
DR. GAMINI GOONETILLEKE AND OTHERS
VS.
THE UNIVERSITY OF COLOMBO AND OTHERS

COURT OF APPEAL,
SRISKANDARAJAH. J.
CA 1262/2004,
DECEMBER 9, 2004.

*Writ of certiorari - To quash selection to the post of Professor of Surgery-
Should all the members of the University Council be made respondents ? -Is
it fatal ?*

The petitioner sought to quash the selection of the 11th respondent to the post of Professor of Surgery.

The respondents raised a preliminary objection that the petitioners have failed to make all the members of the University Council as respondents.

The position of the petitioner was that as he had sought to quash the selection of the 11th respondent, all the members of the Selection Committee were made parties, and it was not necessary to make all the members of the University Council as respondents.

HELD:

1. A mere selection will not always result in an appointment. In this instance the University Council has appointed the 11th respondent on the recommendation of the Selection Committee.
2. All the members of the University Council are necessary parties-failure to add them is a fatal irregularity.

Application for writ of certiorari on a preliminary objection.

Case referred to :

1. *Karunaratne vs. Commissioner of Co-operative Development* 79(2) NLR 193.

Elmo Perera for petitioners.

H. L. de Silva, PC, with Gomin Dayasiri and Priyanthi Guneratne for 4th-11th respondents.

Chandana Prematilleka for 12th respondent.

June 06th 2005,

S. SRISKANDARAJAH, J.

The Petitioner in this application has sought a writ of certiorari to quash the selection of the 11th Respondent to the post of Professor of Surgery and/or any appointment purported to have been made in terms of such selection. Even though the Petitioner has sought a writ of prohibition, preventing the Respondents from making any appointment to the post of Professor of Surgery the 11th Respondent was appointed to the post of Professor of Surgery of the University of Colombo on the 12th of May, 2004 before this application was filled. Hence, the Court in this application could only consider the issue of a writ of certiorari to quash the selection and the appointment of the 11th Respondent to the post of Professor of Surgery.

The 1st to the 11th Respondent's have raised a preliminary objection to this application namely : that the Petitioners have failed to make all the members of the University Council as respondents to this application. The University Council is the Governing Authority and Appointing Authority and hence its members are necessary parties to this application. The appointment of Professor of Surgery of the University of Colombo, which is impugned in this application, was made by the University Council on the 12th May, 2004 on the recommendation of the Selection Committee. The University Council alone is statutorily empowered to make such decision as the governing authority of the 1st Respondent. Therefore the said Respondents submitted that this application is invalid and not maintainable in law.

The Counsel for the 1st to 11th Respondents submitted that in terms of Section 45 of the Universities Act, No. 16 of 1978, it is the Council of the University which is empowered to appoint persons and to suspend, dismiss or otherwise punish persons in the employment of the university. In this instant case the appointment of the 11th Respondent was made by the University Council itself and what is sought to be challenged by this application is the appointment of the 11th Respondent although it is the Selection Committee that selects a candidate and makes a recommendation to the Council the actual act of appointment is carried out by the University Council sitting together and taking a decision thereon. In this case, the Council at its 350th meeting held on 12.05.2004 considered

the recommendation of the Selection Committee and unanimously decided to appoint the 11th Respondent as Professor of Surgery 2R1. The 11th Respondent's legal status and rights as Professor of Surgery now flows from the decision made by the University Council which accepts the recommendation of the Selection Committee which decision also needs to be set aside if the 11th Respondents legal rights and status as a Professor are to be affected. The said Respondents further submitted that even if the recommendation of the Selection Committee is declared to be of no legal effect or if it is to have any legal consequences, the appointment of the 11th Respondent as Professor has to be quashed, which cannot be done in the absence of all the members of the Council who are not before court. The counsel for the Respondent submitted that all members of the Council must be given an opportunity in these proceedings to justify the validity and legality of the decision that they made to appoint the 11th Respondent.

The 12th Respondent associated himself with the preliminary objection raised by the 1st to the 11th Respondents and further submitted that the Petitioner made no attempt whatsoever at any stage, not even after that appointment of the 11th Respondent was made known to Court to add the members of the University Council as Respondents though their was ample time to do so before the 2nd Respondent filed his objection despite Rule 3 (8) of the Court of Appeal (Appellate Procedure) Rules 1990 authorizing such course of action.

The Petitioners in reply to the preliminary objection submitted that the Council cannot, even by a unanimous decision validate a nullity by purporting to approve the nullity and purporting to act in terms of the said nullity. As such the purported approval of the said selection by the Council on 12th May, 2004 2R1 and the purported letter of appointment 2R2 are *ab initio* void and not merely voidable. He further submitted that what is sought to be quashed in prayer (b) is the purported selection of the 11th Respondent by the Selection Committee. All the members of the said Selection Committee have been made Respondents. Therefore he submitted that the preliminary objection be rejected.

The Petitioners in this application has sought a writ of certiorari to quash the selection of the 11th Respondent to the post of Professor of Surgery and/or appointment purported to have been made in terms of such selection. The Petitioner's position that he only challenged the

selection of the 11th Respondent which is not borne out by his prayer. Even if the petitioner has made an application to quash the selection alone in the absence of an appointment that application would have been rejected on the basis that the application is premature. A mere selection will not always result in an appointment. A selection could be challenged only if that selection was relied upon by an authority or acted upon on that selection or recommendation. In that event, the challenge is for appointing a person who is not legally entitled for that appointment as his selection was wrong or illegal. In this instant case, the University Council has appointed the 11th Respondent on the recommendation of the Selection Committee. In *Karunaratne v Commissioner of Co-operative Development* Ismail, J citing several authorities held ; "In view of these authorities it appears to me that the Deputy Commissioner of Co-operative Development J. D. J. Vitharana who made the award is a necessary party to these proceedings and the failure to add him as a party respondent is a fatal irregularity. It is therefore not necessary to deal with the other matters referred to in the petition."

In these circumstances the Court holds that the members of the University Council are necessary parties to this application and as the Petitioners had failed to make them as Respondents is a fatal irregularity and hence Court upholds the preliminary objection of the 1st to 11th and 12th Respondents and dismisses this application without costs.

Application dismissed.
