

SAMARASINGHE  
V.  
AIR LANKA LTD. AND OTHERS

SUPREME COURT.  
AMERASINGHE, J.  
PERERA, J. AND  
WIJETUNGA, J.  
S.C. APPLICATION NO 275/93.  
02 & 07 MARCH 1994.

*Fundamental Rights - Constitution Article 12 (1) - Equality and discrimination with reference to recruitment and promotion.*

The post of International Relations Manager was created by upgrading Petitioner's present post. He had been recommended for appointment by a duly constituted panel of high ranking - officials including the Consultant himself - after internet advertisement. The fact that he lacked a part of the stipulated experience at the time of his application should not have stood in the way. It was not an insuperable obstacle. In any event the 13th Respond-

ent who was appointed in preference to him had no experience at all. Further the avowed policy of Air Lanka was to fill such vacancies, to the maximum extent possible, by internal candidates. Yet the Petitioner was not only denied his promotion, but he now finds himself condemned in these proceedings by the very management that took steps towards creating a post with a view to promoting him.

The allegations of incompetence, inefficiency and lack of responsibility levelled against the Petitioner are without foundation.

The Petitioner had a legitimate expectation of being appointed International Relations Manager.

The 1st Respondent had a legitimate interest and a public duty in ensuring that the best candidate was appointed. The salutary procedures and provisions for doing so were totally disregarded and the 13th Respondent was appointed for reasons that had no rational connection with the object of appointing the best qualified person. The Petitioner was consequently not only treated unequally, but also offensively discriminated against. The discrimination was both unwarranted and invidious.

There was no vacancy advertised by Air Lanka in respect of which the 13th Respondent could have made an application. He has secured his appointment as International Relations Manager otherwise than through the recognized procedure for such recruitment. There is no justification for making such appointments by private negotiation, under a veil of secrecy. The 13th Respondent does not have the basic requirements necessary for appointment as a Manager, Grade M.1. The appointment depended upon the violation of the Petitioner's constitutional right to equality by the demonstration of undue partiality towards the 13th Respondent. I have no hesitation, therefore, in holding that his appointment is invalid. I direct that the appointment of the 13th Respondent be terminated forthwith.

**Per Wijetunga, J.**

"The principle of equality applies from the stage of one's recruitment to the state sector right upto the end of one's career. It applies to the ever important matter of promotions too. This 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's against the very concept of equality and should, therefore, be abhorred. There must, in the public interest, al-

ways be honesty, openness, and transparency in regard to executive or administrative acts.

**APPLICATION** for relief for infringement of fundamental rights.

*R.K.W. Goonesekera with Jayantha de Almeida Guneratne and Francis Gunawardene for Petitioner.*

*K.C. Kamalabayson D.S.G. with Mohan Peiris S.S.C. for 1st, 6th and 12th Respondents.*

*L.C. Seneviratne P.C. with Max Bastiansz for 7th to 11th Respondents.*

*Varuna Basnayake P.C. with S.J. Mohideen for 13th Respondent.*

*Cur. adv. vult.*

02 June, 1994.

**WIJETUNGA, J.**

The Petitioner who is the Senior International Relations Executive of the 1st Respondent, Air Lanka Ltd. (Air Lanka) complains of the violation of his fundamental rights guaranteed by Article 12 (1) of the Constitution by reason of the appointment of the 13th Respondent to the post of International Relations Manager.

The Petitioner had joined Air Lanka on 16.11.88 as International Relations Executive, a post in Grade E IV of the cadre. The vacancy had been duly advertised in the newspapers and the Petitioner claims that he was selected from among hundreds of applicants, after several interviews held by different panels. He had thereafter been promoted Senior International Relations Executive, Grade E V, on or about 20.12.89. He holds a Bachelor of Arts degree in Government from the University of Essex and a Master of Arts degree in International Affairs from Columbia University. The Petitioner claims that in or about October, 1992, he made a request that his position as Senior International Relations Executive be upgraded to Manager level and in response to the said request the Consultant, International Relations and Legal ('Consultant') had a Staff Vacancy Notice dated 23.11.92 (P3) published, inviting applications on or before 7.12.92 from confirmed staff of the Company for the said post. The vacancy was to be filled by internal recruitment. One of the requirements was five years experience at Air Lanka, out of which two years should have been in the Senior Executive (E V) grade. The Petitioner duly submitted his appli-

cation through the Consultant, who was his head of department, and was interviewed on 13.1.93 by a panel of high ranking officials constituted for the purpose. He was the only applicant interviewed. On or about 23.2.93, the Petitioner came to know through the Senior Manager, Human Resources Development (Human Resources Manager) that though the interview panel had recommended his appointment, the Board of Directors at the time comprising the 2nd to 6th Respondents, had decided to defer the said appointment. The Petitioner then handed over a letter of protest to the 2nd Respondent, dated 2.3.93 (P5). The Secretary to the Board of Directors informed him on 22.3.93 that the Board would meet him at a Board Meeting scheduled for 25.3.93, but the said meeting did not take place. The Secretary's subsequent intimation to the Petitioner that his case would be taken up at the next Board Meeting also did not materialise. On or about 6.4.93 the Petitioner was informed by the Consultant that the Board was considering appointing the 13th Respondent to the said post. He inquired from the Petitioner whether in the circumstances he would wish to be transferred to another department as a Senior Executive. When the Petitioner indicated that he did not favour such a course of action, he was asked by the Consultant whether he would like a Manager-level position in either the Corporate Planning or Marketing Divisions. This suggestion too was rejected by the Petitioner who indicated to the Consultant that he was interested only in the post of International Relations Manager, since this was the post which was in keeping with his qualifications, experience and expertise. Thereafter, he handed over a letter dated 24.4.93 (P6) to the Consultant, complaining against the treatment that was being meted out to him and requesting him to inform the 2nd Respondent to deal with the matter in accordance with established and normal administrative procedures. Despite the protests of the Petitioner, the 13th Respondent was appointed to the post of International Relations Manager on or about 3.5.93.

The Board of Directors of Air Lanka was reconstituted in or about May, 1993. The Petitioner made a fresh appeal to the new Board of Directors comprising the 6th to 11th Respondents. He also made this application to Court in terms of the provisions of Article 126(2) of the Constitution.

In response to the Petitioner's application, the 1st to 6th Respond-

ents in their objections took up the position that Air Lanka was not an instrument and/or agent of the State and that the Petitioner was not entitled to maintain this application as the alleged acts or omissions complained of do not fall within the phrase 'executive or administrative action.' They further stated that the appointment of the 13th Respondent was proper, valid in law and not in violation of any fundamental right. With regard to the circumstances leading to the appointment of the 13th Respondent, affidavits were submitted from the former Chairman, a former Director and the Human Resources Manager. An affidavit from the Consultant was also submitted.

The 7th to 11th Respondents who are the Chairman and members of the new Board of Directors (the 6th Respondent who was a Director of the former Board being a member of the present Board as well), state that at the time they took office as Directors of Air Lanka, the contract of employment of the 13th Respondent had already been made and he had assumed office as International Relations Manager. They submit that they were advised that they are bound by the said contract. They further state that they had not taken a decision in regard to the appeal made to the new Board of Directors by the Petitioner as this application was pending before Court. It is their submission that the decision not to promote the Petitioner does not amount to an actionable violation of the Petitioner's fundamental rights entitling him to relief under Article 12 of the Constitution.

The 13th Respondent admits that he assumed duties as International Relations Manager on 3.5.93. He states that he was admitted and enrolled as an Attorney-at-Law in November, 1989. In 1990, he became a graduate student at the Institute of Air and Space Law at McGill University, Canada, his academic and professional qualifications having been considered sufficient to exempt him from the requirement of a bachelor's degree. The course was of two years duration and he was awarded a Master's degree.

Prior to being appointed International Relations Manager, he was first interviewed by the Consultant and later by a panel comprising the 2nd Respondent, then Chairman of Air Lanka, the Human Resources Manager and the Chief Financial Officer. Their recommendations were approved by the Board of Directors, subject to his appointment being

on a contract basis and limited to a period of two years initially. He denies that he has been unduly favoured and states that his appointment has been made on merit.

The 13th Respondent points out that the Petitioner's academic qualifications are of a general nature and not specially oriented to aeronautical law or organization, that the Petitioner is not an Attorney-at-Law and that he also lacked the minimum 5 year employment qualification with Air Lanka. He submits that he has been advised that the petition does not disclose grounds entitling the Petitioner to relief under the provisions of Article 12 of the Constitution.

Although the learned Deputy Solicitor-General, at the commencement of his argument, gave indications that he would maintain that the acts of Air Lanka did not constitute executive or administrative action, he withdrew from pursuing the question of jurisdiction and confined himself to the facts.

Counsel for the other respondents too made no serious attempt to persuade the Court that the acts complained of did not amount to executive to administrative action within the meaning of Articles 17 and 126 of the Constitution. In any event, this question has been dealt with exhaustively by this Court in *Rajaratne v. Air Lanka Ltd.*, <sup>(1)</sup> and I see no reason to take a different view.

I have already set out the sequence of events leading to the exclusion of the Petitioner from appointment as International Relations Manager.

Although the former Board of Directors failed to enlighten this Court of the circumstances in which the 13th Respondent came to make his application for this post, learned President's Counsel for the 7th to 11th Respondents who are members of the present Board of Directors, with exemplary correctness, submitted an affidavit on 7.3.94 from the present Company Secretary and Secretary to the Board of Directors, together with copies of certain documents relevant to this matter.

It appears from the material so furnished that one Tissa Abeyratne, the former International Relations Manager of Air Lanka, had addressed

a letter dated 21.11.91 (7 R4) to the former Chairman, the 2nd Respondent in these proceedings, enclosing a resume of the 13th Respondent's career, while the latter was still a student at Mc Gill University, recommending him "for a management position . . . . . in the marketing - legal field." By letter dated 25.1.92 (7R5) addressed to Tissa Abeyratne by the Consultant, to whom the said letter had been referred, the Consultant has stated, inter alia, as follows:

"Chairman passed on to me your letter to him regarding Lasantha Hettiarachchi. We discussed the matter and I indicated to him that the applicant shows promise and should be invited over for a chat when he returns to Sri Lanka. It appears from your letter that he will be returning to Sri Lanka (if he has not done so already) after concluding his Masters.

I agree with you totally that he deserves a very close look for he shows signs of a person who could contribute very much to Airlanka. I would, therefore, suggest that you request him to contact me in Colombo and we could then have a preliminary chat with a view to finding out where exactly he could serve Airlanka best. He seems to have qualifications which would serve both the Legal Division as well as International Relations. You have also referred to a Marketing-Legal field. Perhaps you could amplify on that."

Although the letter refers to Lasantha Hettiarachchi, the 13th Respondent, as the "applicant", he had made no application at that stage. The 13th respondent's 'application' (7R6) is as follows :-

"Lasantha Hettiarachchi  
437891

101/1 - 3/1 S.G.'s  
Quarters  
Kew Road, Colombo 2.

26 March, 1993.

Mr. Dunstan Jayawardene  
Chairman/Managing Director

Airlanka Ltd.  
York Street,  
Colombo 1.  
Sri Lanka.

Dear Mr. Jayawardene,

Further to our telephone conversation and the subsequent meeting I had with Mr. Shibly Aziz, I would like to submit an application to be considered for the post of manager in the International Relations department of Airlanka.

In the course of my meeting with Mr. Aziz, he explained to me the present structure of the International Relations department, the possible entry level for a person with my qualifications and experience, and the type of emolument package I could expect from Airlanka.

I have come back to Sri Lanka with the intention of staying. I am prepared to give the best of my best years to our national airline if presented with the proper opportunity and the commensurate compensation package.

I am looking forward to meeting with you and further discussing the possibility of working in International Relations at Airlanka. A copy of my resume and copies of two letters of recommendation are submitted herewith for your perusal. I would be very grateful for an early response on this matter.

Thank You.  
Yours sincerely,  
(Signature)

The affidavit of the Human Resources Manager indicates that in accordance with the directive of the then Chairman/Managing Director, the 13th Respondent was called for an interview on 31.3.93 with the Chairman/Managing Director, Chief Financial Officer and the Human Resources Manager and his application "was accordingly recommended to the Board on a 02 years contract on a Rs. 20,000/-monthly pay plus Rs. 2190/- entertainment allowance with official transport from home

to office in lieu of reimbursement of 30 gallons of fuel." The reason given for the post not being advertised in the newspapers is that "the recruitment was done only to find a person for a limited period of time."

It was the submission of the learned Deputy Solicitor - General who appeared for the former Board of Directors, that what he called the "non appointment" of the Petitioner and the appointment of the 13th Respondent were separate issues and that there was no nexus between them. He contended that if the matter was so viewed, the question of discrimination would not arise.

But the material before us is to the contrary. The letter of Tissa Abeyratne dated 21.11.91 (7R4) addressed to the then Chairman/Managing Director was without doubt a step towards sponsoring the 13th Respondent, who was yet at McGill University, for a suitable position at Airlanka. The Consultant's letter to Tissa Abeyratne dated 23.1.92 (7R5) shows that discussions had already been held between the Chairman and the Consultant as to the possibility of finding a suitable position for him. The Consultant, even at that stage, had expressed the view that the 13th Respondent "seems to have qualifications which would serve both the Legal Division as well as International Relations". The application of the 13th Respondent dated 26.3.93 (7R6) refers to a telephone conversation between him and the Chairman and a subsequent meeting that he had with the Consultant, further to which he was submitting his 'application' for the post of Manager, International Relations.

In the meantime, the Petitioner had been interviewed on 13.1.93 by a panel of high-ranking officials including the Consultant, who had recommended him for the said post. The Petitioner had learnt on or about 23.2.93 through the Human Resources Manager that although the interview panel had recommended his appointment, the Board of Directors at that time had decided to defer the same. He had even handed over a letter of protest (P5) dated 2.3.93. It was on 6.4.93 that the Petitioner had learnt that the Board was considering appointing the 13th Respondent.

The Consultant's affidavit too indicates that a few months after the Petitioner was recommended for the said post, the former Chairman

had asked him to meet and assess the 13th Respondent and ascertain his suitability to join the Department as Manager. He further states that he met the 13th Respondent "a few times" and "was satisfied . . . that he would be suitable for a management position at International Relations and thereafter conveyed (his) views to the then Chairman" and that he believes that "the former Chairman had also interviewed him (the 13th Respondent) and come to the same conclusion."

Thus it is seen that the Consultant as well as the Chairman had satisfied themselves as regards the 13th respondent's suitability for the post even before he submitted his 'application'. It is futile, therefore, to suggest that there was no nexus between the failure to appoint the Petitioner and the appointment of the 13th Respondent : The latter displaced the Petitioner from a position for which he had earlier been regarded as qualified. The appointment of the 13th Respondent was necessarily conditional upon the removal of the Petitioner as a competitor.

The failure to appoint the Petitioner is sought to be justified by the former Board on the basis that the Petitioner was unsuitable for management responsibilities at that point in time. The Chairman in his affidavit states that he recalls that at the Board Meeting at which the recommendation to promote the Petitioner was discussed, the Board unanimously decided not to take action on the recommendation as in its view the Petitioner was not yet ready for a promotion. He further states that it was the view of the members of the Board that "steps be taken to look for someone suitable, even from outside Airlanka, since the only applicant who had applied pursuant to the Internal Staff Vacancy Notice was the Petitioner himself."

We do not know whether the Chairman at the time, namely the 2nd Respondent, made the Board of Directors aware of the lurking, albeit shadowy, presence of the 13th Respondent in Air Lanka from 1991/1992, as regards whose suitability for this post he had already formed a favourable opinion. That would have obviated the necessity "to look for someone suitable". The minutes of that Board Meeting, which are so vital to the matter under consideration, have curiously not been furnished to us.

The alleged unsuitability of the Petitioner has to be examined in the light of certain other averments in paragraphs 6 and 7 of the former Chairman's affidavit. He says that within the last year of his tenure as Chairman/Managing Director, the Consultant brought to his notice and that of Mr. Wijayatilake, the 4th Respondent, who was another fellow-Director, certain difficulties he experienced, due to constraints of time, of effectively supervising and managing the work of this Department and he requested him to provide him with a capable Manager to take over some of his responsibilities, leaving him to serve in the capacity of a Consultant for which he was originally recruited. He discussed this matter with several senior Managers of Air Lanka who were familiar with the work performed by the International Relations Department, including the former Chief Marketing Officer as well as the present Chief Marketing Officers, and it was the general consensus that some one from outside the International Relations Department should be brought in at managerial level, since the most senior person in the International Relations Department, namely the Petitioner, was unsuitable for management responsibilities as yet. He says that he as well as Mr. Wijayatillake fully concurred with these views, since both of them had first hand experience of the work and disposition of the Petitioner.

Mr. Wijayatilake too, in his affidavit, states with specific reference to paragraphs 6 and 7 of the Chairman's affidavit that it sets out correctly the factual position and the conclusions which the Chairman and he had reached with regard to the Petitioner.

If, therefore, the general consensus was that the Petitioner was not suitable for the post of International Relations Manger, one fails to see why the management decided to engage in the futile exercise of inviting applications from within, being well aware that the only likely internal candidate for that position would be the Petitioner himself. Moreover, as specifically admitted by the former Chairman and the Board of Directors in their statement of objections, it was the Petitioner who, in or about October, 1992, requested that his position as Senior International Relations Executive be upgraded to Manager level and it was in response to that request that the Consultant had a Staff Vacancy Notice (P3) published, in terms of which the said vacancy was to be filled by internal recruitment.

On the other hand, if the Board was not satisfied as regards the suitability of the Petitioner and was really looking for a more qualified person for this important post, it should in the best interests of Air Lanka have called for applications from outside as well, without having recourse to what now appears to be a sham recruitment procedure by internal advertisement.

Nor does the matter end there. The interview panel that recommended the Petitioner for promotion had consisted of the Consultant himself (who had functioned as the Petitioner's Head of Department since February, 1990), the Training Co-ordinator of Air Lanka, the Financial Advisor to the Chairman and a representative of the Ministry of Policy Planning and Implementation. There is no gainsaying that the Consultant, directly under whom the Petitioner worked, would have had the best opportunity of assessing the Petitioner's suitability for this post. As already mentioned, it was the Consultant who had taken steps to upgrade the Petitioner's post by calling for applications from within, knowing very well that the Petitioner would be the obvious choice. The Petitioner's application (P4) had been submitted through the Consultant himself, who had recommended the same. But, the Consultant now says in his affidavit of 12.8.93 that some very senior Managers at Air Lanka and the then Chairman and Mr. Wijayatillake, Director, were not satisfied with the Petitioner's performance and that he had, on many occasions, informed the Petitioner of these criticisms and had advised him to remedy his shortcomings, stating that he too had observed them.

If that was the Consultant's own assessment of the Petitioner, I fail to see why he should have taken steps to upgrade his post and even recommend him for appointment, particularly if, as he now claims, he was aware that the Chairman "was very dissatisfied with him (the Petitioner)" and he too shared the concerns of the Chairman and Mr. Wijetillake about the Petitioner's inadequacies.

The Petitioner, in his counter affidavit dated 1.9.93, replying to the affidavits of the Respondents, categorically denies that during his service he had ever been faulted or found wanting in his work. He further dismisses as false and malicious, the allegations that he was unsuitable for management responsibilities, or lacked competence and con-

fidence, or showed inability to effectively handle situations which required quick responses and reactions, or was careless and irresponsible. The Petitioner also points out that he received a promotion after one year in service and had earned his increments on time - which is inconsistent with the position that he was inefficient or incompetent or that his work and conduct was in any way unsatisfactory and that on no occasion had there been any adverse comments in regard to the performance of his duties.

If the Petitioner was found wanting, as it is now alleged, one would have expected the management to bring those matters to the Petitioner's notice in writing and even warn him suitably. On the contrary, the management not only gave him a promotion but even took steps to upgrade his present post.

The Petitioner further states that during his career at Air Lanka he has been nominated by the Chairman, with the agreement of the Consultant, to attend about 35 airline meetings and about 30 bilateral (government-to-government) meetings. Even in July 1993, after the 13th Respondent had assumed duties, the Petitioner had accompanied the Consultant for a bilateral meeting in Japan.

The former Chairman, in his affidavit, states that notwithstanding the Petitioner's good academic background which furnished him with an aptitude for research, he had noticed in him a "lack of competence and confidence in other areas relating to international relations and an inability to effectively handle situations which required quick responses and reactions" and that the Petitioner "often found it difficult to bring to situations a pragmatic approach, a major disadvantage in successfully handling communications or negotiations with other airlines and aviation authorities." He also "found him at times careless or irresponsible in matters entrusted to him." He says that he had discussed these matters with the Consultant who informed him that he was also mindful of them and that he was trying his best to assist the Petitioner to overcome some of these difficulties, though he was unsure whether these could be remedied in a short time. In the meantime, the Chairman says, "we decided to give him as much exposure and experience so that he could overcome them."

If so, one wonders whether such enormous expenditure of public funds in allegedly helping some one to overcome his personal deficiencies can be justified? The Government of Sri Lanka admittedly holds approximately 95% shares of Air Lanka and even the other shareholders are state sector institutions such as the Bank of Ceylon, People's Bank, National Savings Bank, Salu Sala and the National Insurance Corporation. The material furnished by the Respondents, however, does not warrant this condemnation of the Petitioner. He was obviously included over and over again in the delegations because he had a positive contribution to make and not for altruistic purposes.

According to the promotion/recruitment procedure at Air Lanka (P7), where the level of a post to be filled is that of a Departmental and Sectional Manager, the specific approval of the Chairman/Managing Director must be obtained to fill such vacancy. One can, therefore, assume that the steps taken to fill the post of International Relations Manager by internal recruitment had the sanction of the Chairman/Managing Director. It appears from the affidavit of the Human Resources Manager that, though the panel which interviewed the Petitioner had recommended him for selection, special approval was necessary for their recommendation as the Petitioner lacked the stipulated five years experience. That apparently was the reason why the matter was brought to the notice of the Board at all.

It is admitted that the Petitioner had the requisite two years experience in the Senior Executive Grade (E V). At the time of his application, however, he had completed only four years service at Air Lanka. The subsequent affidavit of the Human Resources Manager indicates that the practice had been for Board approval to be obtained in such situations; and, such approval was ordinarily granted. In fact, a recommendation made in regard to a post of Manager (M 1) by the same panel which interviewed the Petitioner had also been put to the Board for their approval, since the person recommended had lacked the stipulated experience of two years in the Senior Executive Grade (E V), and the Board had approved his appointment at the very meeting at which the recommendation in respect of the Petitioner was turned down. The fact that the Petitioner was short of the stipulated experience by one year at the time of his application would, therefore, not have stood in his way; the management itself does not seek to justify his non-appointment on that basis.

I shall now consider another aspect of the matter before us. The Consultant admits the receipt of the Petitioner's letter dated 24.4.93 (P6), which refers to two meetings between the Consultant and the Petitioner, both said to have been initiated by the Consultant, which have a direct bearing on the circumstances surrounding the non-appointment of the Petitioner to the post in question. The Petitioner recapitulates the suggestions said to have been made by the Consultant at these two meetings in considerable detail. He requests the Consultant "to inform the Chairman of the contents of this letter and to transfer to him (his) request that this matter be handled through normal administrative procedures such as were applied at the time of (his) recruitment".

The Consultant, in his affidavit dated 12.8.93, dealing with the said letter states at paragraph 11 as follows:

"I pointed out to the Petitioner that the said letter contained inaccuracies particularly relating to the offer of alternative posts to the Petitioner and the role attributed to Mr. Tissa Abeyratne (as Mr. Abeyratne did not recommend that Mr. Hettiaratchi should be taken to Airlanka). I requested the Petitioner to correct them as otherwise I shall have no alternative but to send my comments to the Chairman when forwarding P6. Though the Petitioner agreed to consider this and revert to me, he has still not done so."

The Chairman and Directors of the former Board (other than the 6th Respondent) went out of office in May, 1993. It does not appear that the letter P6 was forwarded even to the Chairman of the present Board of Directors, with or without the Consultant's comments. Despite the Consultant's observations to the contrary, the letter 7R4 of 21.11.91 shows that Tissa Abeyratne did not in fact recommend the 13th Respondent to the then Chairman for a management position at Air Lanka.

P6 certainly was not a letter that could have been left uncontradicted if it contained "inaccuracies", judging by its contents which were damaging not only to the Consultant, but to the management itself. But yet, there the matter remains. One cannot, therefore, help but accept that it sets out accurately what went on behind the

scenes, particularly as the Petitioner stands vindicated in regard to the matter of Tissa Abeyratne's recommendation regarding the 13th Respondent.

So also, the letter of protest dated 2.3.93 (P5), handed over by the Petitioner to the then Chairman, the receipt of which has been admitted, which states, *inter alia*, as follows :

" . . . . . I have no reason to think that the decision to defer my promotion was due to any deficiencies in my educational background, sense of responsibility, loyalty to the company, discharge of duties or staff relations. If one or more of these deficiencies was identified, I am sure that it would have been brought to my notice at some time during the past few years . . . . "

There again, the management chose not to respond, thus giving credence to the Petitioner's denial of the allegations now made against him.

It would be relevant at this stage to look at the qualifications and experience of the 13th Respondent. He had obtained his Master's degree from McGill University in October, 1992. His experience as an Attorney-at-Law in Sri Lanka had been from November, 1989 to October, 1990, a period of less than one year; and his work as a lawyer did not involve aviation or related matters. He had no working experience whatsoever with any Airline.

In regard to the suitability of the 13th Respondent for appointment to this post, the then Chairman states that the Consultant who was requested to assess his suitability gave a very favourable assessment, which the Consultant informed him was arrived at after **several** meetings which he had with the 13th Respondent.

The Consultant, however, states that he met the 13th Respondent a **few** times and was satisfied that he would be suitable for a management position at International Relations.

The then Chairman further states that he too met the 13th Respondent and was very favourably impressed with his academic qualifications and his overall personality and disposition.

From the application of the 13th Respondent, it appears that he has had a meeting with the Consultant prior to his applying for the post. He goes on to say that he was looking forward to meeting with the Chairman and further discussing the possibility of working in International Relations.

In his affidavit, the 13th Respondent states that prior to his appointment he was interviewed first by the Consultant and later by an interview panel comprising the then Chairman, the Human Resources Manager and the Chief Financial Officer.

The opportunities available to the management to assess the suitability of the 13th Respondent were thus limited to those mentioned above.

The Human Resources Manager, by way of justification of the procedure adopted in appointing the 13th Respondent, states that "there are instances when the services of officers are needed to meet short term manpower requirements, they have been employed on contract basis without calling for applications for such posts in the press. Such steps have been taken only when the services of highly specialised personnel such as pilots, engineers and similar professionals are needed due to exigencies of service". He further states that "the post was not advertised in the press since the recruitment was done only to find a person for a limited period of time."

One cannot see the logic of his reasoning. Initially, steps were taken by the Consultant to upgrade the post of Senior International Relations Executive held by the Petitioner to that of International Relations Manager, at the instance of the Petitioner himself and such appointment was sought to be made by internal recruitment. The proposal was not intended to increase the cadre in the Department. In terms of the manual on promotion/recruitment procedure (P7), it is Air Lanka 's policy that "to the maximum extent possible, vacancies within the approved establishment shall be filled by internal candidates". The Petitioner in his counter affidavit states that it was the intention of the Consultant that with the Petitioner's appointment to the upgraded post of Manager (M 1), the post that he held (at E V) would be abolished.

If the Board was not satisfied with the recommendation made by the interview panel in regard to the appointment of the Petitioner, the only legitimate course open to it was to call for applications from external candidates, through proper advertisement. There is no justification whatsoever for making such appointments by private negotiation, under a veil of secrecy. Had it not been for the very proper step taken by learned President's Counsel for the present Board of Directors, even the circumstances surrounding the 'application' of the 13th Respondent would still have remained a mystery. We now know that while the 13th Respondent was yet a student at McGill University, moves were afoot to find him a suitable place at Air Lanka. His appointment to the post in question was purely on the basis of his academic and professional qualifications, in total disregard, from a management point of view, of the *sine qua non* of experience.

The stipulated qualifications and requirements for a Sectional Manager, Grade M I at Air Lanka are:

**Internal (Promotions)** - 5 years experience at Air Lanka out of which 2 years should be in Senior Executive (E V) grade.

**External (Recruitment)** - A degree from a recognized university and 5 years managerial experience.

The emphasis placed on experience is thus quite evident.

The Petitioner's complaint is that his fundamental right to equality within the meaning of Article 12(1) of the Constitution had been violated by the 1st and/or 2nd to 6th Respondents. The principle of equality applies from the stage of one's recruitment to the state sector right up to the end of one's career. It applies to the ever important matter of promotions too. This 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.

The Petitioner, as is evident from the circumstances referred to above, had a legitimate expectation of being appointed International Relations Manager. The post had been created by upgrading his present post. He had been recommended for appointment by a duly constituted panel of high ranking- officials, including the Consultant himself. The fact that he lacked a part of the stipulated experience at the time of his application would not, as shown above, have stood in his way. It was not an insuperable obstacle. In any event, the person appointed in preference to him had no experience at all. Further, the avowed policy of Air Lanka was to fill such vacancies, to the maximum extent possible, by internal candidates. Yet, the Petitioner had not only been denied his promotion, but he now finds himself condemned in these proceedings by the very management that took steps towards creating a post with a view to promoting him.

It must be emphatically stated that the material furnished to this Court by the management does not, in the absence of any contemporaneous record showing that the Petitioner had been found wanting in any respect and that appropriate action had been taken in that behalf, justify the condemnation of the Petitioner. The inability of the management to furnish such documentary evidence inevitably leads to the presumption that there was no such material available. Even after the Petitioner categorically denied all such allegations, by way of counter affidavit, characterising them as false and malicious, and in the face of his assertion that there had been no occasion for any adverse comments on the performance of his duties, the Human Resources Manager in his counter affidavit of 23.9.93, could not contradict the Petitioner, although he made some inconsequential observations in regard to other matters of much less relevance and importance.

The allegations of incompetence, inefficiency and lack of responsibility levelled against the Petitioner are thus without foundation. They evidently are *ex post facto* explanations in an attempt to justify the arbitrary and irrational manner in which the 13th Respondent's appointment was made. They clearly show that the Petitioner was looked upon with an evil eye, whereas the 13th Respondent was regarded with peculiar favour. The 1st Respondent had a legitimate interest and a public duty in ensuring that the best candidate was appointed. The salutary procedures and provisions for doing so were totally disregarded

and the 13th Respondent was appointed for reasons that had no rational connection with the object of appointing the best qualified person. The Petitioner was consequently not only treated unequally, but also offensively discriminated against. The discrimination was both unwarranted and invidious.

I, therefore, hold that the Petitioner's fundamental rights under Article 12(1) of the Constitution have been violated as aforesaid.

This brings me to the question of validity of the 13th Respondent's appointment. There was no vacancy advertised by Air Lanka in respect of which the 13th Respondent could have made an application. He has secured his appointment as International Relations Manager otherwise than through the recognized procedure for such recruitment. He does not even have the basic requirements necessary for appointment as a Manager, Grade M 1. The appointment depended upon the violation of the Petitioner's Constitutional right to equality by the demonstration of undue partiality towards the 13th Respondent. I have no hesitation, therefore, in holding that his appointment is invalid. Accordingly, I direct that the appointment of the 13th Respondent be terminated forthwith.

Learned President's Counsel for the 7th to 11th Respondents submitted that even in the event of the Court holding that there had been discrimination, it should still refrain from appointing the Petitioner to the post in question. It was his contention that in the matter of assessment of the suitability of candidates for a post, the Court should not substitute its decision for that of the Board of Directors. He drew our attention to the fact that the new Board of Directors, appointed in May, 1993, had refrained from taking a decision in regard to this matter as this application was pending before Court. He, therefore, urged that it be left open to the present Board to choose a suitable candidate, subject to whatever conditions the Court may impose.

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. Instead, I make order and direct that steps be taken forthwith by the 1st and 6th to 11th

Respondents to fill the resulting vacancy in accordance with the 1st Respondent's policy aforementioned and in terms of its promotion/recruitment procedure (P 7), and that the appointment of the International Relations Manager be made within three months of the date of this order.

I further direct that the application already made by the Petitioner be taken as an application for the said post, subject to any additional material he may submit, and be considered on its merits and that the opinions/views expressed by any member of the former Board of Directors or by any official of the 1st Respondent including the Consultant in the course of these proceedings concerning the Petitioner be totally disregarded.

Having regard to the wholly unwarranted discrimination and the needlessly offensive manner in which the failure to appoint the Petitioner was sought to be justified, I award the Petitioner a sum of Rs.50,000/- as a solatium for the violation of his fundamental rights guaranteed by Article 12 (1) of the Constitution, payable by the 1st Respondent.

I further order that the 1st Respondent pay the Petitioner a sum of Rs. 5,000/- as costs.

**AMERASINGHE, J.** - I agree.

**PERERA, J.** - I agree.

*Relief granted.*