

W. D. B. L. M. FERNANDO
v.
RANAWEERA, SECRETARY,
MINISTRY OF CULTURAL AND RELIGIOUS AFFAIRS AND OTHERS

SUPREME COURT
ISMAIL, J.,
EDUSSURIYA, J. AND
YAPA, J.
SC APPLICATION NO. 46/99
MARCH 06 AND APRIL 05, 2002

Fundamental Rights – Eligibility of public officer to purchase official vehicle on retirement – Whether right to purchase such vehicle may be postponed until the termination of continued service on contract after retirement – Uberrima fides.

The petitioner was a Senior Superintendent of Police who reached his age of compulsory retirement on 14. 05. 1992. However, in terms of a Cabinet decision, he assumed duties as a Senior Assistant Secretary (Christian Affairs) in the Ministry of Cultural and Religious Affairs with effect from 06. 05. 1992 eight days prior to the date of compulsory retirement.

By a further Cabinet decision dated 19. 08. 1998, he was appointed Additional Secretary in the same Ministry until 31. 12. 1998 on which date that appointment terminated. At or about the time of such termination, the petitioner applied to purchase his official car in terms of circular No. 24/93 dated 01. 10. 1993 (P6) which permitted an officer to purchase his official vehicle on retirement. In terms of that circular the application for purchase had to be made at the time of submitting papers for retirement.

The 1st respondent (Secretary, Ministry of Cultural and Religious Affairs) by his letter dated 29. 12. 1998 (X1) sought clarification from the 3rd respondent (The Director of Establishments) whether the petitioner was eligible to purchase the vehicle. The 3rd respondent by his reply dated 04. 01. 1999 (X2) replied that the petitioner being a person who had been re-employed after retirement was not eligible to purchase the vehicle in the absence of Cabinet approval for such purchase. The Ministry by letters dated 04. 01. 1999 and 06. 01. 1999 (P8 and P10) required the petitioner to return the vehicle.

The petitioner filed an application on 18. 01. 1999 alleging infringement of his rights under Article 12 (1) of the Constitution and obtained leave to proceed and interim relief to defer the recall of the vehicle having suppressed the information contained in (X2) which he was in all probability aware of.

Held:

- (1) In terms of Circular P6 that came into operation on 01. 10. 1993 (after 16 months from the petitioner's retirement on 14. 05. 1992) which required an application for purchase of an official vehicle on retirement, the petitioner was not eligible to purchase the official vehicle used by him on the termination of his continued employment on contract.
- (2) The petitioner's conduct in particular, in obtaining interim relief showed lack of *uberrima fides*. This too disentitled him to redress from court.

Cases referred to :

1. *Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others* (1997) 1 Sri LR 360.

APPLICATION for relief for infringement of fundamental rights.

Mohan Peiris with *Nuwanthi Dias* for petitioner.

N. Pulle, State Counsel for respondents.

Cur. adv. vult.

May 24, 2002

HECTOR YAPA, J.

The petitioner in his application has averred that while he was holding the post of Senior Superintendent of Police, in terms of a cabinet decision he was appointed as a Senior Assistant Secretary (Christian Affairs) of the Ministry of Cultural Affairs with effect from 06. 05. 1992 and that he assumed duties in that capacity 8 days prior to his reaching the age of 60 years. Thereafter, by a further cabinet decision dated 19. 08. 1998 he was appointed as Additional Secretary in the same ministry and he retired from that post on 31. 12. 1998.

The petitioner claims that he was eligible to purchase his official vehicle Mazda car bearing No. 15-9892 in terms of the Public Administration Circular No. 24/93. The 1st respondent had sought clarification from the 3rd respondent as to whether the petitioner was in fact qualified to purchase the said vehicle in terms of the said circular. The petitioner was so informed by a letter dated 04. 01. 1999 and had also requested the return of the vehicle (P8). The petitioner was again requested by the 2nd respondent to return the vehicle forthwith by letter dated 06. 01. 1999 (P10). 10

The petitioner fearing that respondents would refuse his application to purchase the vehicle alleged that there was an imminent infringement of his fundamental right guaranteed under Article 12 (1) and sought a direction on the respondents to transfer the ownership of the said vehicle to the petitioner. In addition he sought interim relief to direct the respondents to defer the recall of the vehicle until the final determination of this application. The application was supported on 26. 01. 1999. The petitioner was granted leave to proceed in respect of the alleged infringement of Article 12 (1) of the Constitution and was granted interim relief as prayed for. 20

According to the material furnished by the petitioner, he had joined the Police Department as a probationary Sub Inspector on 20.06.1957. In the year 1992, while the petitioner was holding the post of Senior Superintendent of Police, he was appointed to the post of Senior Assistant Secretary (Non SLAS) of the Ministry of Cultural Affairs and Information on 06. 05. 1992. This appointment was made consequent to a cabinet decision dated 29. 04. 1992 on the basis of secondment. A copy of the extract of the draft minutes of the said meeting of the cabinet of ministers held on 29.04.1992, has been marked P1. The *Gazette* notification dated 11. 06. 1992 in regard to the said appointment of the petitioner has been marked P2 and the letter of his 30

appointment as Senior Assistant Secretary has been marked P3. As referred to above, the petitioner has assumed duties in the said post ⁴⁰ of Senior Assistant Secretary just eight (8) days prior to the date of retirement, ie 14. 05. 1992 from the Police Department on reaching the age of 60 years. The petitioner functioned in that capacity until 19. 08. 1998. Thereafter, by a cabinet decision dated 19. 08. 1998, the petitioner was appointed to the post of Additional Secretary (Christian Affairs) of the Ministry of Cultural and Religious Affairs by the suppression of the existing post of Senior Assistant Secretary (Christian Affairs) held by him. This appointment was effective till the end of December, 1998. The copy of the said cabinet decision has been marked P4, and the letter of appointment to the post of Additional Secretary which was on a contract basis has been marked P5. It would appear therefore that the petitioner's contract of employment as ⁵⁰ Additional Secretary in the Ministry of Cultural and Religious Affairs ended on 31. 12. 1998.

At the hearing of this application learned counsel for the petitioner submitted that for all practical purposes the petitioner's date of retirement from the Public Service should be reckoned as from 31. 12. 1998. Counsel contended that Public Administration Circular No. 24/93 (P6) Part III (1) provided that an officer who is entitled to an official vehicle, and had been assigned a vehicle, may on retirement be permitted to purchase the vehicle he has been using. Further, Part III (3) of the said Circular provided that officers with ⁶⁰ continuous, uninterrupted service up to the date of retirement or on extension after reaching the age of 55 years are eligible to apply. Hence, counsel submitted that the petitioner was eligible to purchase the official vehicle assigned to him in his capacity as Senior Assistant Secretary and Additional Secretary (Christian Affairs). It was further submitted that according to the circular, it was the 1st respondent who was the authority to whom an application to purchase the vehicle

had to be made and once such an application was made, 1st respondent was required to take necessary action in terms of the circular. Accordingly, the petitioner had submitted to the 1st respondent an application to purchase the vehicle in question, and the 1st respondent by his letter dated 16. 12. 1998 marked P7, had recommended and forwarded the said application to the 3rd respondent. The 1st respondent after having recommended the petitioner's application, informed the petitioner by his letter P8 that he had sought clarification from the 3rd respondent, as to the petitioner's eligibility to purchase the vehicle in terms of the aforesaid circular and requested him to return the vehicle until the receipt of a reply from the 3rd respondent. Thereafter, when the petitioner by his letter dated 04. 01. 1999 marked P9, requested the 1st respondent to expedite action so that he could purchase the vehicle in terms of the circular, the 2nd respondent by P10 informed the petitioner that action had been taken regarding his application and requested the petitioner to return the vehicle forthwith, since it was State property. 70 80

Learned counsel for the petitioner therefore argued that the action on the part of the respondents to deprive the petitioner of the facility to purchase the vehicle in question would be unfair, arbitrary, malicious and tantamount to an imminent infringement of the petitioner's fundamental right guaranteed under Article 12 (1) of the Constitution.

Learned State Counsel for the respondents on the other hand submitted that the Public Administration Circular No. 24/93 dated 01. 10. 1993 (P6) had provided the criteria with regard to the transfer of ownership of an official vehicle. According to part III (1) of the circular, it is provided that an officer who is entitled to an official vehicle and had been assigned a vehicle, may on retirement be permitted to purchase the vehicle he had been using. State Counsel contended that according to the circular such an officer who wishes to purchase 90

a vehicle should submit his application on retirement. This position was made clear by Part III 2 (a) of the circular which provided as follows :

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"Application can be made only in respect of the vehicle assigned to the officer at the time of submitting his papers for retirement."

Learned State Counsel submitted that in the present case, the petitioner had retired on 14. 05. 1992, and not on 31. 12. 1998, so that he should have submitted his application to purchase the vehicle in terms of the circular (P6) at the time of submitting his retirement papers which should have been on some date close to 14. 05. 1992. Learned counsel further argued that the petitioner could not have submitted such an application to purchase the vehicle at that time, since the circular (P6) was not operative then. In fact, the circular ¹¹⁰ came into operation only on 01. 10. 1993, ie about sixteen months after the date of the petitioner's retirement.

The submission of learned State Counsel made on the basis that the petitioner retired on 14. 05. 1992, should be considered in the light of the position taken up by the counsel for the petitioner that the date of retirement of the petitioner was 31. 12. 1998. Under normal circumstances the date of retirement of a public servant is 60 years. In fact, it was admitted in the petition and in the written submissions of the petitioner that he assumed duties in the post of Senior Assistant Secretary 8 days prior to the date of retirement from the Police ¹²⁰ Department at the age of 60 years. Hence, it is not possible to accept the submission of the petitioner's counsel that his (petitioner's) date of retirement from the Public Service should be reckoned as from 31. 12. 1998 and not from 14. 05. 1992. Further, if counsel's contention is accepted, it would appear that the petitioner had retired after reaching the age of 66 years and seven months. Such a conclusion

would create an absurd situation in the public service. Besides, it is to be noted that petitioner's appointment to the post of Additional Secretary (Christian Affairs) was on a contract basis as seen from his letter of appointment marked P5. Therefore, the submission of the learned petitioner's counsel that he (petitioner) retired on 31. 12. 1998 has to be rejected and the contention of learned State Counsel that the petitioner retired on 14. 05. 1992 should be accepted. 130

The position that the petitioner had retired at the age of 60 years and therefore not entitled to the relief he is claiming in this application finds further support from the letter written by the 3rd respondent to the 1st respondent. This letter dated 04. 01. 1999 marked X2 had been sent to the 1st respondent by the 3rd respondent in response to the 2nd respondent's letter of 29. 12. 1998 marked X1. Both these letters (X1 and X2) had been annexed to the objections filed by the 2nd respondent to this application. The 3rd respondent's letter (X2) very clearly stated that the petitioner was not eligible to purchase the official vehicle in terms of part III of the Public Administration Circular No. 24/93 (P6). Letter X2, further stated that if the ministry was of the view that the petitioner who was re-employed after retirement should be granted the facility to purchase the vehicle the petitioner had been using in his capacity as Senior Assistant Secretary and Additional Secretary, it was desirable for the ministry to take action to obtain cabinet approval. In these circumstances, it would appear that the petitioner has failed to establish that there has been an infringement of a fundamental right. 140 150

There is another serious matter that has been observed in this application namely, that the petitioner had withheld from Court the contents of X2. The petitioner filed this application on 18. 01. 1999, and it was supported and leave to proceed obtained on 26. 01. 1999. On the same date, counsel for the petitioner had obtained interim relief

by seeking a direction on the 1st and 2nd respondents to defer the recall of the vehicle bearing No. 15-9892 until the final hearing and determination of this application. It would appear therefore, that the petitioner had obtained leave to proceed and interim relief by suppressing the contents of X2, which very clearly stated that the petitioner was not eligible to purchase the vehicle he was using in terms of the circular P6. Under normal circumstances X2 would have reached the 1st respondent by about 06. 01. 1999. The petitioner who was anxiously waiting for the approval from the 3rd respondent to purchase the vehicle in question under the circular would have known the decision conveyed by the 3rd respondent to the 1st respondent by X2. Hence, the petitioner cannot be heard to say that he had no knowledge of the contents of X2. Besides, the timing of the petitioner's application to this Court which was on 18. 01. 1999, suggests that the petitioner had decided to file this application soon after the 3rd respondent's letter X2, which stated that the petitioner was not eligible to purchase the vehicle in terms of the circular. It should be mentioned here that, had the contents of X2 been made known to the Court, it was very unlikely that the Court would have given the interim relief that was granted to the petitioner. Therefore, it would appear that the petitioner had been guilty of suppressing a material fact from Court. In doing so, the petitioner had misled Court and obtained an interim order which this Court would not have made, had the contents of X2, been made known to the Court. Further, it is to be noted that the petitioner had obtained the said interim relief from Court in the absence of the respondents. On the other hand, if the respondents had timely notice of this application, it was very likely that they would have brought to the notice of Court the contents of X2.

The petitioner by withholding from Court the material contained in X2, clearly showed a lack of *uberrima fides* on his part. When a litigant makes an application to Court seeking relief, he enters into a con-

tractual obligation with the Court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court. It was highlighted in the case of *Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others*,⁽¹⁾ that the contractual obligation which a party enters into with the Court, requires the need to disclose *uberrima fides* and disclose all material facts fully and frankly to Court. Any party who misleads Court, misrepresents facts to Court or utters a falsehood in Court will not be entitled to obtain redress from Court. This is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court.

In this case, it is very clear that the petitioner is not entitled to purchase the vehicle he was using in terms of the Public Administration Circular No. 24/93 (P6). Further, the petitioner by suppressing a material fact from Court had brought about a situation whereby he had continued to use the vehicle in question although he was not entitled to do so. The vehicle No. 15-9892 is government property and under normal circumstances, the petitioner as a law-abiding citizen should have returned the vehicle to the Ministry of Cultural and Religious Affairs no sooner the 1st respondent requested him to return the vehicle immediately by P8.

For the aforesaid reasons, the petitioner's application is dismissed with costs fixed at Rs. 15,000.

210

ISMAIL, J. – I agree.

EDUSSURIYA, J. – I agree.

Application dismissed.