GREGORY FERNANDO AND OTHERS
v
STANLEY PERERA, ACTING PRINCIPAL, CHRIST THE KING NATIONAL SCHOOL AND OTHERS

COURT OF APPEAL
FERNANDO, J. AND
SRIPAVAN, J.
C.A.1766/2003
DECEMBER 17, 2003

Writ of certiorari – Necessary parties not made parties to the application – Acquired rights being affected – Natural justice – Fair hearing

The petitioners sought to quash the (temporary) list containing the names of the successful children published by the 1st respondent and further sought to compel the 1st respondent to constitute an interview board and to hold interviews afresh.

It was contended that, the petitioners have failed to make the successful children or their parents as parties to this application.

Held:

(i) It is vital that fairness demands that a person whose rights would be adversely affected must be given an opportunity for a fair hearing. One would not go to the merits of a case without hearing necessary parties.

Per Sripavan, J.,

> "The law is concerned with public confidence in the administration of justice; hence it is of paramount importance to ensure that individuals feel that they have been given a fair hearing before a decision is taken...."

APPLICATION for a writs in the nature of *certiorari* and *mandamus.*

Cases referred to:

1. *Farook* v *Siriwardena, Education Officer* – (1997) 1 Sri LR 145 at 148.
2. *Abayadeera and 162 others* v *Don Stanley Wijesundera, Vice Chancellor, University of Colombo and another* – (1983) 2 Sri LR 267
3. *Mutusamy Gnanasambanthan* v *Chairman, REPIA and others* – (1998) 3 Sri LR 169

4. *University of Ceylon* v *Fernando* – (1960) 1 WLR 233
5. *Schmidt* v *Secretary of State for Home Affairs* – (1969) 2 CA 149, 170
6. *Gamini Dissanayake* v *Kaleel* – (1993) 2 Sri LR 135 (Distinguished)

S.F.A. Cooray with *C.Wijesuriya* for petitioners.

Janaka de Silva, State Counsel for respondents.

Cur.adv.vult

December 19, 2003

SRIPAVAN, J.

When the aforesaid application was taken up for hearing on 15.12.2003 learned State Counsel appearing for the respondents raised a preliminary objection to the maintainability of this application on the basis that the petitioners have failed to make the successful children or their parents whose names appeared in the temporary list published by the first respondent as parties to this application.

The substantial relief sought by the petitioners is a *writ of certiorari* to quash the temporary list of successful children published by the 1st respondent and a *writ of mandamus* compelling the first respondent to constitute an Interview Board and to hold interviews afresh in terms of circular number 2003/03 dated 23.05.2003.

The objection of the learned State Counsel is that the relief claimed by the petitioners, namely, quashing the temporary list of successful children would affect their acquired rights and as such the successful children or their parties should have been made parties to this application. It is on this basis learned State Counsel urged that this application must be dismissed *in limine* since the petitioners have failed to make necessary parties as respondents to this application.

A Court exercising judicial review has a duty to ensure that basic principles of natural justice are followed and cannot negate or breach it to the detriment of any party. In *Farook* v *Siriwardena, Election Officer* (1) at 148 the Supreme Court observed thus:

"There is another point, although it had not been previously raised namely, that T.K.Azoor who had been nominated by the party as its new member of the Municipal Council and whose rights are affected in these proceedings had at no stage been made a party to the application made to the Court of Appeal. This is itself is fatal to the validity of the application."

In *Abayadeera and 162 others* v *Dr.Stanley Wijesundara, Vice Chancellor, University of Colombo and another*(2) the petitioners sought a writ of *mandamus* on the respondents to compel them to hold the 2nd MBBS Examination only for students of the University of Colombo. A three judge Bench of this Court observed that if a *mandamus* is issued 115 students of the North Colombo Medical College will be adversely affected and the failure to make them respondents is fatal to the petitioners application.

In *Muthusamy Gnanasambanthan* v *Chairman, REPIA and others* (3) the Supreme Court considered whether an authority whose order is assailed must be made a party and held that the failure to make REPIA a party was a fatal irregularity that would lead to a dismissal of the application.

The petitioners in paragraph 10 of the petition alleged that the first respondent did not duly publish a temporary list of the successful candidates and the reserve list till 27.09.2003. The petitioners were aware of the names of the successful candidates by 27.09.2003. The petitioners filed this application on 13.10.2003. Accordingly, the petitioners had sufficient time to make the successful candidates or their parents as parties to this application. Even after the first respondent filed his statement of objections disclosing the names of successful students together with the names and addresses of the parents, the petitioners never sought the permission of Court to add the successful students or their parents as parties to this application.

In the circumstances, the explanation tendered by the petitioners that this application has to be disposed of early as it involves the question of admission of children to school cannot be accepted. It is vital that fairness demands that a person whose right would be adversely affected must be given an opportunity for a fair hear-

ing. The conduct of the petitioners itself dis-entitles them for the relief they have prayed for. In any event, how does one go into the merits of a case without hearing necessary parties? It is implied by natural justice that no one ought to suffer any prejudice without giving first an opportunity of defending himself.

The right to legal representation is a part of natural justice. In *University of Ceylon* v *Fernando*[4] at 233 where Lord Jenkins equated natural justice with "*elementary and essential principles of fairness*" and went on to say:

> "I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs."

In *Schmidt* v *Secretary of State for Home Affairs*[5] Lord Denning M.R. suggested that the ambit of natural justice extended not merely to protect rights but any "*legitimate expectation*" of which it would not be fair to deprive [a person] without hearing what he has to say.

Accordingly, it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The law is concerned with public confidence in the administration of justice; hence it is of paramount importance to ensure that individuals feel that they have been given a fair hearing before a decision is taken.

The learned Counsel for the petitioner relied on the judgment of Fernando, J. in *Gamini Dissanayake* v *Kaleel* [6] I do not think that the decision in Kaleel's case can be applied to the present application. The question whether necessary parties were before Court was not considered in Kaleel's case. The petitioners in that application were not given an opportunity to give any explanation before the working committee. The Supreme Court held that all the issues in that application relate to legal matters arising upon admitted facts; expulsion had not yet taken effect and their validity is to be decided by the Court.

Even though there is some "**urgency**" in disposing this applica-

tion, the petitioners had ample time to make the successful students or their parents whose rights would be affected as necessary parties to this application. This the petitioners have failed to do.

For the reasons stated above I uphold the preliminary objection raised by the learned State Counsel and dismiss the petitioners application, in all the circumstances without costs.

FERNANDO, J. – I agree.

Preliminary objection upheld;
application dismissed.