation to win their demands, they have encountered resistance from a rival trade union, namely, Jathika Saukya Seva Heda Sangamaya, which enjoys the support and the patronage of the government, presently in power: that, in consequence of a work-to-rule campaign launched by the petitioners' Union in 1985, the members of this Union had been black-listed and victimized in various ways: that, as a result, they were deliberately excluded from the post-basic training course for appointment as trainees, in October 1985: that such exclusion resulted in several of these Petitioners having to come into court: that these proceedings were settled on 25th June 1986, on the undertaking given by the state that the

Petitioners in that case would be accommodated at the very next course: but that the said undertaking has not been honoured up to date: that, thereafter during the month of December 1984, and during the year 1985 several circulars were issued for the holding of limited competitive examinations for selection for various posts and grades of Nursing Tutors, Public Health Sisters and Ward Masters: that, by a circular issued in May 1985, applications were called from Nursing Sisters, Grade II, Segment 'A' for Post-Basic Nursing Training for appointment to Grade I: that the Petitioners applied to be selected for such course: that, thereafter, in order to win several demands which had been put forward by their Union, an island-wide campaign of reporting 'sick' on the 18th and 19th March 1986, was launched by the Union: that the Administration, however, treated such trade union activity to be a "strike" and declared that the participants of that campaign had vacated their posts: that, purporting to act under the Emergency Regulations, the Administration, locked them out from their places of work and even sought to eject them from the quarters which they were in occupation of; that, thereafter, on the 17th April 1986, those who had participated in such trade union activities, were allowed to return to work unconditionally: that subsequently the Administration has sought to victimize the participants in various ways, such as making penal transfers and holding disciplinary inquiries: that the selections for the said Post-Basic Training course had been finalised by December 1985 and January 1986: the selections, however, were not announced until March 1987: that the rival union, referred to above, had made representations to His Excellency the President, by their letter P8 dated 15.5.1986, inter alia, for the—

- (a) Payment of two extra increments to those who did not participate in the campaign held on 18.3.86: and
- (b) withholding of the promotions of nurses who had "struck" work, and to stay the announcement of the selections:

that the selections were announced on 30th March, 1987, but the individuals so selected were requested to attend the course which was said to commence from 1st April 1987: that this was a variation from the practice which had hitherto been adopted, namely, for the names of the selectees being posted to the various hospitals; that this was so done deliberately to prevent aggrieved parties obtaining interim relief from the court: that the Petitioners have not been so selected,

whilst those, who have obtained less marks than the Petitioners, have been selected. The Petitioners, therefore, complain that they have been unequally treated and discriminated against, on account of their political opinions.

The 1st Respondent, who is the Secretary to the Ministry of Health, has, in his affidavit dated 28th April 1987 averred that:

"in consultation with my Minister it was decided that all nurses who had defied an Essential Services Order made under the Public Security Ordinance by His Excellency the President will not be considered for this course which involved upon completion the grant of further responsibilities to the nurses who were selected. It was our decision that all nurses which included those petitioners who had participated in the strike commencing 18th March 1986, which was rendered illegal in consequences of Essential Services Order dated 18.3.86, made by the President (copy of which order is annexed hereto marked X) should not be considered for this course. Hence, the names of all nurses who had participated in the illegal strike were deleted. It was our opinion that the irresponsibility and gross dereliction of duties shown by the "striking" nurses which paralysed the Health Services and seriously risked the lives of patients who had entered hospitals to receive treatment taken together with their defiance for over a month of the Essential Services Order making nursing an essential service render them unfit to be considered for supervisory positions which successful completion of the course entail."

The position so taken up by the 4th Respondent, has been submitted by learned Deputy Solicitor General, who appeared for the 1st and 3rd Respondents, as constituting a permissible classification justifying the deliberate exclusion of the Petitioners, who would otherwise have been eligible for selection to follow the said course. It was contended that the two essential ingredients, namely (a) an intelligible differentia, and (b) a rational relation between "such differentia" and the object sought to be achieved by such differential treatment, exist to bring such difference in treatment within the sphere of permissible classification.

It has, however, been contended on behalf of the petitioners that there is no such intelligible differentia in the treatment so meted out: that even, if there was, there was no reasonable connection between

such differentia and the object sought to be achieved by the adoption of such differential treatment: that the discrimination, which is being sought to be justified, is, in fact, arbitrary, capricious and done at the behest of a rival union and is lacking in good faith.

On a consideration of all the facts and circumstances, which have been established by the pleadings filed by the respective parties, several factors seem to exist which tend to militate against the bona fides of the discrimination which is being sought to be advanced.

One of the submissions made on behalf of the Respondents to justify the classification made in the case of these nurses is that those who defied an Essential Services Order cannot be relied upon thereafter to be entrusted with supervisory duties of a responsible nature. The Petitioners have, however, in paragraph 7 of the affidavit of 27.5.87, given several specific instances of the manner in which Dental Surgeons of Government Hospitals, who had, in February 1986, themselves defied a similar Essential Services Order, brought into operation in consequence of trade union activities launched by them, had thereafter been treated by the Administration. These averments show that, far from being penalised for such conduct, several such Dental Surgeons had been even promoted thereafter. The Petitioners have further averred expressly that Doctors who had participated in similar trade union activities, had also neither been penalised nor discriminated against, and that promotions and other benefits had not being withheld. The Petitioners contend that, in the case of the Dental Surgeons and the Doctors, who had conducted themselves in a manner similar to the way in which they (the Petitioners) themselves had, had not been found by the Administration to have disqualified themselves to have entrusted to them even thereafter duties of a more responsible nature. It must be noted that these averments have not been contradicted by any counter affidavit filed on behalf of the Respondents. It was submitted by learned Deputy Solicitor-General that, whilst the Dental Surgeons and Doctors were out in defiance of the Essential Services Order only for a few days, the nurses, on the other hand, were out for almost one month. What has to be noted in regard to this matter is that the position taken up by the Petitioners is that they were compelled to be out for that period of time, because several of them had, after the Essential Services Order had been promulgated, even been locked out from the quarters in which they were resident, and that, in any event, when they were taken back on the 17th April, 1986, they were taken back unconditionally.

Document P8 is a copy of a letter, dated 15.5.1986, addressed to His Excellency the President by the Jathika Saukya Seva Heda Sangamaya setting out several matters in respect of which they desire to have discussions with His Excellency. In P8, item 3(1) states "that in matters of promotions, as a matter of policy, no promotions should be granted to those nurses who have participated in strikes"; and item 3(2) that "the list of promotions which has been prepared, be stayed until further discussions with the two Honourable Ministers take place;" and item 8, that "steps be taken forthwith to grant two increments to those in the Nursing Services Staff Officers who had not participated in this strike, inclusive of the 18th and 19th March, and one increment to those Nursing Services Staff Officers, who gave up the strike half-way. It is in evidence that the increments set out in item 8 have in fact been obtained by the members of the Union after their discussions with His Excellency the President. It was strongly contended on behalf of the Petitioners that the position taken up subsequently by the Administration in denying the petitioners the promotions which they were entitled to was as a result of the pressure exerted by this particular rival union, which, as has already been referred to, had the patronage of the government in power.

It has also been contended that, as the ban that the 1st Respondent imposed upon those nurses, who had participated in trade union activities during the relevant time, has not been stated to be limited to a particular period, the said ban would, therefore, operate to the detriment of the Petitioners indefinitely. Although, during the course of the inquiry before this court, the learned Deputy Solicitor-General, in answer to an inquiry made by this Court, did, after consulting an officer who was present in court, inform this Court that the ban so imposed would operate only in respect of the particular selection which is the subject matter of the present application, yet, no averment to that effect is to be found in the affidavit filed by the 1st Respondent: nor in any other document tendered to this court by or on behalf of the 1st Respondent.

Furthermore, although the 1st Respondent, in his first affidavit, has, in paragraph 21, averred that the decision not to select those nurses who had defied the Essential Services Order was made "in consultation with my Minister," yet, no particulars of any such meeting with the Minister has been set out in the affidavit. Nor has any document been produced in support of any such consultation.

Upon a consideration of the averments before this court it becomes clear that the selections (or at any rate the markings obtained by those who sat the examination) had been finalised by December 1985/January 1986. Even so, no announcement had been made even as late as 12.3.87, the date on which the letter P9 had been addressed by the Petitioners' Union to the Minister of Health. No satisfactory explanation has been tendered by the 1st Respondent in respect of what would seem an inordinate delay. Even when those selected were in fact informed of their selection the procedure adopted by the Administration to communicate such selections had been, as maintained by the Petitioners, different from the procedure which had been followed up to that time to communicate such selections. The explanation tendered by the 1st Respondent, in regard to the change in procedure so made, sounds rather lame and unconvincing.

On a consideration of the matters referred to above, it seems to me that the classification, upon which the 1st Respondent relies to justify the admitted unequal treatment adopted by the Administration in the selection of nurses for the said training course, has not been done bona fide. I am, therefore, of opinion that the Petitioners' assertion of not being equally treated and of being discriminated against is entitled to succeed.

I accordingly make order directing that all selections made for the said training course – as for instance set out in P10 and P11 – as Grade I Nursing Officers (Hospital Services), be and the same are hereby set aside: that fresh selections be made on the basis of the marks obtained by those who presented themselves (including the Petitioners and the Added Petitioners) for the examination, without any disqualification being imposed upon them on the ground of participation in any trade-union action between 18.3.86 and 17.4.86.

The 1st and 2nd Respondents are directed to pay the 1st – 10th Petitioners a sum of Rs. 2100 as costs.

ATUKORALE, J. – I agree.

TAMBIAH, J. – I agree.

Selections for training course set aside.

Fresh selections ordered.