

SAMARASINGHE
v.
NATIONAL SAVINGS BANK AND OTHERS

SUPREME COURT
FERNANDO, J.,
GUNAWARDANA, J. AND
GUNASEKARA, J.
S.C. APPLICATION NO. 392/96
FEBRUARY 27, 1999

Fundamental rights – Appointment of Chief Legal Officer – Deviation from the prevailing scheme of recruitment – Failure to consider the claim of an eligible candidate – Article 12 (1) of the Constitution.

By an advertisement in the newspaper the 1st respondent Bank called for applicants for the post of Chief Legal Officer. The candidate who was placed first among the applicants declined the post and the post was advertised a second time. On that occasion also the candidate who was placed first declined appointment and no appointment was made. The advertisement was in keeping with the prevailing scheme of recruitment. It called for applications from persons who amongst other qualifications had to be Attorneys-at-Law and Notaries Public with at least 15 years experience in Court and notarial work. The petitioner applied on both occasions and was placed second in order of merit. After the candidate placed first declined the post on each occasion, the petitioner was not considered for appointment. Instead the Board of Directors decided "to appoint the most senior officer amongst the legal officers in the Bank to act as Chief Legal Officer" without advertisement. Consequently, the 6th respondent who had not applied for the post and who did not possess the basic qualification of 15 years practice as an Attorney-at-Law and Notary Public was appointed to act as Chief Legal Officer.

Held:

The decision of the Board to deviate from the prevailing scheme of recruitment was ad hoc and arbitrary and the appointment of the 6th respondent was bad in law. The petitioner's fundamental rights under Article 12 (1) were infringed by the failure to consider her for appointment.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonasekera for the petitioner.☞

Shibly Aziz, PC and S. Fernando, SSC for the respondents.

Cur. adv. vult.

May 28, 1999.

GUNASEKARA, J.

The petitioner who had joined the 1st respondent Bank as an Assistant Legal Officer (Grade IV) in 1985 had been promoted to a post of Assistant Legal Officer (Grade III) in 1990 which designation had been subsequently altered to Legal Officer (Grade II). According to the petitioner in terms of the scheme of recruitment of the Bank's Legal Department the cadre of Legal Officers as evidenced by 'P3' was as follows:

Chief Legal Officer	–	Grade I	–	one post
Legal Officer	–	Grade II	–	one post
Legal Officer	–	Grade III	–	five posts
Assistant Legal Officer	–	Grade IV	–	one post

By an advertisement published in the "Sunday Observer" of 25th June, 1995 (P4) the bank had called for applications for the post of Chief Legal Officer (Grade I). According to the said advertisement amongst other qualifications the applicants had to be Attorneys-at-Law and Notaries Public with at least 15 years experience in Court and notarial work. The petitioner had been the only internal candidate amongst the nineteen applicants who had applied in response to the said advertisement. At an interview that was held on 5.9.95 one Mr. G. M. Gunasekera had been placed first and the petitioner second. Although Mr. Gunasekera who had come first at the interview was offered the post he had declined to accept it. However, the petitioner who had been placed second at the interview had not been offered the said post but instead the Bank had re-advertised the post on 19.11.95 by the advertisement marked P9.

The petitioner had responded to the said advertisement and had submitted an application (P10). On seeing the petitioner's application the petitioner states that the 5th respondent had advised the petitioner not to apply for this post as "she was too young and was a female because the preference of the Chairman was for a male". However, she had been called for an interview in response to her application (P10) to be held on 10.1.96. 18 candidates had presented themselves at the said interview, amongst whom was one other employee of the 1st respondent's Bank other than the petitioner. The said officer, namely Mr. K. M. P. Kulatunga, a Regional Legal Officer attached to the Kurunegala branch of the 1st respondent Bank lacked eligibility as he had not obtained a Notarial Licence as evidenced by (P12). The petitioner states that after the said interview that the legal branch had been informed that Mrs. C. Ellawala had scored the highest marks at the said interview and Mr. Kulatunge and the petitioner had scored the second and third highest marks, respectively. Mrs. Ellawala who was selected for appointment had declined to accept the post. By circular letter dated 1.4.96 marked (P14) the 3rd respondent had appointed the 6th respondent who had not even applied in response to the 2nd advertisement (P10), as acting Chief Legal Officer (Grade I) for a period of 6 months with effect from 1.4.96 subject to confirmation in the said post after a proper assessment of her performance during the said period together with a payment of an acting allowance of Rs. 1,787.50 per month from 1.4.96.

The petitioner's contention is that the said appointment of the 6th respondent in the aforesaid manner is arbitrary, capricious discriminatory and is in violation of Article 12 (1) of the Constitution and bad in law.

The position of the 2nd respondent (the Chairman of the 1st respondent's Bank) is that the management of the Bank decided that the post of Chief Legal Officer should be filled by a fairly senior person in the legal profession and therefore the Bank decided to advertise the post to try and recruit a senior experienced person from outside the Bank.

With this in mind the 1st respondent Bank advertised in the 'Sunday Observer' of 25.6.95 (P4). Candidates who responded to the said advertisement were called for an interview which was held on 25.9.95 by a panel consisting himself, the 3rd respondent and Mr. Kolitha Dharmawardena, Senior State Counsel. Subsequent to the said interview the panel recommended one Mr. G. M. Gunasekera as the most suitable candidate to fill the post and that the panel also decided that in order of merit the petitioner and Mr. R. C. Karunakaran were placed second and third at the interview: however, no recommendations were made in regard to them. He also admits that since the candidate recommended for selection did not agree to accept the appointment that he had brought this fact to the notice of the Board of Directors who decided that the Bank should re-advertise the post of Chief Legal Officer. The 2nd respondent also admits that the post was re-advertised on 19.11.95 by (P9) and at an interview held in response to that advertisement on 10.1.96 by a panel consisting of himself, the 5th respondent and Mr. Kolitha Dharmawardena that the panel's unanimous view was that Mrs. C. Ellawala was the most suitable candidate to be selected to the said post, and that on this occasion too that the panel did not express any view about any other candidate but stated that Mr. K. M. P. Kulatunge and the petitioner were placed 2nd and 3rd in the order of merit. It is the position of the 2nd respondent that on this occasion too that Mrs. C. Ellawala the candidate who was recommended for appointment declined to accept the appointment and that she had informed the Board of this fact. The 2nd respondent further states that at a Board meeting held on 13.2.96, the Directors were informed that the selected candidates had refused to accept the post of Chief Legal Officer on two occasions.

According to the original minutes of the Board meeting held on 30.1.96, after discussion the Directors decided:

- (1) not to call for applications for the post of Chief Legal Officer immediately:
- (2) *to authorise the Chairman to select a suitable officer from among the Legal Officers in the Bank and appoint to act as Chief Legal Officer. This officer may be given*

a fair and reasonable time (about 6 months) to prove her skills/aptitudes required for the post. Thereafter, if the bank is not satisfied with the performance of the officer concerned, the Bank should re-advertise the post of Chief Legal Officer; and

- (3) to obtain the services of a Legal Consultant on an *ad hoc* and piece meal basis if and when required (2R3).

That Board minute does not suggest that the Chairman informed his colleagues that on both occasions the petitioner was the next most suitable and qualified candidate. The Board was not invited to consider whether she should be appointed as Chief Legal Officer.

While the Board decision as originally recorded gave the petitioner a chance of being considered for an acting appointment, at the next Board meeting on 27.2.96 the relevant part of paragraph 2 (underlined) was deleted and replaced, without explanation, by the following:

"To appoint the most senior officer amongst the legal officers in the Bank to act as Chief Legal Officer."

That denied the petitioner the chance of even an acting appointment.

On a consideration of the submissions made and a perusal of the documents filed, it is to be noted that the 2nd respondent admits the contention of the petitioner that there is a scheme of recruitment to the Bank in respect of the legal department as evidenced by (P3). It is common ground that the advertisements (P4) and (P9) calling applications for the post of Chief Legal Officer, Grade I, in the 1st respondent Bank had been made in keeping with the scheme of recruitment (P3).

In my view the Board decision (2R3) dated 13.2.96 to deviate from the prevailing scheme of recruitment was *ad hoc* and arbitrary, and sought to achieve indirectly what it could not do directly.

Thus, the appointment of the 6th respondent who had not even applied in response to the advertisements (P4 & P9) for the obvious reason that she did not possess the basic required qualification of 15 years' practice as an Attorney-at-Law and Notary Public as the Chief Legal Officer, Grade I (acting) with the prospect of being confirmed after 6 months (whether or not she had the minimum qualifications required by the scheme of recruitment) together with an acting allowance of Rs. 1,787.50 per month by (P14) was violative of the prevailing scheme of recruitment.

Therefore, I hold that the said appointment of the 6th respondent by (P14) is bad in law. Hence, I quash the appointment of the 6th respondent as Chief Legal Officer, Grade I (acting) made by (P14) to take effect one month from today. I further direct the 1st respondent Bank to call for applications for the said post from candidates within the Bank who are eligible for selection in accordance with the scheme of recruitment marked (P3) within one month from today.

The fact that the 6th respondent has functioned as acting Chief Legal Officer since 1.4.96 should not be given any weightage in the selection process.

The petitioner's fundamental right under Article 12 (1) has been violated by the failure to consider her for appointment, first as Chief Legal Officer, and, subsequently, as acting Chief Legal Officer. Although I cannot assume that she would have been appointed if duly considered, nevertheless she is entitled to compensation for the failure to consider her.

I direct the 1st respondent Bank to pay the petitioner a sum of Rs.100,000 as compensation together with a further sum of Rs. 20,000 as costs.

FERNANDO, J. – I agree.

GUNAWARDANA, J. – I agree.

Relief granted.