

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

In the matter of an Application under Article 126 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka

1. Amura Deshapriya Alles,
No. 83/A, Kajugahawatta, Gothatuwa,
Angoda.

2. Gamunu Thissa Lankathillaka Vithanage,
“Sandakalum” Galathara,
Mawanella.

PETITIONERS

SC FR Application No. 448/2009

-VS-

1. Road Passenger Services Authority of the
Western Province,
No. 59 Robert Gunawardena Mawatha,
Battaramulla; and 15 others, all of the said Road
Passenger Services Authority of the Western
Province;

17. H.K.Asoka Wickckramanayake,
No.16/1, Giridara, Kapugoda;

18. P.L.R.P.C Wijewarnasooriya,
Samagi Mawatha,
off Fathima Mawatha,
Kalamulla,
Kalutara;

19. Hon. Attorney General,
Attorney Generals Department,
Colombo 12.

RESPONDENTS

BEFORE:

Hon. Marsoof, PC, J

Hon. Sripavan, J and

Hon. Imam, J

COUNSEL: Canishka Witharana for the Petitioners.
Kaplia Liyanagamage for 1st, 3rd, 10th, 11th, 12th, 13th, 14th and 15th Respondents.
Chandarana Wijesuriya, for the 17th and 18th Respondents.
Ashan Fernando, State Counsel, for the 19th Respondent.

ARGUED ON: 6.3.2012

SETTLEMENT CONSIDERED ON: 21.5.2012, 11.6.2012 and 15.6.2012

WRITTEN SUBMISSIONS ON: 19.07.2012

DECIDED ON: 22.02.2013

SALEEM MARSOOF J:

When this case was taken up for hearing on 6th March, 2012, a preliminary objection was taken up by the learned Counsel for the 17th and 18th Respondents, to the effect that the Petitioners cannot have and maintain this application for the reason that it is time-barred as far as the 17th and the 18th Respondents are concerned, who are essential parties to this case. No previous notice of this preliminary objection had been given by or on behalf of the 17th and 18th Respondents to any of the other parties, and admittedly there is no mention of it in the objections filed by the said Respondents, who had also not filed any written submissions prior to this application being taken up for hearing.

Having heard learned Counsel for the 17th and 18th Respondents and the other learned Counsel on the preliminary objection, since all other parties including the Petitioner had been taken by surprise by the said preliminary objection, Court directed all learned Counsel to make their submissions on the merits of the case as well, and permitted learned Counsel to file any written submissions on all the matters arising in this case including the preliminary objection within one month's time. Judgment was reserved by Court, but since it was of the view that the parties should seek to resolve this matter through some administrative redress, a formula which was suggested by Court, order was made that the case is to be mentioned on 21st May 2012 in order to ascertain whether the matter has been administratively resolved. The case was mentioned on the said date and one subsequent date when learned Counsel indicated that they required further time to consider administrative redress, and on 15th June 2012, when they finally informed Court that no such relief had been agreed upon, and since no written submissions had been filed by the parties, a further period of one month was granted for the filing of written submissions.

The Time Bar

Extensive written submissions have been filed by the learned Counsel for the 17th and 18th Respondents and other learned Counsel traversing various aspects of the preliminary objection taken up on behalf of the 17th and 18th Respondents, but it is in my view sufficient to mention that the Petitioners have stated in their petition and affidavits that they became aware of the alleged violation of their fundamental rights only on 10th February 2009 and they promptly preferred a complaint to the Human Rights Commission of Sri Lanka on 19th February 2009.

It is clear from the decisions of this Court including the decision in *De Silva v Wickramaratne and Others* (2011) 2 BLR 360 that while time begins to run when the infringement takes place, but when the Petitioners became aware of the alleged infringement of their fundamental rights only on a subsequent date, time would begin to run only when “both infringement and knowledge exists.” It is admitted that even when the Petitioners invoked the jurisdiction of this Court in terms of Article 126 of the Constitution on 8th June 2009, the said complaint was pending before the said Commission, which made its recommendations as provided in the Human Rights Commission of Sri Lanka Act No. 21 of 1996 on 30th November 2009 (X4). It is expressly provided in Section 13(1) of the said Human Rights Commission of Sri Lanka Act that-

Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.

In *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* (2008) Part II B.L.R. 169, this Court has considered and applied the provisions of Section 13(1) of the Human Rights Commission of Sri Lanka Act, and held that in those circumstances the time-bar would not apply as time would not run during the pendency of proceedings before that Commission. However, learned Counsel for the 17th and 18th Respondents has contended strenuously that the principle enunciated in that decision would not apply to the instant case *inter-alia* as the Petitioners have not filed a copy of the said complaint to the Human Rights Commission or any other document in this Court to show when their alleged complaint was made to the Human Rights Commission and what their complaint was. He pointed out that the Petitioners have only filed the recommendations of the Human Rights Commission on a complaint made by them, but this document does not reveal the exact date of the complaint to the said Commission, or whether the 17th and 18th Respondents were mentioned in the said complaint. Learned Counsel for the Petitioner has responded to the said contention with the submission that in terms of the Human Rights Commission of Sri Lanka Act, it was only necessary to give details of the alleged violation of fundamental rights and the name or names of those who are alleged to have committed such violation, there being no requirement that the names of those who benefitted from such violation such as the 17th and 18th Respondent should be named.

However, in view of the admitted fact that the preliminary objection relating to time-bar was taken up for the first time only on the date of hearing of this case, namely on 6th March 2012, there being no prior notice of it either in the statement of objections filed by the 17th and 18th Respondents or through any motion filed in Court with notice to all parties or their learned Counsel that such a preliminary objection would be taken, no written submissions having been filed by learned Counsel for the 17th and 18th Respondents prior to that date, this Court has to consider once again the decision in *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* 2008 Part II B.L.R. 169, in which the identical position prevailed. In that case, this Court was at pains to refer to Rules 30(4), 45(6), 45(7) and 45(8) of Part IV of the Supreme Court Rules of 1990, all of which occur in Part II of the Supreme Court Rules.

Rule 45(6) of the Supreme Court Rules of 1990 reads as follows:

Each respondent may file counter-affidavits within fourteen days of the receipt of such notice, with notice to the petitioner and the other respondents. The petitioner may in like manner file a counter-affidavit, within seven days, replying to the allegation of fact contained in any Respondent's affidavit.

This provision has direct relevance to the submission of learned Counsel for the 17th and 18th Respondents that the Petitioners have not filed with their petition or counter affidavit, a copy of their complaint to the Human Rights Commission or any other document in this Court to show when their alleged complaint was made to the Human Rights Commission and what their complaint was. However, it is important to remember that the 17th and 18th Respondents had disclosed their preliminary objection relating to time-bar in their statement of objections, the Petitioners would have been put on notice of this position and would obviously have been compelled to file all documentation relating to their complaint to the Human Rights Commission with their counter-affidavits so as to assist them in meeting the factual issues that could arise from the time-bar. In my opinion, it is not open to the 17th and 18th Respondent to take issue to the paucity of information pertaining to the exact date of the filing of their complaint to the Human Rights Commission and the contents of the said complaint, when they themselves had failed to give any prior notice of their preliminary objection based on time-bar.

Furthermore, in the case of *Romesh Cooray*, this Court also referred to Rule 45(7) of the Supreme Court Rules 1990, which provides as follows:-

The petitioner and the respondent shall file their written submissions at least one week before the date fixed for the hearing of the application, with notice to every other party.

Court also made reference to Rule 45(8) of the aforesaid Supreme Court Rules, which expressly provided that,

The provisions of Part 11 of these rules shall apply, mutatis mutandis, to applications under Article 126.

Rule 30(4) of the aforesaid Supreme Court Rules specifically deals with the contents of the written submissions of the Respondents and states that, the submissions of the Respondent shall

contain as concisely as possible a statement of facts whether, and if not to what extent, the Respondent agrees with the statement of facts as set out by the Petitioner in his petition or written submissions, referring to the evidence, both oral and documentary, and the questions of law or the matters which are in issue in the case. Rules 30(6) and 30(7) specify time limits for the filing of written submissions, which when interpreted mutatis mutandis to a fundamental rights application would mean that the Petitioner shall file his written submissions within 6 weeks of the date of grant of leave to proceed, and the Respondent shall follow suit 6 weeks after he receives notice of the written submissions of the Petitioner, unless Court specifies a shorter period of time for filing of written submissions when granting leave to proceed. It is important to note that Rule 30(7) provides that:

Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal, as the case may be, giving notice in like manner.

In a fundamental rights application, this would mean that even where the Petitioner (as in this case) has failed to file his written submissions in terms of Rule 30(6), the Respondent has to file his written submissions within twelve weeks from the date of grant of leave to proceed.

After carefully considering the provisions of the aforesaid Rules, Dr. Shirani A Bandaranayake, J. (as she then was) has observed in *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* 2008 Part II B.L.R. 169, at page 172 as follows:-

Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the Petitioner's objections are taken along with the objections and/or written submissions filed by the Respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights. Therefore, as correctly pointed out by the learned President's Counsel for the Petitioner, the earliest opportunity the 6th Respondent had of raising the aforementioned preliminary objection was at the time of filing his objections and written submissions in terms of the Supreme Court Rule 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th Respondent intended to raise at the hearing. Admittedly, the 6th Respondent had not raised the preliminary objection on the ground of the application being filed out of time either in his objections or in the written submissions. In the circumstances, it is apparent that there is no merit in the objection raised by the 6th Respondent.

I am in respectful agreement with the above observation of Court, and am of the opinion that there is no merit in the preliminary objection taken up by learned Counsel for the 17th and 18th Respondents, and must necessarily be overruled.

Alleged Violation of the Petitioners' Fundamental Right to Equality

In this case, leave to proceed has been granted by this Court on 15th March 2010 for the alleged violation by the Respondents (other than the 19th Respondent) of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution, which simply provides that “all persons are equal before the law and are entitled to the equal protection of the law.”

The main grievance of the Petitioners is that they were employees of the said 1st Respondent Road Passenger Services Authority of the Western Province, where the 1st Petitioner was holding the post of Road Inspector-Grade 6 and the 2nd Petitioner as Road Inspector-Grade 5.

Admittedly, by an internal circular bearing No. 65 dated 6th September 2007, applications were called from internal applicants of the said 1st Respondent Authority for the post of Assistant Manager (Transport) Grade 4, to which post the Petitioners state that they were qualified to apply under category (c) (ii) of the relevant scheme of the promotions. The Petitioners submitted their applications for the said post on 14th September 2007 and 7th September 2007 respectively, and an interview which was earlier fixed for 28th February 2008 was postponed for reasons unknown to the Petitioners, and finally held on 8th May 2008 which date was duly informed to the Petitioners in writing by letters marked P16A, P16 and P17 respectively.

The Petitioners have averred in their petition and their affidavits that on or about 3rd December 2008 the Petitioners were verbally informed to be present at the Head Office at 10.00 am on 4th December 2008. They attended the Head Office the next day in the expectation that they would receive their promotions, for which they had waited anxiously. However, to their surprise, they found that an interview panel consisting of the 2nd, 14th and 15th Respondents and two others were interviewing persons for the same post and they were compelled to participate in it. The Petitioners state that on or about 10th February, the Petitioners became aware that only the 17th and the 18th Respondents were selected for the said post. Their appointments were ante-dated to the 19th January 2009 (P19 and P20). To the further surprise of the Petitioners the said appointment letters, copies of which they obtained with difficulty, refer to a purported interview that had been held on 27th November 2008. The Petitioners have stated that they were not informed and also not aware of any such interview held on that date. According to the Petitioners, there was neither an announcement of cancellation of the previous interview before holding of the second interview nor an opportunity granted for the applicants to prepare for the second interview. Learned Counsel for the Petitioners state that although the 1st Respondent has filed objections in this case it has not tendered to Court the marking sheet of the two interviews that the Petitioners faced on 8th May 2008 and on 4th December 2008, and curiously enough a copy of the mark sheet of the second of these interviews has been tendered to Court by the 17th and 18th Respondents, who had no right to have access to this mark sheet.

Learned Counsel for the 17th and 18th Respondents have submitted that the Petitioners have not challenged the decisions to cancel the interview held on 8th May 2008 and to hold a fresh interview with the participation of a representative from the Chief Ministry and the Petitioners, without any protest, have faced the interview held on 4th December 2008.

It is significant to note that the Petitioners have clearly alleged in their affidavits that they have come to know from very reliable sources that two Petitioners had obtained the highest marks at the interview held on 8th May 2008, the mark sheet relating to which has not been tendered to Court by any of the Respondents. The Respondents have taken up the position that marks were not finalised at this interview as the members of the panel of interview were not unanimous about the persons to be selected. However, this position has been contradicted by the 1st Respondent Authority, which has in its observations to the Human Rights Commission marked X1, categorically admitted that the Petitioners had obtained the highest marks at the interview held on 8th May 2008, and stated that the interview panel did not have unanimity in regard to the question as to whether in view of the fact that there were certain disciplinary investigations contemplated against the Petitioners, they should be appointed to the post. However, the Respondents have not in the objections filed in this Court taken this position, nor have they given any particulars regarding the contemplated disciplinary investigations.

In these circumstances we are inclined to the opinion that the interview held on 4th December 2008 was not held in any transparent or regular manner, and that in the state of the material placed before this Court there are many reasons to disbelieve the contents of the affidavits filed on behalf of the Respondents in this case. I am therefore of the opinion that in all the circumstances of this case the purported interview held on 4th December 2008 should be declared invalid.

I accordingly make order declaring that the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution have been violated by the Respondents, and quash the purported appointments of the 17th and 18th Respondents to the post of Assistant Manager (Transport) Grade 4, contained in the letters marked P19 and P20. I would also make order directing the 1st Respondent to hold proper interviews for the post of Assistant Manager (Transport) Grade 4 and to make appointments as expeditiously as possible. I am not inclined to grant compensation or any of the other reliefs prayed for by the Petitioners.

In all the circumstances of this case I do not make any order for costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN J

I agree

JUDGE OF THE SUPREME COURT

IMAM J

I agree

JUDGE OF THE SUPREME COURT