

WICKREMASINGHE

v.

CEYLON PETROLEUM CORPORATION AND OTHERS

SUPREME COURT
S.N. SILVA, CJ.
BANDARANAYAKE, J. AND
ISMAIL, J.
S.C. APPLICATION NO 304/98(FR)
6TH DECEMBER, 2000

Fundamental Rights - Termination of dealership in petroleum products in terms of the Dealership Agreement - Applicability of Public Law - Reasonableness on objective basis for determining the Constitutional validity of the impugned termination - Article 12(1) of the Constitution - Relevance of the classification doctrine.

The petitioner had been a dealer in petroleum products from 1949 at premises No. 267 Galle Road, Colombo 4 when the said premises were with the British owned Shell Company until the same vested with the 1st respondent Corporation in 1964 under the Ceylon Petroleum Corporation Act after which the business was continued on an Agreement with the Corporation. The Agreement of Dealership could be terminated either without notice on the ground of defaults on the part of the dealer or by either party giving 3 months notice to the other party.

There was no allegation of default against the petitioner who carried on the business of selling petroleum and providing ancillary services including the maintenance of a service station, at a well located site on the land side of the Galle Road. The average monthly sales were about Rs. 12 million.

The 1st respondent Corporation by its letter dated 25.4.1998(P4) terminated the Agreement on the second ground namely, mutual notice and required the petitioner to hand over vacant possession of the premises on or before 31.12.1998. P4 states that the dealership was being terminated since the land on which the business is being conducted, being owned by the 1st respondent Corporation was the most suitable site for the construction of a Head Office Complex for the Corporation. A Committee which had considered nine locations finally recommended the site occupied by the petitioner.

Held :

1. Since the termination of the Agreement is challenged on the basis of an infringement of the right to equality guaranteed by Article 12(1) of the Constitution, the legality of the termination has to be reviewed not in the light of the law of contract but in the domain of the Constitutional guarantee of equality enshrined in Article 12.
2. The 1st respondent Corporation having the monopoly in relation to petroleum products is an agency of the Government and its acts would ordinarily come within the pale of "executive or administrative action."
3. The question for decision is whether the impugned decision is reasonable on an objective basis and not arbitrary, viz., whether such decision is fairly and substantially related to the object of legislation.

Per S.N. Silva, CJ

"The case of *Perera v. Jayawickrema*⁽⁵⁾ demonstrates the ineffectiveness of the guarantee in Article 12(1) which results from the rigid application of the requirement to prove that persons similarly circumstanced as the petitioner were differently treated. Such an application of the guarantee under Article 12(1) ignores the essence of the basic standard which is to ensure reasonable as opposed to arbitrariness....."

4. The respondents erred in looking at the premises of established petrol sheds in Colombo to site its proposed Head Office Complex. This course of action cannot be fairly and substantially related to the objective of the legislation which is to carry on the business of supplying and distributing petroleum to motorists.
5. The impugned termination of the petitioner's dealership infringed his rights under Article 12(1); hence such termination is invalid and of no force in law.

Cases referred to :

1. *Roberts and Another v. Ratnayake and Others* (1986)2 SRI L.R. 36
2. *Wickrematunga v. Ratwatte and Others* (1998) 1 SRI L.R. 201
3. *Sangadasa Silva v. Ratwatte and Others* (1998) 1 SRI L.R. 350

4. *Royster Guano Co. v. Commonwealth of Virginia* (1920) 253 US 412
5. *Perera v. Jayawickrema* (1985) 1 SRI L.R. 285

APPLICATION for relief for infringement of fundamental rights.

E.D. Wickremanayake with A.M. Najeem for petitioner.

P.A.D. Samarasekera, P.C. with Kushan de Alwis and B.C. Perera for 1st to 9th respondents.

Cur. adv. vult.

July 23, 2001.

SARATH N. SILVA, C.J.

The Petitioner has been granted leave to proceed in respect of the alleged infringement of the fundamental rights to equality guaranteed by Article 12(1) and (2) of the Constitution.

The Petitioner is a Dealer in petroleum products carrying on business at premises No. 267, Galle Road, Colombo 4, which is popularly known as the "Dickmans Road" petrol shed and service station. He commenced business when the premises were with the British owned Shell Company and has continued after the premises vested with the 1st Respondent Corporation in terms of the Ceylon Petroleum Corporation Act in 1964. The Agreement with the Corporation in terms of which the Petitioner becomes entitled to continue in business is dated 26.9.1964. (Dealership Agreement P1). The alleged infringement of the Petitioner's fundamental right to equality relates to the decision of the Corporation to terminate the dealership, notified to the Petitioner by letter dated 23.4.1998 (P4).

The impugned decision to terminate the dealership has been made in terms of clause 12B of the Agreement. This clause has broadly two parts. The first part empowers the Corporation to terminate the Agreement, without notice on the basis of what may be generally described as defaults on the part of the dealer. The second part provides for a unilateral right to terminate,

that may be exercised at the option of either party i.e. by the Corporation or the dealer, upon 3 months notice being given to the other party. In this instance the termination has been effected in terms of the second part of clause 12B and the letter P4 dated 25.4.1998 requires the Petitioner to hand over vacant possession of the premises on or before 31.12.1998. In that respect the termination of the Petitioner's dealership is in compliance with specific terms of the Agreement (P1) and the Petitioner may not be entitled to any relief in respect of the termination under the law of contract and the common law on the subject. But, that is from the perspective of the Private Law. In these proceedings, the termination is challenged from the perspective of Public Law on the basis of an alleged infringement of the fundamental right to equality, guaranteed by Article 12(1) and (2) of the Constitution. Therefore the matters to be considered transcend the mere examination of the terms of the Agreement and a review of the legality of the termination in the light of the Law of Contract and enter the domain of the constitutional guarantee of equality enshrined in Article 12.

Article 126(2) of the Constitution vests the sole and exclusive jurisdiction in this Court to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or IV of the Constitution. Article 17 and 126(2) give a right to any person who alleges any such infringement or imminent infringement to invoke the jurisdiction of this Court in the manner provided therein. Therefore the issues that come up for consideration are initially whether the impugned action comes within the pale of executive or administrative action and if so whether there has been an infringement of the Petitioner's rights to equality guaranteed by Article 12(1) and (2) as alleged by him.

There is little doubt as to the initial issue. The 1st Respondent is a Public Corporation established by the Ceylon Petroleum Corporation Act No. 28 of 1961. It is vested with an exclusive right to import, export sell, supply or distribute

petroleum in terms of Section 5C of the Act. A Public Corporation vested with a monopoly in relation to a commodity vital to the community would undoubtedly be an agency of the Government and its acts would ordinarily come within the pale of executive or administrative action.

In the case of *Roberts and another vs. Ratnayake and others*⁽¹⁾ by a majority decision it was held that where a statutory authority (a Municipal Council) gives out premises on a lease, the constitutional guarantee of equality applies only at the threshold stage of entering into the lease and that subsequent action taken to terminate the lease for an alleged breach of its terms should be considered as a matter of Private Law only; without interposing the Public Law requirements of the guarantee of fundamental rights. This decision had been departed from in later cases, in particular *Wickrematunga vs. Ratwatte and others*⁽²⁾ and *Sangadasa Silva vs. Ratwatte and others*^s where it was specifically held that the act of the Petroleum Corporation in terminating a Dealership Agreement was in the nature of executive or administrative action and would attract jurisdiction of the court under Article 126 of the Constitution. Therefore the impugned termination of the Dealership Agreement by P4, should be reviewed in these proceedings not from the narrower perspective of only the terms of the Agreement but from broader perspective of the exercise of executive or administrative action by an agency of the Government and the constitutional guarantee of equality which should guide the exercise of power under the Agreement.

Article 12(1) guarantees to every person equality before the law and the equal protection of the law. Since diversity is inherent amongst persons, from an early time the United States Supreme Court applied the equal protection clause as permitting classification of persons provided that such classification satisfies a basic standard. This basic standard is set out in the often cited judgment of the United States Supreme Court in the case of *Royster Guano Co. vs. Commonwealth of Virginia*⁽⁴⁾ as follows :

"..... classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
(P.415)

Although the objective is to ensure that all persons, similarly circumstanced are treated alike, it is seen that the essence of this basic standard is to ensure reasonableness being the positive connotation as opposed to arbitrariness being the related negative connotation. The application of this basic standard has been blurred in later cases due to an over emphasis on the objective of ensuring that all persons similarly circumstanced shall be treated alike. The case of *Perera vs. Jayawickrema*⁽⁵⁾ demonstrates the ineffectiveness of the guarantee in Article 12(1) which results from the rigid application of the requirement to prove that persons similarly circumstanced as the Petitioner were differently treated. Such an application of the guarantee under Article 12(1) ignores the essence of the basic standard which is to ensure reasonableness as opposed to arbitrariness in the manner required by the basic standard. If the legislation or the executive or administrative action in question is thus reasonable and not arbitrary, it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality. As noted above, the effectiveness of the guarantee would be minimized if there is insistence that a failure of the end result should also be established to prove an infringement of the guarantee. If however there is such evidence of differential treatment that would indeed strengthen the case of a Petitioner in establishing the unreasonableness of the impugned action.

The next question, which is of particular significance to the facts of this case, is the basis upon which the aspect of reasonableness of the impugned action should be examined. It is submitted on behalf of the 1st to 9th Respondents that the decision to terminate the dealership was taken bona fide and that the reasons for it are contained in the letter of termination

itself P4 (dated 23.4.98). The letter states very clearly that the dealership is being terminated since the land on which the petrol shed and the service station is located, being owned by the 1st Respondent Corporation, is the most suitable site for the construction of a Head Office Complex for the Corporation. The Respondents have adduced evidence to establish that the Corporation had to vacate its Head Office located at No. 113, Galle Road, Colombo 3 (next to the official residence of the Prime Minister/President) due to security reasons in 1995, and thereafter several departments of the Head Office have been temporarily located at different premises that have been leased paying high rents. That, efforts made to construct a new Head Office complex on other sites, failed. At that stage a committee was appointed to select a petrol filling station in Colombo, which could be used as the site for the construction of the Head Office Complex. The committee in its report, which has been produced, considered 9 locations and finally recommended the site occupied by the Petitioner. The Board of Directors accepted the recommendation and it was decided to terminate the dealership of the Petitioner and obtain possession of the land to construct the Head Office Complex.

On the other hand the Petitioner submits that the petrol shed has been operated at this well located site from 1949 and from the inception he has been a model dealer and has carried out business without any complaints or adverse reports from the Corporation. He has set out the full range of facilities that is provided at the premises by way of supplying fuel and ancillary services and relies on the several commendations received for the services rendered. It is also submitted that this is the only petrol shed and service station situated on the land side of the Galle Road, between the petrol shed at Kollupitiya and the other at Dehiwala. Due to the bifurcation of the Galle Road it serves a large number of motorists travelling on the land side of the Galle Road. It is claimed that the average monthly sales is in the region of Rs. 12 million. None of these matters are disputed by the Respondents.

The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties. In this context I find the basic standard laid down in the *Royster Guano case* and cited above to be a useful guide. It has to be borne in mind that the basic standard was laid in relation to a challenge of the validity of State legislation granting a tax exemption to certain corporations and not others.

The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principle element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be effected. But, the test once again, is one of being reasonable and not arbitrary. Of particular significance to the fact of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities,

schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis. In this respect the second element of the basic standard would be a useful guide. That, the "classification..... must rest upon some ground having a fair and substantial relation to the object of the legislation." When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority.

Extra

On the basis of the foregoing analysis of the legal requirements relevant to the guarantee of equality I would now revert to the facts of this case. The Ceylon Petroleum Corporation was established by Act No. 28 of 1961. Its principal object as stated in the long title of the Act and section 5(a) is to "carry on business as an importer, exporter, seller, supplier or distributor of petroleum." In terms of Section 5c(i) the Corporation has been vested an exclusive right, in the nature of a monopoly to carry

on the said business. The business of the Petitioner as dealer is a vital link between the Corporation and the end user such as motorists. When considered from this objective of the legislation the action of the Corporation should be fairly and substantially related to the maintenance and improvement of the supply and distribution of petroleum to end users such as motorists. Any action which detracts from or diminishes the supply and distribution of petroleum would per se be devoid of a fair and substantial relation to the objective of the legislation. In this instance the impugned decision is for the closure of a vital petrol shed, which cannot be fairly and substantially related to the objective of the legislation.

The Respondents contention is that it is necessary to have a well located Head Office complex to carry out the full range of its activities. This contention cannot be basically faulted. It is further contended the premises at Galle Road, Colombo 4, where the petrol shed in question is located is a good site for the new Head Office complex. There may be merit in this contention, as well. To add another virtue, the site being owned by the Corporation could be secured without any additional cost. Further, the evaluation done by the Committee in selecting the premises in question out of the petrol sheds in Colombo, to site the Head Office Complex may be a seemingly reasonable process. But in my view all these factors are negated since the starting point is faulty. The Respondents erred in looking at the premises of established petrol sheds in Colombo to site its proposed Head Office Complex. This course of action cannot in any way be fairly and substantially related to the objective of the legislation which is to carry on the business of supplying and distributing petroleum. The maintenance of a centrally located head office is subordinate to the maintenance of efficient and effective distribution points. The task of maintaining an efficient and effective distribution point should get priority when related to the objective of the legislation. Therefore I hold that the decision communicated by P4 to terminate the dealership of the Petitioner infringes the fundamental right of the Petitioner guaranteed by Article 12(1) of the Constitution.

Next, I have to consider the alleged infringement of Article 12(2) of the Constitution. It is contended that the Petitioner has been a member of the United National Party and in active politics on behalf of that Party for a period of 22 years, particularly in the Kalutara District. On that basis it is alleged that the Petitioner is discriminated against on the ground of political opinion. However, the Petitioner has significantly failed to disclose that he has been and continues without any disruption as a dealer of the Corporation at the petrol shed situated at premises No. 878, Main Street, Kalutara. The Respondents have produced marked R 11 the dealership agreement in respect of that petrol shed. Furthermore the Petitioner has carried on business at the petrol shed in question for almost 4 years after the change of Government without any adverse reports or hindrance on the part of the 1st Respondent. In fact two months prior to the impugned decision the 9th Respondent who was a member of the committee that recommended that the petrol shed in question was the most suited location for the Head Office Complex issued a commendation in respect of the services rendered by the Petitioner as a dealer. Whereas only 3 months notice should be given of the termination in terms of clause 12B of the dealership agreement, the letter of termination P4 gives 8 months notice to Petitioner. The letter itself which sets out reason for the termination is couched in temperate language and ends with virtually a plea which states as follows :

"We trust you would kindly extend your unstinted co-operation in handing over the vacant and peaceful possession of the land building to our Area Manager."

All these matters in my view negative the allegation of discrimination on the basis of political opinion. It is clear that the Petitioner has included this allegation merely to strengthen his case. The tendency to unnecessarily present disputes upon divisions based on political colour is one that this Court cannot view with favour. I hold that the Petitioner has failed to establish any infringement of Article 12(2) of the Constitution.

Accordingly I allow the application and grant to the Petitioner a declaration as prayed for in paragraph (b) of the prayer to the petition that his fundamental right guaranteed by 12(1) of the Constitution has been infringed by the 1st to 9th Respondents and declare the termination of the dealership agreement effected by document P4 as invalid and of no force in law. Considering the finding against the Petitioner in respect of the alleged infringement of Article 12(2) of the Constitution, and the fact that he has continued to operate the dealership, I would not award any compensation or costs in his favour.

BANDARANAYAKE, J. - I agree.

ISMAIL, J. - I agree.

Relief granted.