

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 Constitution. 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 Gandhi 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 Karaippper 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 Ivor 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 be 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.