

GUNAWARDENA

v.

CEYLON PETROLEUM CORPORATION AND OTHERS

SUPREME COURT

AMERASINGHE, J.

PERERA, J. AND

EDUSSURIYA, J.

SC (FR) APPLICATION NO. 28/97

10TH NOVEMBER, 2000

Fundamental rights - Refusal by the Ceylon Petroleum Corporation to grant dealership in petroleum products at a Service Station - Application by petitioner to be appointed upon the demise of the original dealer, the petitioner's father - Legitimate expectation - Article 12(1) of the Constitution.

The father of the petitioner had been appointed and was functioning as the Dealer for the 1st respondent Corporation at the Lanka Service Station located at No. 169, Maya Avenue, Colombo 06 with effect from 3rd March 1980 on the basis of an agreement P1. He was issued with a letter of authority authorizing to deal in petroleum products in terms of section 5(e) of the Petroleum Corporation Act. (vide P2). The land on which the said Filling Station was located belongs to the Corporation. The petitioner's father died on 8.5.1996 leaving as his sole heirs his widow and five children, including the petitioner.

The petitioner states that he was involved in the management of the Service Station even prior to the death of his father; and after his demise carried on the business effectively and efficiently without customer complaints; and bills for the purchase of petroleum products were settled in the petitioner's name. The other heirs of the deceased in a letter addressed to the 9th respondent (Marketing Manager of the Corporation) requested that the petitioner be appointed the Dealer of the Corporation at the said Service Station.

Thereafter the petitioner addressed a letter dated 29.05.1996 to the 2nd respondent (Chairman of the Corporation) making a formal application for appointment as such Dealer. Clause 9.2.5 of the Marketing Manual of the Corporation concerning change of Dealership, P9, provides, inter alia,

that sympathetic consideration may be given to the family of the deceased.

Consequently the 9th respondent prepared a Board Paper dated 3.7.1996, 9R 12, recommending to the Corporation the appointment of the petitioner as the Dealer of the said Service Station in succession to his father. However, on 17.10.1996 the 10th respondent (the Area Manager of the Corporation) visited the Service Station and pasted a letter dated 16.10.1996 (on the direction of the 2nd respondent) under the hand of the 9th respondent purporting to cancel the agreement P1 and requiring persons in charge of the Service Station to hand over the same and the equipment to the 10th respondent. The petitioner however, retained the possession of the Service Station but the Corporation immediately stopped the supply of petroleum products to the outlet.

On inquiries made, the petitioner found that the reason for the purported cancellation of P1 was to enable the Corporation to appoint the 11th respondent the wife of the Secretary to the Minister of Power and Energy as the Dealer of the said Service Station. This was in breach of clause 8.2.1 of the Marketing Manual of the Corporation for the selection of a Dealer, P 10, which requires consideration of at least three suitable candidates before an appointment is made.

On 12.12.1996 the petitioner received a letter dated 6.12.1996, P11, informing him that possession of the Service Station would be taken over under the provisions of the Petroleum Corporation Act. Thereafter the Corporation broke open the doors of the premises and handed over the possession of the same to the 11th respondent with effect from 14.1.1997.

In response to the petitioner's claim the 9th respondent filed an affidavit alleging, inter alia, irregularities and public complaints in the carrying on of the business of the Service Station.

Counsel for the petitioner also submitted that the petitioner was seeking in his application to agitate a matter which is strictly within the realm of commercial contract which does not fall within the purview of the fundamental rights jurisdiction of the Supreme Court.

Held :

1. The allegations made against the petitioner have been made without sufficient evidence and even without calling upon either the petitioner

or his father to give explanations, vis - a - vis those allegations, contrary to the principles of natural justice.

2. The failure on the part of the respondent Corporation to appoint the petitioner as the Dealer of the outlet at No. 169, Maya Avenue, Colombo 6 having considered his application objectively and in a fair manner in terms of the rules set out in the Marketing Manual is *mala fide*, grossly arbitrary, capricious and unreasonable.
3. On the facts established, the petitioner had a legitimate expectation that he would be appointed Dealer of the aforesaid Service Station upon satisfying prescribed conditions set out in the Marketing Manual of the 1st respondent Corporation.
4. Whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements, in particular to those set out in Article 12 even in the sphere of contract; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, the aggrieved party cannot be contained to his remedy under the law of contract.
5. The rights of the petitioner guaranteed by Article 12(1) of the Constitution have been infringed by the 1st to 8th respondents.

Cases referred to :

1. *Att. Gen for Hong Kong v. Ng Yuen Shiu* (1983) 2 AC 629
2. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*. (1948) 1 KB 223
3. *Wickrematunga v. Ratwatte and others* (1998) 1 Sri LR 201.

APPLICATION for relief for infringement of fundamental rights.

Tilak Marapone, P.C. with *Nalin Ladduwahetty* and *Jayantha Fernando* for petitioner.

R.K.W. Goonesekera with *Sanjeewa Jayawardena* for 1st to 10th respondents.

A.K. Premadasa, P.C. with *Dr. Jayattassa Costa* and *C.E. de Silva* for 11th respondent.

April 3, 2001.

PERERA, J.

The Petitioner in this case has sought a declaration from this Court that his fundamental rights guaranteed and protected by Article 12(1) of the Constitution have been infringed by the failure on the part of the 1st to the 8th Respondents to appoint the Petitioner as the Dealer of the 1st Respondent of the Petrol Station at No. 169, Maya Avenue, Colombo 6. He has also sought an order from this Court quashing the decision of the 1st to the 8th Respondents to appoint the 11th Respondent as the Dealer of the said Service Station and for a direction on the 1st to 8th Respondents to appoint the Petitioner as the Dealer of the Corporation at the Service Station at No. 169, Maya Avenue and to grant him the authority to deal in petroleum products at the aforesaid location.

FACTS:

It is the case of the Petitioner that the Petitioner's father Hiniduma Liyanage Ariyasinghe Gunawardena, was appointed and was functioning as the Dealer for the Corporation at the Lanka Service Station located at No. 169, Maya Avenue, Colombo 6 and bearing Account No M/1196, with effect from 3rd March, 1980. The said Gunawardena upon such appointment had entered into an Agreement with the Corporation (vide P1), and was issued with a letter authorising him to deal in Petroleum Products in terms of Section 5(e) of the Petroleum Corporation Act, No. 61 of 1928 as amended by Act, No. 5 of 1993 (vide P2)

The said Service Station situated at No. 169, Maya Avenue, Colombo 6 is classified as a 'Corporation Controlled Outlet.' The land on which the said filling Station was located belongs to the Ceylon Petroleum Corporation.

In terms of the said Agreement, Gunawardena was appointed as the Dealer and was required to purchase Petrol

and Diesel oil on a pre-paid basis from the Corporation at its Terminal at Kolonnawa. The oil so purchased was transported to the Service Station at No. 169, Maya Avenue, Colombo 6 and using the facilities at the said outlet the Dealer was required to dispense Petrol and other related products to consumers at the said Service Station.

The said H.L.A. Gunawardena who was the father of the Petitioner died on 8.5.1996 leaving as his sole heirs, his widow and 5 children including the Petitioner.

The Petitioner states that he was involved in the management of the said Service Station even prior to the death of his father and continued to do so even after his demise.

According to the Petitioner after the death of his father, he had carried on the business effectively and efficiently and free from any customer complaints. In the aforesaid circumstances, the family, that is, the heirs of the deceased H.L.A. Gunawardena had a legitimate expectation that they would be appointed as the Dealer of the Corporation at the Service Station situated at No. 169, Maya Avenue, Colombo 6 in terms of the provisions of the Marketing Manual of the 1st Respondent Corporation.

Upon the death of the said H.L.A. Gunawardena, the heirs of his estate decided to have the Petitioner appointed as the Dealer of the Corporation at the said outlet and signed a communication addressed to the Marketing of the Ceylon Petroleum Corporation, Kolonnawa whereby the other heirs requested the Marketing Manager, Ceylon Petroleum Corporation to appoint the Petitioner as the Dealer of the Corporation at the outlet situated at the said premises. The 9th Respondent in his Board Paper marked 9R12 has admitted the receipt of this document.

Thereafter, the Petitioner addressed a letter dated 29th May, 1996 (P4) addressed to the Chairman of the Ceylon Petroleum Corporation making a formal application for the Dealership of

the Corporation at the aforesaid premises. In this letter, the Petitioner had specifically requested the 2nd Respondent to give due consideration to the fact that it was he who had been involved in the management of the said Service Station even during the lifetime of his father and appealed to him to grant the Petitioner the Dealership.

According to the Petitioner, he effectively carried on the business of the said Service Station upon the demise of the said H.L.A. Gunawardena and bills for the purchase of Petroleum Products were settled in the Petitioner's name and/or through his Bank. (See P5A to P5D and P13).

However, the Dealership of the said Service Station has been granted to the 11th Respondent on a decision of the Board of the 1st Respondent upon a Board Paper prepared by the 9th Respondent. A true copy which has been produced marked P7.

On the 17th of October, 1996 the 10th Respondent who arrived at the aforesaid Service Station had pasted a letter dated 16.10.96 (on the directions of the 2nd Respondent), under the hand of the 9th Respondent informing the Petitioner that it has been decided to cancel the Dealership in terms of Section 12(b) of the Agreement P1 and the authority given under Section 5 (H) (4) of the Petroleum Corporation Act. This letter further required the persons in charge of the said Service Station to hand over the Service Station and the equipment owned by the 1st Respondent Corporation to the 10th Respondent. (P8).

The 1st Respondent Corporation immediately thereafter stopped the supply of petroleum products to this Outlet. The Petitioner however retained possession of the said Service Station.

According to the petitioner, inquiries made by him revealed that the decision to cancel the Agreement and Authority (P1) conveyed by the letter of the 9th Respondent dated 16.10.96

had been taken by the 1st Respondent to enable the Corporation to appoint the 11th Respondent as the Dealer of the said Lanka Service Station at Maya Avenue. The Petitioner alleges that the 11th Respondent is the wife of a person employed at the SLFP Head Office and also functioned as a Secretary to the Minister of Power & Energy under whose purview the 1st Respondent Corporation functions.

The Petitioner complains that the Area Manager (10th Respondent) in selecting the 11th Respondent as the Dealer has failed to comply with Clause 8:2 of the Marketing Manual of the 1st Respondent Corporation for the selection of a Dealer. The attention of this Court has been specifically invited to the requirement in the aforesaid paragraph for the Area Supervisor to make inquiries locally and obtain applications from at least three suitable candidates and to forward his comments as to the competence and suitability of such candidates to the 10th Respondent. (Vide Clause 8.2.1 of P10).

Further in terms of Clause 9.2.5 of the Marketing Manual, the 1st Respondent Corporation is obliged to *give sympathetic consideration to the family members* of a deceased Dealer in respect of the Dealership, unless they are individually or collectively incapable of operating the outlet satisfactorily because of lack of funds or other valid reason. (Vide P9 Clause 9.2.5)

The Petitioner has averred that there was no valid reason for the 1st Respondent Corporation to form the opinion that the Petitioner was incapable of operating the said outlet satisfactorily.

It is the case of the Petitioner that after the demise of H.L.A. Gunawardena, the Petitioner had always faithfully, diligently and efficiently performed the duties and obligations as a Dealer of Petroleum of the 1st Respondent and has not defaulted in complying with any of the Terms, Covenants and Conditions of the Dealership Agreement or the Conditions under which

commissions and allowances are payable to him in terms of the Agreement.

In the aforesaid circumstances, the Petitioner states that upon the demise of his father, the 1st Respondent Corporation ought to have considered him for appointment as the Dealer, there being no valid reason to believe that he was incapable of operating the outlet satisfactorily. The action of the Corporation in depriving him of the appointment as the Dealer and appointing the 11th Respondent is therefore *mala fide*, capricious, unreasonable and unfair.

The Petitioner has also adverted to an earlier application made to this Court for relief upon the decision of the 2nd Respondent to terminate the Dealership awarded to his father (Application No. 713/96) on the ground that the Dealership held by the deceased Gunawardena enured to the benefit of the heirs of his estate. This Court has refused leave to proceed in respect of his application on the basis that there existed no such right to inherit but had reserved the right to the Petitioner to file a fresh application if the 1st Respondent failed to appoint a member of the family, upon such application being made by that family member.

Thereafter, the Petitioner had met the 3rd Respondent and had requested him to reconsider the decision taken by the Board and to grant a further opportunity to the Petitioner by recommending to the Board to review the decision of the Board to appoint the 11th Respondent as the Dealer of the Service Station at Maya Avenue. The 3rd Respondent had then given the Petitioner an assurance that he would make such recommendation to the Board of the 1st Respondent Corporation and acting upon such assurance the Petitioner had awaited his appointment as the Dealer of the said Service Station.

However on 12.12.96 the Petitioner had received a letter dated 6.12.96 requiring the Petitioner to hand over possession of the premises No. 169, Maya Avenue, Colombo 5 on which

premises the said Service Station was located and that the possession of the premises in question would be taken over in terms of Section 32(a) (i) and (ii) read with Section of the 38(2) of the Petroleum Corporation Act. (Vide P11).

Consequent to the aforesaid letter, the 1st Respondent Corporation has broken open the doors of the said Service Station and has handed over the possession of same to the 11th Respondent with effect from 14.1.97. The 11th respondent is presently functioning as the Dealer of the Corporation at the said premises.

President's Counsel on behalf of the Petitioner submitted that having regard to the matters the Petitioner has pleaded, the decision taken by the 1st Respondent and the 2nd to the 8th Respondents as members of the Board of Directors of the 1st Respondent Corporation to refrain from appointing the Petitioner as the Dealer of the said Outlet and the decision to award same to the 11th Respondent is *mala fide*, capricious, unreasonable and unfair and that by such action the Petitioner has been subjected to hostile discrimination in violation of his fundamental rights guaranteed by Article 12(1) of the Constitution.

It is in these circumstances, that the Petitioner sought a declaration that the fundamental rights of the Petitioner guaranteed and protected by Article 12(1) of the Constitution have been infringed by the failure to appoint the Petitioner as the Dealer of the Outlet located at No. 169, Maya Avenue, Colombo 6.

In response to this claim of the Petitioner, the 9th Respondent on behalf of the 1st to the 10th Respondents in this case filed a very comprehensive affidavit seeking to justify the decision of the 1st to the 8th Respondents to appoint the 11th Respondent as the Dealer of the Service Station at No 169, Maya Avenue and authority granted to her to deal in petroleum products upon the following grounds :-

(a) *Irregularities perpetrated by the Petitioner*

Neither the Petitioner and/or the Petitioner's mother operated the said Service Station satisfactorily after the death of Mr. H.L.A. Gunawardena resulting in numerous complaints from members of the public in respect of the constantly insufficient stocks of petroleum and diesel. The Petitioner's mother and/or the Petitioner had failed negligently to maintain the minimum required stock of diesel and petrol in the underground storage tanks of the Service Station contrary to the rules and regulations formulated by the 1st Respondent. It is the position of the 9th Respondent that maintenance of this minimum quantity is insisted upon by the 1st Respondent in order to ensure the ready and uninterrupted supply of petroleum to the public.

In September and October 1996, i. e. immediately before the 11th Respondent was appointed as the Dealer of the said Service Station this fact was detected. In support of this proposition he produced the "Daily Sales Analysis" for the months of September and October, 1996 marked 9R3 and 9R4.

(b) *Public complaints against the Petitioner*

In about the latter part of July 1996, the 9th Respondent—the Marketing Manager of the 1st Respondent became aware that the Area Manager (West/South) of the 1st Respondent had received numerous complaints from members of the public to the effect that the service extended at this Service Station was very unsatisfactory in view of the constantly depleted levels of petroleum and diesel maintained at the Station.

The 9th Respondent also seeks to rely on a report furnished by the Area Manager (West/South) dated 19.8.96 after a routine inspection by the Service Station Manager. (Vide 9R7) and extracts from the Field Officer's log book after a

visit to this Service Station by the Deputy Marketing Manager marked 9R6 that the Lanka Service Station at Maya Avenue had been operated in a manner which is prejudicial and inimical to the discharge by the 1st Respondent of its duty towards the public under the stewardship of the Petitioner's mother and/or Petitioner.

The 9th Respondent has also referred to two complaints (9R10 & 9R11) made against the Petitioner's father regarding his failure to operate the Service Station satisfactorily - but he states that the allegations could not be proved with sufficient certainty to warrant the imposition of disciplinary action although inquiries were made by the 1st Respondent.

(c) *P4 is not an application*

The 9th Respondent states that the document marked P4 is merely a letter from the Petitioner indicating his desire to be appointed as the Dealer of the Lanka Service Station at Maya Avenue and fails to furnish any acceptable material pertaining to the Petitioner's ability to operate Dealership on a long-term basis. P4 was therefore not a properly constituted application. There was also some degree of doubt in regard to the financial capacity of the Petitioner to operate the Dealership successfully.

(d) In the 9th Respondent's affidavit he has specifically stated that he was not aware that the husband of the 11th Respondent (the present Dealer) was a Secretary to the Hon. Minister of Power & Energy and the then Deputy Minister of Defence.

(e) That the Marketing Manual of the 1st Respondent Corporation has been abrogated and was therefore not in operation at all times material to the Petitioner's application having been invalidated by the Board of Directors of the 1st Respondent Corporation (Vide 9R18 & 9R19). Without prejudice to the invalidity of the Marketing Manual the 9th

Respondent states that in any event Clause 9.2.5 of the said Manual specifically points out that "while sympathetic consideration may be given to the family of the deceased, if they are individually or collectively incapable of operating the outlet satisfactorily because of lack of funds or other valid reasons, their claims may be dismissed."

- (f) That upon the death of the Petitioner's father the Dealership was automatically terminated as a result of the death of the appointed dealer.

I now propose to examine the validity of the grounds set out by the 9th Respondent in his affidavit justifying the non appointment of the Petitioner as the Dealer of the aforesaid Service Station.

(a) & (b) **The failure on the part of the Petitioner's mother and/or Petitioner to operate the Service Station satisfactorily.** In this connection, the Petitioner in his counter affidavit has invited the attention of this Court to the fact that the 1st Respondent Corporation has at no stage issued any warnings to either the Petitioner or to his father during his lifetime with regard to the unsatisfactory manner in which the said Filling Station has been operated nor has the 1st Respondent Corporation at any stage called for any explanation either from the Petitioner or from his father with regard to the inadequate stock of fuel maintained at the said Filling Station. The 9th Respondent has failed to adduce any evidence on this aspect of the matter.

In the absence of any form of evidence in support of the matter set out above, I agree with the submission of Mr. Marapone, P. C. on behalf of the Petitioner that it is safe to presume that the operation of the said Filling Station was continued satisfactorily before and after the death of the Petitioner's father on 8.5.96 without any complaints from the public. It is also relevant to observe that the Respondents have failed to produce any complaint from the public for the period

January to October, 1996 nor have they produced any details with regard to the inadequate stock levels maintained or the unsatisfactory manner in which the said Filling Station was operated in the months immediately after the death of the Petitioner's father. In this connection it is significant that the 9th Respondent has admitted that he had prepared a Board Paper No 1996/106/196 dated 3.7.96 (9R12) recommending to the Board of Directors of the 1st Respondent Corporation the appointment of the Petitioner as the Dealer of the said Service Station in succession to his late father.

There also appears to be much substance in the submission of Counsel for the Petitioner that detections and spot inspections referred to in the 9th Respondent's affidavit and the allegations relating to the maintenance of inadequate stock levels surfaced only in September and October 1996 when the appointment of the 11th Respondent as Dealer was under consideration by the 1st Respondent Corporation. The letter issued by the Bank of Ceylon to the 1st Respondent dated 20.9.96 (9R15) relating to the financial capacity of the 11th Respondent is strongly supportive of the fact that towards the latter part of September 1996 the selection of the 11th Respondent for Dealership was under serious consideration by the 1st Respondent Corporation. The aforesaid facts in my view support the proposition of the Petitioner that at this stage the 1st Respondent Corporation was making every endeavour to pave the way for the 11th Respondent to obtain the Dealership of this Service Station.

In evaluating the allegation made by the 9th Respondent that he became aware in the latter part of July 1996 that the *Area Manager (North/South) at the 1st Respondent Corporation* had received numerous complaints from the members of the public alleging that the service extended at this Service Station was very unsatisfactory in view of the constantly depleted levels of petroleum and diesel maintained at the said Service Station, it is relevant to note that the Respondents have not produced any details with regard to the inadequate stock levels maintained or the unsatisfactory manner in which the said

Filling Station was being operated immediately after the death of the Petitioner's father in May 1996 - the documents produced relate only to the months of September and October 1996. It is the submission of Counsel for the Petitioner that orders were placed by the Petitioner upon payment of cash with the 1st Respondent Corporation so that there would be adequate stocks when the inspections took place. However the delivery of necessary stocks of petrol and diesel had been deliberately delayed with a view to ensuring that there would not be adequate stocks when the inspections took place. Counsel relied on the documents marked P15(A) to P15(N) in support of his submission.

Further, the Petitioner in this letter P4 dated 20.5.96 while applying for the Dealership had indicated to the 2nd Respondent his financial capability and suitability to continue as the Dealer of the said Service Station. Hence in my view, it is safe to presume that the 9th Respondent prepared the Board Paper (9R12) recommending the Petitioner for Dealership having determined that the Petitioner was both financially stable and was capable of conducting the operations of the Service Station in a suitable manner.

It is also necessary to observe that no report from the Area Manager (10th Respondent) has been adduced in support of the 9th Respondent's contention that the said Service Station was functioning in an unsatisfactory manner either immediately before or after the aforesaid Board Paper (9R12). In the aforesaid circumstances, there appears to be merit in the contention of Counsel for the Petitioner that the adverse material was collected thereafter for the purpose of preventing the Board Paper (9R12) being approved by the Board of the Respondent Corporation as the 11th Respondent had by this time indicated an interest in the Dealership of the said Service Station.

Yet another matter that must be borne in mind in this regard is that no material has been placed before this Court to establish that the Petitioner was at any stage called upon to give any

explanation either by the 9th Respondent or by the Board of the 1st Respondent Corporation with regard to the inadequate stock levels maintained at the said Service Station, the Petitioner's financial capabilities or with regard to any complaint on the unsatisfactory manner in which the said Service Station had been operated.

(c) The letter P4 submitted by the Petitioner for Dealership of this Service Station is not a properly constituted application. It was the contention of Counsel for the 1st to the 10th Respondents that the document produced marked P4 is merely a letter from the Petitioner indicating his desire to be appointed as the Dealer of the Lanka Service Station at Maya Avenue. The said letter failed to furnish any acceptable material pertaining to the Petitioner's ability to operate a Dealership on a long-term basis.

I wish to observe that the document marked P4 which is the letter dated 29.5.96 by which the Petitioner applied for the Dealership of this Service Station he has indeed indicated to the 1st Respondent his financial capability and his suitability to continue as the Dealer of the said Service Station. In point of fact, the Respondents have not produced in this case details of any public complaints that existed from January to October 96, nor produced any details with regard to the inadequate stock levels maintained and the unsatisfactory manner the said Filling Station was being operated during the period immediately after the death of the Petitioner's father.

Further, in my view, there can be little doubt that the 9th Respondent when he prepared the Board Paper marked 9R12 recommending the Petitioner to be appointed as the Dealer of the said Service Station, he had acted upon the document P4 and had accepted the suitability and financial capability of the Petitioner for appointment as the Dealer of this Service Station.

The conduct of the 9th Respondent to initiate inquiries into the capacity and eligibility of the Petitioner after he prepared the document 9R12 lends support to the allegation made by

the Petitioner that the 9th Respondent was not acting *bona fide* in this matter and raises grave suspicions in regard to the course of conduct adopted by him. If the Petitioner's application (P4) had not been properly constituted as alleged by the 9th Respondent, then the question arises as to why the 9th Respondent prepared the Board Paper (9R12) recommending the Petitioner's application for appointment for Dealership.

For the aforesaid reasons, I am unable to accept the statement of the 9th Respondent who at this late stage takes up the position that P4 was not an application for Dealership which conformed to the requirements of the 1st Respondent Corporation.

(d) The 9th Respondent in his affidavit has stated that he was not aware that the husband of the 11th Respondent (the present dealer) was the Secretary of the Hon. Minister of Power & Energy and the then Deputy Minister of Defence. However, on this matter, we have the specific averment in the affidavit furnished by the 11th Respondent herself who says that she is the wife of Samarasekera referred to in paragraph (4) of the petition and that her husband was the Secretary to the Hon. Anuruddha Ratwatte, Minister of Power & Energy and the Deputy Minister of Defence.

(e) Marketing Manual of the 1st Respondent Corporation has been abrogated - The 9th Respondent has also raised the objection that the Marketing Manual of the 1st Respondent Corporation has been abrogated and was therefore not in operation at all times material to the Petitioner's application. It was the contention of Counsel for the 1st to the 10th Respondents that at the relevant time the Marketing Manual had been invalidated by the Board of Directors of the 1st Respondent Corporation (9R18 & 9R19).

However, upon a perusal of the document (9R18), it is clear that while it contains a declaration that the Marketing Manual is obsolete, the decision of the 1st Respondent Board dated

24.9.96 (9R19) does not indicate that the Board of the 1st Respondent Corporation had made a decision either to abrogate or declare the Marketing Manual to be obsolete. Instead the Board had only taken note of the contents of the Board Paper (9R18) submitted by the 9th Respondent. I am unable therefore to accept the averment of the 9th Respondent that at all times material for the Petitioner's application for Dealership and the appointment of the 11th Respondent as the new Dealer, the Marketing Manual had been abrogated by the Board of Directors of the 1st Respondent Corporation.

I hold, therefore, that upon the material placed before this Court there is no justification to hold that the Marketing Manual had in fact been abrogated, nor has there been a declaration by the 1st Respondent Board to the effect that the Marketing Manual was obsolete. In point of fact a memo dated 30.12.96 (P12) addressed to the 2nd Respondent by the 9th Respondent relating to the appointment of Dealer of a Corporation Controlled Outlet at Thambuttegama is supportive of the fact that the 1st Respondent Corporation was indeed acting in conformity with the Guidelines set in the Marketing Manual (Vide P20) even as late as December 1996.

Part 8 of the Marketing Manual relates to the appointment of Dealers which lays down the policy and procedure in the appointment of Dealers. Clause 8.2.1 requires the Area Supervisor to make inquiries locally and obtain applications from at least 3 suitable candidates and to forward his comments as to the competency and suitability of the 3 candidates as required by Clause 8.2 of the Marketing Manual. (Vide Part 8 of the Marketing Manual marked P9 of the 1st Respondent Corporation). There is no material whatsoever furnished by the Respondent to show that they have complied with the aforesaid requirements.

The only conclusion one can reach in the aforesaid circumstances is that the 1st Respondent Corporation had not taken any step in terms of the procedure laid down by the

Marketing Manual in the selection of the dealer for this Service Station and in taking steps to appoint the 11th Respondent as the dealer of the said Service Station.

Further, Part 9 of the Marketing Manual makes provision for change of Dealership and Closure of Outlets. Clause 9.2.5 states thus:

“While sympathetic consideration may be given to the family of the deceased, if they are individually or collectively incapable of operating the outlet satisfactorily because of lack of funds or other valid reasons, their claims may be dismissed.”

On a consideration of the entirety of the material placed before this Court by the 1st to the 10th Respondents, one cannot reasonably come to the conclusion that any endeavour has been made by the 1st Respondent Corporation to comply with the provisions contained in Clause 9.2.5 of the Marketing Manual. In my view the Respondents have failed to give any consideration whatsoever to ascertain whether the petitioner “was individually or collectively incapable of operating the outlet satisfactorily because of lack of funds or other valid reasons.”

On the contrary, the material placed before this Court is more supportive of the fact that the Petitioner has efficiently performed his duties and obligations as a Dealer of petroleum products of the Corporation and has not defaulted in complying with any of the terms and/or conditions of the Dealership Agreement.

It would appear to me that the allegations made against the Petitioner have been made without sufficient evidence and even without calling upon either the Petitioner or his father to give explanations, vis-a-vis, those allegations contrary to the principles of natural justice. It is also significant in this connection to advert to the fact that the allegation that adequate stock levels had not been maintained have been levelled against

the Petitioner, particularly during the months of September and October, 1996 after the 11th Respondent had clearly indicated an interest in the Dealership as borne out by 9R15. Neither the 1st Respondent Board nor the 9th Respondent has adduced any evidence to support the allegation with regard to the inadequate stock levels or other allegations during the period before and immediately after the death of the Petitioner's father, i.e. the 8th of May, 1996.

There seems to be much merit in the submission of Counsel for the Petitioner that the Petitioners have delayed delivery of fuel "during the period the Respondents allege the Service Station had inadequate stock levels" after payment was made in cash which is borne out by the documents P15A to P15M to enable the Respondents to justify the Dealership being given to a person other than the Petitioner.

The Petitioner's position is that the failure on the part of the 1st to the 10th Respondents to consider his application upon its merits for Dealership is *mala fide*, grossly arbitrary, capricious and unreasonable, and also that such failure has been influenced by collateral considerations and made for alleged reasons which do not bear any form of objective scrutiny.

I am of the view that the failure on the part of the 1st Respondent Corporation to appoint the Petitioner as the Dealer of the Outlet located at No. 169, Maya Avenue, Colombo 6, having considered his application objectively and in a fair manner in terms of the rules set out in the Marketing Manual of the 1st Respondent Corporation constitutes action which is *mala fide*, grossly arbitrary, capricious and unreasonable.

It has been held in the Case of *Att. Gen. for Hong Kong v. Ng Yuen Shiu*⁽¹⁾ that a legitimate expectation which has been created may sometimes be no more than that a particular procedure may be followed.

On the facts established in the present case, I hold that the Petitioner had a legitimate expectation that he would be

appointed Dealer of the aforesaid Service Station upon satisfying prescribed conditions set out in the Marketing Manual of the 1st Respondent Corporation. I hold that the rights of the Petitioner guaranteed by Article 12(1) of the Constitution have been infringed by the 1st to the 8th Respondents. It is now well settled law that if it can be shown that a decision was based on irrelevant considerations, or that improper purposes were being pursued, it will be struck down on the Wednesbury Criteria. (See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*)⁽²⁾.

It was also contended on behalf of the Respondents that the purported right of the Petitioner cannot be vindicated in a fundamental rights application. It was Counsel's submission that the Petitioner was seeking in his application to agitate a matter which is strictly within the realm of private commercial contract which does not fall within the purview of the fundamental rights jurisdiction of this Court. This matter has now been finally resolved by this Court. In the case of *Wickrematunga vs Anuruddha Ratwatte and Others*⁽³⁾ - where it was held that "Law in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct. In the context, whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements, in particular to those set out in Article 12 even in the sphere of contract; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, the aggrieved party cannot be confined to his remedy under the law of contract."

I accordingly declare that the action of the 1st to the 9th Respondents in this case is indeed *mala fide*, grossly arbitrary, capricious and unreasonable and the Petitioner's fundamental right to equal protection of the law has been violated. In the circumstances of this case, I consider it just and equitable that

the 1st Respondent Corporation should pay the Petitioner a sum of Rs 250,000/- as a solatium.

I make order that a sum of Rs 250,000/- be paid by the 1st Respondent Corporation to the Petitioner as a solatium for the infringement by the Corporation of the Petitioner's fundamental rights. I also make order that the 1st Respondent Corporation shall pay the Petitioner a sum of Rs 25,000/- as costs.

AMERASINGHE, J. - I agree.

EDUSSURIYA, J. - I agree.

Relief granted.