

NARENDRAKUMAR
v.
ZIYARD AND OTHERS

SUPREME COURT
S. N. SILVA, C. J.
PERERA, J. AND
GUNASEKERA, J.
S. C. (FR) APPLICATION No. 777/96
29TH OCTOBER, 1999.

Fundamental rights - Complaint against appointments in a Bank - Articles 12(1), 17 and 126(1) of the Constitution - Time bar.

The petitioner and three others Ziyard, Jayawardena and Kiritharan applied for the post of Deputy Chief Legal Officer of the 2nd respondent Bank. All of them were eligible to apply for the post. After interview the Board of Directors selected Jayawardena and the formal announcement of her appointment was made on 31.08.1995. That appointment was challenged by Ziyard, the 1st respondent to this application in SC(FR) 483/95 in which the petitioner to this application and Kiritharan (the 14th respondent to this application) were not made parties. Ziyard was granted leave to proceed in respect of the alleged infringement of Article 12(1) of the Constitution. While that application was pending, Ziyard reached the optional age of retirement. The Bank had on 18.01.1996 refused to grant him an extension of service. This prompted him to file application SC(FR) 240/96 on 15.02.1996 against the Bank. In that application also, leave to proceed was granted in respect of the alleged infringement of Article 12(1).

Kiritharan applied to intervene in SC(FR) 483/95. This was refused by the Court on 30.09.1996. On 23.10.1996 both applications were concluded by a settlement in Court whereby the Bank agreed to appoint Ziyard as Deputy Chief Legal Officer (Supernumerary) with effect from that day and Ziyard agreed to retire after going on leave prior to retirement from that day on available privilege leave. It was also agreed that his pension will be computed on the basis of his appointment as Deputy Chief Legal Officer (Supernumerary).

Whereupon, the petitioner filed the present application on 25.11.1996 naming as respondents inter alia, Ziyard, Jayawardena and Kiritharan

as the 1st, 9th and 14th respondents respectively on the ground of alleged infringement of Article 12(1).

Held :

As regards Jayawardena's appointment, the application was way outside the period of one month prescribed by Article 126(1). As regards Ziyard's appointment the application made on the ground that the said appointment, recorded by Court as a settlement, was arbitrary and capricious, is misconceived in that what Ziyard received was a retiral benefit. The settlement effectively prevented him from functioning in the appointment which he received pro forma. The petitioner not having reached the optional age of retirement, was not in the same class of persons as Ziyard.

Cases referred to :

1. *Gunawardena v. Senanayake* FRD Vol. 1 p. 177.
2. *Jayawardena v. Attorney - General* FRD Vol. 1 p. 175.
3. *Krishna Mining Co. Ltd. v. JEDB* (1996) 2 SRI LR. 209.
4. *Gamaethige v. Siriwardena and others* (1998) 1 SRI LR. 384.
5. *Ramanathan v. Tennakoon* (1988) 2 CALR 187.
6. *Edirisinghe v. Navaratne* (1985) 1 SRI LR. 100 at 106.
7. *Saman v. Leeladasa* (1989) 1 SRI LR. 1.
8. *Namasivayam v. Gunawardena* (1989) 1 SRI LR. 394.

APPLICATION for relief for infringement of fundamental rights.

S. Sivarasa, P. C. with E. R. S. R. Coomaraswamy and A. R. Sivendran for petitioner.

Sanjeeva Jayawardena for the 1st and 2nd respondents.

E. D. Wickremanayake for the 2nd to 8th and 12th to 13th respondents.

Romesh de Silva, P. C. with Harsha Amarasekera for the 9th respondent.

Nilanthi Mendis for the 10th respondent.

March 31, 2000

S. N. SILVA, C. J.

This Application has been filed on 25.11.96 and the Petitioner has been granted leave to proceed on 30.1.97 in respect of the alleged infringement of Article 12(1) of the Constitution.

The Application is linked with a previous application S. C. (FR) 483/95 filed on 1.9.95 to which is linked to yet another Application S. C. 240/96. Both these Applications were concluded by an order made by this Court on 23.10.96. In essence the dispute in all these applications relate to the appointment of a Deputy Chief Legal Officer of the 1st Respondent Bank. The pleadings in this application make extensive references to the pleadings and proceedings in the previous applications and in view of objections that have been raised, I would set out briefly the material facts and sequence of events relevant to them.

Taking the picture that emerges from the totality of the pleadings, the dispute in these applications involve four persons, namely (i) the petitioner (Narendrakumar) (ii) the 1st Respondent (Ziyard) (iii) 9th Respondent (Jayawardena) and (iv) the 14th Respondent (Kiritharan). They have been all officers attached to the Legal Branch of the Bank. Their long service in the Bank commenced in 1976/1977 and the initial appointments in the service of the Bank were made as follows:

Ziyard	-	01.12.1976
Jayawardena	-	22.03.1977
Kiritharan	-	27.03.1977
Narendrakumar	-	30.03.1997

They were promoted to the grade of Senior Legal Officer on the same day i. e. 1.1.1990. Things appear to have moved smoothly until the pyramid narrowed and the time came for

the appointment to the single post of Deputy Chief Legal Officer, upon the premature retirement of the then incumbent on 31.5.1995.

According to the applicable organisational chart and the promotional scheme, the eligibility for the post of Deputy Chief Legal Officer is three years service as a Senior Legal Officer Grade I. Thus, the four persons referred to above were eligible and were required to submit their bio-data which was done in the 2nd week of July 1995. They were interviewed by the Board of Directors of the Bank on 4.8.1995 and the Petitioner has stated in his affidavit that a short time after the interviews were concluded, he was informed that Jayawardena has been selected for the post of Deputy Chief Legal Officer. The formal announcement of her appointment was made by letter dated 31.8.1995 and she was appointed to that post with effect from 1.8.1995.

Ziyard filed application bearing No. S. C. 483/95 in this court on 1.9.1985 alleging that the selection of Jayawardena constituted an infringement of his fundamental right to equality. Neither the Petitioner Narendrakumar nor Kiritharan were made parties to that application. The application was supported for leave to proceed on 4.9.95 and leave was granted in respect of the alleged infringement of Article 12(1) of the Constitution. The case was fixed for hearing on 31.10.95, on which date it was refixed for hearing on 9.2.96, since Ziyard being the Petitioner moved for time to file a counter affidavit. Thereafter the application was listed for hearing on 25.3.96.

In the meanwhile there was another development in which Ziyard who was reaching the optional age of retirement in the service of the Bank sought an extension of his period of service which was refused by the Bank by letter dated 18.1.96. In the result Ziyard had to retire with effect from 16.4.1996. This prompted him to file application S. C. (FR) 240/96 on 15.2.96. That application was supported on 8.3.96 and leave to proceed was granted in respect of alleged infringement of Article 12(1)

of the Constitution. The application was listed for hearing on 8.7.96 and relisted on 15.10.96.

When application S. C. (FR) 483/95 was taken up for hearing on 16.9.96, arising from the submissions made in court, it was recorded that the Petitioner agreed to explore the possibility of a settlement and the case was to be called on 30.9.96 to ascertain whether a settlement had been reached and if not, to list the case for resumption of hearing. When that case was called on 30.9.96, an application was made by Kiritharan to intervene in that case. In his petition for intervention dated 27.9.96, Kiritharan stated that the appointment of Jayawardena to the post of Deputy Chief Legal Officer is arbitrary and flawed by discrimination and sought an order cancelling her appointment. On 30.9.96 the Court refused the application of Kiritharan for intervention. The journal entry states that the applications for intervention by Kiritharan and Narendrakumar are rejected. However, the record in that case contains only an application of Kiritharan for intervention. Be that as it may, in the proceedings it is further recorded that counsel informed court that it had not been possible to pursue a settlement in view of the application for intervention and moved for a further date. The case was then fixed for 23.10.96.

The cases S. C. (FR) 483/95 and 240/96 were concluded by the order made by Court on 23.10.96. Since both counsel have made extensive references to portions of that order, I would set out the entire order;

"The Petitioner (Ziyard) is present and through his Counsel agrees to the following terms of settlement :

In view of the Bank (1st Respondent) agreeing to place the Petitioner in the post of Deputy Chief Legal Officer (Supernumerary) with effect from today i. e. 23.10.1996 and to adjust his salary accordingly, the Petitioner :-

-
- (a) will go on leave prior to retirement and will avail himself of the privilege leave available to him with effect from today; and
 - (b) will be entitled to his pension computed on the basis of this appointment as Deputy Chief Legal Officer (Supernumerary)

The Court makes order in terms of the above settlement. This settlement will not in any way affect the rights of the 8th Respondent (Jayawardena) who has been appointed as Deputy Chief Legal Officer.

In view of the above settlement, the Petitioner withdraws S. C. Application No. 240/96."

Registrar to note

A copy of this to be filed in the docket of S. C. Application No. 240/96."

This application was filed by Narendrakumar on 25.11.96, naming Ziyard being the Petitioner in both previous applications as the 1st Respondent and Jayawardena as the 9th Respondent, and Kiritharan who sought to intervene in the previous application as the 14th Respondent. Thus all four aspirants to the post of Deputy Chief Legal Officer are now in court, in what is numerically the 3rd round of litigation relating to the much coveted office.

The petitioner has been granted leave to proceed on the alleged infringement of Article 12(1) of the Constitution.

Two preliminary objections have been raised by the Respondents on the basis :

- (iv) that this application is misconceived;
- (v) that it is time-barred.

Since there are wide ranging averments in the Petition and in view of the preliminary objections raised, it is necessary to focus on the specific infringement alleged and the corresponding relief that has been sought. The thrust of the averments in the Petition is two fold: firstly it is directed at the appointment of Jayawardena as the Deputy Chief Legal Officer. Secondly, it is directed at the appointment of Ziyard as Supernumerary Deputy Chief Legal Officer.

Paragraphs 8 to 13 of the Petition refer to the criteria and the process adopted by the Board of Directors for the selection of a candidate for the post of Deputy Chief Legal Officer and the Petitioner draws an inference from what he has set out in paragraph 14 as follows :

“In all these circumstances it is submitted that a fair and equitable evaluation based on rational criteria could not have been made. The whole process smacks of arbitrariness and discrimination. The procedure adopted by the Board, functioning as a Selection Board, has been arbitrary and not guided by any rule or principle known in advance.”

The complaint regarding the appointment of the 1st Respondent as Supernumerary Deputy Chief Legal Officer is somewhat muted and restricted to a single paragraph of the petition, where it is merely alleged that the appointment is “arbitrary, capricious and without cancelling the appointment of the 9th Respondent and in violation of the 2nd Respondent’s own cadre and procedure.” These averments are followed up by way of relief in a single sub-paragraph in the prayer by which an order is sought directing the 2nd Respondent Bank to cancel the appointments of 9th Respondent Jayawardena and the 1st Respondent Ziyard.

Although the Petitioner with a degree of ingenuity has rolled up the relief in respect of both appointments in the said sub paragraph of the prayer, in view of the objection of time bar

we have to examine the alleged infringements in relation to the respective appointments, separately.

The selection of Jayawardena to the post of Deputy Chief Legal Officer was made immediately after the interview held on 4.8.95, as alleged by the Petitioner himself. The appointment was effected by letter dated 31.8.95 with effect from 1.8.95. Whereas the appointment of Ziyard as Supernumerary Deputy Chief Legal Officer was made with effect from 23.10.96 pursuant to a settlement in Court.

The objection of time bar relates to the infringement alleged in respect of the appointment of Jayawardena.

Article 126(2) of the Constitution gives the right to a person who alleges an infringement or imminent infringement of a fundamental right guaranteed by the Constitution to apply to this Court within one month of such infringement.

In the early cases in which the question of time bar was considered by this court it was held that the general rule is that an application has to be made within one month of the petitioner becoming aware of the alleged infringement - *vide Gunawardena vs. Senanayake*⁽¹⁾ - FRD Vol. 1 page 177.

In the case of imminent infringement, the period is computed from the date the Petitioner had an apprehension that his fundamental rights are about to be infringed (*vide Jayawardene vs. Attorney-General*⁽²⁾).

In *Krishna Mining Co. Ltd., vs. JEDB*⁽³⁾ - it was held that although a Petitioner is entitled to challenge an imminent infringement, he was nevertheless entitled to wait until there was an actual infringement when the application pertains to the infringement, as such. Thus, for the purposes of applying the time bar an alleged imminent infringement and the actual infringement have to be considered separately although the acts complained of may constitute a single executive or administrative process.

In the case of *Gamaethige vs. Siriwardena and others*⁽⁴⁾, a strict interpretation was adopted. It was held that the time limit was mandatory and the pursuit of other remedies judicial or administrative does not prevent or interrupt the operation of the time limit.

This decision was followed in *Ramanathan vs. Tennakoon*⁽⁵⁾, where it was held that the delay cannot be excused on the basis of an application to a commission appointed under the Regulations made in terms of the Sri Lanka Foundation Law. A statutory exception has now been introduced in relation to applications made within the one month period to the Human Rights Commission of Sri Lanka by Section 13(1) of Act No. 21 of 1996.

The Court has recognised that there is an element of discretion in entertaining an application that is *ex facie* outside the one month time limit. To avail of this discretionary power "the Petitioner must provide an adequate excuse for the delay in presenting the petition" *vide Edirisinghe vs. Navaratne*⁽⁶⁾. The rationale of the exercise of discretion in this regard is the application of the principle *lex non cogit ad impossibilia* which has been recognised in several cases relating to alleged infringements of Articles 13(1) and 13(2) of the Constitution, arising from the arrest and detention of persons. [*vide Saman vs. Leeladasa*⁽⁷⁾ and *Namasivayam vs Gunawardena*⁽⁸⁾].

In the background of the aforestated consistent trend of decisions in applying the one month rule as contained in Article 126(2) of the Constitution, I would now deal with the arguments in this case which involve yet another dimension relevant to the nature of proceedings contemplated by Article 126 and the application of rule. As noted above the principal complaint of the Petitioner relates to the appointment of Jayawardena as Deputy Chief Legal Officer. The Petitioner became aware of the appointment very early in the state of affairs, i. e. on the date of the interview itself, being 4.8.95. This application has been filed on 25.11.96 which is *ex facie* way

outside the period of one month from the date the Petitioner became aware of the alleged infringement. He seeks to excuse the delay on the basis that the complaint regarding the appointment of Jayawardena was made to this court by Ziyard well within the period of one month of the appointment. That, the Petitioner and Kiritharan identified themselves with the complaint of Ziyard. But, when Ziyard sought to enter into a settlement with the Bank in relation to the proceedings instituted by him, they (in fact only Kiritharan) sought to intervene in those proceedings and having failed in that endeavour the Petitioner instituted the present proceedings, within one month of the application filed by Ziyard being concluded upon the settlement referred to above.

On a consideration of the factual matters I am inclined to believe the assertion of the Petitioner that Kiritharan and he identified themselves fully with the applications filed by Ziyard. They expected Ziyard to "deliver the goods" by dislodging Jayawardena from the post which they aspired to secure for each of them. It appears from the pleadings, that they viewed Jayawardena as the common adversary. However, the issue that we are now confronted with cannot be resolved on such a simplistic factual basis. It involves mixed questions of fact and law. It involves four elements, they are :

- (i) the question relating to a right;
- (ii) the correlative duty;
- (iii) an alleged infringement; and
- (iv) the institution of the legal proceedings to redress that infringement.

These four elements are encompassed in the classic phrase "cause of action" which runs through the gamut of Civil Procedure. Section 5 of the Civil Procedure Code defines a cause of action as "the wrong for the prevention or redress of

which an action may be brought and includes the denial of a right . . .". If we, only for purpose of clearer comprehension, relate that definition to the proceedings provided for by Article 126 of the Constitution, it will be seen that the right that is claimed is a fundamental right. In terms of Article 4(d) of the Constitution fundamental rights constitute part of the sovereignty of the People which are declared and recognised by the Constitution, that is in Articles 10 to 14 of the Constitution. The correlative duty is also laid down in Article 4(d) which mandates all organs of Government to respect, secure and advance the fundamental rights of the People as are declared and recognized by the Constitution. It is further mandated that these rights shall not be abridged, restricted or denied save of the manner and to the extent as provided in the Constitution.

Every person, is entitled to the rights and freedoms recognized in Articles 10, 11, 12(1) and 13 of the Constitution. Every citizen is entitled to the rights and freedoms recognized in Article 12(2) and 14 of the Constitution. The right to equality which is guaranteed by Article 12(1) being the one in issue, carries with it the concept of classification based on intelligible differentia, having a rational relation to the object sought to be achieved by such classification. Thus there is a common element in these rights and the correlative duty lying upon the organs of the Government, to respect, secure and advance these rights, in the sense that they pertain to every person or citizen as the case may be. In this respect these rights transcend personal and contractual, rights recognized and enforced in private law by the civil courts.

Although these rights and freedoms are common to everybody or every citizen, as noted above, the right to invoke the Constitutional remedy in Article 126(1) upon an infringement of such a right is individual to the person who is aggrieved by such infringement. This is the necessary inference of the words as contained in Article 17 and 126(2) of the Constitution.

Which reads thus:

Article 17: “Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive of administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

Article 126(2) “Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.”

Thus the four aspirants to the post of Deputy Chief Legal Officer, who faced the interview on 4.8.1995 enjoyed the common right to the equal protection of the law as guaranteed by Article 12(1) of the Constitution. Some of them may have had a similar perception that the selection process was flawed by arbitrariness and the absence of rational criteria as is alleged resulting in an infringement of their right to the equal protection of the law. The right to apply to this Court in respect of such infringement which also takes the form of a fundamental right in the manner it is stated in Article 17 of the Constitution may also be common to those who allege the same infringement. But, the manner of making such an application as provided in Article 126(2) is restrictive and gives that process a personal or individual character. The words, “where **any person** alleges that any such fundamental right or

language right relating to **such person** has been infringed or about to be infringed by executive or administrative action, **he may himself** or by an attorney-at-Law **on his behalf**, within one month thereof.....apply to the Supreme Court..... (emphasis by me) as appearing in Article 126(2) amply demonstrate the personal or individual character of the right to institute proceedings in relation to the special jurisdiction vested in this court for the enforcement of fundamental and language rights as declared and recognised by Chapters III and IV of the Constitution. Hence a person who alleges an infringement cannot stay his hand on the basis that the infringement perceived by him is already before Court through a proceeding instituted by another similarly situated. If he elects to do so, he puts in peril the right he has in terms of Article 17 to apply to this Court in respect of the infringement of the fundamental right as alleged by him. This is a clear application of the maxim *vegilantibus nor dormientibus, jura subveniunt* (the laws assist those who are vigilant, not those who sleep over their rights).

For these reasons, I uphold the preliminary objection of time bar as to the infringement, that is alleged in respect of the appointment of the 9th Respondent as Deputy Chief Legal Officer.

The other infringement alleged is in respect of the appointment of Ziyard as Supernumerary Deputy Chief Legal Officer. The objection that is raised is that the application is misconceived in this regard. Several arguments have been raised on the question whether, this appointment made pursuant to a settlement entered in Court constitutes executive or administrative action or is in the nature of judicial action which is outside the jurisdiction of this Court in view of Article 126 of the Constitution.

The order made by this Court on 23.10.96 in S. C. (FR) 483/95 and 240/96 has been set out by me in its entirety in a preceding section of this judgment. It is clear that the Court

has merely taken note of a settlement that has been entered into by the parties. It appears that the process involves elements of executive and administrative action on the one hand and judicial action, on the other. It is not necessary in the context of this application to dwell on this matter further. The Petitioner's complaint is that the appointment of Ziyard as Supernumerary Deputy Chief Legal Officer without cancelling the appointment of the 9th Respondent is arbitrary and capricious and in violation of the provisions relating to the cadre of officers in the Bank and the procedures relevant to appointments. Although *ex facie* Ziyard has been given an appointment as Supernumerary Deputy Chief Legal Officer, an examination of the terms of settlement reveals that in effect what he has received is a retiral benefit. As noted above Ziyard reached the optional age of retirement when his application was pending and was retired from the service of the Bank. The settlement effectively prevents him from functioning in the appointment which he received *pro forma*. The appointment at issue is nothing but a means of enhancing the benefits he receives upon retirement. The Petitioner has not reached the optional age of retirement. He is thus not in the same class of persons as Ziyard and is precluded from alleging an infringement in relation to retiral benefits to which he is not in any event entitled to. The application is therefore misconceived in this respect.

Accordingly, I uphold the preliminary objections that have been raised and dismiss the application and make no order as to costs.

PERERA, J. - I agree

GUNASEKERA, J. - I agree

Preliminary objections upheld;

Application dismissed.