

PIYASENA AND ANOTHER  
v.  
THE PEOPLE'S BANK AND OTHERS

SUPREME COURT.

FERNANDO, J.

AMERASINGHE, J. AND

GOONEWARDENA, J.

S.C. APPLICATION NO. 359/93

JULY 20TH AND 21ST, 1994.

*Fundamental Rights – Criteria for selection for promotion – Need for publicity to be given for criteria – Seniority – Marking Scheme – Violation of the fundamental right of equality guaranteed by Article 12(1) of the Constitution.*

By means of individual letters the 1st respondent (People's Bank) invited its officers in Grade I to apply for an unspecified number of vacancies in its cadre of Assistant General Managers. Each applicant was asked to submit a short presentation regarding his achievements in his present post together with strategies he would recommend to the Bank for its further development if promoted. Nothing else was stated about the criteria for selection. There were 32 applicants: the two petitioners, the 4th to 11th respondents and 22 others. The Board of Directors interviewed the applicants. The 11th respondent, himself an applicant, was the Secretary to the Board and though interviewed was not assessed as he was functioning as Secretary. On the basis of a Board paper he also was promoted. The marking assessment scheme was formulated by the Interview Board under the heads of Academic qualification (5 marks), Professional qualifications in Banking (10 marks), Performance in the Present Grade (50 marks), Performance at the Interview (25 marks), Seniority (5 marks), Additional qualifications/Achievements (5 marks).

**Held:**

(1) It is very desirable, though perhaps not imperative, that all the criteria relevant to promotion should be publicised so that all candidates have equal opportunities of advancing their claims; and the more complex the scheme, the greater the need for such publicity. Where some special skill or quality is required a fair selection process demands that it be made known in advance. The letters sent to the candidates would naturally have led them to believe that their presentations were important, and would be taken into consideration; such presentations were indeed relevant, and quite appropriate, to determine suitability for promotion to top management posts; and it is one of the many unsatisfactory features of the selection process that no attempt was made to assess the accuracy and quality of the achievements claimed, and the feasibility and usefulness of the 'strategies' suggested by them. Consequently, candidates were misled.

(2) In the scheme of assessment the attitude to seniority was unsatisfactory in two respects. Seniority is an objective factor, while assessment of performance, whether in service or at an interview, is quite subjective. Giving seniority only 5 marks out of 100 amounted, in the circumstances, to ignoring seniority unlike in the past.

(3) The Bank was undoubtedly entitled to change the basis of promotion, and minor changes probably required no prior disclosure. However, a drastic change, whereby the subjective factor almost completely superseded the objective factor, required adequate disclosure. To hold otherwise would permit a scheme of promotion to be secretly varied, from year to year, by successive interview boards to the detriment of employee morale and performance. This was another unsatisfactory feature of the selection process.

(4) While the Court should not set aside a scheme of marking merely because it entertains a different opinion as to the relative weight due (a) for academic as against professional qualifications or (b) for qualifications in one discipline as compared to another, here the scheme is seriously flawed because it did not allow relevant qualifications to be considered at all.

(5) Regarding the interview performance, time taken for each interview namely 10 to 15 minutes is not inadequate. There is no suggestion that the questioning displayed any bias or other flaw.

(6) If the marks allocated for interview performance are relatively low the lack of guidelines may not cause serious concern and review of a *bona fide* exercise of discretion may be well – nigh impossible.

(7) In this case selection depended mainly on the interview (which carried 75% of the marks), for there is nothing to suggest that past performance (in the grade) was separately assessed, either before or after the interviews. It was impossible to ensure that marks were allocated by each interviewer with some degree of uniformity, and fairness, unless there had been some indication, at least in a general way, of the factors relevant to each criterion. This is not to say 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. A proper selection need not necessarily incorporate a marking scheme; but if the selection is to be on the basis of marks, then the scheme must be clear, fair and uniform.

(8) That these deficiencies could cause serious and unexplained anomalies is clear from the marks obtained by the 9th and 10th respondents as against the 1st petitioner. These two respondents had only the G.C.E. O/L (no marks) and part Banking qualifications (5 marks) while the 1st petitioner had a B.Com. upper second degree (5 marks) and part Banking qualifications (7 marks). That advantage of 7 marks was negated by the assessment of past performance.

While for seniority and qualifications the marking was generally in multiples of five. In the absence of proper guidelines, one cannot overlook the possibility that the 1st petitioner was not duly assessed. The position becomes even more unsatisfactory when we find that out of only six candidates who were apparently assessed with greater precision, three were selected. It becomes impossible to give the interview board the benefit of the doubt when the statistical possibilities are considered.

(9) The cumulative effect of all these defects is that the whole interview and selection process was fatally flawed and infringed Article 12(1).

**Cases referred to:**

1. *Perera v. Ranatunga* S.C. 121/91 – S.C. Minutes of 27.05.92.
2. *Perera v. Monetary Board* S.C. 246/93 – S.C. Minutes of 01.11.94.

Application for relief for violation of the Fundamental Right of equality guaranteed by Article 12(1) of the Constitution.

*R. K. W. Goonesekera with R. K. S. Suresh Chandra* for the Petitioner.  
*Asoka de Silva* DSG with *E. Egalahewa* S.C. for 1st, 2nd and 3rd Respondents.

*Cur. adv. vult.*

November 04 1994.

**FERNANDO, J.**

This application was heard together with S.C. Application No. 291/93 as similar questions of law and fact were involved; judgment in that application was delivered on 14.10.94.

By means of individual letters dated 15.3.93, the 1st Respondent Bank invited its Officers in Grade 1 to apply for an unspecified number of vacancies in its cadre of Assistant General Managers. Each applicant was asked to submit a "short presentation in regard to (his) achievements (in his present post) together with strategies (he) would recommend to the Bank for its further development" if promoted.

Nothing else was stated about the criteria for selection. There were thirty-two applicants: the two Petitioners, the 4th to 11th Respondents, and 22 others. The applicants were interviewed on

22.5.93, by the Board of Directors of the Bank (including the 2nd Respondent, the Chairman of the Board), and the 3rd Respondent (the General Manager). The 4th to 10th Respondents were appointed immediately. The 11th Respondent is the Secretary to the Board, and though interviewed like the others was not assessed as he was functioning as Secretary; on the basis of a subsequent Board paper, the Board decided on 8.7.93 to promote him too. The Petitioners filed this application on 5.8.93, complaining that these appointments were in violation of their fundamental right to equality under Article 12(1).

### **INFRINGEMENT OF ARTICLE 12(1)**

It is admitted that the criteria for selection had not been disclosed in advance. The Petitioners complain that even now it is not clear what those criteria were, and how they were actually applied. It is very desirable, though perhaps not imperative, that all the criteria relevant to promotion should be publicised so that all candidates have equal opportunities of advancing their claims; and the more complex the scheme, the greater the need for such publicity (*Perera v. Ranatunga*<sup>(1)</sup>; *Perera v. Monetary Board*<sup>(2)</sup>). However, where some special skill or quality is required, a fair selection process demands that this be made known in advance. Here the letters sent to the candidates would naturally have led them to believe that their presentations were important, and would be taken into consideration; such presentations were indeed relevant, and quite appropriate, to determine suitability for promotion to top management posts; and it is one of the many unsatisfactory features of the selection process that no attempt was made to assess the accuracy and quality of the "achievements" claimed, and the feasibility and usefulness of the "strategies" suggested, by them. Consequently, candidates were misled.

Further, Mr. Goonasekera submitted that although seniority had always been an important, and even a predominant factor in the past, it had been given grossly inadequate consideration on this occasion. In his affidavit, the 2nd Respondent averred that seniority was never the sole criterion for promotion to corporate management positions.

The marking scheme for these promotions was as follows:

<b>1. Academic Qualifications</b>	<b>5 marks</b>
Ordinary Degree	– 3 marks
Second Class Lower Division	– 4 marks
Second Class Upper Division or First Class	– 5 marks
<b>2. Professional Qualifications in Banking</b>	<b>10 marks</b>
Part I	– 5 marks
Part I and Section I of Part II	– 7 marks
Full professional Qualifications	– 10 marks
<b>3. Performance in the Present Grade</b>	<b>50 marks</b>
<b>4. Performance at the Interview</b>	<b>25 marks</b>
<b>5. Seniority &amp; additional qualifications/achievements</b>	
Seniority	5 marks
Additional qualifications/achievements	5 marks
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	<b>100 marks</b>
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It was the interview board which formulated a "scheme of assessment"; its attitude to seniority is unsatisfactory in two respects. Seniority is an entirely objective factor, while assessment of performance, whether in service or at an interview, is quite subjective. Giving seniority only five marks out of 100 amounted, in the circumstances, to ignoring seniority (*Perera v. Ranatunga*<sup>(1)</sup>). The Bank was undoubtedly entitled to change the basis of promotion, and minor changes probably required no prior disclosure. However, a drastic change, whereby subjective factors almost completely superseded this objective factor, required adequate disclosure. To hold otherwise would permit a scheme of promotion to be secretly varied, from year to year, by successive interview boards, to the

detriment of employee morale and performance. This was another unsatisfactory feature of the selection process.

The 2nd Respondent produced the interview schedule, prepared before the interviews. This contained the service record and the academic and professional qualifications of each candidate, as well as a column indicating whether he had participated in a "Management Development Programme"; it did not make reference to any other criteria. The Respondents' pleadings, documents and submissions do not indicate what importance was attached to participation in the Management Development Programme, for which no marks appear to have been allocated. The Respondents did not produce the individual marking sheets which members of the interview board had entered contemporaneously during the interviews. So we do not know whether each member followed this scheme of assessment; and if he did, how many marks he gave each candidate in respect of each criterion. They produced only the final results sheet (2R4), setting out the marks (presumably the average) scored by each candidate in respect of each criterion, and a summary (2R4A) giving the candidates and their aggregate scores in order of merit. This summary showed that the 9th Respondent had scored 76 marks, the 4th to 8th and 10th Respondents had scored 75 marks, and the 1st Petitioner 74 marks.

It transpired in S.C. Application No. 291/93 that more marks (25%) were given for educational and professional qualifications, in the promotions to Deputy General Manager, than the 15% given in these promotions. One would have expected the converse: the higher one goes up the ladder, the less the weightage for such qualifications. Further, regarding professional qualifications, it is not easy to understand how the Banking qualifications (Part I) were assessed at 5 marks, while relevant academic qualifications (such as a first class degree in Law, or Economics, perhaps with Banking as a special subject) were considered to be worth only 5 marks; and why other relevant (and even full) professional qualifications, in relevant disciplines such as Accountancy and Law, were excluded from consideration. That exclusion becomes inexplicable since a first degree in quite unrelated fields, could earn 3 to 5 marks. I

acknowledge, unreservedly, that this Court should not set aside a scheme of marking merely because it entertains a different opinion as to the relative weight due (a) for academic as against professional qualifications, or (b) for qualifications in one discipline as compared to another. But here the scheme is seriously flawed because it did not allow relevant qualifications to be considered at all.

I must turn now to "interview performance." According to the Petitioners, the time taken for each interview ranged from ten to fifteen minutes, which I do not consider inadequate. It appears that the presentations were used as the basis of questioning at the interviews. The Petitioners have produced summaries of some of the questions and answers. There is no suggestion that the questioning displayed any bias or other flaw.

However the assessment of performance was flawed. Neither in the affidavits nor in the submissions was there any clarification, even by reference to broad guidelines, as to how the 75 marks for performance (25 for the interview, and 50 for performance in the grade) were to be allotted. Undoubtedly, assessment of interview performance is necessarily very subjective: thus it may happen that a candidate who is favourably assessed by one interviewer as "having good communication skills" may be dismissed by another as "nothing more than a glib talker." If the marks allocated for "interview performance" are relatively low (e.g. 15% or 20% of the total), the lack of guidelines may not cause serious concern, and review of a *bona fide* exercise of discretion may be well-nigh impossible. However, in this case, selection depended mainly on the interview (which carried 75% of the marks), for there is nothing to suggest that past performance (in the grade) was separately assessed, either before or after the interviews. It was impossible to ensure that marks were allocated by each interviewer with some degree of uniformity, and fairness, unless there had been some indication, at least in a general way, of the factors relevant to each criterion. 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.

That these deficiencies could cause serious and unexplained anomalies is clear from the disparity in the marks obtained by the 9th and 10th Respondents as against the 1st Petitioner. Those two Respondents had only the G.C.E. "O" Level (no marks) and part Banking qualifications (5 marks) while the 1st Petitioner had a B.Com. upper second degree (5 marks) and part Banking qualifications (7 marks). That advantage of 7 marks was negated by the assessment of "performance." The 9th Respondent scored 45 and 20, and the 10th Respondent scored 45 and 23, for performance, while the 1st Petitioner scored only 35 and 20. This may have been ignored, but for one curious feature. While for seniority and qualifications the marking was fine tuned to within one or two marks, when it came to performance, marking was generally in multiples of five; for all candidates except the 4th and 6th Respondents and one other candidate (in regard to performance in the grade), and all except the 4th, 6th, and 9th Respondents, and three others (in regard to interview performance). Had the 1st Petitioner managed to score one or two marks more for performance, or if the successful candidates had scored one or two marks less, the 1st Petitioner would have been selected. In the absence of proper guidelines, one cannot overlook the possibility that the 1st Petitioner was not duly assessed. The position becomes even more unsatisfactory when we find that out of only six candidates who were apparently assessed with greater precision, three were selected. It becomes impossible to give the interview board the benefit of the doubt when the statistical possibilities are considered. If the eight members of the interview board had individually assessed the performance of each candidate, and thereafter the results sheet 2R4 had been prepared to reflect the average scores, it is impossible for 50 scores out of 60 to have been not merely whole numbers, but multiples of five - because the

averages would have been multiples of five, only if the aggregates had been multiples of forty. On the other hand it is neither suggested, nor credible, that 2R4 represented a joint assessment by all eight members.

The 11th Respondent was called for the interviews along with the others; there was no valid reason for not assessing him by reference to the criteria applied to the others. The fact that members of the Board knew him much better than the other candidates was not a reason for dispensing with an assessment.

The cumulative effect of all these defects is that the whole interview and selection process was fatally flawed, and infringed Article 12(1).

I hold that the fundamental right of the Petitioners under Article 12(1) has been infringed by the 1st Respondent Bank. The Bank is directed to hold fresh interviews, after calling for fresh applications if it thinks fit, on the basis of a published scheme of promotion. Although the Petitioners have not proved that they have suffered actual pecuniary loss, because there was no certainty of their promotion, yet they are entitled to compensation for the infringement of their fundamental right to equality, by reason of the defective selection process. I therefore direct the 1st Respondent Bank to pay each of the Petitioners a sum of Rs. 10,000 as compensation and Rs. 5,000 as costs.

**AMERASINGHE, J.** – I agree.

**GOONEWARDENA, J.** – I agree.

*Relief granted.*