

**AMERASINGHE**  
**v.**  
**BOARD OF DIRECTORS, CO-OPERATIVE WHOLESALE**  
**ESTABLISHMENT AND OTHERS**

SUPREME COURT  
G. P. S. DE SILVA, CJ,  
ANANDACOOMARASWAMY, J. AND  
GUNASEKERA, J.  
S.C. APPLICATION NO. FR. 663/96  
NOVEMBER 3, 1997  
FEBRUARY 12, MARCH 29, APRIL 15, 1998.

*Fundamental Rights – Extension of Services – Refusal of the application on the ground of adverse observations against the officer – Natural Justice – Right to a due consideration of the application – Article 12 (1) of the Constitution.*

The petitioner who had 26 years' of meritorious service in the Co-operative Wholesale Establishment and who had been its General Manager since 1. 9. 83 was refused his second extension of service at the age of 56 years. The Board of Directors decided against the extension on account of "adverse observations" and "adverse references" made to the petitioner in two reports, namely the report of the Committee of 9 members of Parliament and the A. L. M. Fernando Committee. The petitioner was never summoned or questioned by those Committees; nor was he given an opportunity of explaining in respect of which the Committees made "adverse observations" or "adverse references". He was not given any hearing at all on matters which he may well have been in a position to explain.

**Held:**

1. Even though the petitioner cannot claim as of right an extension of service beyond 55 years and the extension is a matter of discretion, once he makes an application, he is entitled to have his application properly, duly and fairly considered by the relevant authority.
2. On the facts and circumstances of the case, the exercise of the discretion was unfair, arbitrary, devoid of rational basis and violative of Article 12 (1) of the Constitution.

**Cases referred to:**

1. *Cooper v. Wandsworth Board of Works* (1863) 14 C. B. (N.S) 180.
2. *Shaughnessy v. United States* 345 US 206 (1953).
3. *John v. Rees* (1970) Ch. 345 at 402.

4. *Pinnawala v. Sri Lanka Insurance Corporation Ltd.* (1997) 3 Sri LR 85.
5. *Dissanayake v. Kaleel* (1993) 2 Sri LR 135, 184.
6. *Somipala v. The Board of Directors of the CWE* SC Application 694/96 SC Minutes 8 July 1997. – distinguished.
7. *Perera v. The Board of Directors, CWE* SC Application 688/96 SC Minutes 6 October, 1997. – distinguished.

**APPLICATION** for relief for infringement of fundamental rights.

*S. L. Gunasekara* with *Manohara R. de Silva* and *W. D. Weeraratne* for the petitioner.

*Shibly Azizs, P.C.* with *S. S. Sahabandu* and *S. A. C. Sabry* for the 1st respondent.

*S. Fernando S.S.C.* with *S. Rajaratnam S.C.* for 2nd and 3rd respondent.

*Cur. adv. vult.*

May 4, 1998.

### **G. P. S. DE SILVA, CJ.**

This application relates to the refusal of the 2nd extension of service sought by the petitioner who was the General Manager of the Co-operative Wholesale Establishment (CWE). He complained that the refusal of the extension of his period of service is violative of the fundamental right guaranteed to him in terms of Article 12 (1) of the Constitution. In his petition he averred that he joined the CWE on 1st April, 1970, as an Assistant Accountant; on 1.9.73 he was promoted to the post of Accountant; he was promoted as Senior Accountant on 1.9.74 and on 1.1.79 as Chief Internal Auditor. He assumed office as Finance Manager on 15.7.79 He was appointed to the post of General Manager on 1.9.83, a post which he held until the time of the refusal to grant him his 2nd extension of service. Thus it is seen that the petitioner was a career officer of the CWE with about 26 years' of service. He was a graduate of the University of Ceylon and a fellow of the Chartered Institute of Management of Accountants, U.K. He reached the age of 55 years on the 6th of September, 1995. He was granted his 1st extension for a period of one year from 6.9.95. The 1st extension of his period of service ended on 5.9.96. He had a long period of meritorious service.

On 17.4.96 the then Chairman of the CWE invited the petitioner to apply for his 2nd extension of service in appreciation of the "excellent service" rendered by him (P9). The petitioner submitted his application for the 2nd extension of service on 5.6.96. along with the

recommendation of the Medical Officer and the Acting Chairman of the CWE (P10) and (P10A). Despite reminders there was no response to this application until 2nd September, 1996, when the Chairman of the CWE summoned the petitioner to his office at 11.45 a.m. requested him not to insist on his application for an extension of service. The Chairman had requested the petitioner to inform him of his decision before 2 p.m. the same day. The petitioner by letter dated 2nd September, 1996, P11 (c), stated: ". . . I do not find any reason why I should not ask for an extension or why such extension should not be granted by the Board. In the circumstances. I urge that my application be approved/recommended at the Board meeting to be held at 2.30 p.m. today." On 6.9.96 the petitioner received a letter dated 5.9.96 (P11E) from the Chairman, CWE, stating :

- (i) that his application has been forwarded to the Ministry as the Minister is the authority to decide on the question of extension of service;
- (ii) that the decision of the Minister has not been received as yet;
- (iii) that the petitioner should hand over the files and all other papers and documents, cash, if any, and inventory items including the car.

Although P11E states that no decision has been arrived at in regard to the petitioner's application for his 2nd extension of service, yet P12 clearly shows that at the Board meeting held on 2.9.96 the petitioner's application was considered and refused. It is of the utmost importance to note that the reason for the refusal of the petitioner's application is set out in P12 and it reads thus: "Application for extension was considered by the Board and in view of the adverse observations made by the Parliamentary Committee appointed by the Hon. Minister of Internal and External Trade, Commerce and Food and the A. L. M. Fernando Committee, the Board regretted its inability to recommend the extension of service".

The Chairman of the CWE produced along with his affidavit the document 1R5 which is described as an "addendum to the minutes of the meeting held on 2.9.96". 1R5, however, is dated 16.9.96 and it reads thus: "the Board decided as a matter of general policy not to grant any extension of service after the 55th year and also not

to recommend such extension of service to the Ministry of Internal and External Trade, Commerce and Food in respect of the employees of the CWE in regard to whom any adverse reference had been made either by the Committee of the Hon. Members of Parliament or by the A. L. M. Fernando Committee and also by any other Committee of inquiry appointed in respect of the CWE by the Hon. Minister. . . . In view of the above decision the Board decided not to recommend . . . the extension of service of Mr. G. K. J. Amarasinghe (petitioner)". Thus on a consideration of P12 and 1R5 it is clear that the Board decided not to recommend the extension of the period of service of the petitioner on account of the "adverse observations" and the "adverse references" made to the petitioner in the two reports, namely, the report of the Committee of 9 Members of Parliament and the report of the Committee headed by Mr. A. L. M. Fernando. However, it is not disputed that neither the Committee consisting of 9 Members of Parliament nor the A. L. M. Fernando Committee ever summoned the petitioner as a witness or in any other capacity; he was never questioned in regard to any allegation made against him; at no time was he made aware of any allegation against him; at no stage was the petitioner given an opportunity to explain matters in respect of which the Committee made "adverse observations" or "adverse references". In short he was given no hearing at all on matters which he may well have been in a position to explain.

While it is true, and contended for by Mr. Aziz, counsel for the 1st respondent, that the petitioner cannot claim as of right an extension of service beyond the 55th year, yet, in my view, once he makes an application he is entitled to have his application properly, duly and fairly considered by the relevant authority. Extension of service is no doubt a matter which falls within the discretion of the authority concerned, yet the discretion must be exercised reasonably, fairly and on legitimate grounds. On a consideration of the totality of the material on record, the conclusion is irresistible that the refusal of the petitioner's application for an extension of his period of service (on the basis of "adverse observations" and "adverse references" made by the two Committees of Inquiry) was in violation of the *audi alteram partem* rule. It was submitted by Mr. Aziz that the *audi alteram partem* rule would have applied only if disciplinary proceedings were taken against the petitioner and the refusal of his extension of the period of service was based on the findings reached against him at such disciplinary proceedings. With this submission I do not agree. In the

words of Willes, J. in *Cooper v. Wandsworth Board of Works*<sup>(1)</sup> ". . . the rule is of *universal* application, and founded on the plainest principles of justice". Again, as observed by Jackson, J. in *Shaughnessy v. United States*<sup>(2)</sup>. "Procedural fairness and regularity are of the indispensable essence of liberty . . ." Megarry, J. in *John v. Rees*<sup>(3)</sup> at 402 stated. "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained. . . ."

Mr. Aziz emphasised that the question of granting or refusing an extension of service is entirely a matter that falls within the discretion of the Board and the Minister. But what is relevant and important in the facts and circumstances of the present case is that the discretion has not been fairly, properly and duly exercised. The petitioner having been denied altogether a hearing before the Committees of Inquiry, I hold that the exercise of the discretion by the authorities was unfair, arbitrary, devoid of a rational basis, and was violative of Article 12 (1) (*Pinnawela v. The Sri Lanka Insurance Corporation Ltd. and others*)<sup>(4)</sup>. As observed by Fernando, J. in *Dissanayake v. Kaleel*<sup>(5)</sup> at 184, "An expansive rather than a restrictive interpretation of the protection afforded by the principles of natural justice is demanded by the equality provisions in Article 12 of the Constitution; fairness lies at the root of equality and equal protection".

Mr. Aziz relied on the case of *Somipala v. The Board of Directors of the CWE*<sup>(6)</sup>. This decision was followed in *Perera v. The Board of Directors, CWE*<sup>(7)</sup>. The petitioners in both these fundamental rights applications were officers of the CWE and their applications for the second extension of service were refused by the Board at its meeting held on 2.9.96. While the facts are the same as in the case before us, yet the point considered in the instant case, namely, the total denial of a hearing and the consequent arbitrary exercise of the discretion, *was not raised in those two applications*. I am, therefore, of the opinion that the ruling in the earlier applications can be clearly distinguished from the present case.

For these reasons I hold that the petitioner is entitled to a declaration that the fundamental right guaranteed to him in terms of

Article 12 (1) has been infringed. I direct the first respondent (C.W.E) to pay the petitioner a sum of Rs. 80,000/- (eighty thousand) as compensation and a sum of Rs. 20,000/- (twenty thousand) as costs.

**ANANDACOOMARASWAMY, J.** – I agree.

**GUNASEKERA, J.** – I agree.

*Relief granted.*

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