

DON SHELTON HETTIARACHCHI
v
SRI LANKA PORTS AUTHORITY AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SOMAWANSA, J.
BALAPATABENDI, J.
SC FR APPLICATION NO/ 89/2003
FEBRUARY 21, 2007

Fundamental Rights – Article 12 of the Constitution – Necessary parties – Non inclusion – Fatal? – Pursuing any exercise in futility – Equality – Discrimination.

The petitioner, a civil engineer, was the Chief Engineer (Planning and Development) of the Sri Lanka Ports Authority (the 1st respondent). The 1st respondent appointed the 5th respondent as the Director (Technical) and the 4th respondent as Special Advisor (Technical, Planning and Development). The petitioner contended that the Director (Technical) was the highest post in the engineering hierarchy to be held by a civil engineer, and the appointment of the 5th respondent who was an electrical engineer as Director (Technical) and the appointment of the 4th respondent as Special Advisor were therefore an infringement of Article 12.

Held:

- (1) There was no evidence to substantiate his claim that the highest post in the engineering hierarchy of the port was always held by a civil engineer. Equality requires that all should be treated equally without any discrimination. There cannot be any special privileges in favour of any individual and that persons who are similarly placed under similar circumstances should be treated equally.
- (2) As the petitioner and the 5th respondent had retired from services after the filing of the application pursuing any exercise in futility could only serve as an academic purpose.
- (3) The non-inclusion of all the parties who would be affected by an order made in the application was fatal to the validity of the application.

Cases referred to:

- (1) *S.S. Royappa v State of Tamil Nadu* AIR 1974 SC 555.
- (2) *Velupillai v The Chairman, Urban District Council Secretary* 39 NLR 464.
- (3) *Farook v Siriwardene, Election Officer and others* (1997) 2 Sri LR 145.

Dr. Sunil Cooray with M. Premachandra for petitioner.

Shibly Aziz PC with Senany Dayaratne for 1st, 2nd, 3rd and 5th respondents.

Cur. adv.vult.

December 12, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a Chartered Civil Engineer by profession and a member of the Institute of Civil Engineers, was serving as a Head of a Division under the designation, Chief Engineer (Planning and Development) with effect from 02.10.2001 subject to a probationary period of one year of the 1st respondent Authority. The petitioner alleged that his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated by the 1st and 2nd respondents by the appointment of the 4th respondent as a Special Advisor (Technical, Planning and Development) and by the appointment of 5th respondent to the post of Director (Technical).

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

The facts of this case, as stated by the petitioner, *albeit* brief, are as follows:

The petitioner was appointed as an Engineer by letter dated 02.02.1968 (P2) at the Colombo Port Commission and subsequently by letter dated 22.08.1970 (P3), he was appointed as a Civil Engineer at the Colombo Port Commission. Since 1968, the petitioner had been serving in the Port Infrastructure Management for over a period of 35 years.

According to the petitioner, the chief tasks of the 1st respondent Authority belong to the discipline of Civil Engineering and it had been the practice since 1912 that the position giving the leadership to all port civil engineers was held by a Port Civil Engineer. Presently the highest such designation is the post of Director (Technical). The 5th respondent, according to the petitioner, is not a Civil Engineer, but a qualified Chartered Electrical Engineer and therefore he does not hold the requisite qualifications in terms of section 58(iii) of the Manual of Administrative Procedure of the Sri Lanka Ports Authority (P11) to be appointed as the Director (Technical). The 4th respondent is not an employee of the 1st respondent Authority and is an employee of Port

Management Consultancy Services Limited, which is a subsidiary Company of the 1st respondent Authority headed by the 2nd respondent. The 4th respondent, who is over 60 years of age was appointed as Special Advisor, as the 5th respondent is not a Civil Engineer and the 5th respondent is carrying out the duties, which the petitioner is entitled to carry out and also there is no recognized post in the Ports Authority known as 'Special Advisor'.

Accordingly, the petitioner's grievance is that the appointments given to 4th and 5th respondents should be cancelled and the petitioner should be appointed to the post of Director (Technical) in the 1st respondent Authority on the basis that the said post has been reserved for Civil Engineers.

The contention of the learned Counsel for the petitioner was that the position of Director (Technical) should be held by a Port Civil Engineer as has been the practice since 1912. In support of this contention learned Counsel for the petitioner referred to the previous positions held in respect of the highest position in the Civil Engineers' cadre, which is illustrated in the following chart:

Period	Designation	Organization/ Department	Profession	Relevant Statute
1912 - 1950	Harbour Engineer	Harbour Engineer's Department/PWD	Chartered Civil Engineer	Thoroughfare Ordinance
1951 - 1967	Harbour Engineer/Chief Engineer (Ports)	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Act of 1951
1968 - 1978	Port Commissioner	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Act of 1951
1979 - 2001	Managing Director	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No. 51 of 1979
2002 - 2003	Director (Technical)	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No. 51 of 1979

Learned Counsel for the petitioner further submitted that the Port Engineers are divided into two categories, which include the Port Infrastructure Management and Port Superstructure Management. According to his submission Port Civil Engineers are all involved in the Port Infrastructure Management whereas the electrical, mechanical and marine engineers belong to the Port Superstructure Management. The contention therefore was that since the highest position of the post of Port Civil Engineers' is presently identified a Director (Technical), such position should be held only by a Civil Engineer.

Learned President's Counsel for the 1st, 2nd, 3rd and 5th respondents (hereinafter referred to as the learned President's Counsel for the respondents) strenuously contended that the post of Director (Technical) is not limited to the discipline of Civil Engineers, but open to all the other disciplines such as mechanical, electrical, electronics and marine engineering for the reason that it would be patently unfair and discriminatory to reserve the said post for members of one branch of port engineering.

The petitioner, as stated earlier is challenging the appointments made to the 4th and 5th respondents and specifically the appointment made to the 5th respondent. The 5th respondent was admittedly appointed as the Director (Technical) of the 1st respondent Authority.

The nature and scope of the work of the said position was described in detail in the affidavit of the 1st to 3rd and 5th respondents, where it was averred that the said post is largely an administrative position, which is concerned with co-ordinating and overseeing activities of all the disciplines of port engineering. Such a position should be open to members of various disciplines of port engineering since the specialisation in engineering has not been a deciding factor when appointments were made to this post.

Learned President's Counsel for the respondents submitted that the 5th respondent was appointed to the post of Director (Technical) in terms of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority. Section 58 of the said manual, deals with the covering up duties and section 58(iii) reads as follows:

**58. The general terms and conditions relating to appointments to cover up duties of other posts are indicated below:*

....

(iii) where the covering up period is expected to be over one month, the most senior employee in the grade immediately below should be appointed to cover up duties provided he is considered suitable."

Learned President's Counsel for the respondents contended that on the basis of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority, the 5th respondent, who was the senior most employee in the Head of Director grade, which was the grade immediately below that of the Director, who had over nine (9) years of experience in that grade as opposed to the petitioner, who had only one (1) year and nine (9) months experience in that grade was appointed to cover-up on duties of Director (Technical). It was further submitted that the 5th respondent was also deemed to be suitable for the said position on the basis of *inter alia* seniority, ability, managerial capabilities and contribution towards the achievement of organizational targets and goals.

Subsequently to the said appointment, the Board of Directors of the 1st respondent Authority had obtained approval from the Ministry of Port Development and Shipping to confirm the 5th respondent in the post of Director (Technical) (1R2).

It is to be borne in mind that the post of Chief Engineer (Ports) as the post of Director (Technical) was then known, was held from 1984 to 1989 by one R.B. Wickramage, who was a Mechanical Engineer by profession (1R1).

Thus it is evident that the position in question has not been confined to Civil Engineers and I am therefore in agreement with the submissions made by the learned President's Counsel for the respondents that the post of Director (Technical), being an administrative position, should not be restricted to one area of specialization, so that the most suitable officer could be selected on the basis of his seniority, ability, managerial capabilities and his contribution towards the achievement of targets and goals of the 1st respondent Authority.

In the circumstances it is apparent that the contention of the learned Counsel for the petitioner that the post of Director (Technical) is limited only for civil engineers cannot be accepted.

The petitioner had also complained of the appointment of the 4th respondent stating that the said appointment was made as the 5th respondent, who was not a Civil Engineer was unable to effectively and efficiently carry out the duties as the Director (Technical).

Learned President's Counsel for the respondent contended that the 4th respondent was appointed as a Special Advisor for the purpose of utilizing his expertise and experience for special projects such as donor-funded projects. Further it was submitted that as the 1st respondent was engaged in effecting an expansion of the ports system of the country, it had required the advice and Counsel of port engineers of the 4th respondent's level of experience and expertise to better strategize the utilization of foreign funding in an expedient and efficient manner.

On a consideration of the submissions of the learned President's Counsel for the respondents, it is apparent that the purpose of employing the 4th respondent was for the purpose of strategic utilization of foreign funds on special projects.

Considering the types of duties that had been allocated to the 4th respondent, it appears that his services had been obtained for the sole purpose of functioning as a Special Advisor on donor – funded projects and not for the purpose of assisting the 5th respondent, who was functioning in the capacity of Director (Technical).

The petitioner's complaint was that his fundamental right guaranteed in terms of Article 12(1) was violated due to the appointments of the 4th and 5th respondents.

Article 12(1) of the Constitution, which deals with the right to equality reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

Equality requires that all should be treated equally without any discrimination and as Sir Ivor Jennings (The Law of the

Constitution, P 49) had described, among equals the law should be equal and should be equally administered. It illustrates the concept that there cannot be any special privileges in favour of any individual and that persons, who are similarly placed under similar circumstances should be treated equally.

However, this does not mean that all laws should apply equally to all persons. What it postulates is that classification is permitted provided it is found on intelligible differentia and should be reasonable. There cannot be any arbitrariness in such classifications. Equality as pointed out by Bhagawati, J., (as he then was) in *S.S. Royappa v State of Tamil Nadu*⁽¹⁾ is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. Nevertheless there cannot be any discrimination between two persons, who are similarly circumstanced, which emphasizes the concept that equals cannot be treated unequally and unequals cannot be treated equally.

This concept equally applies to employment opportunities as well. Accordingly in regard to appointments and promotions equals should not be placed unequally and unequals also should not be treated equally.

The question therefore at this point would be whether the petitioner and the 4th and 5th respondents were equals who should have been treated equally.

Admittedly, the 4th respondent was appointed to the post of Special Advisor and the 5th respondent was appointed as the Director (Technical) of the 1st respondent Authority. The petitioner has neither submitted any supporting evidence to indicate that he was suitable and qualified to have been considered for either of these positions nor has he substantiated the position as to why the 4th and 5th respondents were not suitable to have been appointed to their respective posts. Although he has alleged that the 5th respondent should not have been appointed as he is not a Civil Engineer, there is no material that has been submitted by the petitioner to substantiate this position. Moreover, the petitioner had submitted that the purpose of appointing the 4th respondent as a Special Advisor was due to the fact that the 5th respondent was not a Civil Engineer, but only a qualified Electrical Engineer. This

submission is again without any supporting evidence. Would it be possible for a petitioner to make submissions without any supporting and substantiating material? My answer to that question is clearly in the negative. If a petitioner is leveling allegations against another party; it is necessary that supporting evidence, should be submitted to this Court. To uphold one's fundamental rights, it is necessary that a petitioner places sufficient material to show that such rights have been infringed by executive or administrative action. In this matter as referred to earlier, the petitioner has not submitted any material in support of his grievance.

Further, it is to be noted that the petitioner relied on section 58(iii) of the Manual of Administrative Procedure of the 1st respondent Authority, where it was stated that the senior most employees in the grade immediately below would be considered to cover-up duties. The respondents had also relied on that provision and had appointed the 5th respondent as by that time the 5th respondent had over 9 years of experience in that grade as opposed to the petitioner's one year and 9 months. The appointment given to the 4th respondent was admittedly to a special position for the purpose of using his expertise and experience for special projects. In such circumstances it cannot be said that the petitioner and the 4th and 5th respondents were similarly circumstanced to be treated as equals for the purpose of considering the alleged infringement of petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution.

There are two other matters I wish to refer to before I part with this judgment.

Learned President's Counsel for the respondents brought to our notice at the time of the hearing, which was admitted by the petitioner, that both the petitioner and the 5th respondent had retired from the 1st respondent Authority during the pendency of this application and there it was futile for the petitioner to proceed with this application.

Pursuing an exercise in futility, could only serve an academic purpose and as quite correctly pronounced by Abrahams, C.J. **this is a Court of Justice and not an Academy of Law.** (*Velupillai v The Chairman, Urban District Council Secretary*)⁽²⁾.

Secondly learned President's Counsel for the respondents submitted that the necessary parties to this application have not been brought before Court, as the petitioner had contended that only Civil Engineers are entitled to be appointed to the post of Director (Technical) of the 1st respondent Authority.

As submitted by the learned President's Counsel for the respondents, the persons most likely to be affected by such an order were the port engineers of the 1st respondent Authority attached to different branches and who were not civil engineers. Since they were not made parties they were unable to resist such a contention, if not *en masse*, at least by representation.

Learned President's Counsel for the respondents also submitted that the present incumbent of the post of Director (Technical) is also a non Civil Engineer and if a decision was to be taken by this Court that the post of Director (Technical) should only be held by a Civil Engineer, he would have had to vacate his position.

The need for having necessary parties before Court was considered by this Court in *Farook v Siriwardena, Election Officer and others*⁽³⁾, where it was clearly stated that the failure to make a party to an application of person/s, whose rights could be affected in the proceedings, is fatal to the validity of the application.

It was therefore an essential requirement that the parties, who were necessary to this application, should have been brought before this Court and the petitioner had not adhered to this requirement.

Considering all the circumstances of this application and for the reasons aforesaid I hold that the petitioner has not been successful in establishing that his fundamental right guaranteed in terms of Article 12(1) of the Constitution had been violated. This application is accordingly dismissed.

I make no order as to costs.

SOMAWANSA, J. - I agree.

BALAPATABENDI, J. - I agree.

Application dismissed.