

**JAYASINGHE**  
**v.**  
**THE NATIONAL INSTITUTE OF FISHERIES AND NAUTICAL**  
**ENGINEERING (NIFNE) AND OTHERS**

SUPREME COURT  
GUNASEKERA, J.,  
EDUSSURIYA, J. AND  
YAPA, J.  
SC APPLICATION NO. 692/2000  
NOVEMBER 23, 2001 AND  
DECEMBER 11, 2001

*Fundamental rights – Article 126 (2) of the Constitution – Time bar – Knowledge of the wrong complained of may determine whether the claim is time-barred – Lack of uberrima fides a ground for rejecting a claim.*

In his application filed on 15. 12. 2000 the petitioner complained that his right to equality under Article 12 (1) of the Constitution had been infringed by the appointment of the 18th respondent as the Director-General of the National Institute of Fisheries and Nautical Engineering (the NIFNE). The 2nd respondent (Minister of Fisheries and Aquatic Resource Development) made the impugned appointment by his letter dated 14. 01. 2000. The 18th respondent assumed duties and signed the attendance register as Director-General NIFNE whilst the petitioner signed the same register immediately next to the 18th respondent in the capacity of Director NIFNE. There was also a letter dated 10. 07. 2000 written by the petitioner to the 2nd respondent (Minister) which shows that the petitioner was aware of the 18th respondent's appointment as DGM; a letter dated 30. 10. 2000 addressed to the petitioner by the 18th respondent signing as DGM – NIFNE; and the reply dated 01. 11. 2000 addressed to the 18th respondent as DGM – NIFNE by the petitioner. The respondents also produced evidence of CA application No. 1569/2000 made to the Court of Appeal by the petitioner seeking relief in the same motion. Except for the letter dated 01. 11. 2000 addressed by the petitioner to the 18th respondent all the other documents were produced by the respondents.

**Held:**

- (1) The documentary evidence showed that several months prior to 15. 12. 2000 the date of the petitioner's application, he was aware of the appointment of the 18th respondent as the DGM of NIFNE. Hence, the petitioner's application was time-barred.

- (2) All the documents on which the respondents relied to support their preliminary objection to the application, except one, were produced by the respondents. The petitioner suppressed those documents and the fact that he had made an application to the Court of Appeal seeking relief in the same matter and thereby misled the Court. The petitioner's conduct lacked *uberrima fides*. The application has to be rejected *in limine* on this ground as well. This is a principle which applies to cases coming up before the Court in writ cases as well as in injunction applications and even in admiralty cases. In such cases relief will be refused *in limine* without hearing the case on the merits even where the decision is alleged to have been made without jurisdiction. The same principle applies to applications under Article 126 (2).

**Cases referred to :**

1. *Gamaethige v. Siriwardena and Others* – (1980) 1 Sri LR 384 at 397.
2. *Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others* – (1997) 1 Sri LR 360.
3. *Rex v. Kensington Income Tax Commissioners; Princess Edmond De Polignac Ex Parte* – (1917) 1 KB 486.
4. *Castelli v. Cook* – (1948) 7 HARE 89 at 94.

**APPLICATION** for relief for infringement of fundamental rights – Preliminary objection.

*Elmo Perera* for petitioner.

*D. S. Wijesinghe*, PC for 1st, 4th and 18th respondents.

*S. Rajaratnam*, Senior State Counsel for 2nd, 3rd, 12th, 13th, 14th and 15th respondents.

*Cur. adv. vult.*

March 20, 2002

**HECTOR YAPA, J.**

The petitioner in this application has sought a declaration that, his<sup>1</sup> fundamental right to equality under Article 12 (1) of the Constitution has been infringed by some of the respondents, in appointing the 18th respondent as the Director-General of the National Institute of Fisheries and Nautical Engineering (hereinafter referred to as the NIFNE).

Hence, the petitioner has moved this Court to set aside the said appointment of the 18th respondent, and further for a direction on the respondents to appoint the petitioner to the post of Director-General of NIFNE. The petitioner presently is the Director of NIFNE. The 1st respondent to this application is the NIFNE established by 10 Act, No. 36 of 1999. The 2nd and 3rd respondents are the Minister and the Secretary respectively, of the Ministry of Fisheries and Aquatic Resources Development (hereinafter referred to as Ministry of Fisheries). The 4th to 17th respondents are the Chairman and Members respectively, of the Council of NIFNE. The 18th respondent is the Director-General of NIFNE, whose appointment has been challenged by the petitioner in this application.

At the commencement of the hearing, learned Senior State Counsel raised two preliminary objections :

- (a) That this application was out of time in terms of article 20 126 (2) of the Constitution, in that it had been filed more than one month after the infringement complained of;
- (b) That the petitioner was guilty of suppressing material facts from Court.

Learned Senior State Counsel therefore contended that the petitioner's application should be dismissed without going into the merits of the case. Learned President's Counsel who appeared for the 01st, 04th and 18th respondents associated himself in supporting the said preliminary objections. Accordingly, counsel were permitted to make oral and written submissions on the preliminary objections, 30 and it is proposed to make a ruling on them in this judgment.

After hearing Counsel on both sides, it became clear that the question of compliance with Article 126 (2) depended on whether the infringement complained of occurred within one month prior to 15. 12. 2000, which is the date of filing this application or whether the infringement took place several months before 15. 12. 2000.

As submitted by counsel for the respondents, on 14. 01. 2000 the Governing Council of NIFNE decided to recommend to the 2nd respondent (Minister of Fisheries) the appointment of the 18th respondent as Director-General of NIFNE. (*vide* 1 R5 and 1 R5A). By letter <sup>40</sup> dated 14. 01. 2000 the 2nd respondent acting in terms of section 14 of the National Institute of Fisheries and Nautical Engineering Act, No. 36 of 1999, appointed the 18th respondent as the Director-General of NIFNE (*vide* 1 R6). As referred to above the petitioner's application to this Court was filed on 15. 12. 2000. In support of the contention that the petitioner was aware of the appointment of the 18th respondent as Director-General NIFNE several months before this application was filed, learned Counsel for the respondents referred to the following documents :

- (a) The document marked 1 R10 is a certificate issued by <sup>50</sup> NIFNE, to a candidate who had successfully completed a course of training in Fibre Glass Technology during the period 09. 08. 2000 to 22. 08. 2000. The petitioner had signed this certificate in his capacity as the Director NIFNE, while the 18th respondent had signed it in his capacity as the Director-General NIFNE. Assuming that this certificate came to be signed shortly after the course of training, then it is very likely that the petitioner was aware that the 18th respondent was functioning as the Director-General NIFNE, at least three months before the filing of this application. <sup>60</sup>
- (b) A page from the attendance register (copy) maintained at the NIFNE had been produced marked 1R 10A. This document reveals the fact that the 18th respondent had signed the attendance register in his capacity as the Director-General, whereas the petitioner had signed it immediately thereafter in his capacity as the Director NIFNE. Even though this page from the attendance register does not disclose the date of signing, it would be useful to show that the 18th respondent and the petitioner had been functioning as Director-General and Director of NIFNE, respectively.

- (c) The document marked 3 R5, was a letter dated 30. 10. 2000, written by the 18 respondent to the petitioner. This letter had drawn the attention of the petitioner to the 3rd respondent's letter of 23. 10. 2000, (*vide* 3 R4) sent to the 18th respondent requesting the release of the petitioner to the Ministry of Fisheries with effect from 01. 11. 2000. It is important to note that the 18th respondent had written 3 R5 to the petitioner in his capacity as Director-General NIFNE on 30. 10. 2000, which is about 45 days before the petitioner filed this application.
- (d) The document produced by the petitioner marked P33, was a letter dated 01. 11. 2000 written by the petitioner in his capacity as Director, which had been sent to the 18th respondent in his capacity as Director-General NIFNE. In P33, the petitioner had expressed his unwillingness to be attached to the Ministry of Fisheries. It would appear that P33 was in response to the earlier letter of the 18th respondent dated 30. 10. 2000 (3 R5). Mention must be made here that the petitioner had addressed P33 to the 18th respondent in his capacity as Director-General NIFNE, one and a half months before he filed this application challenging the 18th respondent's appointment as Director-General NIFNE.
- (e) Another important document that was referred to by counsel was a letter marked 1 R8. It was a letter dated 10. 07. 2000, written by the petitioner to the 2nd respondent, (Minister) requesting him to consider appointing him (petitioner) to a post of Director or any other suitable post in the Ministry of Fisheries. The petitioner had advisedly withheld this letter from Court as it would operate adversely to his interest. As submitted by learned counsel for the respondents, some of the matters referred to in this letter clearly showed that the petitioner was aware at the time he wrote 1 R8, that the 18th respondent was functioning as the Director-General

NIFNE. To explain this point counsel referred to the following passage from 1 R8, wherein he states, *-inter alia* : "It is evident from the fact that the present Director-General of the new institute is held responsible for all the financial and administrative duties that I carried out before . . ." (*vide* 1 R8 page 2 para 3). We now know, that the 18th respondent had been functioning as the Director-General NIFNE since 14. 01. 2000. Therefore, when the petitioner referred to the "present Director-General of the new institute" in his letter 1 R8, he was clearly referring to the 18th respondent and no other. Thus, it was a fact within the knowledge of the petitioner, when he wrote 1 R8 on 10. 07. 2000, which is five months prior to the filing of this application. <sup>110</sup>

Therefore, several supporting documents referred to by counsel for the respondents, clearly establish the fact that the 18th respondent had been appointed Director-General in terms of the National Institute of Fisheries and Nautical Engineering Act, and that he had been functioning in that capacity. It would appear that a large number of <sup>120</sup> official letters including some of the letters sent to the petitioner, had been signed by the 18th respondent in his capacity as Director-General NIFNE. It is difficult to believe as the petitioner tried to make out, that the 18th respondent would have signed such letters as Director-General NIFNE without a proper appointment. It is to be observed that the 18th respondent had written the letter marked 1 R9 to the petitioner, as the Director-General NIFNE, as far back as 17. 01. 2000. The two documents marked 1 R10 (certificate) and 1 R 10A (Attendance Register) support the position that the petitioner and the 18th respondent had placed their signatures on them, as <sup>130</sup> Director and Director-General NIFNE, respectively. Besides the petitioner had admitted in his petition that he received the 18th respondent's letter of 30. 10. 2000, (3 R5) which he had marked as P32. (*vide* para 29 of his petition). He had also admitted writing the letter dated 01. 11. 2000 marked P33, addressed to the Director-General NIFNE who is the 18th respondent in this application. (*vide*

para 31 of his petition). Further, in para 27 of his petition, he had stated that the 18th respondent purported to function as Director-General and he (petitioner) sought clarification from the 3rd respondent. Therefore, on his own admission, it would appear that the petitioner's <sup>140</sup> cause of complaint arose several months prior to 15. 12. 2000.

In these circumstances, the contention of learned Counsel for the petitioner, that he (petitioner) was not aware of the appointment of the 18th respondent as Director-General NIFNE is untenable. Further, his submission that in any event, 18th respondent's appointment as Director-General could not have been made, since cadre provisions (P29) and salary scales (P30) for NIFNE were approved very much later is not an acceptable proposition, for the reason that such approval can always be obtained later. Besides, petitioner's own conduct supports the position that he knew or should have known, <sup>150</sup> that the 18th respondent had been functioning as Director-General NIFNE since 14. 01. 2000.

Article 126 (1) of the Constitution makes provision for a person to obtain redress from the Supreme Court not only when there is an infringement but also when there is an imminent infringement of any fundamental right. As Fernando, J. stated in the case of *Gamaethige v. Siriwardena and Others* <sup>(1)</sup> . . ." the remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed time, and if not so availed of, the remedy ceases to be available". Besides, it has been held in several cases that the provisions of Article <sup>160</sup> 126 (2) are mandatory. Vide *Gamaethige v. Siriwardena and Others* (*supra*). In the same case Fernando, J. further expressed the view that . . ." While the time is mandatory, in exceptional cases, on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time". However, in the present case, the petitioner had no such reasons for any delay. In fact, when the petitioner wrote 1 R8 to the 2nd respondent on 10. 07. 2000, he knew that 18th respondent was functioning as

Director-General NIFNE. Further, he knew very well that he could not 170 make a claim to be the Director-General NIFNE. It is made clear from his letter 1 R8, when he stated as follows : . . . "The cadre proposed for the new institute does not include a post corresponding to my services as the Director of the National Institute of Fisheries Training" . . . Hence, it is abundantly clear that the petitioner's application is out of time.

The preliminary objection must therefore be upheld, and the petition has to be dismissed on this ground.

The allegation that the petitioner was guilty of suppressing material facts from Court is two-fold. Firstly, the petitioner had withheld from 180 Court the letter written by him to the 2nd respondent on 10. 07. 2000 marked 1 R8, seeking a post of Director in the Ministry of Fisheries. Secondly, the petitioner had withheld from Court the fact that he had filed an application in the Court of Appeal seeking identical relief. Some of the contents in the letter 1 R8, explain very clearly that the petitioner had no intention of making a claim to be the Director-General NIFNE. He also knew that the Director-General (18th respondent) was functioning. It was, therefore, understandable, why the petitioner in his letter 1 R8 had stated as follows :

". . . If not for the fact that I had to go on compulsory retirement 190 on 20th December, 1999, as a result of establishing the National Institute of Fisheries and Nautical Engineering. I would have continued in a senior management position in the Government services for a further period of 16 years prior to my legitimate retirement age.

The Act No. 36 of 1999 provides to obtain a post in the newly established Institute and it also emphasizes that the post in the Institute should not be at a lower level to the then incumbent post. Unfortunately, such a vacant post is not available in the new institute where the institute can appoint me to perform such duties 200

which I carried out earlier. The cadre proposed for the new institute does not include a post corresponding to my services as the Director of the National Institute of Fisheries Training. It is evident from the fact that the present Director-General of the new institute is held responsible for all the financial and administrative duties that I carried out before . . . As mentioned previously, had I been able to function as a Director in the Ministry, my chances to carry on for another 18 years until my retirement would have contributed much to my professional and personal life. This would have helped me much in economic terms in addition to my privilege to buy the <sup>210</sup> official vehicle that I had been using. . . . I kindly request you to consider appointing me to your Ministry as a Director relevant to my field of study or any other suitable post to provide for my seniority and job satisfaction."

It was consequent to the request made in 1 R8, that steps were taken to release the petitioner from NIFNE to the Ministry of Fisheries. The two letters marked 3 R4 and 3 R5 were written to accommodate the request made in 1 R8. In fact, the 2nd respondent (Minister) in his affidavit had confirmed the position that on receiving such a request from the petitioner, arrangements were made to have him <sup>220</sup> released to the Ministry of Fisheries. It would appear that some time later, the petitioner had changed his mind and refused to be attached to the Ministry of Fisheries by writing his letter dated 01. 11. 2000 (P33). As submitted by counsel for the respondents. It would appear that the petitioner sought to suppress 1 R8 to mislead Court. Firstly, by withholding 1 R8 from Court, the petitioner had tried to show that his transfer to the Ministry of Fisheries was the work of some of the respondents to harass him and to keep him out of NIFNE. Secondly, by withholding 1 R8 from Court, the petitioner had attempted to avoid his application to this Court being declared out <sup>230</sup> of time.

Similarly, the petitioner's failure to disclose to this Court, the fact that he had filed an application in the Court of Appeal seeking identical

relief (a fact known to him when he supported this application in the Supreme Court) is a serious suppression of a material fact. The 4th respondent had annexed to his affidavit a copy of the objections filed in the Court of Appeal case No. CA 1569/2000 to prove this point. Thus, it is manifestly clear that the petitioner had failed to carry out an imperative legal duty and obligation to Court.

Therefore, the conduct of the petitioner in withholding these material<sup>240</sup> facts from Court shows a lack of *uberrima fides* on the part of the petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court. In the case of *Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others*<sup>(2)</sup> the Court highlighted this contractual obligation which a party enters into with the Court, requiring the need to disclose *uberrima fides* and disclose all material facts fully and frankly to Court. Any party who misleads Court, misrepresents facts<sup>250</sup> to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations. Vide *Rex v. Kensington Income Tax Commissioners; Princess Edmond De Polignac*.<sup>(3)</sup> This principle of *uberrima fides* has been applied not only in writ cases where discretionary relief is sought from Court, but even in Admiralty cases involving the grant of injunctions. In the case of<sup>260</sup> *Castelli v. Cook*,<sup>(4)</sup> the Vice-Chancellor Sir James Wigram considered this proposition and stated as follows :

"The rule, as I understand it, is this : that a plaintiff applying *ex parte* comes under a contract with the Court. He will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the

injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go." 270

It would appear, therefore, that the petitioner in this application had wilfully suppressed material facts from Court by withholding his own letter 1 R8 dated 10. 07. 2000 and by non-disclosure of his application to the Court of Appeal seeking identical relief.

In the result,<sup>1</sup> on both these aforesaid points, I hold that the petitioner has failed to make a full and frank disclosure of all material facts. Hence, by this conduct the petitioner had violated his contractual obligation to Court to disclose *uberrima fides*.

In the circumstances, I uphold the two preliminary objections raised in this application. Accordingly, I proceed to dismiss and reject the <sup>280</sup> application *in limine* with costs fixed at Rs. 10,000.

**GUNASEKERA, J.** – I agree.

**EDUSSURIYA, J.** – I agree.

*Application rejected.*