

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application under
and in terms of Article 126 read with
the Article 17 of the Constitution of
Sri Lanka.

Weerasuriya Arachchige Leela
Weerasuriya.
No.1/21, Kalapaluwawa,
Rajagiriya.

Petitioner

S.C.(F.R.) Application No. 419/2015.

Vs.

1. People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

2. Mr. Hemasiri Fernando
The Chairman,
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

- 2A. Mr. Sujeewa Rajapakse
The Chairman,
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

3. Mr. Rohan Pathirage ,
Deputy General Manager/Secretary
to the Board of Directors,
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

- 3A. Ms. Shyama Wijekoon,
Secretary (Acting) to the Board of
Directors,
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

4. Mr. Jehan P. Amarathunga,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

- 4A. Mr. Malindu Ranasinghe,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

5. Ms. G. D. C. Ekanayake,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

- 5A. Mr. Keerthi Goonathilake,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.
6. Mr. Janaka Sugathadasa,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.
- 6A. Mr. Isuru Balapatabendi,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.
7. Mr. Felician Perera,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.
- 7A. Mr. Manjula Wellalage,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.
8. Mr. Sanjaya Galaboda,

The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

8A. Mr. K. A. Vimalenthirajah,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

9. Mr. K. Rajendran,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

9A. Mr. Sudarshan Ahangama,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

10. The General Manager,
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

11. The Deputy General Manager
(Human Resources),
People's Bank,

No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

12. Ms. R. P. N. Premalal,
No. 467/B2,
"Lakmina Mawatha", Eriyawetiya,
Kelaniya.
13. The Hon Attorney General,
Department of the Attorney General
Colombo 12.
14. Mr. Kumar Gunawardana,,
The Director
People's Bank,
No.75,
Sir Chittampalam A Gardiner
Mawatha, Colombo - 02.

Respondents

BEFORE : JAYANTHA JAYASURIYA, PC, CJ.
JANAK DE SILVA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Saliya Pieris, P.C. with Thanuka Nandasiri for
the Petitioner.

Manoli Jinadasa instructed by Janath
Jayawardena for the 1st to 6th ,10th to 11th and
2A, 3A, 5A, 9A, and 14th Respondents

Rasika Dissanayake for the 12th Respondent.
Rajiv Goonethilake DSG for the A.G.

ARGUED ON : 14th December, 2021

DECIDED ON : 28th November, 2024

ACHALA WENGAPPULI, J.

The Petitioner has invoked the jurisdiction conferred on this Court under Articles 17 and 126 of the Constitution by alleging infringement of her fundamental right to equality, guaranteed to her under Article 12(1), by the 1st to 11th Respondents in promoting the 12th Respondent to the post of Deputy Head of Finance, over her. The Petitioner repetitively asserts in her petition that she is the *“only qualified officer in the bank to apply for the said post.”*

After affording an opportunity for the Petitioner to support her application and to the Respondents to resist the same, this Court decided to grant leave to proceed under Article 12(1) on 15.03.2016.

The Petitioner, having joined the 1st Respondent Bank as an Accounts Assistant in June 1989, was promoted to the post of Assistant Finance Officer on 17.04.2000 and thereafter to the Grade of Deputy Finance Officer in 2008. During the period 1996 to 2008, she was attached to the Audit Department. In 2008, she was transferred to the Risk

Management Department, where she covered up duties of the Grade of Senior Manager (Operational Risk), until her promotion as a Deputy Chief Finance Officer in February 2010. Since then, the Petitioner functioned in that capacity attached to the Risk Management Department of the 1st Respondent Bank. Being a Deputy Chief Finance Officer, with academic and professional qualifications coupled with a long period of service, she was eligible to apply to the post of Deputy Head of Finance.

It is averred by the Petitioner that since July 2009, she applied to the management of the 1st Respondent Bank to be appointed as the Deputy Head of Finance on three sperate occasions (2009, 2012 and 2013), upon calling for applications from eligible candidates. She further alleged that the 1st to 11th Respondents did not proceed to complete the selection process by citing various reasons, and effectively "*shelved*" the necessity of filling that post.

With the issuance of Staff Circular No. 7588/2015 of 24.08.2015, applications were called once more to fill the post of Deputy Head of Finance by the 1st Respondent Bank, and the Petitioner tendered her perfected application for the only vacancy in that post. She was called for an interview along with the 12th Respondent on 22.10.2015. No marking scheme or criteria, which would be adopted at the interview, was provided to the Petitioner, prior to the interview. In spite of being confident that she was the 'only' qualified person to be promoted to the post, the Petitioner was dismayed to learn that the 12th Respondent has been selected to be promoted to post of Deputy Head of Finance. The impugned decision taken by the 1st Respondent Bank to appoint the 12th

Respondent to the only vacancy that existed in the post of Deputy Head of Finance, resulted in negating the Petitioner's future promotional prospects completely as the former is comparatively a junior officer in service.

The 1st to 5th, 10th and 11th Respondents as well as the 12th Respondent (being the successful candidate) have tendered their Statements of Objection resisting the Petitioner's application, and collectively prayed for its dismissal. The Petitioner filed her counter affidavit, challenging some of the positions taken up by the Respondents in their respective Statement of Objections.

When this matter was taken up for hearing on 03.11.2021, learned President's Counsel for the Petitioner, in support of the allegation that the decision of the 1st to 11th Respondents to appoint the 12th Respondent to the post of Deputy Head of Finance is unreasonable, arbitrary and discriminatory one, has presented following submissions for the consideration of this Court:

- a. the conduct of the 1st to 11th Respondents, in their failure to fill the disputed vacancy for a very long time by cancelling the interviews that were scheduled twice over, demonstrates that they were waiting for the 12th Respondent to be promoted to the Grade of Deputy Chief Finance Officer and thereby facilitating her to contest for the disputed post along with the Petitioner, who has served the 1st Respondent bank for a longer period of time,

- b. the interview process in itself is bad in law as the Board Nomination Committee of the 1st Respondent bank failed to provide any interview criteria and thereby ensuring the transparency of the interviewing process and its failure to disclose the marks indicating the assessment of the suitability of the two candidates at the close of the interview,

- c. the Board Nomination Committee failed to act in good faith, when they prepared a set of mark sheets subsequent to the interview, which they should have done during the interviewing process, in order to cover up their already made decision to appoint the 12th Respondent to the post of Deputy Head of Finance.

In view of the detailed submissions made by the learned President's Counsel in relation to each of these contentions, I intend to consider them after dividing them into two parts. The first part would deal with the events that had taken place prior to the interview conducted on 13.10.2015, while the second part deals with the factors that were highlighted in relation to the very process of the interview.

The Petitioner's contention on the first part is founded upon a strong belief entertained by her that she was repeatedly and systematically denied of a fair opportunity to earn her due promotion, in spite of the fact

that she possessed all the requisite academic, professional qualifications and long years of dedicated service. The Petitioner has accordingly highlighted certain events that had taken place during this period, which contributed to strong belief she entertains in her mind.

In making reference to these several events, she first relied on the fact that the management's failure even to respond to her letter dated 02.07.2009, by which she made a request to appoint her to the post of Deputy Chief Finance Officer. She tendered that request with the recommendation of the Senior Deputy General Manager (P5). The basis of her request was that she has covered up duties of the Grade of Senior Manager (Operational Risk) for period of over a year.

The second instance which the Petitioner relied on has taken place in September 2010, when applications called from eligible candidates to fill two vacancies in the Grade of Deputy Head of Finance. The dates on which the interviews were originally fixed rescheduled twice. The management eventually issued a letter on 23.09.2010, stating that the Board of Directors has decided to fill only the vacancies that are referred to in that letter. The post of Deputy Head of Finance was not included in the said letter and hence no interview regarding that particular post was held. The reason for this change of mind on the part of the 1st Respondent Bank was said to be due to the restructuring process of the organisation that was taking place and once that is completed, the management would take steps to re-announce the vacancies. Being the only qualified officer available at that point of time to fill that position, the Petitioner alleged that she was deprived of that opportunity for the second time.

With the issuance of Staff Circular No. 7181/2012 on 05.04.2012, and calling for application to fill the same post, the third in the series of such deprivations has occurred. The Petitioner tendered her application in compliance with the said Circular. She was called for an interview. However, the Petitioner states that “ *the management of the bank refrained from filling the said vacancy for reasons unknown*”, despite being the “ *only officer in the bank who possessed the required educational and professional qualifications to be promoted the Grade of Deputy Head of Finance...*”.

It is her contention that these three instances, which she describes as instances of systematic deprivation of her due promotion, should also be viewed in the light of two more additional factors. One of them is the change of policy made by the management of the bank from time to time permitting or restricting its employees to switch from the “ *Mainstream*” to the “ *Finance officer’s Service*” or from the “ *Finance officer’s Service*” to the “ *Mainstream*”. The other factor the Petitioner relied on was the circumstances under which the 12th Respondent was promoted to the Grade of Deputy Chief Finance Officer, and thereby facilitating her to be a competitor by occupying a position similar to the one held by the Petitioner.

The Petitioner states that the officers of the 1st Respondent bank are generally separated into two streams. The two streams are referred to as “ *Close Service*” and “ *Main Stream*”. Promotions of the two streams would run parallel but, independently of each other. Generally, the professionals who joined the bank are grouped into the ‘ *Close Service*’. In terms of Staff Circular No. 283/1987, no switching was permitted to Finance Officers

from 'Main Stream' to the 'Close Service'. However, with the issuance of Staff Circular No. 387/2008, the preceding Staff Circular No. 283/1987 was cancelled and, as a result, officers of the 'Main Stream' could switch to the 'Close Service'. The Staff Circular No. 392/2008, introduced another change of policy by permitting the Finance Officers of the 'Main Stream' to switch to 'Close Service' at a higher level, even as Senior Finance Officer, by removing the restriction imposed by the earlier circular that they could do so only at the initial level of Finance Officer's service, namely, Assistant Finance Officer Grade III.

After the issuance of the Staff Circular No. 387/2008, the 12th Respondent, who was originally serving in the 'Main Stream', has switched to 'Close Service', in 2008 itself and that too as a Senior Finance Officer. The 12th Respondent was thereafter promoted to the Grade of Deputy Chief Finance Officer, a post similar to the one held by the Petitioner, even though the former is "*much junior*" in her service. Some of these factual assertions were refuted by the 1st to 5th, 10th and 11th Respondents as well as by the 12th Respondent.

In his Statement of Objections, tendered by the 3rd Respondent, on behalf of the 1st, 2nd, 4th, 5th, 10th and 11th Respondents, it was averred that after applications were called to fill the two vacancies in the Grade of Deputy Chief Finance Officer in terms of Staff Circular No. 6822/2009, the Petitioner was promoted to that post w.e.f. 05.02.2010. This relates to the first instance complained by the Petitioner in support of her complaint of systematic deprivation of her due promotion.

In relation to the second instance, the 3rd Respondent states that, despite the rescheduling of the interviews for the Grade of Deputy Chief Finance Officer pending restructuring of the 1st Respondent Bank, the management nonetheless conducted interviews on 27th and 28th of September 2010, in which the Petitioner too has participated along with several other candidates. The Petitioner was however unsuccessful in securing a position to be among the nine successful candidates, who were promoted. The extracts of the Minutes of the Board of Directors were tendered as "3R4" in support of that assertion. The 3rd Respondent therefore accused the Petitioner of intentionally suppressing material factors in her petition addressed to this Court.

In relation to the alleged third instance of deprivation of a promotional opportunity, the 3rd Respondent once again accused her of intentionally suppressing material factors. The 3rd Respondent states that the Petitioner was in fact interviewed for the only vacancy that existed in that post. The management was however not impressed with her performance at the interview and therefore decided not to fill the vacancy, as she was found to be not suitable to be promoted to the post. The extracts of Minutes of the Board of Nomination Committee of 31.03.2014 are tendered annexed to the Statement of Objections as "3R5".

The 3rd Respondent, in his affidavit, offers a clarification as to the two streams that exists in the 1st Respondent Bank, which the first is termed as the "*Main Banking Stream*" while the other is termed as "*Non-Banking Stream*" respectively, and it is the "*Non-Banking Stream*" which casually referred to as the "*Close Service*". He further states that

professionals who are employed by the 1st Respondent Bank are serving in both these streams. The 3rd Respondent further states that, as the way the 12th Respondent opted to switch from her original stream in terms of the said Circular, the Petitioner too could have opted to switch but did not.

Whilst admitting that the 12th Respondent was promoted to the Grade of Deputy Chief Finance Officer, a post similar to the one held by the Petitioner, the 3rd Respondent states that the incumbent officers at the tier of Deputy Chief Finance Officer are eligible to be promoted to the Grade of a AGM, but are appointed primarily on performance of the individual applicant, rather than merely on the period of service in the 1st Respondent bank.

The counter affidavit of the Petitioner reveals that she now admits that she was called for an interview in July 2010, but reiterates her claim made in the petition once more. In replying to the job description of the post of Deputy Head of Finance, tendered by the 3rd Respondent as "3R6", the Petitioner claims that it was formulated only in January 2016, and that too after the instant application was filed before this Court. The Petitioner points out that the position now taken up by the 3rd Respondent, that the length of service is of little relevance to be promoted, primarily meant to cover up its own lapse in promoting a person with lessor experience. She further alleged that the explanation of the 3rd Respondent, as to the marks entered by the three members of the Board Nomination Committee in respect of the two contestants, reflect that they have allocated identical marks under each different criterion for both candidates. The Petitioner thereby claims that is a factor that seriously undermines the credibility of

the interview process. Therefore, the Petitioner contends that the sequence of events, as averred by the 3rd Respondent, is improbable and not credible.

Perusal of the related documents, in the light of the factual averments of the Petitioner as well as of the 3rd and 12th Respondents, the complaint of the Petitioner that she was denied of her promotion in 2009 for the first time, when the management made no response to her request, revealed that the management would promote an officer only when a vacancy is publicised by way of issuance of a Staff Circular. By calling applications from those who are eligible, the management would select the candidates and that too after an interview. The Petitioner's contention that the failure to acknowledge her request to be considered for a promotion, in relation to the 1st instance of alleged deprivation of promotion, is an instance where she did not comply with that established procedure but made a "*request*" instead. I find it difficult to accept that allegation as a one that has been substantiated in view of the material available. She herself admits that there was no vacancy notified by way of a Staff Circular, before she made her "*request*" for a promotion. Nonetheless, she was duly promoted to that post, but after the issuance of Staff Circular No. 6822/2009, and thereby following the proper procedure.

The allegation that the Petitioner has deliberately suppressed material particulars and made misrepresentations in her petition as to the circumstances related to the alleged deprivation of her promotion for the second time, therefore appears to be a one which is substantiated with documentary evidence. The Petitioner stated in her petition that in 2010,

after rescheduling the interviews twice, “ *the management of the bank refrained from filling the said vacancy for reasons unknown*”, despite she is the “*only officer in the bank who possessed the required educational and professional qualifications to be promoted the Grade of Deputy Head of Finance...*”. The 3rd Respondent effectively countered this claim and stated that the management did in fact conduct interviews on 27th and 28th of September 2010 for that post. The Petitioner too was called along with several other candidates for the interviews. The fact that the Petitioner was unsuccessful in securing a position among nine successful candidates, who were promoted consequent to that interview, was not disclosed in her petition. Her allegation that she was deprived her promotion is made upon suppression of that fact, which, had she chosen to disclose in the first place, would not have supported that claim. The extract of the Minutes of the Board of Directors containing the said selection process is tendered by the 3rd Respondent, marked as “3R4”. It is a contemporaneous document and therefore an item of strong and reliable evidence in this regard.

In terms of the said document “3R4”, the interview panel has interviewed a total of 39 candidates. Each of them was allocated marks by following a common but a structured marking scheme. The successful candidates were selected by totalling the marks allocated to each of them by the three members of the Committee and in the order of merit, judging from the final total. The fact that the Petitioner’s name is not included in the list of successful candidates is clear proof that she failed to satisfy the required criteria for the promotion. The Petitioner is bound to disclose the true facts, even though the disclosure may not have supported her cause.

The Petitioner, having presented an edited version of facts, and making an allegation that she was denied of her promotion for the second time on that misrepresented set of facts, displayed a conduct which is not an acceptable from a person who complains of infringement of fundamental rights and seeking an equitable remedy.

Similarly, the allegation of the third act of deprivation a promotional opportunity, as complained by the Petitioner is tainted with intentionally suppressing material factors. The 3rd Respondent states that the Petitioner was in fact interviewed as the only candidate for that post, but the Board of Nomination Committee was not impressed with her performance and therefore decided not to fill the vacancy of AGM- Finance. The 3rd Respondent too was present during the interview process and has vouched for the accuracy of these facts from his personal knowledge. He has tendered the extracts of Minutes of the Board of Nomination Committee of 31.03.2014 annexed to the Statement of Objections as "3R5".

Turning to consider the allegations levelled at the management of the 1st Respondent bank that, it facilitated the 12th Respondent to change her stream and thereby paved the way so that she could be promoted over the Petitioner, it must be noted in this regard that the Petitioner did not challenge the promotion of the 12th Respondent to the Grade of Deputy Chief Finance Officer, nor did she mount any challenge to the propriety of the latter's act of switching of streams, in terms of a Staff Circular. The references that were made to the existence of the two streams and also to the fact that the 12th Respondent was given a promotion to a post similar to the

one held by the Petitioner, after she had switched from her original stream, therefore of no significance in this context.

The allegation levelled by the Petitioner that she was systematically deprived of her due promotion, although she was the only qualified candidate to the post, in order to facilitate the 12th Respondent, to be promoted over her, by placing reliance on certain events that has taken place prior to the impugned interview therefore remains a mere unsubstantiated proposition, rather than an actual scenario that resulted in an actual discrimination. Despite the repeated failure to secure a promotion to the required Grade, the Petitioner did not challenge those decisions and chose to challenge only when the 12th Respondent was promoted, admittedly because, she being a younger employee, and with the impugned promotion her “... *entire professional career path of the Bank had been blocked*” (“P17”).

No doubt that the Petitioner is entitled to choose the stage at which she would mount a legal challenge to the validity of the alleged repeated acts of deprivation of her ‘due’ promotion by the 1st Respondent Bank. But when she eventually decides to take that path and tries to make out a case based on systematic deprivation of equal opportunity there must be some credible material that should have been placed before this Court in support that allegation, which she failed to do in this instance. Instead, the Petitioner has chosen to present a distorted picture before this Court by presenting an edited version of events with suppression of material factors.

After arriving at the said finding on the segment that covered the series of incidents up to the interview by which the 12th Respondent was selected, I shall now move on to the core of her complaint presented before this Court, in which she alleged that the said interviews process is bad in law in its entirety. The Petitioner contended the interview process is liable to be quashed for following reasons:

- a. the Bank did not provide any marking scheme or criteria prior to the interview and thereby failed to ensure that the interview process is a transparent one,
- b. each of the panellists who interviewed has failed to assess her merits independently,
- c. the selection criteria contained in paragraph 13 is unfair,
- d. the award of zero marks to the Petitioner over the assessment criteria "*business orientation of the Bank*" is unfair,
- e. the justification of the Respondents in their failure to promote her due to "*incompetence*", when her Performance Appraisal form indicates that she is "*Committed and Hard Working*",
- f. the allegation the Petitioner did not possess any experience relating to the duties of Deputy Head of Finance is wrong,
- g. that the interview panel should have allocated 30% of marks for her seniority in the Final Marking Sheet "*3R20*".

These multiple grounds could conveniently be dealt with by considering them after grouping them under three headings. The Petitioner's first concern is in the very process of interviewing, in which she alleged to have been treated unequally, unfairly and discriminately in comparison with her only other competitor, the 12th Respondent. She also heavily relies on her qualifications by repetitively asserting that she is the most qualified candidate for the post as the second head. She thirdly relies on her long service record with the 1st Respondent bank, which, according to her, should have been given adequate weightage by the panel, much more than it did, at the interview.

Before venturing to consider her contention under these three headings, I wish to make a brief reference to the underlying principle of law on which she has premised her complaint to this Court. Primarily the Petitioner seeks a declaration from this Court that her fundamental rights guaranteed to her under Article 12(1) were violated by the Respondents. Article 12(1) confers a fundamental right on all persons assuring that they are all equal before law and are entitled to equal protection of the law.

What Article 12(1) envisage in terms of equality is described by *Ranasinghe CJ* in *Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (1991) 1 Sri L.R. 11 (at p. 19) as “... among equals, the law should be equal and it should be equally administered: that like should be treated alike: that all persons are equal before the law and are entitled to equal protection of the law: that no citizen shall be discriminated against on grounds of race, religion, language, casts, sex, political, opinion, place of birth or any of such grounds.” Founded upon

this principle, this Court in *Samarasinghe v Air Lanka Ltd., and Others* (1996) 1 Sri L.R. 259, in relation to recruitment and promotions in the public sector, noted that (at p. 276), “[T]his Court has, in dealing with the equality provisions of the Constitution, insisted that while there should be proper schemes of recruitment and promotion, their implementation should not be tainted by caprice, bias or prejudice. Favouritism on the one hand or the evil eye on the other, necessarily militate against the very concept of equality and should, therefore, be abhorred. There must, in the public interest, always be honesty, openness, and transparency in regard to executive or administrative acts”. In the judgment of *Perera and Others v Monetary Board of Central Bank of Sri Lanka* (1994) 1 Sri L.R. 152, this Court further observed (at p. 167) that “[A] scheme of promotion must be justifiable in its formulation and just in its application. The law insists on justice and this, among other things, means that in the exercise of authority or power there must be just conduct. In the exercise of the power of recruitment, just conduct entails the even-handed treatment of those who might be affected by the exercise of a power”.

In the light of the principles enunciated in these judicial pronouncements, I now proceed to consider the validity of the interviewing process adopted by the 1st Respondent Bank. In terms of the Banking Act No. 11 of 2007, the Central Bank of Sri Lanka has published a set of directions applicable to all licensed commercial banks coming under its purview. The said set of directions “3R3”, provide for different committees to be appointed by the Board of Directors of those banks, under Rule No. 3(6)(i), and one such committee is for the purpose of making “nominations”.

The 1st Respondent bank, in compliance of the said Rule, appointed Committees consisting of different members each time it called for applications to fill vacancies that exists in its senior management level. Such a Nomination Committee is empowered to “ *implement a procedure to select/appoint new directors, CEO and key management personnel*” and also empowered to “ ... *set the criteria such as qualifications, experience and key attributes required for eligibility to be considered for appointment or promotion to the post of CEO and key management positions*” in terms of Rule 3(6)(iv)(a) and (c) of the said set of Directives (emphasis added).

There is no dispute that the post of Deputy Head of Finance indeed qualifies to be taken as a key management position in the 1st Respondent Bank. In terms of the Organisational Structure of the 1st Respondent bank “3R10”, the two Deputy Heads of Finance are expected to report directly to their immediate senior, the Head of Finance, who reports to the Chief Executive Officer/General Manager. Thus, the post of Deputy Head of Finance was placed in the third tier of key management positions of the 1st Respondent Bank. Being a position in the senior management, and termed as a ‘*key management position*’, the competence of the incumbent holder of the position has a significant bearing on the overall performance of the 1st Respondent Bank. Due to the impact that post would make on its affairs of the 1st Respondent Bank, unlike in the case of a lower grade officer, whose performance affects the organisation only in a limited sphere, it is reasonable to add more on weightage on competency than mere long service and seniority. In this regard, I find merit in the submissions of learned Counsel for the 1st to 11th Respondents that the 1st Respondent

Bank, being a licensed commercial bank, must compete with other private commercial banks and must have the most competent officers at its senior positions.

The single vacancy for the post of Deputy Head of Finance was announced and applications from eligible candidates were called by Staff Circular No. 7588/2015 "3R11". This Circular made reference to Staff Circular No. 392/2008 "3R7", which sets out the applicable "*Eligibility Criteria*". The Staff Circular "3R11" also informs the candidates that the selections will be made "*subject to an interview*" under item No. 3(1) and further states that only those who have completed a "*minimum*" period of service and possess the required academic and professional qualifications, could apply. Thus, the criteria set by the said Committee in that circular is restricted only to the qualifications, experience and key attributes that are "*... required for eligibility to be considered for appointment or promotion*". The word 'illegibility' in the said Rule should be noted and given meaning to.

In setting out the '*minimum*' requirements to be considered as being eligible to apply for the post in itself is an indication that it is not the final act of screening and there would be other requirements that an applicant might need to satisfy in order to qualify for the promotion. It is therefore reasonable to expect that the assessment of the suitability of each candidate for the promotion would be taken into consideration at the end of the interview process by the Board Nomination Committee, at which stage the candidate, who is most suited for the post, is selected to be recommended for promotion.

The selection of the candidates after an interview by a Board Nomination Committee has been the procedure consistently applied by the 1st Respondent bank, as indicative from the Staff Circular Nos. 392/2008 403/2009 (“3R12(b)”) (“3R7”), 7587/2015 (“3R12(a)”), 7588/2015 (“3R11”) and 7663/2016 (“3R12”). If an applicant is eligible to be applied to the post, then he is expected to perfect an application following the specimen provided, which will then be submitted through his Head of Department, who acts as a “*reporting officer*”. The application would thereafter be forwarded to the senior management along with a “*Performance Appraisal*” of the candidate by the reporting officer. All these documents were tendered, marked, “3R13” for perusal of Court. The Petitioner has no issues over the manner of selection, as set out in the Circular, i.e. by way of an interview.

Since this has been the procedure consistently adopted by the 1st Respondent Bank in selecting candidates for promotions, it is understandable that the Petitioner’s decision not to mount a challenge to the legality of the mode of selection made by the Board Nomination Committee through an interview. The Petitioner was subjected to same and identical procedure in all of her previous unsuccessful attempts to secure a promotion. Even, in her appeal addressed to the Chairman of the 1st Respondent Bank (“P17”), after the 12th Respondent was promoted to the post of Deputy Head of Finance, she did not complain either the procedure was wrong or the manner in which the interviewing process conducted was wrong.

One of the contentions presented by the learned President's Counsel in this regard is that the 1st Respondent Bank has failed to issue the marking scheme that would be adopted by the Board Nomination Committee in assessing the suitability of her candidacy for the post prior to the interview. Admittedly no marking scheme was issued by the 1st Respondent Bank to either of the two candidates prior to their interviews. In this respect, the Petitioner and the 12th Respondent were similarly circumstanced.

The desirability of making known the applicable marking scheme to the prospective candidates, prior to the selection process for recruitment as well as for promotions, although not insisted on as an imperative requirement, was already recognised by this Court. The judgments of *Perera and Another v Cyril Ranatunga* (1993) 1 Sri L.R. 39, *Perera and Others v Monetary Board of Central Bank of Sri Lanka* (supra), *Piyasena and Another v Peoples Bank and Others* (1994) 2 Sri L.R. 65, *Abeyasinghe and Others v Central Engineering Consultancy Bureau and Others* (1996) 2 Sri L.R. 36 and *Wijesuriya v National Savings Bank* (1997) 1 Sri L.R. 181 are some of the instances, where this requirement was consistently insisted upon. The underlying reason for the insistence of compliance of this requirement is, if such a scheme is publicised in advance, it affords an equal opportunity to all candidates in presenting their individual cases in the best possible manner, when facing their respective interview panels. That would ensure a level playing field for all candidates giving them the confidence that they will be selected through a transparent process.

However, the Petitioner's act of placing reliance on the failure to fulfil that requirement by the 1st Respondent Bank, could not be reconciled with her complaint before this Court, for the reason that her complaint against the interview process is founded on a totally different footing.

The Petitioner in her appeal addressed to the Chairman of the 1st Respondent Bank ("P17") complained that she entertains the thought that she "*... had been earmarked not to be given the promotion ...*". She then states in paragraph 30 of her petition to this Court that "*... the said interview process was flawed in as much as there was a failure to set out the manner in which marks would be allotted at the interview. The Petitioner verily believes that the interview was a sham interview done with the intent of giving legitimacy to the promotion of the 12th Respondent. The Petitioner states that if there were some intelligible criteria the Petitioner would have been entitled to be appointed to the impugned post. The Petitioner does not possess the mark sheets given at the interview ...*". Supporting her said allegation that the interview was only a "*sham interview done with the intent of giving legitimacy to the promotion of the 12th Respondent*", the Petitioner also states in paragraph 29 that "*... the Management of the 1st Respondent Bank waited for more than five years until the 12th Respondent obtained eligibility to apply for the Grade of Deputy Head of Chief Finance Officer.*" The Petitioner, based upon these accusations, submitted that "*... the process aforesaid demonstrated that the Bank waited till the 12th Respondent was promoted to Grade of Deputy Chief Finance Officer to fill the vacancy in dispute. It is further substantiated by cancelling the first two instances in which applications were called to fill the vacancy in dispute.*"

Obviously, the Petitioner makes a specific claim that she has been subject to an act of wilful discrimination committed by the 1st Respondent Bank, by extending an unwarranted preferential treatment to the 12th Respondent, in making the impugned selection for promotion. If the allegation of the Petitioner that the Board Nomination Committee was partial in their assessment in favour of the 12th Respondent, and that they acted in collusion with the management, which kept this vacancy for over five years vacant until the 12th Respondent became eligible to apply, is accepted, then it is reasonable to infer that, irrespective of the fact that the marking scheme was issued prior to the interview and the Petitioner was able to put her case across in the best possible manner, she would not succeed in securing the promotion anyway, as the Committee was pre-determined on whom they intend to select. Hence, in this particular instance, the impact of the failure to make the marking scheme known to the candidates prior to the selection, made on the final outcome of the interview is greatly reduced and thereby loses relevance.

In these circumstances, this Court must then proceed to decide the question whether the Petitioner has established that the interview conducted by the Board Nomination Committee, acted in a manner prejudicial to her interests, by arriving at a pre-determined finding made in favour of the 12th Respondent by treating her differently from the 12th Respondent.

In order to impress upon this Court that the Board Nomination Committee discriminated against the Petitioner, she has relied on following factors:

- a. she was not informed of her total marks at the close of the interview,
- b. mark sheets applicable to the Petitioner lacks the details in contrast to the marksheet 3R20,
- c. her period of long service, although not the only factor for consideration, should have been a one relevant to her promotion, but not considered,
- d. the mark sheets of the two candidates, although to be completed during the interview process, were completed subsequently to justify the appointment of the 12th Respondent, as the individual members of the interview panel have given identical marks under different headings, but were entered into mark sheets by one person
- e. allocation of marks by the Board Nomination Committee was not done in good faith.

In order to properly appreciate the Petitioner's contention on this issue, it is desirable that the different criteria, that were applied by the Board Nomination Committee, during the interview and in awarding marks to the two contestants are referred to at this stage. The different criteria on which the Board Nomination Committee has decided to evaluate the two candidates at the interview are as follows:

- a. Persuasive communication and presentation skills,
- b. Leadership in delivering of a strategic vision,
- c. Analytical ability with macro picture awareness,
- d. Business orientation,

e. Promoting team work and leadership capabilities.

Contesting the description of these different criteria, the Petitioner, in her counter affidavit, stated that the version presented by the Respondents is a “*improbable and not credible*” one for it is clear that the different heading under which marks were given have been prepared *ad hoc*. Learned President’s Counsel for the Petitioner also brought it to the attention of Court that the mark sheets on which the members of the Board Nomination Committee entered marks under each of these criteria bore identical handwriting. He therefore requests the Court to reject the explanation of the 3rd Respondent, that he wrote them down on the instructions of each Committee member, as a highly untenable and unlikely scenario, and further submitted that it also demonstrates the panel did not give any marking contemporaneously. Learned President’s Counsel further submitted that the identical marks given by each member under each criterion, seriously undermines the credibility of the interview. He referred to the fact that the decision to award a zero mark for the Petitioner over the criterion of business orientation of the Bank is unfair, in view of her immense contribution to “*uphold the business orientation of the bank*”.

It is advisable for this Court, before making an attempt to consider this particular aspect of the Petitioner’s case, to consider the scope within which the Board Nomination Committee has acted, in setting up the said criteria.

The 3rd Respondent, in paragraph 17 of her affidavit stated in relation to the post of Deputy Head of Finance, that the “ ... *said position is performance oriented and necessitates the incumbent to possess good presentation and communications skills, dynamism and a sociable personality especially as she has to represent the 1st Respondent Bank at forums such as Central Bank of Sri Lanka and other third party local and international institutions*”. He further avers that “ *[I]n fact criteria such as length of service and or seniority are not mandatory requirements specified in the eligibility criteria in the scheme of promotion for the post of Deputy Head of Finance.*”

The Petitioner, in seeking to counter the 3rd Respondent’s said assertion, merely states in her counter affidavit that, by placing reliance on the contents of the said averment, the 1st Respondent Bank is deliberately making an attempt to convince this Court of the fact that she was not qualified to hold the relevant post.

Given the importance of the post of Deputy Head of Finance, in the organisational structure of the 1st Respondent Bank, I am inclined to accept what the 3rd Respondent has said in his affidavit, in terms of the mode of assessments carried out at the interview, as the Board Nomination Committee was, by then, fully possessed itself of the educational, professional and other qualifications of the two applicants, along with their “*Performance Appraisals*”, that were endorsed by “*reporting officers*” who inserted their observations. It also had the benefit of the “*Performance Evaluations*” made by another committee “3R14”, made in respect of the two candidates, among several other candidates. In this evaluation the Petitioner received a “C” ranking by coming within the band of 17 -23

marks, whereas the 12th Respondent received a “B” ranking, by securing marks within the band of 24 – 29.

It is therefore reasonable to expect that the Board Nomination Committee is only left with the evaluation of the candidates by testing their suitability to the requirements of the post to which the promotion is sought and that too at the interview, founded upon an intelligible differentia, between the two competitors. *Amerasinghe J, in Ragunathan v Jayawardene, Secretary ,Ministry of Transport and Highways and Another* (1994) 2 Sri L.R. 255, observed that (at p. 256) “[A]rticle 12 of the Constitution does not preclude the imposition of qualifying examinations, selective tests and other criteria for selecting or promoting public officers to assure efficiency.” More importantly, his Lordship further observed that “[T]he distinction between those qualified for promotion and those who were not was therefore founded upon an intelligible differentia.” Similarly, in *Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (supra), it was held that (at p. 19), “ ... the equality of opportunity takes within its fold all stages of service from initial appointment to its termination including promotion, but that it does not prohibit the prescription of reasonable rules for selection and promotion applicable to all members of a classified group.” Hence, the Petitioner and the 12th Respondent, after being appointed to the Grade of Deputy Finance Officer, could then be taken in as “members of a classified group” who should have been treated as equals when facing the interview.

The marks that were awarded at the interview by the Board Nomination Committee to the two contestants are tabulated below:

	Persuasive Communication and Presentation skills (2 marks)	Leadership in delivering of a strategic vision (5 marks)	Analytical ability with micro picture awareness (1 mark)	Business orientation (1 mark)	Promoting team work and leadership capability (1 mark)	Total
Petitioner	1	2	1	0	1	5
12 th Respondent	2	3	1	1	1	8

The Petitioner now seeks to challenge the credibility of the claim made by the 3rd Respondent of utilisation of different criteria at the interview on the basis that it has been adopted on an *ad hoc* basis and the management did so only after this Court granted leave to proceed in the instant application. Despite challenging the fact that an interview was conducted on a set of criteria determined by the Board Nomination Committee, the Petitioner, in her petition itself complains that she was not informed of her total marks, at the close of the interview, indicating that the said Committee, in fact has awarded marks to the two contestants, probably based on those criteria. In consideration of the complaint that the Petitioner received only zero marks for '*business orientation*', it must be noted that the total marks that could have been awarded under that

particular criterion is limited to just one mark. In that scenario, if the Petitioner could not perform to the expected level, then there is no other option left for the Board Nomination Committee other than to award only zero marks, for if she is given one mark, that would indicate that she did possess the required skill to the satisfaction of the Committee. *Mark Fernando J in Piyasena and Another v The People's Bank and Others* (1994) 2 Sri L.R. 65 made the following observation (at p. 71) in this regard:

"[I] must not be understood as suggesting that a strict allocation of marks for each such factor was necessary; especially at this level of management that would unduly constrict a fruitful selection process. For example, one or two extraordinarily innovative strategies for development might win one candidate full marks for interview performance, just as a serious deficiency in management capabilities may lead to the conclusion that any further promotion of another candidate would be detrimental to the institution. I am also not of the view that a proper selection process must necessarily incorporate a marking scheme; but if selection is to be on the basis of marks, then the scheme must be clear, fair, and uniform".

The other complaint is the identical handwriting that appears in the mark sheets, and the probability of the 3rd Respondent's claim of entering the marks by himself. Her complaint is that the mark sheets of the two candidates, which should have been completed during the interview process, were completed subsequently in order to justify the appointment of the 12th Respondent, as the individual members of the interview panel

have given identical marks under different headings, but those marks were entered into respective mark sheets by a third person.

This aspect was first brought to the notice of Court by the 3rd Respondent in his affidavit. He has offered an explanation. According to the 3rd Respondent, he is tasked by the Committee to enter marks, as indicated by each of the members at the end of the interview, and that too after having arrived at consensus among them. This explains the identical marking given by all three members under a given criterion. As to the probabilities of the 3rd Respondent being tasked to enter the marks, he tendered similar entries that were made in respect of other interviews, marked as "3R20" indicating that it was his own handwriting that appears in them as well. The Petitioner brought up this issue only in her counter affidavit and that too after the 3rd Respondent, in his affidavit has sufficiently explained this factor.

The remaining complaint that should be examined in relation to the allegation of the Petitioner is made on account of her long period of service was not considered by the Board Nomination Committee. It has already been referred earlier on in this judgment that the post of Deputy Head of Finance is a performance oriented senior position in the management of the 1st Respondent Bank and therefore, as the Petitioner herself concedes that her long service, although not the only factor for consideration, is only a one relevant factor, among many others.

The eligibility criteria, as set out paragraph 6 in the said circular, for the said post are as follows:

- “a. A good record of service*
- AND*
- b. Deputy Chief Finance Officer with associate membership of ICA/ACCA/CIMA*
- OR*
- c. Final examination of ICA/ACCA/CIMA with 2 years’ experience in the grade of Deputy Chief Finance Officer*
- OR*
- d. Intermediate/Part II level qualifications of ICA/ACCA/CIMA with a minimum of 3 years’ experience in the grade of Deputy Chief Finance Officer and should have 18 years’ experience in the bank of which 8 years in the Finance Division.”*

The Petitioner, in her application opted to place her eligibility under “Para 6 (a) and (b)” whereas the 12th Respondent placed her eligibility under “Para 6 (b) only. The Petitioner, although had 18 years of service by then, could not apply under Paragraph 6(d), as she did not have the other eligibility requirement of 8 years in the Finance Division. With the insertion of this paragraph in setting out different eligibility criteria, the 1st Respondent Bank, offered due recognition for seniority but insisted that the applicant should have a significant part of his seniority in its Finance Division. Hence, the Petitioner cannot claim that her long service should have been the primary factor at the interview, when the Board Nomination Committee devised its own criteria to assess the candidates, based on the requirements of the 1st Respondent Bank. None of the candidates opted to

rely on their respective service periods as a basis upon which they claim eligibility to apply for the post.

Having set up the different criteria on which the Committee intended to select the candidate to be recommended for promotion, it has proceeded to conduct the interviews on two consecutive days. It is not clear whether the two candidates were interviewed by the Board Nomination Committee on both these days or whether it interviewed each candidate on different days. Whatever the manner the two candidates were interviewed on, it is clear that the Committee has devoted sufficient time for each of the candidate to impress upon it of their suitability for the post in the best possible manner. The Petitioner opted not contest that position.

At the end of the interview process, what the Committee did was to allocate marks to each of the two candidates, in respect of each criterion. After adding up the individual total scored by each of the candidates, the Board Nomination Committee made the recommendation that the 12th Respondent be promoted to the post of Deputy Head of Finance as she has scored the highest. When the Board Nomination Committee made the selection on the basis of marks each candidate was given on different criteria, and after selecting the 12th Respondent to be nominated to the post on the basis of she is the highest scorer, it had applied an *intelligible differentia*, based on the performance of each of them in the interview. The Petitioner and the 12th Respondent, who upon being roped into a group of Deputy Chief Finance Officers, are candidates who should have been treated as equals, but prior to the interview. However, after the interview

was concluded, and with the assessment made by the Board Nomination Committee over the marks that should be given to each of them on multiple criteria on which that interview was conducted, the highest scorer then by virtue of that fact becomes an unequal to the other candidate. The Petitioner who scored less and therefore could not be treated as an equal to her former colleague.

What the equality before law and equal protection of law, assured on the Petitioner by Article 12(1), connotes was dealt by *Sharvananda* CJ in the judgment of *Perera v University Grants Commission* F.R.D.(1)103 (at p. 114). His Lordship stated that “... *discrimination to be violative of Article 12 must be discrimination between equals; that no infringement of Article 12 is involved where unequal’s are treated differently; that the intelligible differentia required to support a permissible classification must distinguish persons or things that are grouped together from others left out of the group, and must have a reasonable relation to the object sought to be achieved; that there must be some rational nexus between the basis of such classification and the object intended to be achieved by such classification.*”

The two tests, in determining what is a permissible classification, namely that it “*must have a reasonable relation to the object sought to be achieved; that there must be some rational nexus between the basis of such classification and the object intended to be achieved by such classification*”, as applied by *Sharvananda* CJ, was referred to and applied by *Ranasinghe* CJ in *Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (supra, at p. 20).

The 3rd Respondent in the Statement of Objections has annexed a document, which sets out the nature of the responsibilities that the post of Deputy Head of Finance carries. The documents titled "Job Description - Deputy Head of Finance", tendered as "3R6" states under the title "summary of the job", that he is "... responsible for providing of accurate and timely management of information on Bank's performance monthly, quarterly and annually, responsible for providing information requested by other internal departments and external parties such a Central Bank of Sri Lanka, Government Ministries, Fitch Ratings etc. It includes the responsibility for handling annual report work and implementation of Sri Lanka Accounting Standards (including 32&39, SLFRS 7) in the Bank. Responsible for the Sustainability Reporting and GRI (Global Reporting Initiatives) in the Bank."

Perusal of the said job description seemed to suggest that the post of Deputy Head of Finance is primarily responsible for timely dissemination of accurate information of the Bank's performance to multiple local and foreign agencies all year round. It is therefore reasonable to assume that in order to fulfil that responsibility effectively, the candidate who aspires to take on that post, must have an overall familiarity of the workings of almost all the Departments of the Bank, and particularly an in-depth knowledge of its Finance Department. This factor is highlighted when one considers the requirement that, in addition to acting as the primary interface between the Bank and other related entities and ensuring maintenance of banking standards, the Deputy Head of Finance is also responsible to " highlight special improvements and negative trends to the management in order to take necessary actions."

The key competencies/skills that are listed out therein includes *“a good understanding of the accounting standards and previous working experience in a bank/financial organisation/finance department is a must to handle this job”*. In her counter affidavit, the Petitioner, after highlighting that the document “3R6” was created subsequent to her filing of the instant petition before this Court and even though having portrayed it as an attempt by the bank to convince this Court that she is not qualified to the post, states that she had already presented *“... ample evidence to substantiate my presentation and communications skills and dynamism.”*

The fact that the contents of the document “3R6” was formulated on 01.01.2016, and subsequent to the Petitioner coming before this Court is undisputed. However, as learned Counsel for the Respondents submitted, the fact remains that the Petitioner too, by highlighting her own credentials that aligns with the job description as described therein and claims that she too has the required skills, thereby tacitly accepted the contents of that document as reflecting the correct job description of a Deputy Head of Finance.

It is a fact that the Petitioner is an accomplished communicator as she acted as a resource person in multiple training programs conducted by the 1st Respondent Bank passing valuable knowledge to her junior colleagues. She has won the title of “Competent Communicator” from the Toastmasters International Communication Program in 2014, in addition winning many other awards. But what is relevant here is the communication skills, in terms of the responsibilities that are associated with the post of Deputy Head of Finance, which in turn necessitates a

thorough understanding of the workings of the Finance Department of the 1st Respondent Bank. The job description too highlights this necessity by emphasising on the importance of “*previous working experience in a bank/financial organisation/finance department is a must to handle this job.*” The Petitioner has long experience in Internal Audit and Risk Management. She has never served in the Finance Department of the 1st Respondent Bank, whereas the 12th Respondent, has work experience in that Department, for a period of more than 11 years.

When viewed in this backdrop of factors, it is not surprising that the 12th Respondent has performed better than the Petitioner in almost all the different criteria, which meant to test the suitability of the two candidates for the vacancy of the post of Deputy Head of Finance, as she has a distinct edge over her rival in the field of finance. It is this factor that led to the ultimate result, which secured the promotion to the 12th Respondent, now challenged under these proceedings.

I have already referred to the different criteria on which the Board Nomination Committee has adopted to evaluate the two candidates during the interview in this judgment. It is of relevance to reproduce them once more here at this stage to highlight a slightly different aspect. This became necessary as the *intelligible differentia*, on which the 12th Respondent was recommended to be promoted, needed to be tested for reasonableness of that classification. The criteria adopted by the Board Nomination includes the following:

- a. Persuasive communication and presentation skills,

- b. Leadership in delivering of a strategic vision,
- c. Analytical ability with macro picture awareness,
- d. Business orientation,
- e. Promoting team work and leadership capabilities.

It is my considered view that these criteria, adopted by the Committee to select the most suitable candidate to be recommended for promotion, when viewed against the job description of the post of Deputy Head of Finance, satisfies the two tests applied by this Court in *Perera v University Grants Commission* (supra) and *Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (supra).

Learned Counsel for the 1st to 5th, 10th and 11th as well as the 12th Respondents contended that the selection was made strictly on the basis of merit as the nature of the responsibilities of the post, and the criteria set up by the Committee to be in line with those requisites, warranted a competent person to be selected as the Deputy Head of Finance and the 12th Respondent found to be the most suitable of the two candidates for the said post.

The examination of the criteria set up by the Board Nomination Committee, also reflects that it intended to screen the two contestants on their relative merits rather than totally on their seniority in the 1st Respondent Bank. The merit component seems to have weigh more in the selection process, as the 3rd Respondent states that the candidates were to be assessed on their performance. In this context it is relevant to refer to an

observation made by Mark Fernando J in *Perera and Another v Cyril Ranatunga, Secretary Defence and Others 93/1/39*, (at p. 43) “ ... ‘merit’ must be considered in relation to the individual officer, as well as requirements of the post to which he seeks promotion. ... It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skill required for the efficient discharge of the functions of that post, and the service to be rendered.”

His Lordship further observed that (at p. 46) “ ... the weightage given to seniority vis-à-vis merit can vary. Less weight may legitimately be given where the post involves onerous responsibilities and requires special skills and aptitudes and correspondingly, greater weightage given to ‘positive’ merit and the candidate’s skills and aptitudes.” In this instance of course, there cannot be a dispute that the post of Deputy Head of Finance fits perfectly into the description that “the post involves onerous responsibilities” and therefore to select a candidate with “special skills and aptitudes” by giving “greater weightage ... to ‘positive’ merit and the candidate’s skills and aptitudes.” This reasoning of Fernando J in *Perera and Another v Cyril Ranatunga, Secretary Defence and Others* (supra) was consistently adopted in *Abeyasinghe and Others v Central engineering Consultancy Bureau and Others* (1994) 1 Sri L.R. 152 and in *Ariyasinghe v State Timber Corporation and Others* (1996) 2 Sri L.R. 48. In *Dharmaratne and Another v Sri Lanka Export Development Board and Others* (1995) 2 Sri L.R. 324, Fernando J thought it fit to add another factor to the said pronouncement by stating that (at p. 337) “[T]he weightage to be given, to seniority and other criteria, was a matter within the discretion of the interview board.”

His Lordship thereupon reiterated once more (also at p. 337) that “ ... [T]he weightage for seniority must depend on the nature of the post: the greater its responsibilities, more the justification for giving greater weightage for factors relevant to merit and ability, and performance.”

Thus, in view of the considerations I have referred to in the preceding paragraphs, the impugned selection of the 12th Respondent is qualified to be taken in as an instance where “ ... equality of employment opportunity admits discrimination with reason and prohibits discrimination without a reason” as observed by Ranasinghe CJ in *Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (supra, at p.22). In these circumstances, despite the fact that prior to the interview, both the Petitioner as well as the 12th Respondent could be grouped together as equals, they could not be treated as equals any longer with the 12th Respondent scoring higher marks and, in the circumstances, as Amerasinghe J observed in *Ragunathan v Jayawardene, Secretary ,Ministry of Transport and Highways and Another* (supra, at p. 256) to “ ... treat the petitioner and 3rd respondent as equally entitled to promotion would be improper, for it would result in treating unequal's equally.”

Having dealt with the issues of whether the criteria on which the candidates were assessed and the *intelligible differentia* on which the 12th Respondent was recommended to be promoted, I now turn to the remaining part of the complaint of the Petitioner that she was wilfully discriminated by the 1st Respondent Bank, by affording preferential treatment to the 12th Respondent. This was the complaint she made to the

Chairman of the 1st Respondent Bank in her appeal (“P17”). She stated, “[I] wonder if I had been earmarked not to be given the promotion (for reasons I do not know) when all the facts mentioned above are taken together”, after the 12th Respondent was selected to the post.

The complaint of being discriminated by denying her a due promotion was more formally made by the Petitioner in her petition addressed to this Court as the primary ground of complaint. The Petitioner states that she was systematically deprived of her promotion over several years and made references to several instances during which the 1st Respondent Bank made announcements to fill the vacancy, long before the impugned interview was held. In relation to the last of the interviews, which is impugned in these proceedings, the Petitioner stated that she “... verily believes that the interview was a sham interview done with the intent of giving legitimacy to the promotion of the 12th Respondent”, an averment the 3rd Respondent specifically denied by stating that the “... candidates are judged by testing their suitability to the requirements of the post to which the promotion is sought”.

Thus, the manner in which the interview was conducted becomes the very foundation on which the Petitioner’s claim of discrimination is built on.

Strangely, the Petitioner did not describe the manner in which the interviews were held by the Board Nomination Committee. It is in the Statement of Objections that the 3rd Respondent has set out the different

criteria, which were adopted by the Board Nomination Committee to award marks to the candidates at the interview and the manner in which the two interviews were held. The 3rd Respondent too has participated in these interviews, in his capacity as the Secretary to the Borad of Directors, and therefore provided direct evidence as to the manner in which the interviews were conducted. The Petitioner tendered a counter affidavit by which she denied most of these averments and presented certain set of circumstances over some selected instances, by which she made an attempt to address to the issues that were taken up by the 3rd Respondent in the Statement of Objections.

The Petitioner, however, is conspicuously silent on what exactly happened during the interview and the manner in which the Board Nomination Committee has treated her and considered her suitability to the post. Clearly there is no allegation made by the Petitioner that the Board Nomination Committee has acted in a hostile manner, treated her shabbily or was indifferent and thereby prevented her from presenting her suitability for the post in an effective manner before the Committee. Neither she states that it acted *mala fide*, during that process. This is an important factor, particularly in view of the Petitioner's allegation that the 1st Respondent has kept the vacancy for five consecutive years without filling it by promoting her, all the while patiently waiting until the 12th Respondent became eligible to apply for that vacancy and the Committee too participated in that conspiracy by in acting in collusion with the 1st Respondent Bank, in selecting the 12th Respondent overlooking her. If the

Committee was determined to fail the Petitioner from the selection process by acting on a pre-agreed terms with the management, all it needs to do was to make it difficult for the Petitioner to put across her case effectively.

Despite describing the interview as a sham interview, conducted “with the intent of giving legitimacy to the promotion of the 12th Respondent”, the Petitioner in her petition, did not accuse any individual member or the Board Nomination Committee of having taken part in a conspiracy with the 1st Respondent Bank by agreeing to somehow select the 12th Respondent to the post of Deputy Head of Finance, and in the process to totally disregarding the Petitioner’s educational, professional qualifications and of her performance during the interview in order to discriminate her.

Similarly, there is no specific factual allegations made by the Petitioner against the Committee that the criteria that has been adopted at the interview to award marks to the two candidates, except to state that it was adopted on an *ad hoc* basis after she complained to this Court. There is no explanation in the counter affidavit as to why the Petitioner failed to disclose any factual assertions in relation to the manner in which the Committee has conducted the interview. Her complaint against the Committee is confined to her being awarded with only a zero mark under the criterion for Business Orientation of the Bank. These individual complaints against some aspects of the interview, which has no bearing on

the allegation of discrimination, and were already dealt with and need not be reconsidered once more at this stage. The complaint that the interview is a sham, is also tied to the Petitioner's allegation of multiple deprivations of opportunity for a promotion, as an essential component. That part offers no support to the Petitioner's allegation of denial of her right to equality by discrimination.

This Court, in the judgment of *Elmore Perera v Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others* (1985) 1 Sri L.R. 285, held that (at p. 323) “... relief cannot be granted in proceedings under Article 126 in the absence of proof of hostile discrimination evidencing unequal treatment.” The judgment of *Samarasinghe v The Bank of Ceylon Ltd.*, (1979) 1 Sri L.R. 221, also considered the question of the required degree of proof to which a petitioner must satisfy this Court, after making an allegation of discrimination. The Court held (at p.229) that “... the petitioner has not displaced the burden which is upon him to set out facts required to support the plea of discrimination. He has not placed any cogent and convincing evidence to establish discrimination.” In this instance too I hold that the Petitioner has failed to discharge that burden to the required level of proof.

In view of the reasons set out herein before, I am of the view that the Petitioner has failed to establish that the 1st to 11th Respondents have infringed her fundamental right to equality by discrimination, in selecting the 12th Respondent to fill the vacancy for the post of Deputy Head of

Finance in the 1st Respondent Bank, on a balance of probability with cogent and convincing evidence.

Accordingly, the petition of the Petitioner stands dismissed.

I make no order on costs.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ.

I agree.

CHIEF JUSTICE

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT