

AMUNUPURA SEELAWANSA THERO AND OTHERS
v
ADDITIONAL SECRETARY,
PUBLIC SERVICE COMMISSION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
JAYASINGHE, J.
UDALAGAMA, J.
SC FR 575/2003
JUNE 30, 2004, JULY 23, 2004
OCTOBER 14, 2004

Constitution – Article 12(1) – Promotion of similarly circumstanced officers – Cancellation of Promotion – Equal treatment guaranteed by Article 12 is equal treatment for the performance of a lawful Act? – Authorities acting illegally in one case because they acted illegally in another case? – Cannot be done?

The petitioners contend that, their fundamental rights Article 12(1) were violated by the respondents by their decision allowing some officers who were similarly circumstanced to be promoted and by cancelling the promotions given to the petitioners.

The respondents contended that an applicant for promotion should have a minimum of five years satisfactory service in the lower grade, but the applications of the petitioners were made after one year of service.

Held:

- (1) The basic requirements for their promotion to Class 1 included the applicants to have five years satisfactory service in Class 1 Grade 1; The petitioners have not shown that they have fulfilled this basic requirement and one cannot see as to how they could be qualified for promotions without the basic qualifications. The basic norm is that unequals cannot be treated as equals as well as equals cannot be treated as unequals. Equal opportunity is for equals who are similarly circumstanced in life.

Held further:

- (2) It is evident the although there may have been promotions made consequent to backdating of appointments to Class II Grade 1, the

petitioners cannot now rely on such appointments and seek to be promoted to Grade 1 on that basis as an authority cannot be compelled to act illegally in a case for the mere reason that it has acted illegally in previous cases. Equal treatment does not mean that one could act illegally to avoid discrimination.

Per Dr. Shirani Bandaranayake, J.

"A government authority will have to deal with all persons, may it be an appointment, promotion, transfer or a dismissal, in conformity with the standard norms which are not arbitrary, irrational capricious or unreasonable. Equal treatment does not mean that one could act illegally to avoid discrimination".

APPLICATION under Article 126 of the Constitution.

Cases referred to:

- (1) *C.W. Mackie and Co. Ltd. v Hugh Molagoda Commissioner-General of Inland Revenue and others* 1986 1 Sri LR 300.
- (2) *Gamaethige v Siriwardane and others* 1988 1 Sri LR 384.
- (3) *Jayasekera v Wipulasekara* 1988 2 Sri LR 237.
- (4) *J.V. Setty v Commissioner, Corporation of the City of Bangalore* AIR 1968 Mysore 251.
- (5) *Ram Prasad v Commissioner of India* AIR 1979 Raj. 131.
- (6) *Chief Commissioner v Kitty Puri* AIR 1973, Delhi 148.

Lakshman Keerthisinghe for 1st, 2nd and 3rd petitioners.
Rajiv Goonetilleke SC for respondents.

Cur.adv.vult.

November 23, 2004

DR. SHIRANI BANDARANAYAKE, J.

The petitioners were officers of the Sri Lanka Teacher Education Service (hereinafter referred to as SLTES) under the Ministry of Human Resources Development, Education and Cultural Affairs and claimed that at the time of the filing of this application they were serving in Class II Grade I. The 1st petitioner was attached to the Teacher Education Institute at Saliyapura, Anuradhapura as the Head of the Institution whereas the 2nd and 3rd petitioners were the Acting President of the Wayamba National College of Education Bingiriya and National College of Education, Adalachchenai, respectively.

The petitioners claim that their fundamental rights guaranteed in terms of Article 12(1) of the Constitution were violated by the 1st to the 10th respondents by their decision, allowing some officers who were similarly circumstanced to be promoted to Class 1 of the SLTES and by cancelling the promotions given to the petitioners. They prayed for an order from this Court directing the 1st to 10th respondents to reinstate the petitioners in Class 1 of the SLTES with effect from 15.05.2002.

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

The case for the petitioners' is as follows:

By a circular dated 17.09.2001, issued by the 1st respondent, addressed to all Heads and/or Presidents of Institutions engaged in Teacher Education under the Ministry of Human Resources Development, Education and Cultural Affairs, applications were invited from suitably qualified persons in Class II Grade I for consideration for promotion to Class I of the SLTES (P1).

The three petitioners had applied for the said promotion and they were interviewed on 18.02.2002 (P2). According to the petitioners, about 30 officers of Class II Grade I had faced the interviews out of which six persons (6) were selected for promotions to Class I, which included the three petitioners.

By letters of appointment dated 05.05.2002, issued by the 1st respondent, the petitioners were promoted to Class I of the SLTES with effect from 15.05.2002, (1P1, 2P1 and 3P1). On or about 22.10.2002, the petitioners had received letters from the 1st respondent, informing the petitioners that their promotions to Class I of the SLTES have been cancelled with immediate effect as the Education Service Committee has observed that the said promotions have been effected in violation of the Constitution of the SLTES (1P2, 2P2 and 3P2).

The petitioners submitted that although their promotions were cancelled, nine officers who were similarly circumstanced on the basis of their qualifications and service in Class II Grade I were promoted to Class I with effect from 15.11.1999 by the predecessor to the 1st respondent and the said promotions were not cancelled

(P7). The petitioners further submitted that although the officers who were similarly circumstanced were promoted in 1999, such promotions were backdated without any cancellation whereas with such backdating the 2nd petitioner's promotion was subsequently cancelled. The 1st and the 3rd petitioners were never given any such backdating.

The petitioners claimed that by the cancellation of their promotions to Class I when there were similarly circumstanced officers whose promotions were not annulled, the petitioners were subjected to arbitrary, capricious and discriminatory treatment by the 1st to 10th respondents.

The respondents have clearly stated their position in the affidavit of the 2nd respondent, viz., the Chairman of the Public Service Commission. Their contention is that there is a mandatory requirement in terms of the Minutes of the SLTES Service and the Gazette Extraordinary No. 1070/13 dated 11.03.1999 (P3), that an applicant for promotion to Class I of the SLTES should have a minimum of five years satisfactory service in Class II Grade I of the SLTES. Accordingly the 2nd respondent has taken the position that the petitioners were promoted to Class II Grade I of the SLTES with effect from 01.09.2000 and their applications for promotions were made only in September 2001 which is just after one year of service in Class II grade I of the SLTES.

With regard to the alleged discriminatory treatment, the 2nd respondent submitted that in 1999, the nine applicants who were promoted had applied for Class I whereas the petitioners at that time, had applied for Class II Grade I. Therefore, the 2nd respondent contended that the petitioners and the nine others had not applied for the same promotion and hence the marks obtained by individual applicants or the comparison with the nine others referred to by the petitioners is irrelevant and unwarranted. The said nine applicants applied and were promoted to Class I in 1999, whereas the petitioners had applied for Class I promotions only in 2001. The 2nd respondent therefore submitted that there cannot be any comparison between the nine others and the petitioners as they do not come within the same class.

It is common ground that the petitioners applied for promotion to Class I of the SLTES in terms of the advertisement dated 17.09.2001. According to the said advertisement a person had to possess the following, to be eligible for such promotion:

- (a) five years satisfactory service in Class II Grade I; and
- (b) be confirmed in Class II Grade I.

The petitioners were promoted to Class II Grade I by letter dated 15.08.2001, with effect from 01.09.2000 (2R1, 2R2 and 2R3). Applications for the promotion to Class I were called on 17.09.2001 and admittedly by that time, the petitioners had just completed only one year in Class II Grade I. The petitioners were confirmed by letter dated 22.04.2002 (1P7) and the closing date for the said promotions was on 12.10.2001. According to the letter of confirmation it was to be effective from 01.01.1995. This letter was however cancelled by letter dated 30.10.2002 and the confirmation in the post of Class II Grade I was to be with effect from 01.09.2000 (IP5 and IP6). Accordingly at the time of the closure of the applications for the said positions the petitioners did not have five years satisfactory service in Class II Grade 1. Moreover, they were not even confirmed in that Grade as the letters of confirmation, though backdated with effect from 01.09.2000 were sent only in 2002. Therefore the petitioners at the time they made their applications, were not qualified even to be considered for promotion to Class I of the SLTES.

The petitioners contended that when applications were called for the promotions to Class I, what was stated was that it should be from officers with satisfactory service of not less than five years in a post '**scheduled under Class II Grade I of the service**'. The contention was that as the word used was '**scheduled**' and not the word '**under**' alone, what it conveyed was that the persons who have been acting in such positions for the said period and later confirmed in such posts were also eligible to apply for promotion to Class I. The petitioners contended that they were confirmed officers in Class II Grade I.

Although the petitioners were confirmed in Class II Grade I they were so confirmed only on 01.09.2000. It is common ground that the applications were called and interviews were held in February 2002. The basic requirements for the promotions to Class I included the applicants to have five years satisfactory service in Class II Grade I.

The petitioners have not shown that they have fulfilled this basic requirement and one cannot see as to how they could be qualified for promotions without the basic qualifications.

The petitioners referred to promotions to Class I in 1999 where nine officers were promoted from Class II Grade I to Class I of the SLTES. Their position was that, at that time those nine officers did not have five years even in an acting capacity in Class II Grade I. Therefore the petitioners' claim was that they have been treated differently when those persons were promoted to Class I without considering the basic qualifications. However, it is to be noted that the petitioners, to begin with have not made those nine persons respondents to this application. Therefore the petitioners cannot now challenge their appointments. Furthermore the petitioners and those nine promotees were not considered for promotions to Class I of the SLTES at the same time, as those promotees had applied and were promoted in 1999 whereas the petitioners had applied for Class I promotions only in 2001.

Be that as it may, it is now well settled law that every differentiation is not a discrimination and classification which could be identified as 'good and valid' cannot be treated as arbitrary. As pointed out by Jain Kagzi, (The Constitution of India, Vol 11 pg. 210) for a classification it would be necessary to satisfy two basic considerations which are as follows:

- (a) that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group, and*
- (b) that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved.*

The basic norm therefore is that unequals cannot be treated as equals as well as equals cannot be treated as unequals. Equal opportunity therefore is for equals who are similarly circumstanced in life.

The petitioners' reference to promotions to Class I in 1999, to indicate unequal treatment cannot therefore be taken into account to show that the denial of promotions to petitioners to Class I in 2001 is discriminatory for several reasons. Firstly, the first set of promotions were in 1999 and the promotions in question were made in 2001.

Therefore these promotions belong to two different groups and cannot be considered as promotions that were given on a comparative basis. Secondly, according to the documents dated 09.07.1999 (1P9) and 27.09.1995 (2P7), the backdating of appointments given to petitioners were on the basis of Cabinet decisions. Thirdly, as submitted by the learned State Counsel for the respondents quite correctly, the promotions which were given in 1999, the Cabinet of Ministers had acted in terms of Article 55(1) of the Constitution which empowered them to take decisions regarding appointments. Since the enactment of the 17th Amendment to the Constitution, the Public Service Commission is empowered to make appointments. The cumulative effect of these provisions is that, the Public Service Commission now has to function in terms of the Minutes of the SLTES which are applicable for the relevant promotions. Therefore there is no possibility for the Public Service Commission to act contrary to the said Minutes of the SLTES with regard to the promotions to Class I.

It is not disputed that the petitioners neither had five years service in Class II Grade I of the SLTES nor confirmed in that Grade at the time of their applications for promotion to Class I of the SLTES. Therefore, in a situation where the petitioners have not fulfilled the requirements to be promoted to Class I, it would be contrary to law if the Public Service Commission takes steps in order to promote them. In fact the decision in *C.W. Mackie and Co. Ltd. v Hugh Molagoda, Commissioner-General of Inland Revenue and others*⁽¹⁾ had considered the legal point in issue and it was held that Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. Stating that, for the complaint of unequal treatment to succeed he must demonstrate unequal treatment in the performance of a lawful act, Sharvananda, C.J., was of the view that,

"But the equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of an illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."

A similar view was taken in *Gamaethige v Siriwardene and others*⁽²⁾ and in *Wipulasekera v Wipulasekera*.⁽³⁾

In *Gamaethige's* case the petitioner was the General Secretary of the Sri Lanka Government Clerical Union and was released for full time Trade Union work. In view of petitioner's participation in a strike from 17.07.1980 to 12.08.1980, he was treated as having vacated his employment, but later on appeal he was reinstated. Earlier in 1973 the petitioner's name had been registered in the waiting list for Government Quarters. In June 1984 prior to the petitioner's reinstatement in service, the petitioner's eligibility for quarters was re-examined, and upon it being reported that he was not in service, his name was deleted from the waiting list for Government Quarters. He alleged discrimination stating that preferential treatment was accorded to the respondent and four others who were not in the waiting list and another employed on contract after retirement who had been given Government Quarters though their names were not in the waiting list. Referring to the complaint made by the petitioner and considering whether there was any infringement of Article 12(1) of the Constitution, Fernando, J. observed that,

"Here the petitioner's allegation that these persons were not in the waiting list and/or were not eligible for General Service Quarters amounts to an allegation that quarters were allocated in breach of the relevant rules. Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong."

An identical view was taken in *Jayasekera's case* (*supra*) where G.P.S. de Silva, J. (as he then was) citing *T.V. Setty v Commissioner, Corporation of the City of Bangalore*⁽⁴⁾ stated that, the authorities cannot act illegally in one case because they have acted illegally in other cases.

A similar approach was taken by the Indian Courts in the applicability of Article 14 of the Indian Constitution which is the corresponding Article to Article 12 of our Constitution. In *Ram Prasad v Union of India*⁽⁵⁾ it was stated that,

"the guarantee under Article 14 cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases. No one can contest that a wrong must be extended to him as well in order to satisfy the provisions of Article 14."

"In *Chief Commissioner v Kitty Puri* ⁽⁶⁾ it was clearly stated that,

"But the respondent No. 1 cannot contend that because the society and the government have illegally shown favour to some persons, then this Court must compel them to commit another illegality to show favour to respondent No. 1 in the same way. This is not the meaning of equality guaranteed by Article 14 of the Constitution."

On a consideration of the aforementioned material placed before this Court it is evident that, although there may have been promotions made consequent to backdating of appointments to Class II, Grade I, the petitioners cannot now rely on such appointments and seek to be promoted to Grade I on that basis, as an authority cannot be compelled to act illegally in a case for the mere reason that it has acted illegally in previous cases.

A government authority will have to deal with all persons, may it be an appointment, promotion, transfer or a dismissal, in conformity with the standard norms which are not arbitrary, irrational, capricious or unreasonable. Equal treatment does not mean that one could act illegally to avoid discrimination.

For the reasons aforesaid, I hold that the petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1) were violated by the respondents. This application is accordingly dismissed. In all the circumstances of this case there will be no costs.

JAYASINGHE, J. - I agree.

UDALAGAMA, J. - I agree.

Application dismissed.