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DIGEST

(g) a ' For Sale' advertisement;

(h) a domestic name plate;

(i) a name plate not exceeding 09 square meters in area, used for professional purpose;

(j) an advertisement on a vehicle used for trade purposes displaying the name and address of the owner of that vehicle;

(k) an advertisement relating to the trade or business carried on in the premises upon which such advertisement is displayed.

Part II of the said set of by-laws, refers to the other relevant provisions pertaining to advertisements. The learned Counsel for the 1st to 5th respondents submitted that the by-laws referred to above are the currently applicable by-laws and the 4th respondent too had averred to this effect in his affidavit of 30.11.2007.

It is therefore abundantly clear that there was a set of valid by-laws in addition to the aforementioned guidelines pertaining to advertisements within the city limits of the 1st respondent Council area. The contention on behalf of the 1st to 5th respondents, as stated in the affidavit of the 4th respondent is that the question whether the hoardings set up at various locations referred to in the petition in violation of the guidelines does not arise since the operation of the said guidelines had been suspended by the 3rd respondent. Although the learned Counsel for the 1st to 5th respondents strenuously contended that the guidelines in question were not adequate for the purpose it was intended and that they had not obtained legal sanctity, there was no reference made to the applicability of the by-laws approved by the members of the Municipal Council and published in terms of the Municipal Councils Ordinance in the Gazette of 20.01.1989. Specific reference was however, made to the by-laws of 1948 (R9) being 'archaic and in need of drastic changes to suit socio

economic environment at present'. The question however, arises at this juncture as to whether the 3rd respondent could have taken the decision to suspend the guidelines in question as stated earlier with just a stroke of a pen and totally ignore the by-laws enacted in terms of the provisions of the Municipal Councils Ordinance.

The law regarding the waiver, relaxation and repeal of by-laws of local authority has no ambiguities as there is no possibility for a local authority to waive its by-laws unless there is specific provision contained in the by-law itself. Referring to this position, Charles A Cross (Principles of Local Government Law, 6th Edition, pg.123) stated that,

> "An authority has no power to waive its by-laws or to relax them in any respect unless the by-laws themselves contain provisions enabling this to be done (it is highly improbable that by-laws containing a dispensing power would be confirmed) or else there is specific statutory provisions for waiver or relaxation."

This position was considered as far back as in 1899 by Day,J.in *Yabbicom v King* [(11)], where it was categorically stated that,

> ". . . by-laws properly made have the effect of laws; a public body cannot any more than private persons dispense with laws that have to be administered; they have no dispensing power whatever."

When the 3rd respondent had decided to suspend the guidelines, he had not stated about the applicability of the by-laws. A careful examination of the letter from the 3rd respondent to the Director Engineering (Projects) however, reveals that there is no reference to the applicability of by-laws enacted and published in the Gazette Notification dated 20.01.1989. In these circumstances the question arises as to whether the 3rd respondent's decision to suspend the

application of guidelines and by-laws without any authority from the 1st respondent Council could be regarded as lawful and not an arbitrary decision. The answer to the question is clearly in the negative for the reasons set forth in the following paragraphs.

The allegation of the petitioner is that the failure of the 1st to 5th respondent to remove a large number of unauthorized hoardings erected and further granting of purported approval for the erection of hoardings within the city limits of the 1st respondent Council area contrary to applicable by-laws and guidelines had infringed the fundamental rights of the petitioner' and of the resident's of the CMC area guaranteed in terms of article 12(1) of the Constitution.

Article 12(1)of the Constitution deals with the right to equality and reads as follows:

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

Equality, which is a dynamic concept, forbids unfairness and arbitrariness. The Concise Oxford Dictionary of Current English (7th Edition, pg. 44) refers to an arbitrary decision as,

> "Derived from mere opinion or random choice; capricious; unrestrained, despotic."

Referring to arbitrariness, in *E. P. Royappa v. State of Tamil Nadu* (12) it was stated that equality is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. In the words of Justice Bhagwati (as he then was),

> In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both

according to political logic and constitutional law and is therefore violative of Article 14. . . ."

The summation of these concepts is that in terms of the Constitution everything must be carried out according to the rule of law. The concept of the rule of law has many meanings and out of which an important and relevant aspect is that the functions of the authorities should be conducted within a framework of recognized rules and principles, which would restrict discretionary power. Professor Wade refers to the picturesque language of Coke, where he had described this position as 'the golden and straight metwand' of law as opposed to 'the uncertain and crooked cord of discretion' (Administrative Law, supra pg. 20).

Although Dicey in his theory had explained that in classical constitutional law wide discretionary power was incompatible with the rule of law (A. V. Dicey, Law of the Constitution, 9th Edition, pg. 202), this concept does not hold good in today's context and in practical terms what is necessary would be not to eliminate the wide power of discretion, but the control of its exercise.

This general principle had remained unchanged for centuries and in Coke's words (Administrative Law, supra page. 351),

> "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit.*"

It is interesting to note that the general principle which was evolved since the *Rooke's* case in 1958 (Administrative Law, supra) was followed continuously in related matters and the decision in *Westminister Corporation v.*

London & North Western Railway[13], where Lord Macnaghten, stated with reference to a local authority's power to erect public conveniences that,

> "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

This position was further illustrated with approval by Lord Denning M.R. in *Breen v Amalgamated Engineering Union* [14], referring to the land mark decision in *Padfield v Minister of Agriculture, Fisheries and Food* [15], where it was stated that,

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield v Minister of Agriculture, Fisheries and Food,* which is a land mark in modern administrative law."

It is therefore apparent that a public authority has no absolute or unfettered discretion. Referring to this position, Professor Wade (supra pgs. 354-355) had stated that,

> "**Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely –** That is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended" (emphasis added).

Learned Counsel for the petitioner contended that the manner in which the approval was granted for the hoardings and how they were allowed to be displayed constituted a grave abuse of power and violation of the doctrine of public trust and the 1st to 5th respondents were liable in terms of section 12(1) of the Constitution.

This Court in *Bulankulama and others v Secretary, Ministry of Industrial Development and others (supra)* had carefully considered the concept of public trust and had held that the 'organs of State are guardians to whom the people have committed the care and preservation of the resources of the people'. This position was referred to in the Supreme Court Determination on 'Land Ownership' (Decisions of the Supreme Court on Parliamentary Bills, 1991 – 2003, Vol. VII pg. 455), where it was stated that, 'from the time immemorial, land had been held in **trust** for the people in this island republic'.

The concept of public trust had been followed in several judgments of this Court and now it is an accepted doctrine that the resources of the country belong to the people; Sri Lanka's sovereignty is in the people in terms of Article 3 of the Constitution and is inalienable and includes the powers of government, fundamental rights and the franchise; and the people have committed the care and preservation of their resources to the organs of the State, which are their guardians or trustees.

In such circumstances, the 1st to 5th respondents have a fundamental duty as specified in Article 28(d) 'to preserve and protect public property, and to combat misuse and waste of public property'. Furthermore the learned Counsel for the petitioner contended that the arbitrary methods of approving hoardings in a non-transparent manner had serious lapses of financial accountability. The 1st respondent Council, which has a history of over one hundred and twenty two years, is the

largest and the oldest Minicipal Council in the country. Revenue from an independent source, which is an essential commodity for any local authority, could have been enhanced, if the 1st respondent Council had utilized the applicable by-laws and the guidelines in granting approval for the hoardings.

Accordingly it is apparent that by the process, which was followed by the 1st to 5th respondents, the 1st respondent Council would have lost a substantial amount of income, which could have been put to good use for the upliftment, not only of the capital city, but also of its residents.

Learned Counsel for the 1st to 5th respondents contended that the guidelines, which were suspended did not provide for many important aspects of advertising. It had not made provision to prevent covering the public view, and no provision regarding the safety of the public. Furthermore, there was no provision for competitive transparent bidding procedure in awarding the bill boards and hoardings to advertisers. It was also contended that the existing bylaws were archaic and outdated and in need of drastic changes to suit the present socio-economic environment.

Learned Counsel for the 1st to 5th respondents had further contended that the 1st respondent Council received only the annual fee of Rs. 20,000/- per hoarding regardless of the location of the hoarding. It was conceded referring to the documents marked P9(a) to P9(e) that the Road Development Authority had fetched millions of rupees adopting the competitive bidding process.

There were five (5) documents submitted by the petitioner along with his petition marked P9(a) to P9(e). These documents refer to the charges levied by the Road Development Authority in the year 2007 for the erection and maintenance of hoardings, gantries, cantilevers and overhead bridges. The relevant portions of these documents are re-produced

below, since they indicate the income that could be generated through this process.

". . . . Permission for erection and maintenance of hoardings at Peliyagoda abundant bridge on Colombo – Kandy road.

This refers to the auction held at Ministry of Highways on 16.01.2007 on the above.

You are required to do the following prior to the erection of hoarding.

Make payment of Rupees **Seven Million Nine Hundred and Twelve Thousand and Five Hundred + 15% VAT (Rs. 7,912,500.00 + 15% VAT)** by a Bank draft. . . .

1. You are required to erect, maintain and removal of the above hoarding strictly in accordance with the conditions for erection, maintenance and removal of hoardings on National Highways. . . . (P9a)

Permission for erection and maintenance of gantries and cantilever on Cotta Road.

. . . Make payment of Rupees One Million Six Hundred Thousand + 15% VAT (Rs. 1,600,000.00 + 15% VAT by a Bank draft. . . (P9b)

Permission for erection and maintenance of gantries, cantilevers and overhead bridges on Marine Drive.

. . .

This it to inform you that you are the successful bidder at the above auction for installing and maintaining of **02 Nos. full gantries, 04 Nos. cantilevers and advertising space of 02 Nos. overhead bridges on Marine Drive.**

. . . .

Make payment of Rupees Two Million Eight Hundred Thousand + 15% VAT (Rs. 2,800,000.00 + 15%VAT) . . . (P9c)

Permission for erection and maintenance of gantries and cantilevers on W. A. Silva Mawatha.

. . . .

This is to inform you that you are the successful bidder of the above auction for installing and maintaining **of 03 Nos. full gantries and 02 Nos. Cantilevers on W.A. Silva Mawatha**

. . . .

This is to inform you that you are the successful bidder of the above auction for installing and maintaining **of 03 Nos. full gantries and 02 Nos. Cantilevers on W. A. Silva Mawatha.**

. . . .

Make payment of Rupees One Million Nine Hundred Thousand + 15% VAT (Rs. 1,900,000.00 + 15% VAT) . . . . (P9d)

Permission for erection and maintenance of hoarding on Baseline Road.

. . . .

This is to inform you that you are the successful bidder at the above auction for installing and maintaining of **35 Nos. hoardings on Baseline Road.**

. . . .

Make Payment of Rupees Six Hundred Thousand + 15% VAT (Rs. 6,600,000.00 + 15% VAT). . . . (P9e)" (emphasis added).

It is common ground that the 1st respondent Council had charged only a maximum of Rs. 20,000/- per annum per hoarding. The aforementioned documents clearly illustrate the amount of revenue the 1st respondent Council could have earned through such hoardings. In fact guideline 18 of the document marked P4 refers to the fact that hoardings could be awarded to advertisers by calling for tenders. Even in the event that there were no proper guidelines, the 1st respondent Council could have formulated relevant guidelines either to allow tenders or to conduct auctions. Irrespective of the method used, it is not disputed that, this would have paved the way for the 1st respondent Council to enhance its revenue from an independent source of income.

Learned Counsel for the petitioner submitted that it is common ground that even a newspaper advertisement of a full page in an insignificant page of a widely circulated newspaper would cost over Rs. 350,000/-. In such circumstances, it is surprising that the 1st respondent Council, presumably being aware of how advertising space was given by other organizations such as the Road Development Authority, took no steps at least on a temporary basis, until such time the guidelines were implemented, to levy a fee commensurate with the other comparable institutions.

Learned Counsel for the 1st to 5th respondents submitted that the 1st respondent Council had levied license fees in terms of Council Resolution No. 2061 (sanctioned on 28.06.1996) and that it is necessary to revise the present fees.

Accordingly learned Counsel for the 1st to 5th respondents contended that it was the sole responsibility of the members of the 1st respondent Council to impose appropriate license fees and to prepare a new set of by-laws to regulate the setting up of hoardings.

Whilst such was the situation, the 3rd respondent had taken steps to suspend the guidelines without making any

arrangements as to the procedure that should be applicable regarding the erection of hoardings in the interim. At the time the guidelines were suspended no reference was made to the applicability of the prevailing by-laws. Accordingly it is not disputed that due to the said action of the 3rd respondent, several illegal hoardings had come up within the city limits of Colombo without any consideration for the safety of the general public or the scenic beauty of the capital city of the country.

Advertising, it is to be noted, has been used by the commercial enterprises and the business community for the purpose of promoting their products and has become a thriving industry in the commercial world. Considering its competitiveness in today's context, advertising, which in its purest form is an art, alone had become a booming industry, which should not be stifled. It is also to be noted that the creativity and the variety of out door advertisements carried out in an organized manner could add colour, vividity and luster to a city centre.

However, it is to be admitted that there should be a policy, guidelines and bylaws to regulate the erection of hoardings, bill boards, gantries and any other mode used for the purpose of exhibiting advertisements. These regulations should have the requirement in issuing licenses for such hoardings etc. in public places as well as in private places. When public places are concerned, it is not disputed that the State or the local government institutions concerned has the authority to regulate them. As stated in *Saghir Ahmad v. The State of Uttar Pradesh* (16), referring to the decision in *C. S. S. Motor Service v. State of Madras* (17):

> "The true position then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the

public are entitled as beneficiaries to use them as a matter of right. . . . The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally;. . ."

However, this does not mean that the hoardings erected on private places should be excluded. As referred to in *Links Advertisers and Business Promoters v Commissioner, Corporation of the City of Bangalore* (18), what is necessary to be considered is whether the advertisement affixed is fronting the public street and is exposed to public view and if so the conditions applicable to hoardings situated in public property would be applicable to those as well.

On an examination of all the circumstances aforementioned, it is apparent that the manner in which hoardings had been allowed to be displayed without any regard to the scenic beauty and the historical value of the capital city of the country, without due regard to safety of the public and the non consideration for the financial accountability regarding the income that could have been generated by the 1st respondent Council, the said respondents should have taken steps to remove the unauthorized hoardings in terms of the applicable by-laws and guidelines. Such failure to remove the said unauthorized hoardings and granting approval without giving due consideration to the by-laws and guidelines, which were applicable at the time material had constituted an infringement of the fundamental rights of the petitioner and the residents of the CMC area by 'executive and administrative action' within the meaning of Article 126 of the Constitution and I hold that the 1st to 5th respondents are responsible for the said violation of the fundamental rights of the petitioner's and the residents' of the CMC area, guaranteed in terms of Article 12(1) of the Constitution.

I accordingly allow this application and direct the 1st respondent to take action forthwith on the following:

1. to strictly enforce the by-laws published in the Gazette Notification dated 20.01.1989 (R10) and the guidelines for advertising in Colombo which came into effect on 01.01.2006, (P4) until such time amended by-laws and guidelines are introduced;

2. to remove all unauthorized/illegal hoardings and hoardings erected in the Colombo Municipal Council area which were given approval in violation of the aforementioned by-laws and the guidelines for advertising in Colombo; and

3. to take immediate steps to revise the present guidelines, considering the globally accepted detailed policies on hoardings and out door advertising in keeping with the practice of other organizations such as the Road Development Authority conducting auctions to enhance the financial viability in the process. Such revision of guidelines to be carried out as an urgent requirement by the 1st respondent Council and to consider the proposals for this purpose that could be submitted by the 6th and 7th respondents, who are the President and the Secretary – General of the Outdoor Advertising Association of Sri Lanka, respectively.

   These guidelines to be prepared and finalized to come into being with effect from 01.01.2010.

If these directions are sincerely and expeditiously carried out, it would not only improve the revenue of the 1st respondent Council, but would also be an enhancement to the advertising industry and more importantly, would beautify the capital city of the pearl of the Indian Ocean.

In all the circumstances of this case, I make no order as to costs.

AMARATUNGA, J. – I agree

BALAPATABENDI, J. – I agree

Application allowed

KANAPATHIPILLI VS. SRI LANKA BROADCASTING CORPORATION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE. J.
AMARATUNAGA J.
BALAPATABENDI. J.
SC 145/2007
DECEMBER 4. 2008
JANUARY 22, 2009

Constitution – Art 12 (1), 17, 126 – Jurisdiction of the Supreme Court to grant reliefs or give directions. Concept of equality – equals and unequals.

The petitioner programme producer of the 1st respondent Corporation alleged that the appointment of the 4th respondent to the post of Director Tamil Service was illegal and thereby had violated Art 12(1) of the Contitution. It was the contention of the petitioner that the 4th respondent was disqualified from being re-employed in the public service in terms of Administrative Circular 44/90, and that out of the eligible candidates he had scored the highest marks.

The respondent contended that, the Corporation was unaware of the circumstances of the 4th respondent's retirement from public service and that the interviews were held over two years ago and a long duration of time had passed since the holding of the said interview, and that the petitioner had obtained only 42 marks out of hundred which does not reflect an extremely high degree of competence.

Held

(1) The concept of equality, which is a dynamic concept is based on the principle that the status and dignity of all persons should be protected whilst preventing inequalities, unfairness and arbitrariness.

(2) Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than

others not only causes pain and distress to that person but also violates his or her dignity as a human being.

(3) There should not be any discrimination between persons, who are equally circumstanced; equals should not be placed unequally and at the same time unequals should not be treated as equals. Equal opportunity is only for equals who are similarly circumstanced in life.

Per Dr. Shirani Bandaranayake. J.

"It is apparent that the 4th respondent should not have been summoned for the interview as he was disqualified in terms of Administrative Circular. The petitioner and the 4th respondent cannot be treated as equals and out of the two applicants it is only the petitioner who was qualified to be considered for the post of Director Tamil Services".

(4) Fundamental rights, which represent the basic values cherished by the people, would become meaningless if there are no remedies or no independent machinery for their enforcement. The Constitution had made provision for remedies in terms of Article 17 read with Article 126. The provisions laid down in Article 126 are very clear wherein the Supreme Court could grant such relief or make such directions as it may deem just and equitable in the circumstances of the application in question.

APPLICATION under Article 126 of the Constitution.

Cases referred to:-

(1) *Ghaidan vs. Godin Mendoza* 2004 2 AC 557

(2) *Maneka Ghandhi vs. Union of India* 1978 AIR SC 597

(3) *Karunatilaka vs. Jayalath de Silva* SC 334/2003 SCM25.11.2002

(4) *M. K. Wijetunga et al vs, The Principal, Southlands College* SC 612/2004 SCM 17.11.2005

(5) *Asanka Pathiratne vs. University Grants Commission* SC 618/2002 SCM 5.8.2003

(6) *Anushka Jayatileke vs. University Grants Commission* SC 280/2001 SCM 25.10.2004

(7) *Nazir vs. Post Master General* SC 251/96 SCM 7.5.1998

(8) *Perera vs. Jayaratne* SC 8/96 SCM 5.3.1998

(9) *Ratnadasa vs. Government Agent* SC Spl 66/96-SCM 16.12.1997

(10) *Samarasinghe vs. Air Lanka and others* 1996 1 Sri LR 259.

J. C. Weliamuna for petitioner.

Shaheeda Barrie SC for the 1st, 2nd, 3rd and 5th respondents.

Nizam Karaipper for 4th respondent.

Cur.adv.vult.

March 30, 2009

DR. SHIRANI BANDARANAYAKE, J.

The petitioner was a Programme Producer attached to the Education Service of the 1st respondent Corporation at the time of the filing of this application. The petitioner alleges that the appointment of the 4th respondent to the post of Director-Tamil Service of the 1st respondent Corporation was illegal and thereby had violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution for which this Court had granted leave to proceed.

On 24.06.2008, when this matter came up for hearing, learned Counsel for the 4th respondent informed Court that the 4th respondent is no longer interested in the position of Director-Tamil Service and that he had obtained employment elsewhere. In the circumstances, learned Counsel for the 4th respondent moved that the 4th respondent be discharged from these proceedings. Learned Counsel for the petitioner had no objection for the said discharge and accordingly the 4th respondent was discharged from these proceedings.

Thereafter this matter was mentioned before this Court on 18.07.2008 to ascertain whether there is a possibility of a settlement. On that day parties had informed Court that they are not in agreement for a settlement. This matter was

thereafter fixed for hearing and both parties were so heard on the date of hearing.

The petitioner's case, as submitted by him, is as follows:

The petitioner had obtained his degree of Bachelor of Arts from the University of Peradeniya in 1993 (P1(a)), a post graduate Diploma in Education from the Open University of Sri Lanka in 1999 (P1(b)) and a Diploma in Journalism from the University of Colombo in 2002 (P1(c)).

On 31.03.1995, the petitioner was recruited to the Education Service of the 1st respondent Corporation as Programme Producer on a daily paid basis, initially for a period of three months, which was periodically extended until 31.12.1999. Thereafter from January 2000 until September 2001, the petitioner had served as the Producer of the Education Service on contract basis. In September 2001, the petitioner was made permanent in the post of producer of the said Education Service and he had been serving in that post up to the time this application was filed (P29(a), P2(b), P2(c), P2(d), P2(e), P2(f), P2(g) and P2 (h).

The petitioner stated that he had nearly 12 years of experience as a Programme Producer and had produced a large number of programmes over the years. The petitioner had also worked as a radio announcer and had interviewed many well-known personalities. He had contributed articles to *Veerakesari* and *Thinakural* daily newspapers and had published two books in the Tamil language.

In or about May 2006, the 1st respondent Corporation had called for applications, internal and external, for the post of Director – Tamil Service for which the petitioner had responded as an internal applicant (P3). By letter dated 11.07.2006, the Director (Personnel) of the 1st respondent Corporation

had called the petitioner for an interview, which was held on 18.07.2006. The petitioner had attended the said interview with six other applicants.

The petitioner had not known the results of the interview but in April 2007 he had reliably learnt that the 4th respondent had been selected and appointed to the post of Director-Tamil Service of the 1st respondent Corporation.

The petitioner stated that in 1996 the 4th respondent, while serving as a Teacher at the Hindu College, Bambalapitiya had retired from public service in terms of the Public Administration Circular No. 44/90. The petitioner claimed that the appointment of the 4th respondent to the said post is contrary to the Public Administration Circular No. 44/90, as in terms of the said Circular the 4th respondent is disqualified to be re-employed in the public service.

Further the petitioner stated that in any event the 4th respondent could not have been selected for the said post as he was under interdiction from 19.01.2001 to 29.10.2001 in respect of an incident of fraud. The 4th respondent was re-instated with effect from 29.10.2001 on the basis that he had paid the 1st respondent Corporation the defrauded sum (P9 and P10).

The marking scheme, which was used at the interview, had not been disclosed to candidates prior to the interview. Subsequently in May 2007, the petitioner had received a document containing the criteria used at the interview and the marks given to each candidate and according to that document the petitioner had got the second highest marks, whilst the 4th respondent had got the highest marks at the interview (P11). At the interview, marks had been allocated on the following basis:

		Marks.
1.	educational qualifications in the relevant field	30
2.	experience in the relevant field	30
3.	language proficiency	20
4.	general facts relevant to interview	20

The petitioner complained that as the 4th respondent was disqualified from being re-employed in the Public Service in terms of Public Administration Circular No. 44/90, the 4th respondent's appointment to the post of Director – Tamil Service of the 1st respondent Corporation, is illegal and is in violation of petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

Learned State Counsel for the 1st to 3rd and 5th respondents admitted that in terms of clause 5 of the Public Administration Circular No. 44/90, dated 18.10.1990, the 4th respondent was not entitled to hold any post in the public sector including public Corporations.

The 2nd respondent had averred in his affidavit that the 1st respondent Corporation had been unaware of the circumstances of the 4th respondent's retirement from Public Service. Further it was averred that,

> "As the attention of the 1st respondent has now been drawn to this fact by the petitioner, steps have been taken to suspend the appointment of the 4th respondent **until the conclusion of this case"** (emphasis added).

Learned counsel for the petitioner contended that out of the eligible candidates, it is the petitioner, who had scored the highest marks and therefore the failure to appoint the petitioner for the post in question was arbitrary and discriminatory and in violation of Article 12(1) of the Constitution.

Article 12(1) of the Constitution, deals with the right to equality and reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

The concept of equality, which is a dynamic concept, is based on the principle that the status and dignity of all persons should be protected whilst preventing inequalities, unfairness and arbitrariness. Sir lvor Jennings (The Law of the Constitution, pg 49) referred to the concept of right to equality and had stated that, where among equals the law should be equal and should be equally administered. This position relates to the view expressed by Dicey, where he took up the position that officials should enforce the law consistently and even-handedly (The Law of the Constitution, 10th edition, Pg. 193). Such consistency, it had been regarded by Dicey (supra), as a fundamental feature of the rule of law. Referring to the principle of equality, Baroness Hale in *Ghaidan v Godin-Mendoza*[1] had stated that,

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others, not only causes pain and distress to that person, but also violates his or her dignity as a human being."

Thus, there should not be any discrimination between persons, who are equally circumstanced; equals should not be placed unequally and at the same time unequals should not be treated as equals. Equal opportunity is only for equals, who are similarly circumstanced in life.

As stated earlier, both the petitioner and the 4th respondent had faced the interview for the post of Director-Tamil Service of the 1st respondent Corporation on 18.07.2006, and when the 4th respondent had scored the highest marks. viz. 48, the petitioner had been next in line obtaining 42 marks.

It is also to be noted that the petitioner had not challenged the selection process in its entirety. The contention of the

learned Counsel for the petitioner was that the process of selecting a candidate for the post of Director-Tamil Service was followed properly, except for the fact that the 4th respondent was not qualified and should not have been called for the interview. The petitioner had not challenged either the manner in which the interview was held or the marks that were allocated under the criteria referred to above to the applicants.

Considering the submissions made by the learned Counsel for the petitioner and the learned State Counsel for the 1st to 3rd and 5th respondents, it is apparent that the 4th respondent should not have been summoned for the interview as he was disqualified in terms of clause 5 of Public Administration Circular No. 44/90 (P6). Accordingly in terms of Article 12(1) of the Constitution, the petitioner and the 4th respondent cannot be treated as equals and out of the two applicants, it is only the petitioner, who was qualified to the considered for the post of Director-Tamil Service of the 1st respondent Corporation.

On a consideration of the totality of the circumstances, I hold that the appointment of the 4th respondent was not on a basis that is reasonable and justifiable; it was arbitrary, unreasonable and in violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution and I hold that the 4th respondent's appointment is invalid.

Learned Counsel for the petitioner contended that out of the eligible candidates, the petitioner had scored the highest marks and therefore the petitioner should be appointed to the post of Director-Tamil Service of the 1st respondent Corporation.

The 2nd respondent in his affidavit dated 12.02.2008,. had referred to the mark sheet (1R1), of the interview held for the post of Director-Tamil Service. According to the said document (1R1) there were 5 candidates, who had been

possessed of basic qualifications. Out of them, the 4th respondent had obtained 48 marks, the petitioner 42 marks and the others had obtained 37, 36 and 22 marks respectively. Accordingly as stated earlier, the petitioner had received the second highest marks at the interview However, it is relevant to consider the recommendation made by the members of the Interview Panel, which consisted of six members, where it had been stated that,

> "Considered the pass mark as 35 (Thirty-five) – Recommend to appoint an applicant who has got over 35 marks, after calling for Police clearance report."

Learned State Counsel for the 1st to 3rd and 5th respondents also submitted that the interviews were held over two years ago in July 2006 and a long duration of time had passed since the holding of the said interview. It was also submitted that the petitioner had obtained only 42 marks out of hundred, which does not reflect an extremely high degree of competence of the petitioner.

Fundamental rights, which represents 'the basic values cherished by the people' (*Maneka Ghandhi v Union of India*(2)) would become meaningless, if there are no remedies or no independent machinery for their enforcement. The Constitution therefore had made provision for remedies in terms of Article 17 read with Article 126 of the Constitution. Article 17, which is contained in Chapter III of the Constitution deals with remedies for the infringement of fundamental rights by executive action.

Article 126 of the Constitution deals with the fundamental rights jurisdiction and its exercise and Article 126(4) specifically refers to the relief that could be granted in respect of petitions filed before this Court. Article 126(4) reads as follows:

> *"The Supreme Court shall have power to grant such relief or make such directions as it may deem just and*

equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."

The provisions laid down in Article 126 of the Constitution are very clear wherein the Supreme Court could grant such relief or make such directions as it may deem just and equitable in the circumstances of the application in question. On this basis, there are instances, where this Court had given directions to admit students to schools or higher educational institutions such as universities (*Karunathilake v Jayalath de Silva*[3] *M. K. Wijethunga et al v The Principal, Southlands College*[4] *Asanka Pathiratne v University Grants Commission*[5] *Asanka Jayathilake v University Grants Commission*[6] or to make appointments in accordance with the law (*Nasir v. Post Master General*[7] *Perera v. Jayaratne*[8] *Ratnadasa v. Government Agent*[9].

An examination of the provisions of Article 17 read with Article 126 of the Constitution and the decisions of this Court, reveal that although this Court has a wide discretion in terms of Article 126(4) of the Constitution in granting relief and making such directions as it may deem just and equitable, such decisions would be taken **considering the circumstances** of the case in question. In *Samarasinghe v. Air Lanka and others* [10] the said position was emphasised by this Court, when considering the validity of the appointment made to the 13th respondent as the International Relations Manager, which was created by upgrading that petitioner's current post. In that the petitioner had been recommended for appointment by the duly constituted panel of high ranking officials. Whilst holding that the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution, and directing that the appointment of the 13th respondent be terminated forthwith, the Court considered the relief that

should be granted to the petitioner in that case and stated thus:

> "Although the Court has a wide discretion in terms of Article 126(4) of the Constitution in granting relief and making such directions as it may deem just and equitable, I do, in the circumstances of this case refrain from making an order of appointment.

On a careful consideration of all the facts and circumstances of this application stated earlier, I am of the view that no order of appointment should be made in this matter.

For the reasons aforesaid, I hold that the petitioner's fundamental rights guaranteed in terms of Article 12(1) had been violated. The petitioner's application is accordingly allowed and I direct that the appointment of the 4th respondent, which has been suspended until the final hearing and determination of this application by the 1st respondent be terminated forthwith. I award the petitioner a sum of Rs. 100,000/- as compensation and costs for the infringement of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution, payable by the 1st respondent within three months from today.

I also make order and direct that steps be taken forthwith by the 1st respondent to fill the vacancy of Director-Tamil Service of the 1st respondent Corporation in terms of the 1st respondent Corporation's policy and the said appointment to be made within four (4) months from today.

AMARATUNGA, J. – I agree

BALAPATABENDI, J. – I agree

Application allowed.

1st Respondent directed to take steps forthwith to fill this vacancy in terms of the Respondent corporation's policy.

JEGAN AND ANOTHER
VS
INSPECTOR GENERAL OF POLICE AND OTHERS

SUPREME COURT
SHIRANEE TILAKAWARDENE. J.
MARSOOF. PC. J
SRIPAVAN, J
SC FR 21/2008
OCTOBER 28, 2009

Fundamental Rights – Provincial Councils Elections Act No. 2 of 1988 – Section 92 – Complaint against Provincial elections – Two separate remedies available? – Constitutional right guaranteed under the Constitution and Election Petition.

The petitioner sought a declaration based on alleged acts of rampant violation, acts of intimidation and acts leading to fear psychosis in the Provincial Councils elections held in the Batticaloa district. The respondents objected to the application on the basis that the only necessary remedy which could be invoked by the petitioners was in terms of Section 92 of the Provincial Councils Elections Act.

On The Preliminary objection taken,

Held:

(1) Every citizen whether he or she is a candidate or a voter is empowered in terms of the Fundamental Rights Chapter of the Constitution to seek relief for his or her own personal benefit, in respect of an executive or administrative act or omission which resulted in a violation of constitutionally guaranteed rights.

(2) The range of remedies available would extend to declarations of such violations in terms of the Constitution, directions on the Police and Election Authorities with regard to their specific action or inaction and or commensurate award of compensation.

(3) In terms of the Provincial Councils Elections Act a specific candidate whose election results have been materially affected is

enabled to seek remedy under the specific provisions of Section 92 within the limitations prescribed.

(4) Undoubted safeguard contained in Section 92 and the other related sections in the Provincial Councils Elections Act which protect the fairness of elections do not detract or preclude the constitutional jurisdiction of the Supreme Court. This is a right that must be recognized, cherished, safeguarded and upheld.

APPLICATION under Article 126 on a preliminary objection taken.

J. C. Weliamuna with *Pulasthi Hewamanne* for petitioner

Ms. Indika Demuni de Silva DSG for respondents

Cur.adv.vult.

March 30, 2009

SHIRANEE TILAKAWARDANE. J.

A preliminary objection was taken by Mrs. De Silva, D. S. G., that the application of the petitioners should be dismissed in limine on the following grounds:-

(1) That in its pith and substance, the petitioners had sought a declaration based on alleged acts of rampant violence, acts of intimidation and acts leading to fear psychosis in the Provincial Council elections held in the Batticaloa district. If credence is to be given to this application, then the only remedy available to the petitioners, would be to seek recourse under Section 92 of the Provincial Councils Election Act No. 2 of 1988 to seek a declaration that the election of the aforesaid district be declared null and void, in other words, to seek an avoidance of the said election. This objection she stated was substantiated on the several pleadings contained in paragraphs 8 and 18 of the petition. Her argument was therefore that the only necessary remedy which could be invoked by the petitioners was in terms of Section 92 of the said Act. Even if the avoidance was to be limited to a single member,

this was the only and limited remedy that was available to the petitioner.

(2) That in any event, under the Provincial Councils Election Act No. 2 of 1988 the Court could not grant relief to the petitioners and make findings against the respondents without setting aside the entire election. This would undoubtedly affect those who were duly elected as members as any such findings made would be adverse to their interest. They are not parties to this application, but would be necessary parties who would be directly affected by the avoidance of the said election. Under the circumstances the application cannot be entertained by this Court.

Having considered the submissions made by both Deputy Solicitor General and the counter submissions made by learned Counsel Mr. Weliamuna appearing for the petitioners, this Court finds that two separate remedies are available to a party who complains about the Provincial elections. The first is under the Provincial Councils Election Act No. 2 of 1988 and the second is by invoking the Fundamental Rights Chapter of the Constitution. These remedies which are available are distinctive and different. The reliefs prayed for and claimed are also separate, different and distinct.

A citizen, indeed every citizen of Sri Lanka, whether he or she is a candidate, or a voter, is empowered in terms of the Fundamental Rights chapter of the Constitution to seek redress for his or her own personal benefit, in respect of an executive or administrative act or omission which resulted in a violation of constitutionally guaranteed rights. The range of remedies available would extend to declarations of such violations in terms of the Constitution, directions on the Police and Election Authorities with regard to their specific action or inaction and/or commensurate award of compensation.

It is to be understood that in terms of the Provincial Councils Election Act No. 2 of 1988 as amended, a specific candidate whose election results have been materially affected is enabled to seek remedy under the specific provisions of section 92, of the Provincial Councils Election Act No. 2 of 1988 as amended, within the limitations prescribed under the scope and ambit of this Section. Indeed, this Court is appreciative of the fact that the fundamental rights application of the petitioners invokes a specific constitutional right leading to a constitutional remedy which is guaranteed by the constitutional jurisdiction vested in the Supreme Court.

We, therefore hold that undoubted safeguard contained in Section 92 and the other related Sections of the Provincial Councils Election Act which protects the fairness of elections do not detract or preclude the constitutional jurisdiction of this Court.

Indeed, every citizen who is prevented in any manner whatsoever from exercising his or her right to vote, which is after all an integral part of his or her freedom of expression and choice is entitled to claim an unimpeded passage, free of violence and/or other unlawful incursion to cast his or her ballet in a free and unobstructed manner. This is a right that must be recognized, cherished, safeguarded and upheld by this Court.

We accordingly overrule and dismiss the preliminary objections of the respondents.

The main argument is fixed for 15.02.2010.

MARSOOF – I agree.

SRIPAVAN. J. – I agree.

Preliminary objection over ruled Main Matter set down for argument.