

DESHAPRIYA
v.
RUKMANI, DIVISIONAL SECRETARY,
DODANGODA AND OTHERS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
GUNASEKERA, J.
S.C. (SPL)
APPLICATION NO. 118/97
AUGUST 20, 1999.

Fundamental Rights – Suspension of a Samurdhi Niyamaka – Articles 12 (1) and 12 (2) of the Constitution.

The 3rd respondent the Deputy Speaker of Parliament and a Member of Parliament for the Kalutara District summoned the petitioner, a Samurdhi Niyamaka and all other Samurdhi Niyamakas in the Dodangoda Divisional Secretary's Division for a meeting at which the 3rd respondent asked the Samurdhi Niyamakas to canvass among the people, support for the People's Alliance candidates at the Pradeshiya Sabha elections due to take place on 21. 03. 97. The petitioner said that the People's Alliance candidates were not the best candidates and declined to canvass for them; whereupon, the 3rd respondent reprimanded the petitioner and said that all Samurdhi Niyamakas within the area had been appointed on his recommendation, hence, it was their duty to act according to his wishes. The 3rd respondent followed it up with a letter marked "A" addressed to the Minister of Samurdhi complaining that the petitioner had declined to support the SLFP and he also had information that the petitioner was supporting the JVP. The 3rd respondent requested urgent disciplinary action against the petitioner.

Thereafter, on the Samurdhi Minister's direction, the 2nd respondent (Commissioner- General of Samurdhi) directed the 1st respondent (Divisional Secretary) to suspend the petitioner. Upon that direction, the 1st respondent suspended the petitioner.

Held:

1. The suspension of the petitioner was not just a case of a suspension for which there was no reason but unlawful and a gross abuse of power to the knowledge of the 2nd respondent. The 3rd respondent instigated the suspension; and the 1st, 2nd and 3rd respondents infringed the petitioner's rights under Article 12 (1).

Per Fernando, J.

"The 2nd respondent may have acted – as he says in his affidavit – only because he was ordered to do so by the Minister of Samurdhi, but he should have known that that was an unlawful order which it was his duty to refuse to obey."

2. The 2nd and 3rd respondents also infringed the petitioner's rights under Article 12 (2) in that the suspension was the result of hostile discrimination on the ground of political opinion. Those respondents become personally liable for such infringement.

Per Fernando, J.

"I hold that the use of the resources of the state – including human resources – for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one political party which is denied to its rivals."

3. The suspension of the petitioner's service is null and void.

Case referred to:

1. *Faiz v. Attorney-General* – (1995) 1 Sri LR 372, 383.

APPLICATION for relief for infringement of fundamental rights.

Srinath Perera for the petitioner.

U. Egalahewa, SC for the respondents.

Cur. adv. vult.

September 24, 1999.

FERNANDO, J.

By a letter dated 9. 4. 95 signed by the Divisional Secretary of Dodangoda (the 1st respondent), the petitioner was informed that, pursuant to a decision of the Ministry of Youth Affairs, Sports and Rural Development, in regard to the Samurdhi Programme, he had been appointed as a full-time Samurdhi Niyamaka for the Neboda West Grama Seva Division, and that he was entitled to a monthly allowance of Rs. 2,000 for his services. The 1st respondent informed the petitioner, by letter dated 13. 5. 97 (P2), received by him on 15. 5. 97), that in accordance with letter dated 2. 5. 97 from the Commissioner-General of Samurdhi (the 2nd respondent), his services had been suspended with immediate effect. No reason was given. By another

letter dated 10. 6. 97, the 1st respondent asked the petitioner to hand over all the files and documents in his possession. His complaint is that his fundamental rights under Articles 12 (1), 12 (2) and 14 (1) (g) had been infringed by the suspension of his services.

The circumstances leading up to that suspension were these. The petitioner received a letter dated 28. 2. 97 (marked P4) signed by the 3rd respondent, the Deputy Speaker and Member of Parliament for the Kalutara District. That letter, written on what appears to be the official letter-head of the Deputy Speaker of Parliament, summoned him for a meeting to be held at the Matugama Auditorium on 5. 3. 97 (a working day) at 10.00 am; he was told to consider his presence as compulsory because it was for a special reason.

The petitioner averred that all the Samurdhi Niyamakas of the Dodangoda Divisional Secretary's Division were present at that meeting, at which the 3rd respondent presided; that "the meeting was convened for canvassing support and other organisational matters connected with the election campaign of the People's Alliance candidates contesting the Dodangoda Pradeshiya Sabha election on 21. 3. 97"; and that "the 3rd respondent asked the Samurdhi Niyamakas to canvass among the people they work, support for the People's Alliance candidates . . ." He said that at that meeting "he expressed the view that the candidates put forward by the People's Alliance for the Dodangoda Pradeshiya Sabha were not the best candidates within the People's Alliance and therefore he was unable to go to the people and canvass for them"; that, thereupon, "the 3rd respondent reprimanded the petitioner saying that the petitioner and other Samurdhi Niyamakas [within that area] were appointed on his recommendations and therefore it was the duty of all of them to act according to his wishes"; and that the petitioner was the only person who spoke against the views of the 3rd respondent, while others who shared the petitioner's sentiments remained silent due to the consequences they might have to face.

The petitioner contended that "the 3rd respondent who is a politician cannot dictate terms to the petitioner as to how he should behave"; that he was the only Samurdhi Niyamaka from that Division who was dismissed (actually, suspended); that he had been singled out and victimized because he expressed his opinions at that meeting; and that his suspension was a consequence of ill-will on the part of the 3rd respondent.

Although notices were served by registered post more than once on the 1st and 3rd respondents, they did not file any objections or affidavit. However, they were represented at the hearing by learned State Counsel.

The 3rd respondent not only failed to deny the petitioner's version of the events of 5. 3. 97, but corroborated it in a letter dated 6. 3. 97 to the Minister of Samurdhi, Youth Affairs and Sports (which was copied to the 2nd respondent, who produced it marked "A"). That letter was also written on the official letter-head of the Deputy Speaker of Parliament. In it the 3rd respondent stated that the meeting of 5. 3. 97 was held to explain matters connected with the Pradeshiya Sabha election; that a principal reason for holding that meeting was that after the initial meeting regarding the elections he had received reports that a handful of Niyamakas had neglected these election activities; that at that meeting the petitioner, in the presence of about 300 Niyamakas, had publicly stated that he would not support the SLFP candidates, and would support only the candidates of his choice; and that he had attempted to incite others to follow suit. The 3rd respondent added that he had information that the petitioner was supporting the JVP. He urged that if immediate action was not taken in this connection, this might become an example to others; if so, it would not be possible to achieve the objectives of this programme; and thereby serious harm would result. He requested that urgent disciplinary action be taken against the petitioner.

It was only the Commissioner-General of Samurdhi (the 2nd respondent) who filed an affidavit. There was a bare denial of the petitioner's averments in regard to the letter "P4" and the events of 5. 3. 97. That denial is of no value because he had no personal knowledge of those matters, and because the 3rd respondent, who did have personal knowledge, substantially corroborated the petitioner in his letter "A". Despite that denial, he did state that:

"Samurdhi Movement is the major poverty alleviation programme of the government . . . it requires to be impartially implemented. Accordingly, all the officers who are engaged in the Samurdhi Programme (including Niyamakas) have been instructed to perform their duties devoid of politics; . . .

[the 3rd respondent] has informed the Hon. Minister of Samurdhi, Youth Affairs and Sports, by his letter dated 97. 3. 6 that [the petitioner] had espoused his political opinions at a public meeting held on 97. 3. 5. The Hon. Deputy Speaker has complained of the said

Samurdhi Niyamaka's affiliation with certain political parties. . .

Upon those allegations, the Hon. Minister of Samurdhi has directed the [2nd respondent] to remove the petitioner from his office as a Samurdhi Niyamaka . . .

[The 2nd respondent] by his letter dated 97. 5. 2 has directed [the 1st respondent] to suspend the services of the petitioner. . .

[The 1st respondent] has acted accordingly by [her] letter dated 97. 5. 13 (P2)."

He did not produce copies of the Minister's letter to him and of his letter dated 2. 5. 97 to the 1st respondent.

There is thus no dispute, and I hold, that the 3rd respondent required the petitioner to attend the meeting held on 5. 3. 97 and called on him to support one set of candidates at the forthcoming election; that the petitioner lawfully refused to do so, and asserted his legal right to support the candidates of his choice; that because he had expressed his political opinion and was reported to be a JVP supporter, the 3rd respondent had requested the Minister of Samurdhi that disciplinary action be taken against the petitioner; that upon the Minister's direction to remove the petitioner from office, the 2nd respondent had directed the 1st respondent to suspend him; and that upon that direction the 1st respondent suspended the petitioner.

The Minister of Samurdhi was not made a respondent in these proceedings, and I make no finding as to his responsibility.

ARTICLE 12 (1)

The petitioner claimed in his petition that the suspension of his services was without any reason, and therefore violative of Article 12 (1). Not only was no reason given, but the circumstances made it clear that the suspension was arbitrary and capricious.

As far as the 2nd and 3rd respondents were concerned, it was not just a case of a suspension for which there was no reason, but one which they knew full well was for a wholly bad reason. That reason was, unashamedly, stated in the letter "A", and it was obvious to them that a suspension for that reason was both unlawful and a gross abuse of power. The 2nd respondent may have acted – as he says in his affidavit – only because he was ordered to do so by the Minister of

Samurdhi, but he should have known that that was an unlawful order which it was his duty to refuse to obey.

The 1st respondent acted upon the direction of the 2nd respondent. While that does not absolve her from personal responsibility, there is no evidence that she knew the real reason.

There is no doubt that the conduct of the 1st and 2nd respondents, in regard to the suspension of the services of the petitioner, constituted "executive or administrative action". However, the 3rd respondent wrote the letters "P4" and "A" in his capacity as Deputy Speaker and Member of Parliament, and perhaps his conduct might not have been "executive or administrative action". Nevertheless, it was he who instigated, and was primarily and principally responsible for, that suspension, and for the reasons which I have fully stated in *Faiz v. Attorney-General*⁽¹⁾ that is enough to make him liable in these proceedings.

I, therefore, hold that the 1st, 2nd and 3rd respondents have infringed the fundamental right of the petitioner under Article 12 (1).

ARTICLE 12 (2)

The 2nd and 3rd respondents knew that the suspension was improper and unlawful because it was wholly motivated by political considerations: because the petitioner had openly declined to support the candidates of the 3rd respondent's choice, and insisted on supporting those of his own choice, and because the petitioner was a supporter of a rival political party. The suspension of his services was thus the result of hostile discrimination of the ground of political opinion.

I, therefore, hold that the 2nd and 3rd respondents have infringed the fundamental right of the petitioner under Article 12 (2) as well.

There were aggravating circumstances. The 3rd respondent's letter "A" reveals that 300 Samurdhi Niyamakas – all persons engaged to render services to the public, for which payment was out of public funds – were being diverted to serve partisan political purposes. Obviously, that would have hindered the performance of the public functions for which they were being paid – "the major poverty alleviation programme of the government [requiring] to be impartially implemented", devoid of politics. But, another important question of principle arises. Can persons paid out of public funds, collected directly

or indirectly from citizens of *all* shades of political opinion, be used to advance the interests of those of one political persuasion alone? If public funds are paid to one political party while being denied to others, beyond doubt that would be both a denial of equal treatment and discrimination on the ground of political opinion. It makes no difference whether public funds are *directly* paid to one political party (or a group, such as a list of candidates), or whether public funds are *indirectly* used for the benefit of one party or group, as for instance by the diversion to it of equipment, facilities and the like, paid for out of public funds. I hold that the use of the resources of the State – including human resources – for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals.

It is unnecessary to decide whether the petitioner would have been entitled to complain merely in his capacity as a member or supporter of the group prejudiced thereby. Here the petitioner himself was directly affected; a wrongful attempt was made to compel him to participate in political activity contrary to his beliefs, and he was illegally penalized (by the virtual deprivation of his livelihood) for giving expression to his legitimate dissent.

There is also the circumstance that what happened was not merely connected to political opinion in a general way, but was directly in relation to a pending election. I will assume that Articles 4 (e) and 93 of the Constitution do not apply to Pradeshiya Sabha elections. Nevertheless, in a democracy elections must always be free, fair and equal, and Articles 12 (1) and (2) give constitutional force to those requirements of fairness, equality and non-discrimination.

The 3rd respondent's letter "A" makes it plain that the discriminatory action taken against the petitioner was on account of his political opinion – because he differed from the 3rd respondent's and persisted in his own; and that, too, in probable derogation of the fairness and equality of a pending election to a representative body forming part of the democratic structure of Sri Lanka. Not only was free competition among beliefs thereby stifled, but the profession of a particular opinion was punished by the virtual deprivation of livelihood. Democracy without dissent is a delusion. Democracy can never prohibit lawful dissent. Indeed, a fundamental characteristic of true democracy is that it not only protects dissent, and tolerates it, but genuinely cherishes dissent – recognising that it is only through a peaceful contest among competing opinions that the ordinary citizen will perceive the truth.

What has been established in this case, therefore, is a grave violation of the petitioner's fundamental rights under Article 12.

ARTICLE 14 (1) (g)

While it is true that the petitioner's lawful occupation was affected by the suspension of his services, nevertheless, that was entirely the consequence of acts which – as I now hold – were infringements of Article 12. There is no suggestion that there was any other distinct or independent act or omission constituting an infringement of Article 14 (1) (g). Consequently, whatever wrong or injury the petitioner suffered will be fully redressed by granting him relief in respect of his claims under Article 12. It is, therefore, unnecessary to consider whether the suspension of his services was a violation of Article 14 (1) (g) as well.

ORDER

I grant the petitioner declarations that his fundamental right under Article 12 (1) has been infringed by the 1st, 2nd and 3rd respondents, and that his fundamental right under Article 12 (2) has been infringed by the 2nd and 3rd respondents.

Consequently, I declare the suspension of the petitioner's services to be null and void. Accordingly, the petitioner must be deemed for all purposes to have continued to be in service as a Samurdhi Niyamaka from 13. 5. 97 without a break in service. He will be entitled to all arrears of pay, as well as all other benefits which his colleagues received during that period – in the form of salary, allowances, increments, permanency, promotions, etc.

In the initial affidavit which the petitioner sent to the Chief Justice, he claimed Rs. 100,000 as compensation. However, in the formal petition which was filed after the matter was referred to the Bar Association of Sri Lanka, there was only a bare averment that "the petitioner is entitled to be compensated" – with no amount being stated, no prayer for compensation, and no request to the Court to fix the amount of compensation. Those omissions are inexcusable, but are not sufficient to deny the petitioner compensation, because in his initial affidavit he did claim Rs. 100,000 as compensation.

The violation was serious, and was aggravated by the circumstances I have referred to above. I award the petitioner a sum of Rs. 75,000 as compensation.

I see no reason why, in this case, compensation should be paid out of public funds. The 2nd and 3rd respondents could not possibly have thought that the petitioner's suspension was even remotely connected to the objectives of the Samurdhi Programme or any other public purpose; it was plainly motivated by extraneous and improper political considerations. I, therefore, direct the 2nd respondent personally to pay the petitioner a sum of Rs. 5,000, and the 3rd respondent personally to pay him a sum of Rs. 70,000. Those payments shall be made, and proof of payment submitted to the Registrar of this Court, before 1. 12. 99, failing which this application will be listed for an order of Court as to enforcement. Although it is no justification that the 1st respondent merely carried out the orders of her superior, I do not direct her to pay any compensation. Instead, I direct her to pay a sum of Rs. 500 to the petitioner as costs.

I direct the Registrar to forward copies of this judgment –

(a) to the Public Service Commission so that it may consider what disciplinary action, if any, should be taken against the 2nd respondent on account of his conduct in regard to the suspension of the petitioner;

(b) to the Attorney-General so that he may consider whether the conduct of the 2nd and 3rd respondents constitutes "corruption" (within the meaning of section 70 of the Bribery Act as amended by Act, No. 20 of 1994) or any other offence, and take appropriate consequential action; and

(c) to the Auditor-General so that he may consider the regularity (in the light of the applicable financial, administrative and other regulations) of the deployment of Samurdhi Niyamakas for political purposes, particularly in relation to elections, and take appropriate consequential action.

WADUGODAPITIYA, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.