

WIJESURIYA
v.
LAL RANJITH AND OTHERS

SUPREME COURT
M. D. H. FERNANDO, J.
RAMANATHAN, J. AND
P. R. P. PERERA, J.
S.C. APPLICATION NO. 263/93
NOVEMBER 29 , DECEMBER 1 AND 3,1993.

Fundamental Rights – Provincial Public Service Commission – Discrimination in appointment of Grama Niladharis – Constitution, Article 12.

By notice dated 20.9.90 (P1) the Provincial Public Service Commission (PPSC) of the Southern Province called for applications for several posts of Grama Niladharis including the Grama Niladhari Division No. 440 Kottegoda. According to P1 suitable persons were to be selected from candidates who qualified at a written examination in accordance with merit and the ethnic ratio. If for any particular vacancy there were two or more candidates of equal merit, the final decision was to be made by the PPSC. Having specified the basic educational and other qualifications P1 also stated *inter alia*, that special consideration would be given to applicants with certain stipulated academic or practical qualifications in agriculture. A residence qualification was stipulated that an applicant could

apply for a vacancy in a particular Grama Niladhari Division only if within the six years preceding the closing date for applications (12.10.90), he had resided within that Grama Niladhari Division or an adjoining Grama Niladhari Division for at least three years. At the written examination one Wasantha scored the highest marks (112); petitioner was second with 103 marks and the 1st respondent was eighth with 83 marks. Wasantha was not eligible on residence. After an interview held in 1991, the 1st respondent was appointed in preference to petitioner. She alleged discrimination by the 3rd to 5th respondents, members of the PPSC in appointing 1st respondent who was less qualified than her and not entitled on the residence qualification.

Held:

(1) The documents produced though relevant are not conclusive on residence. No material was furnished to the PPSC or to court to establish that in 1990 the petitioner's residence fell within the September 1990 boundaries of the Grama Niladhari Division No. 440 Kottegoda.

(2) If the petitioner was not a resident of the Kottegoda Grama Niladhari Division, it was indisputable that she had been a resident of an adjoining Grama Niladhari Division for the requisite period.

(3) The marks scored at the examination enable a candidate to become qualified. Thereafter it was on the basis of merit and not marks only, that selection was to be made. Merit would include other factors such as additional qualifications or experience in agriculture.

(4) When P1 set out two alternative residence qualifications which had to be possessed at the closing date for applications, and then proceeded to indicate the basis for priority in recruitment, this was necessarily a reference to qualifications possessed at the time of application.

(5) Having regard to the work of a Grama Niladhari, priority for a candidate from the Grama Niladhari Division is clearly appropriate and reasonable. Accordingly, a resident candidate was given a *right* to priority (and not just mere "preference"); as a corollary of that right and not its substitution for it, the PPSC was given a **discretion** at an anterior stage, to exclude other applicants (by not calling them for the examination); that was a reasonable provision, to reduce the administrative work involved in the selection process. The non-exercise of that discretion could not in any way extinguish or otherwise affect the right of the resident candidate.

(6) What a resident candidate is entitled to under P1 is priority, and not a mere preference; certain qualifications, such as the petitioner's agriculture qualification, only entitled a candidate to 'special consideration'. As between two non-resident candidates, one could have gained preference by reason of such "special consideration"; but it is of no avail to displace the priority to which a resident

candidate was entitled. In any event the petitioner did not have that qualification at the time of application but obtained it after the relevant date.

(7) Since it is the petitioner who asserts discrimination on the ground that she was resident within the Grama Niladhari Division, and was therefore in the same class as 1st respondent, it was for her to prove such residence. The *de facto* divisions are admitted; and she has failed to prove that these were illegal. Further the PPSC appears to have acted *bona fide*. Its intention was to appoint a Grama Niladhari for a particular area believed to be the Grama Niladhari Division No. 440 Kottegoda; and it acted on the basis that the electoral register showed which residences were within that area.

In appointing a Grama Niladhari for that area, they did not discriminate against the petitioner.

APPLICATION complaining of infringement of fundamental rights under Article 12 of the Constitution.

Manohara de Silva for petitioner.

C. Daluwatte with *Mrs. S. Saranapala* for 1st respondent.

Mohan Peiris, SSC for 2nd to 6th respondents.

Cur. adv. vult.

December 17, 1993.

M. D. H. FERNANDO, J.

The Provincial Public Service Commission ("PPSC") of the Southern Province by notice dated 20.9.90 (P1) called for applications from qualified candidates for the several posts of Grama Niladharis of the Grama Niladhari Divisions specified in the schedule thereto (which unfortunately has not been produced), admittedly including Grama Niladhari Division No. "440 Kottegoda". According to P1, suitable persons would be selected for vacant posts from among candidates who qualified ("සුදුසුකම් ලබන") at a written examination, conducted by the Commissioner of Examinations or the PPSC, in accordance with merit ("කුසලතා") and the ethnic ratio. In this case the constitutionality of ethnic quotas does not arise for consideration. If for any particular vacancy there were two or more candidates of equal merit ("සමාන කුසලතා"), the final decision would be by the PPSC. Having specified the basic educational and other

qualifications, P1 also stated, *inter alia*, that special consideration ("විශේෂ සැලකිල්ලක්") would be given to applicants with certain stipulated academic or practical qualifications in agriculture.

A residence qualification was stipulated – that an applicant could apply for a vacancy in a particular Grama Niladhari Division only if within the six years preceding the closing date for applications (12.10.90), he had resided within that Grama Niladhari Division or an adjoining Grama Niladhari Division for at least three years. (Applicants were advised to furnish householders' lists, electoral registers, and certificates from Divisional Secretaries). The basis of selection as between applicants from different areas was also set out – residents of that particular Grama Niladhari Division would be given priority ("ප්‍රමුඛත්වය"). It was further stated that if the PPSC was satisfied that a sufficient number of applications had been received from residents of the Grama Niladhari Division, it was open to the PPSC to refrain from calling applicants from adjoining Grama Niladhari Divisions for the written examination.

The Petitioner claims that at the written examination, among those who applied for the post of Grama Niladhari of the Kottegoda Grama Niladhari Division, one Wasantha scored the highest marks (112), while the Petitioner obtained the second highest (103), and the 1st Respondent the eighth highest (83); however, Wasantha was not eligible because she did not reside in Kottegoda or an adjoining Grama Niladhari Division. After an interview held in 1992, the 1st Respondent was appointed, in preference to the Petitioner. The Petitioner claims that, on the basis of P1, she should have been appointed, because she resided in the Kottegoda Grama Niladhari Division; alternatively, even if she did not reside there, P1 permitted the selection of the 1st Respondent in preference to her, only if he had secured equal marks; and in any event her G.C.E. ("O" Level) qualification in agriculture entitled her to preference over him.

She alleges that the 3rd to 5th Respondents, the members of the PPSC, have discriminated against her, in violation of Article 12(1) of the Constitution, by appointing the 1st Respondent, who was less qualified than her, and who was not entitled to any preference by virtue of residence.

Learned Counsel for the Petitioner has not been able to draw our attention to any document which authoritatively defines (or describes) the boundaries of the Kottegoda Grama Niladhari Division; nor to the statutory or other legal provisions under which such Grama Niladhari Divisions are established, subdivided, amalgamated and re-defined. There is no doubt, however, that she resided at No 453, Bandarawatte, Godauda, Kottegoda. She has produced extracts from the electoral register for an area which forms part of Polling District No. 14, which is itself a portion of Polling Division "E" (Devinuwara), of Electoral District No.8 (Matara). In 1984 and 1985 she was under 18 years of age, but her family (residing at house No. 453 in the village of "Godauda") were registered for that area, described as Grama Niladhari Division "No. 440 Kottegoda" within the "Wellabada Pattuwa East"; her name was included, for that same area, in 1986 after she became 18. In 1987 and 1988 the family was registered for Grama Niladhari Division "440A Lunukalapuwa" within the "Wellabada Pattuwa East", the other particulars remaining unchanged. In 1989, 1990 and 1991 the registration was for the Grama Niladhari Division "440C Godauda". In 1992, the registration was again for "440 Kottegoda". There is no dispute that *de facto* sub-divisions of the Kottegoda Grama Niladhari Division took place in 1978 and 1989.

It is relevant to consider whether the Petitioner was aware of these sub-divisions when she applied in response to P1. Learned Counsel for the Petitioner sought to submit that even when she was interviewed in 1992, she was unaware of the sub-divisions. This cannot be accepted, because at the interview she produced extracts from the electoral registers, although we do not know for which years. In view of the advice given in P1, in the normal course, one would have expected her to apply for and obtain extracts for all the years in question; she would then have become aware of the sub-divisions. If, however, she had applied only for the extracts for 1984-1986, it would indicate that she already had knowledge that the extracts for 1987-1990 were unfavourable. Further, the schedule to P1 would probably have indicated that there was a Grama Niladhari Division "440C Godauda", bearing the same name as her own village. As P1 made specific reference to the electoral register, it is probable that at the time she applied she did check the electoral registers.

I will first consider her claim based on P1. Firstly, she relies on a certificate issued by the Grama Niladhari of Kottegoda that she resided at Kottegoda, and on a letter dated 30.10.91 (P9) from the Assistant Govt. Agent, Dickwella, to the Secretary, Provincial Council. The former refers to the subdivisions of 1987 and 1989, and does not suggest that another redemarcation took place in 1990. The latter states that, according to a letter dated 18.9.90 from the Matara, Government Agent, in the course of revision (or re-organisation) of the Kottegoda Grama Niladhari Division, premises No 453 had been included in that Grama Niladhari Division. Learned Counsel therefore contends that on this material the PPSC was compelled to accept that she was resident within that Grama Niladhari Division. However, such documents though relevant are by no means conclusive; in order to check the qualifications of candidates, it was legitimate to refer to the electoral register; and when this revealed a discrepancy, the petitioner was afforded sufficient opportunity to establish that her residence was within the Kottegoda Grama Niladhari Division, i.e. as demarcated after the latest subdivision prior to the closing date for applications.

Secondly, learned Counsel contends that the extracts for the years 1984-86 showed her to be resident within "Kottegoda", and therefore she did satisfy the residence qualification. This is patently untenable. P1 required residence within the Grama Niladhari Division in respect of which appointment was sought; that was the area demarcated as "No. 440 Kottegoda" according to the subdivision in force in 1990, when P1 was issued; although from 1984-86 the petitioner resided in a Grama Niladhari Division having the same name, such residence was not within the September 1990 boundaries of the Grama Niladhari Division in respect of which she sought appointment. What was required was not identity in respect of name but of area. The 6th Respondent, the secretary of the PPSC, with exemplary diligence, sought clarification of the discrepancy between the documents relied on by the petitioner and the electoral register - from the Chief Secretary of the Provincial Council, the Government Agent, the Assistant Govt Agent, the Commissioner of Elections, and the Petitioner; and the replies she received gave her adequate reason to believe that what was stated in the letter dated 18.9.90 of the Govt. Agent, Matara, was only a proposal, which was subsequently given

effect to only in 1992, as evidenced by the 1992 electoral register. No material was furnished then to the PPSC, or now to this Court, to establish that in 1990 her residence fell within the September 1990 boundaries of Grama Niladhari Division No. 440 Kottegoda. Regrettably, learned counsel for the petitioner went to the extent of alleging *mala fides*, and even fraud, against the 6th Respondent, although not pleaded and although the material overwhelmingly pointed to the utmost good faith on her part.

The Petitioner was therefore properly treated as not resident within the Kottegoda Grama Niladhari Division.

If the petitioner was not a resident of the Kottegoda Grama Niladhari Division, it was indisputable that she had been a resident of an adjoining Grama Niladhari Division for the requisite period. The third contention on behalf of the Petitioner was that P1 provided for selection upon the results of a written examination, and any eligible candidate (whether resident within the Grama Niladhari Division or in an adjoining Grama Niladhari Division) was entitled to be selected in preference to a candidate who scored less marks; "සමලකා" was interpreted as equivalent to "marks scored". It was further contended that it was only if two candidates scored the same number of marks that the PPSC had a discretion to give preference to a resident candidate as against another resident outside the Grama Niladhari Division. This submission does violence to the plain language of P1. The marks scored at the examination enabled a candidate to become "qualified"; thereafter it was on the basis of "merit" and not "marks" only, that selection was to be made. Merit would include other factors, such as additional qualifications or experience in agriculture. If P1 intended that selection was to be made on "marks", another more appropriate word would have been used instead of the wider term "සමලකා".

Fourthly, learned Counsel contended that if P1 permitted a preference for a candidate resident within the Grama Niladhari Division, such preference had to be given even if he had not been so resident at the time of application, if he had been so resident, for however short a time, immediately before the time of selection. This submission too is totally unfounded. When P1 set out two alternative

residence qualifications which had to be possessed at the closing date for applications, and then proceed to indicate the basis for priority in recruitment, this was necessarily a reference to qualifications possessed at the time of application.

The Petitioner's fifth contention was that the preference permitted by P1 was restricted to the specific situation mentioned in the very next sentence, namely that the PPSC had a discretion to refrain from calling applicants from adjoining Grama Niladhari Divisions for the written examination. Here that discretion had not been exercised, and thereafter the PPSC had no discretion to give preference to a resident candidate. This is illogical and untenable. Having regard to the work of a Grama Niladhari, priority for a candidate from the Grama Niladhari Division is clearly appropriate and reasonable; accordingly, a resident candidate was given a right to priority (and not just mere "preference"); as a corollary of that right, and not in substitution for it, the PPSC was given a discretion, at an anterior stage, to exclude other applicants (by not calling them for the examination); that was a reasonable provision, to reduce the administrative work involved in the selection process. The non-exercise of that discretion could not in any way extinguish or otherwise affect the right of the resident candidate.

Learned Counsel made yet another submission. Even if the 1st Respondent was entitled to some preference on account of residence, the Petitioner was entitled to preference by virtue of her agriculture qualification; and since the petitioner had also scored higher marks, she should have been appointed. The comparison is fallacious. What a resident candidate is entitled to under P1 is "priority", and not a mere preference; certain qualifications, such as the Petitioner's agriculture qualification, only entitled a candidate to "special consideration". As between two non-resident candidates, one could have gained preference by reason of such "special consideration"; but it was of no avail to displace the priority to which a resident candidate was entitled. In any event, as pointed out by learned Senior State Counsel, the petitioner did not have that qualification at the time of application: she obtained it by passing an examination held after the relevant date.

Learned Counsel then challenged the two subdivisions. He accepted that in 1984 there was a duly constituted Grama Niladhari

Division No. 440 Kottegododa, although there was no Gazette or other official announcement in respect of the establishment of such a Grama Niladhari Division. He contended that, in the absence of a Gazette notification, the later subdivisions were invalid, and hence the appointment of a Grama Niladhari had to be to the Grama Niladhari Division as existing in 1984. He submitted that a Gazette notification under section 8 of the Administrative Districts Act (Cap. 6) was necessary, because, according to him, the extent of the larger administrative unit established by that Act, namely the District, (and even of the DRO's Divisions referred to in the schedule) could not be determined unless the smallest unit of administration within such unit was first known; therefore he argued, any change in the smallest unit involved a change in the larger unit, and hence a gazette notification was essential. This is wholly unfounded. That Act denied the administrative districts by reference to existing administrative units (which are specified in the schedule); the village headman's division, which is the fore-runner of the present Grama Niladhari Division, was a known administrative unit, and it was unnecessary to make any mention of it. Any change in that division, not involving any change in the administrative district, was not required **by that Act** to be gazetted, and we have not been referred to any other provision which required gazetting. Here what is challenged is the sub-division of a division within the "Wellabada Pattuwa East" which is a unit referred to in the schedule; thus manifestly the subdivision did not affect the limits of the administrative district, and the Act had no application to the change. Learned Counsel finally submitted, on this aspect of the case, that the burden was on the Respondents to establish the limits of the Grama Niladhari Division. In my view, since it is the Petitioner who asserts discrimination on the ground that she was resident within the Grama Niladhari Division, and was therefore in the same class as the 1st Respondent, it was for her to prove such residence; the *de facto* subdivisions are admitted; and she has failed to prove that these were illegal. Further, whatever the position might have been in other proceedings to challenge the decision of the PPSC, here the PPSC appears to have acted *bona fide*; its intention was to appoint a Grama Niladhari for a particular area believed to be the Grama Niladhari Division No. 440 Kottegododa; and it acted on the basis that the electoral register showed which residences were within that area. In appointing a Grama Niladhari for that area, they did not discriminate against the Petitioner.

The petitioner's final submission was based on the document P14, which is a document entitled "Guidelines to Divisional Secretaries/Divisional Assistant Government Agents and Grama Niladharis" published by the Ministry of Public Administration, Provincial Councils and Home Affairs; P14 contained a scheme of recruitment of Grama Niladharis, which did not stipulate any preference for applicants residing within the Grama Niladhari Division. Learned Counsel contended that, if the Petitioner was not entitled to succeed on the basis of P1, the provisions for priority on the ground of residence contained in P1 were superseded by P14.

This submission struck at the root of the devolution provided for by the 13th Amendment. Learned Counsel urged at the outset that the terms and conditions of recruitment were not within the purview of a Provincial Council, because it was not specifically mentioned in item 4 of List 1 in the Ninth Schedule; the Ministry had therefore the power to prescribe the scheme of recruitment. However, on the second day of the argument Counsel conceded that this submission could not be maintained.

The Petitioner's application therefore fails, and is dismissed without costs.

RAMANATHAN, J. – I agree.

PERERA, J. – I agree

Application dismissed.