

DHARMARATNE AND ANOTHER
v.
SRI LANKA EXPORT DEVELOPMENT BOARD AND 13 OTHERS

SUPREME COURT
FERNANDO, J.
WADUGODAPITIYA, J.
PERERA, J.
S.C. 115/94
SEPTEMBER 28, 1994.

Constitution – Art. 12 (1) of the Constitution – Promotion – Seniority – Experience – Additional qualifications – Weightage to be given – Absence of due performance appraisal system.

The Petitioners are Asst; Directors of the 1st Respondent Board. They stated that vacancies for posts of Deputy Director Grade 2 were advertised, the appointments were to be made after an interview to be conducted by an Interview Board. The Petitioners applied, but were unsuccessful. It is alleged that the appointments of 7-12th Respondents were arbitrary and without any rational basis for the following reasons:

1. There was no scheme of recruitment setting out criteria and guidelines for selection.
2. The criteria and basis of selection adopted by the Board of Interview were adhoc, therefore arbitrary and vague.

3. That there was inadequate weightage given to seniority.
4. That there was no mechanism to determine experience and managerial ability and no scheme for performance appraisal.
5. It was unreasonable to give too much weightage to the performance of the interview as it was subjective.

Held:

- (i) The 1st criterion 'Seniority' is easily ascertainable from the applicants record of service and is therefore clearly objective.
- (ii) The 2nd criterion 'additional qualifications' is likewise easily ascertainable and is therefore objective.
- (iii) The 3rd criterion 'Experience' – it is clear that the experience of the applicants can in fact be ascertained and assessed on the above basis, and is therefore objective.
- (iv) The 4th criterion 'Performance' – the list is comprehensive and it cannot be said that the assessment under this head was in any way capricious.
- (v) The 5th criterion 'communicating skills' – the abilities of the candidates on the above basis can readily be gauged, and it cannot be said that the assessment under this head was in any way capricious.
- (vi) Under the 6th criterion 'Managerial abilities' the Board of Interview exercised due responsibility in arriving at an assessment under this head.
- (vii) The interviews were conducted quite objectively, several criteria and bases were employed and where there was a lacuna, a system of consultation was resorted to, the totality of the Evidence shows that the Board of Interview had acted responsibly.

Per Fernando J.,

The weightage to be given to seniority and other criteria was a matter within the discretion of the interview Board. The weightage for seniority must depend on the Nature of the post; the greater its responsibilities the more the justification for giving greater weightage for factors, relevant to merit and ability and performance.

Further the weightage given to experience indirectly recognised seniority as well.

"While I agree that an annual performance appraisal system is very desirable for such assessment, it is not presently of a mandatory requirement – though it is possible that industrial relations and practice may make it mandatory in the future.

Per Wadugodapitiya, J.

There is no denying that the system as a whole was not as perfect as it ought to have been but the shortcomings which surfaced and which have been pointed out, constitute in my view blemishes at the most and are in no way serious enough to render the decisions of the Interview Board Nugatory.

Cases referred to:

1. *Perera v. Ranatunga* – 1993 1 SLR 39.
2. *Abeyasinghe v. CECB* – SC 356/93 SCM 2.5.94.
3. *Hewamallikage v. People's Bank* – S.C. 291/93 SCM 14.10.94.
4. *Perera v. Monetary Board* – S.C. 246/93 SCM 1.11.94.
5. *Piyasena v. People's Bank* – S.C. 359/93 SCM 4.11.94.
6. *Wickremasinghe v. Loku Bandara* – SC 59/93 – SCM 7.10.93.
7. *Ariyasinghe v. State Timber Corporation* – S.C. 283/93 SCM 22.9.94.

APPLICATION under Article 126 of the Constitution.

Faisz Musthapha, P.C. with Mahanama de Silva for Petitioner.

A. S. M. Perera, D. S. G., for 1-6th and 14th Respondent.

R. K. W. Goonesekera, with L. C. M. Swarnadhipathy for 7-13 Respondents.

Cur adv vult.

January 1, 1995

WADUGODAPITIYA J.

The petitioners are Assistant Directors of the Sri Lanka Export Development Board, (the 1st Respondent). They state that vacancies for Posts of Deputy Director, Grade 2 in the 1st Respondent Board were advertised in the newspapers on 1.3.93 (P2), and circularised by an internal memorandum dated 3.3.93 (P3). These posts were open to both internal as well as external candidates. The appointments were to be made after an interview to be conducted by

a Board constituted for that purpose, (2nd to 6th Respondents). The 2nd Respondent was the Chairman whilst the 5th and 6th Respondents were Directors of the 1st Respondent Board.

The qualifications and experience called for were clearly set out, viz; a Degree of a recognised University or equivalent professional qualification, with preference to holders of a First or Second Class Degree or Post-Graduate qualification relevant to the job description. In addition, post-qualifying experience of not less than 8 years in the relevant field was called for, of which at least 3 years should have been at Senior Management Level in a recognised Public/Private Sector Institution or an International Institute/Agency.

Both Petitioners applied. Copies of their applications are at P4 and P5 respectively. Thereafter the 1st petitioner was summoned for an interview on 31.1.94 and the 2nd petitioner, on 28.1.94 before the Board of Interview which consisted of the 2nd to 6th Respondents. The petitioners state that in all, 18 internal candidates were summoned for interviews on different dates.

On 10.3.94, however, the petitioners came to know that on 9.3.94, letters of appointment had been issued to the 7th to 13th Respondents appointing them to the posts of Deputy Director, Grade 2 in the 1st Respondent Board. Of these, the 7th to 12th Respondents were internal candidates who were promoted, whilst the 13th Respondent was an external candidate. The Petitioners have no quarrel with the appointment of the 13th Respondent, but state that the promotions and appointments of the 7th to 12th Respondents were arbitrary and without any rational basis, for the following reasons:-

- (a) the selection of the 7th to 12th Respondents was not in accordance with the scheme of promotion (P1) because the performance and skills of the internal applicants were not taken into account. The only way in which this could have been done was to consult the Directors in charge of the Divisions to which the candidates belonged, and this was not done;

- (b) the seniority of the Respondents was not taken into consideration. They state that the 8th to 12th Respondents were junior in service to the 1st petitioner in their appointment to the post of Assistant Director (Gr: 3), and that regarding the same post, the 9th to 12th Respondents were junior in service to the 2nd Petitioner. The 7th Respondent however is of equal seniority with the 1st petitioner and more senior to the 2nd petitioner in the said post. They have filed marked P6, a list of all the 18 internal candidates who applied and who were interviewed, setting out their educational qualifications, dates of appointment to the post of Assistant Director, Grade 3, and the dates on which they first joined the 1st Respondent Board, and
- (c) the 2nd to 6th Respondents had acted under political pressure and that there were no specific criteria adopted in making the selections.

The petitioners state that they have been subjected to unequal treatment by the 1st to 6th Respondents in violation of the provisions of Article 12(1) of the Constitution. They ask further, that the appointments of the 7th to 12th Respondents be quashed and that they be awarded damages in a sum of Rs. 100,000/- each.

The 7th to 12th Respondents, i.e. the internal candidates whose promotions are being challenged by the petitioners, have filed counter-affidavits stating, *inter alia* :-

- (i) that the scheme of promotion introduced in 1985 and which is the scheme relied on by the two petitioners is not in operation, and that what is operative at present is the Scheme of Promotion set out in Public Administration Circular No. 15/90;
- (ii) that the evaluation process introduced in 1984, and which is relied on by the two petitioners has been done away with and that, at present, there is no provision for the evaluation of the performance of executive officers under Public Administration Circular No: 15/90;

- (iii) that seniority is not the only criterion for promotion and that, in addition, merit is also taken into consideration in making promotions, and
- (iv) that the interviews were not a mere formality but were aimed at assessing the ability, capability and suitability of the candidates for Senior Management posts, having regard to the objectives of the organisation.

The 2nd Respondent, who is the Chairman of the 1st Respondent Board, and who also functioned as the Head of the Board of Interview, has filed his objections by way of an affidavit countering the several averments made by the petitioners.

He states that the posts of Deputy Director are senior managerial positions and that it is in the interests of the 1st Respondent Board to recruit persons who are most suited, having regard to the objectives of the organisation; that the Deputy Directors function as unit heads of the several divisions and are required to possess high managerial abilities to manage the units, co-ordinate and liaise with the Director and the top management and also with the subordinate staff; that they are responsible for the implementation of the action plans of the several divisions, and that it is therefore essential that they possess abilities to motivate and manage the performance of the subordinate staff.

The 2nd Respondent goes on to state that after calling for applications, (besides the external candidates), 17 internal candidates (not 18 as set out by the petitioners) were interviewed by the Board of Interview (2nd to 6th Respondents); that at the interviews, the candidates were questioned on various relevant matters, including their academic and professional background, contributions made by them to the organisation, their past and present duties and strategies for development of small and medium industries for exports; that at the interview, due consideration was given to seniority (one mark for each year's service in Grade 3), job-oriented additional qualifications (4/5 marks for a Diploma, 6 marks for the M.Sc./ M.B.A. and 10 marks for a Ph.D.); experience (in export development, marketing, project appraisal, entrepreneur

development, planning and familiarity with trade information); performance (i.e., ability to identify and analyse problems and propose practical and constructive solutions); communicating skills (i.e., correct usage of language, clarity of speech and cohesion and presentation of ideas and information), and managerial abilities (on the basis of their day to day performance). He has filed marked 2R5, a copy of an unsigned and undated mark-sheet, setting out the marks given to the various candidates under the above heads, in terms of which the total marks obtained by the relevant candidates are as follows :- 7th Respondent – 44, 8th Respondent – 40, 9th Respondent – 37, 10th Respondent – 41, 11th Respondent – 38, and 12th Respondent – 40, Contra, the 1st Petitioner has scored only 34 marks and the 2nd Petitioner, 33.

The 2nd Respondent states that prior to the holding of the interviews, schedules setting out the relevant data pertaining to the several applicants were made available to the members of the Board of Interview; that during the interviews, each member made his own notes on the said schedules; that immediately after the conclusion of each interview, marks were assigned to each candidate collectively by the members of the Board of Interview after consideration of the performance of each such candidate, and that those who fared best and obtained the highest marks were selected for the posts of Deputy Director.

The 2nd Respondent also states that, contrary to what the petitioners allege, before decisions were taken as to the candidates to be promoted, the Directors in charge of the relevant Divisions in which the several candidates worked, were consulted. Further, in this connection, he adds that the "Performance Evaluation Scheme" (for Executive Officers) which had been adopted earlier was done away with for the reason that it did not bring about the desired objective and was therefore no longer in operation.

Although the Petitioners rely on P1 and its annexures as constituting the applicable Scheme of Promotion, the 2nd Respondent denies this and states that the document P1 produced by the Petitioners is only a proposal which has not been approved by the Board, and as such, cannot be treated as part of the approved

scheme of promotion. He further states that the applicable scheme of Promotion is contained in the documents filed by him, viz: 2R2 and 2R2A to 2R2E, culminating in the undated document 2R3, by which latter document, he says, the "Promotion Scheme for the Post of Deputy Director was finalised". This document, 2R3, merely sets out the Grade allocated to the Post of Deputy Director, the salary scale applicable to it and the qualifications called for, viz: "A degree of a recognised University or an equivalent professional qualification with two years service in the E.D.B. as an Assistant Director and has been confirmed in the Post".

From the foregoing, it would be seen that the 2nd Respondent has countered the several allegations made by the petitioners, with the following points:-

- (a) that the Scheme of Promotion was not contained in P1 as stated by the Petitioners, but in the documents culminating in 2R3;
- (b) that the seniority of all the internal candidates was in fact taken into consideration and marks given therefor at the rate of one mark for each year's service in Grade 3 (2R5);
- (c) that in addition to Seniority, the merit worthiness of the candidates, in order to assess their performance, their skills, their ability and suitability for senior managerial positions, was taken into account under the several heads set out in 2R5; viz; Additional Qualifications, Experience, Performance, Communicating Skills and Managerial Ability;
- (d) that the Directors in charge of the Divisions to which the several candidates belonged were in fact consulted before decisions for selection were taken;
- (e) that prior to the holding of the interviews, schedules containing all the relevant dates pertaining to the several candidates were made available to the members of the Board of Interview, and that each member made his own notes thereon during the interviews;

- (f) that the "Performance Evaluation Scheme" for Executive Officers which had been adopted earlier was done away with because it did not bring about the desired objective, and was therefore no longer in operation;
- (g) that there was no truth in the unspecified and unsubstantiated allegation made by the petitioners, of political interference, and
- (h) that the appointments of the 7th to 12th Respondents have been made on a rational basis using the above criteria and that petition of the petitioners does not disclose a violation of their fundamental rights.

At the hearing, Learned President's Counsel for the Petitioners was heard in support, but we did not think it necessary to call upon either Learned Counsel for the 1st to 6th and 14th Respondents, or Learned Counsel for the 7th to 13th Respondents, in reply. However, the affidavits filed by all the Respondents, together with their documents were considered by us.

At the outset, Learned President's Counsel for the Petitioners stated that he was not seeking to canvass the appointment of the 13th Respondent, who was the external candidate, and that he was confining himself to the 7th to 12th Respondents only. He sought mainly to rely on the following matters in support :-

- (i) that there was no scheme of recruitment setting out criteria and guidelines for selection. The 2nd Respondent's document, 2R3 did not do so, and was, in any event, undated and not in existence on 1.3.93 when applications were called for by P2, (the newspaper advertisement). Even P2 did not set out any scheme of recruitment or criteria or guidelines for selection. Even the holding of an interview was not mentioned in P2;
- (ii) that the criteria and basis of selection adopted by the Board of Interview were *ad hoc* and therefore arbitrary and vague;

- (iii) that there was inadequate weightage given to seniority. One mark for each year's service in Grade 3 was not enough and at least a third of the total of marks out of a hundred should have been given for seniority;
- (iv) that there was no mechanism to determine experience and managerial ability and no scheme for performance appraisal, and that this category should also command at least a third of the total of the marks out of a hundred, and
- (v) that although the Board of Interview, constituted as it was, of a Mix of insiders (2R, 5R and 6R) and outsiders (3R and 4R) was not unreasonable, it was unreasonable to give too much weightage to the performance at the interview as it was subjective, and that therefore, not more than 10% of the marks should have been allocated for both the interview and "Communicating Skills" and not more than 10% for "Additional Qualifications".

One of the main questions that would arise for consideration in this case is, whether the actions of the Board of Interview were so arbitrary as to compel their having to be struck down. The other question is, whether the submission of Learned President's Counsel for the Petitioners, that the entire interview process was subjective and therefore bad for being wholly unreasonable, is worthy of merit.

In considering these questions, it would be pertinent to note that the Board of Interview consisted of three members of the 1st Respondent Board, viz; the 2nd Respondent who was Chairman since 1989; the 5th Respondent who has been Additional Director-General since 1987, and before that, the Director of Marketing since 1979, and the 6th Respondent who has been the Director of Human Resources Development for a little under two years. It would seem that, at the lowest, these persons were no strangers to the officers of the 1st Respondent Board at the level of Assistant Director, Grade 3, from which grade the applicants for the post in question were drawn. Further, it is of some importance to re-iterate that schedules containing all the relevant personal data concerning the applicants were made available to each member of the Board of Interview

beforehand, so that during the conduct of the Interviews, all the members had the necessary material before them, and each made his own notes on his copy of the schedule during the interviews.

In considering the question of subjectivity raised by Learned President's Counsel, the picture would be seen with clarity if each of the criteria or bases for selection employed by the Board of Interview were to be looked at separately. Taking the criteria in the order set out in the mark-sheet, 2R5, it is quite apparent :-

- (i) that the first criterion "Seniority", is easily ascertainable from the applicant's record of service, and is therefore clearly objective. The applicants were given one mark for each year's service in the Grade 3 post of Assistant Director;
- (ii) that the second criterion "Additional Qualifications" is likewise easily ascertainable and is therefore objective. The holder of a Diploma was given 4 to 5 marks; those in possession of an M.Sc. or M.B.A. Degree were given 6 marks, and those in possession of a Ph.D. were awarded 10 marks; provided the above qualifications were "Job - oriented";
- (iii) that where the third criterion, "Experience" was concerned, marks were given on the basis of the candidate's experience relating to export development, marketing, project appraisal, entrepreneur-development, planning and familiarity with trade information. It is clear that the experience of the applicants can in fact be ascertained and assessed on the above bases and is therefore objective;
- (iv) that where the fourth criterion, "Performance" was concerned, the following were taken into account in allocating marks, viz; ability to identify problems, ability to comprehend the subject, ability to analyse the topic correctly and meaningfully and to relate the results to their actual performance in the 1st Respondent Board with current data and statistics, and the ability to propose constructive and practical solutions. The list is comprehensive and it cannot be said that the assessment under this head was in any way capricious, and

- (v) that where the fifth criterion, "Communicating Skills" was concerned, clarity in speech, correct usage of language, cohesion and presentation of ideas and information were taken into account in awarding marks to candidates. This criterion too cannot be said to be capricious.

The abilities of the candidates on the above cases can readily be gauged and it cannot be said that the assessment under this head was in any way capricious.

In the result, one is left only with the sixth and final criterion, viz; the "Managerial Abilities" of the candidates on the basis of their day to day work and performance. In this connection, the 2nd Respondent in his affidavit says that the Performance Evaluation Scheme which was in operation earlier was done away with for the reason that it did not bring about the desired objective. However, in its place, a system of consultation with the Heads of the relevant Divisions to which the several applicants were attached had been introduced; for the 2nd Respondent adds: "I state that the Directors of the relevant divisions in which the applicants worked were consulted before decisions were taken on who should be promoted". I see no reason as to why the 2nd Respondent should not be believed on this point. This item of evidence shows that the Board of Interview exercised due responsibility in arriving at an assessment under this head. At the very lowest, far from pointing towards capriciousness and arbitrariness, it distinctly points away from it.

I am therefore of the view that the conduct of the Board of Interview in selecting the 7th to 12th Respondents can in no way be said to have been so arbitrary or capricious as to induce me to strike down and nullify the appointments made. Further, I am of the opinion that, for the greater part, the interviews were conducted quite objectively. As set out above, several criteria and bases were employed, and where there was a lacuna, a system of consultation was resorted to, and, far from acting arbitrarily or capriciously, the totality of the evidence shows that the Board of Interview, had, in the circumstances, acted responsibly.

There is no denying that the system as a whole was not as perfect as it ought to have been. But, the shortcomings which surfaced and

which have been pointed out, constitute, in my view, blemishes at the most, and are in no way serious enough to render the decisions of the Board of Interview nugatory.

Therefore; taking all the circumstances of this case into consideration, I am of the view that there has been no violation by the 1st to the 6th Respondents of the fundamental rights of the petitioners under Article 12(1) of the Constitution, and I hold accordingly.

The application is therefore dismissed.

PERERA, J. – I agree.

Application dismissed.

FERNANDO, J.

While agreeing with my brother Wadugodapitiya, J, that the Petitioners' application fails, I wish to add the following observations:

It is certainly desirable that the criteria for selection, and the weightage for each criterion, should be laid down and disclosed to candidates before any interview or other selection process; but the failure to do so is, in general, not a fatal flaw (cf. *Perera v Ranatunge* ⁽¹⁾, *Abeyasinghe v. C.E.C.B.* ⁽²⁾). There are, however, exceptions (cf. *Hewamallikage v. People's Bank* ⁽³⁾, *Perera v. Monetary Board* ⁽⁴⁾, and *Piyasena v. People's Bank* ⁽⁵⁾, but this is not one of them.

In the absence of an established scheme of promotion, the interview board was quite justified in formulating the relevant criteria and weightage. The criteria so determined, namely seniority, relevant additional qualifications, experience, performance, communication skills, and managerial ability, were all relevant; and there was no suggestion that any other relevant criterion had been omitted or that the scheme was irrational (cf. *Perera v. Ranatunge (Supra)* and *Wickramasinghe v. Loku Bandara* ⁽⁶⁾).

Learned Counsel for the Petitioners attacked the scheme itself, as well as its implementation, on several grounds.

He submitted that the criteria were *ad hoc*, subjective, vague and arbitrary; that seniority was given insufficient weightage, and should have been given at least one third of the total marks; and that interview performance was given too much weightage.

Of the six criteria, the first and the second were wholly objective. The other four involved varying degrees of subjectivity, but these criteria were very relevant for senior management posts. Further, the assessment of candidates for such posts involved also an element of judgment, based on past performance, as to how well a candidate was likely to perform if promoted. Subjectivity was thus inevitable. The criteria were clear, and the interview board had formulated adequate guidelines in regard to the criteria. Thus none of the grounds of challenge have been established. In regard to the implementation of the scheme, in the absence of material establishing any lack of competence or good faith on the part of members of the interview board, or abuse or misuse of discretion, or arbitrariness, or the like, subjectivity alone was not a vitiating factor.

The weightage to be given, to seniority and other criteria, was a matter within the discretion of the interview board. While it has been submitted that the correct weightage had not been given to some criteria, it cannot be said that the interview board exercised its discretion arbitrarily or unreasonably (unlike in *Perera v. Ranatunge (supra)*). The weightage for seniority must depend on the nature of the post: the greater its responsibilities, the more the justification for giving greater weightage for factors relevant to merit and ability, and performance. Further, the weightage given to "experience" indirectly recognised seniority as well (*Ariyasinghe v. State Timber Corporation (7)*.) The assessment of suitability for the post was made at the interview. Although there could be different opinions as to the appropriate number of marks to be given to each candidate for performance at the interview, there is nothing to suggest that the interview board exercised its discretion unreasonably or arbitrarily in this respect.

It was strenuously contended that in the absence of an established (i.e. annual) performance appraisal system, there could not be a proper assessment of performance, experience, and managerial ability. While I

agree that such a system is very desirable for such assessment (and indeed, for the efficient and harmonious running of any institution, from the point of view of both employer and employee), it is not presently a mandatory requirement – though it is possible that industrial relations law and practice may make it mandatory in the future. The absence of such a system did not vitiate the selection process: performance, experience and ability had to be assessed, the interview board found itself in a position where there was no annual performance appraisal system, and naturally they had to do the best they could in the circumstances. If the Petitioners' contention is upheld, it would mean that the promotions should have been made without any attempt to assess these factors clearly an untenable and unsatisfactory position.

Application dismissed.
