

COLOMBO SOUTH CO-OPERATIVE SOCIETY LTD
v.
ANURUDDHA RATWATTE, MINISTER OF POWER AND
IRRIGATION AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.,
EDUSSURIYA, J. AND
YAPA, J.
SC APPLICATION NO. 698/98
NOVEMBER 29, 2001

Fundamental rights – Termination of dealership contract in petrol by Petroleum Corporation – "Executive or administrative action" – Article 12 (1) of the Constitution.

The petitioner was carrying on the business of a petrol filling station at No. 502, Sirimavo Bandaranaike Mawatha, Colombo 14, as a dealer of the 2nd respondent Petroleum Corporation (the Corporation). The said filling station was owned by the Corporation. The petitioner was appointed as a temporary dealer in 1984 and a formal dealership agreement was entered into between the petitioner and the Corporation in 1997. On 14. 10. 1998, officers of the Corporation arrived at the petitioner's filling station and took possession of it after handing over a letter of termination dated 13. 10. 1998.

The defence of the respondents was that according to a Board Paper dated 28. 09. 1998 the Board of Directors of the Corporation had decided to limit "one shed per dealer".

The petitioner had been operating three Corporation owned outlets owned by the Corporation.

Notwithstanding, the claim of "one shed per dealer" policy which was also the claim made in an SC application decided on 02. 10. 1997 – it was proved that the Corporation had permitted some dealers to operate more than one filling station and that a dealer who operated one filling station had been given another on 12. 08. 1998.

Normally, the conditions of the agreement require three month's notice prior to the termination of agreement, but in the case of certain specified defaults, the Corporation is permitted to terminate the agreement without notice. In the instant case requisite notice of three months was not given even though the relevant Board Paper did not refer to any such default.

Held:

- (1) Although the relationship between the petitioner and the Corporation was contractual, it is settled law that the latter's conduct constitutes "executive or administrative action" within the meaning of Article 126 of the Constitution.
- (2) The petitioner had been subjected to discrimination *vis-a-vis* persons who were similarly circumstanced. Further, the termination of the agreement without due notice was arbitrary. Hence, the petitioner's right under Article 12 (1) has been infringed.

Cases referred to :

1. *Dahanayake v. De Silva* – (1978-79-80) 1 Sri LR 47.
2. *Kuruppu Don Somapala Gunaratne and Others v. Ceylon Petroleum Corporation and Others* – SC (Application) No. 99/96 SC Minutes of 31st July, 1996.
3. *Wickrematunge v. Anuruddha Ratwatte and Others* – (1998) 1 Sri LR 201.
4. *Sangadasa Silva v. Anuruddha Ratwatte and Others* – (1998) 1 Sri LR 350.

APPLICATION for relief for infringement of fundamental rights.

Romesh de Silva, PC with *Geethaka Gunawardena* for petitioner.

D. S. Wijesinghe, PC for 2nd respondent.

J. C. Weliamuna for 3rd respondent.

Ms. I. Demuni de Silva, Senior State Counsel for 1st and 4th respondents.

Cur. adv. vult.

March 25, 2002

SHIRANI A. BANDARANAYAKE, J.

The petitioner, a duly incorporated society with 17,000 members and approximately 500 employees, had been carrying on the business of a Petrol Filling Station at No. 502, Sirimavo Bandaranaike Mawatha, Colombo 14, as a dealer of the 2nd respondent Corporation. The petitioner was first appointed as a temporary dealer of petroleum products in February, 1984 (C) and a formal dealership agreement between the petitioner and the 2nd respondent Corporation was entered into on 28. 02. 1997 (G2). In September, 1998, the petitioner became aware that the 2nd respondent was attempting to take steps to terminate the dealership. On hearing these unconfirmed reports, the petitioner wrote to the 2nd respondent on 23. 09. 1998, but there was no response to this letter. On 14. 10. 1998, several officers from the 2nd respondent Corporation arrived at the petitioner's filling station and took possession of the filling station, after handing over the letter of termination dated 13. 10. 1998 (I1), to the Manager.

The petitioner claims that by the said termination of the dealership agreement, the 1st and 2nd respondents had infringed the petitioner's fundamental right to equal treatment and acted in a discriminatory manner.

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

The 2nd respondent Corporation on the other hand contended that the agreement with the petitioner was terminated due to a policy decision taken by the Board of Directors to permit the dealers to operate only one dealership. The letter dated 13. 10. 1998, terminating the dealership with the 2nd respondent Corporation (I1) however stated that the termination was due to the fact that the petitioner was operating more than one filling station and further that the petitioner's dealership was on a temporary basis.

The Manager (Marketing) of the 2nd respondent Corporation averred 30
in his affidavit that the general consensus of the Board of Directors
of the 2nd respondent Corporation was that there were several dealers
who enjoyed multiple dealerships and that it was more commercially
viable and equitable if it is limited to one dealership per person. It
was also submitted on behalf of the 2nd respondent Corporation that
representations were made to the effect that persons with multiple
dealerships were not able to maximize the potential of their filling
stations in view of logistical and financial strains they had to bear
as a result of operating more than one filling station. As a result of
this line of thinking, a decision was taken by the Board of Directors 40
of the 2nd respondent Corporation on 06. 10. 1998 to terminate the
dealership of the petitioner's filling station situated at Sirimavo
Bandaranaike Mawatha, Colombo 14.

Consequently, the Manager (Marketing) of the 2nd respondent
Corporation submitted a Board paper on 28. 09. 1998 (2R7) recom-
mending the termination of dealership of the petitioner society. The
reason for this recommendation was on the basis that it was *'the*
intention of the Board of Directors to limit one corporation owned filling
station or service station to one individual or organization'.

It was submitted on behalf of the 2nd respondent Corporation that 50
the said decision to limit 'one shed per dealer' was taken after one
D. Kasturiarachchie filed a fundamental rights application against the
termination of his dealership at Nuwara Eliya in SC (Application)
No. 289/95 decided on 20. 10. 1997 (2R4). The contention of the
2nd respondent Corporation in the said Kasturiarachchie's case was
that, a proposal was made to the Board of Directors of the 2nd
respondent Corporation, to permit one dealership per each dealer, thus
placing a limitation on multiple dealerships.

The Board paper of the 2nd respondent Corporation, dated
28. 09. 1998, had incorporated the following resolution, with regard 60
to the termination of the dealership of the petitioner:

"As it is the intention of the Board of Directors to limit one Corporation owned filling station or service station to one individual or organization—

we recommend that of the three Corporation owned outlets operated by the Colombo South Co-operative Society Ltd, the dealership at the filling station at Sirimavo Bandaranaike Mawatha, Colombo 14, which accrues the lowest income to this society, be terminated . . . "

The petitioner, however, contended that, although the Board of Directors of the 2nd respondent Corporation had taken up the position that a dealer would be given only one filling or service station, contrary to this policy, the 2nd respondent had permitted some agents to operate more than one filling station. The learned President's Counsel for the petitioner contended that, one Slipto Agencies (Pvt) Ltd., had obtained the dealership of filling stations at Baseline Road, at Maligawatte and at Bastian Mawatha. The dealership of the filling station at Baseline Road had to be terminated not owing to a decision taken by the 2nd respondent Corporation, but due to an order given by this Court in SC (Application) No. 251/95. 70

Although the 2nd respondent Corporation accepted that, pursuant to a decision taken by the Board of Directors in or around October, 1997, that facility should be granted to dealers on the basis of 'one shed per dealer', it would appear that even in August, 1998, the 2nd respondent had allocated dealerships to persons who were already dealers of filling or service stations of the 2nd respondent Corporation. The documents annexed along with the affidavit dated 01. 02. 1999 bear testimony to this fact. Annex (i), attached to the Board Paper of the 2nd respondent Corporation, dated 28. 09. 1998 marked 2R7 is a list of dealers operating more than one 'Petroleum Corporation controlled dealerships as at 31. 08. 1998'. According to 2R7, one Mrs. C. K. Warusavithana who was the dealer of the filling station at Attidiya Junction from 12. 10. 1988 was given another dealership 80

in Mt. Lavinia on 12. 08. 1998. It is surprising how the 2nd respondent Corporation decided to grant her the second dealership in August, 1998, if a policy decision was taken in October, 1997, to permit the dealers, 'to operate only one dealership'.

The petitioner contended that, although initially there was only a temporary dealership, on 28. 02. 1997, the petitioner entered into a dealership agreement with the 2nd respondent Corporation. The 100
Manager (Marketing) of the 2nd respondent Corporation has not denied this fact. He, however, contended that the dealership of the filling station at No. 502, Sirimavo Bandaranaike Mawatha, Colombo 14, was given to the petitioner only on a temporary basis and the 2nd respondent Corporation had decided to enter into a formal dealership agreement to regularize and formalize the terms and conditions between the two parties. He, in his affidavit, further averred that even where a dealership is granted temporarily, a dealership agreement is entered into with the 2nd respondent Corporation. The Memorandum of agreement, however, does not indicate that the dealership agreement 110
was on a temporary basis as claimed by the 2nd respondent Corporation. According to the dealer agreement the right to terminate an agreement without any notice was on the basis that the dealer had failed to 'pay and settle in full all monies due to the Corporation'. Clause 12B of the dealer agreement is as follows:

"If the Dealer does not in the opinion of the General Manager perform his duties and obligations as a Dealer of petroleum products of the Corporation, faithfully, diligently and efficiently or if he defaults in complying with the terms, covenants and conditions of this Agreement or the terms and conditions under which commis- 12
sions and allowances are payable to him referred to in paragraph 12 above, the Corporation shall be entitled to terminate this agreement without any notice whatsoever. The Corporation shall also be entitled to terminate this agreement after three months' notice in writing to the dealer . . ."

The Board paper on the letter of termination however, did not refer to any such defaults made by the petitioner regarding the dealership. When the termination of the petitioner's dealership was taken up for discussion on 14. 09. 1998 (2R 5), the Board had directed the Manager (Marketing) of the 2nd respondent Corporation to fall in line with the policy adopted by the Board, viz 'one shed per dealer' (2R 6). When the Board met again on 09. 10. 1998, it was resolved to terminate the dealership of the petitioner on the basis that the co-operative society operated more than one filling station. ¹³⁰

In the first Board paper, it was recommended by the Manager (Marketing) that the 3rd respondent must be appointed as dealer of the filling station in question (2R5). The purpose of the second Board Paper was to *'terminate the dealership of M/s Colombo South Co-operative Society Ltd. and appoint Mr. W. K. D. Tilak Waragoda of No. 26, Biyagama Road, Pethiyagoda, Kelaniya, as Dealer at Corporation owned Lanka Filling Station, Sirimavo Bandaranaike Mawatha, Colombo 14.'* ¹⁴⁰

It is common ground as pointed out earlier, that as soon as the petitioner became aware that there was a move to terminate the dealership of the petitioner, a letter was sent to the 2nd respondent Corporation. If the Board of Directors and the Manager (Marketing) of the 2nd respondent Corporation were of the view that the petitioner's agreement had to be terminated, the petitioner should have been given three months' notice prior to the termination of the agreement in terms of clause 12B of the agreement. No reasons were given by the 2nd respondent as to why the alternative procedure of termination without notice, based upon a resolution of the Board of Directors of the 2nd respondent Corporation was opted for by them. ¹⁵⁰

The relationship between the petitioner and the respondent, which is based on the agreement entered into on 28. 02. 1997, no doubt is contractual. It is however, now well-settled law that the action taken by the Board of the 2nd respondent Corporation to terminate the

petitioner's dealership and to appoint the 3rd respondent in his place constitutes "executive or administrative action" within the meaning of Article 126 of the Constitution (*vide Dahanayake v. De Silva*,⁽¹⁾ 160 *Kurupuge Don Somapala Gunaratne and Others v. Ceylon Petroleum Corporation and Others*,⁽²⁾ *SC (Application) Wickrematunga v. Anuruddha Ratwatte and Others*,⁽³⁾ *Sangadasa Silva v. Anuruddha Ratwatte and Others*.⁽⁴⁾

Article 12 (1) of the Constitution states: "All persons are equal before the law and are entitled to the equal protection of the law". This provision implies that there should be no discrimination between any two persons if they are similarly situated and that no decision should be taken in a capricious, unreasonable or arbitrary manner. Considering the applicability of this provision in a matter regarding 170 the termination of a dealership agreement by the Ceylon Petroleum Corporation, Justice Dr. Amerasinghe in *Wickrematunga v. Anuruddha Ratwatte and Others (supra)* at pp. 229-230 stated that:

"If the rules of conduct contain provisions that are constitutionally impermissible . . . , they must be declared unconstitutional. Likewise, if such provisions are *ex facie* lawful, not invidiously discriminatory and rational in the matter of classification, but in their application violate the constitutional restraints and guarantees relating to fundamental rights and freedoms declared and recognized by the Constitution, the action of the authority concerned must be declared 180 unconstitutional: For instance, if they are applied in an invidiously discriminatory manner or in a capricious, unreasonable or arbitrary manner."

In these circumstances, I am of the view that the 2nd respondent Corporation has acted in an arbitrary manner in total violation of clause 12B of the dealer agreement by their failure to give due notice to the petitioner before the cancellation of the dealer agreement. Besides, it is also to be noted that the aforesaid material shows that the petitioner had been subjected to unequal treatment in violation of

Article 12 (1) of the Constitution by applying the purported policy ¹⁹⁰ decision to limit 'one shed per dealer' unequally and arbitrarily.

I, therefore, hold that the Board of the 2nd respondent Corporation was not entitled to terminate the petitioner's dealership and therefore the termination of the petitioner's dealership was not justifiable. I, accordingly, hold that the petitioner's fundamental right guaranteed by Article 12 (1) of the Constitution has been infringed by the 2nd respondent Corporation. I also hold that the order dated 13. 10. 1998 (I1), terminating the petitioner's dealership of the filling station situated at No. 502, Sirimavo Bandaranaike Mawatha, Colombo 14, and contained in the letter marked I1 is null and void and of no effect ²⁰⁰ in law.

I, accordingly, make order and direct the 2nd respondent Corporation to reinstate the petitioner society as the dealer of the filling station situated at No. 502, Sirimavo Bandaranaike Mawatha, Colombo 14, under and in terms of the agreement dated 28. 02. 1997 (G2) entered into between the 2nd respondent Corporation and the petitioner within one month from today. The 2nd respondent Corporation should also pay the petitioner society a sum of Rs. 125,000 as compensation and Rs. 25,000 as costs. These amounts totalling to a sum of Rs. 150,000 must be paid within three (3) months from today. ²¹⁰

EDUSSURIYA, J. – I agree.

YAPA, J. – I agree.

Relief granted.