

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

S.C (FR) 451/2011

Horathalge Thilak Lalitha Kumara
“Dharmashri” , No. 2, Korossa,
Udugampola.

PETITIONER

Vs.

1. S.S. Hewapathirana
Secretary,
Ministry of Youth Affairs and Skills
Development,
“Nipunatha Piyasa”,
No. 354/2”, Elvitigala Mawatha,
Colombo 5.
2. H. Chithral Ambawatte
Director General,
Department of Technical Education and
Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.
3. P. K. Sarathchandra
Administrative Officer,
Department of Technical Education and
Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.

4. T. A. Piyasiri
Director General,
Tertiary and Vocational Education
Commission,
“Nipunatha Piyasa”,
No. 354/2”, Elvitigala Mawatha,
Colombo 5.
5. P. B. Abeykoon,
Secretary,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 7.
6. Wasantha Gunaratne
Director (Administration)
Department of Technical Education and
Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.
7. T. M. D. Tennakoon
Maintenance Engineer
Department of Technical Education and
Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.
8. Hon. Attorney General
Attorney General’s Department,
Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Sanjeewa Ranaweera for the Petitioner

Suren Gnanaraj S.C for the Attorney General

ARGUED ON: 06.08.2015

DECIDED ON: 17.09.2015

GOONERATNE J.

The Petitioner holds a Bachelor's Degree in Engineering (Mechanical) from the University of Moratuwa (on or about December 1995) and claims that he was qualified to be employed as a Mechanical Engineer. During the period 02.12.1997 to 02.09.1998, he served the Department of Mechanical Engineering of the Open University, Sri Lanka. Petitioner received training in the public service as a Graduate Trainee from the latter part of year 2004, thereafter selected as a Training Assistant (Maintenance) in the Department of Technical Education and Training, Colombo 10 (P3 of 20.09.2005). He passed the Efficiency Bar

Examination only in the year 2010 (P4). Petitioner claims, that duties and responsibilities of the post of Maintenance Engineer and those of the Petitioner as a Training Assistant are substantially the same. The Maintenance Engineer was one A.K.J. Karunasena who had retired from service and applications were called by Gazette P6 of 21.01.2011 for the said post, which fell vacant.

Petitioner's main complaint is that the 7th Respondent was appointed to the post of Maintenance Engineer, Department of Technical Education and the Petitioner impugns inter alia the selection or appointment of the 7th Respondent, over and above him as the Petitioner claims to be the most suitable candidate to be appointed to the said post. Petitioner argues that the new selection criteria and or the new scheme for awarding marks ought to have been disclosed and published in advance of the interview date but it was not done. He also complains that there was no approved selection criteria/scheme/guidelines to select a suitable candidates. In other words the entire selection process was flawed and as such 7th Respondent's selection and appointment as 'Mechanical Engineer' was illegal and null and void. On 17.01.2012 this court granted leave to the Petitioner for an alleged violation of Article 12(1) of the Constitution.

The structured interview to fill the above vacancy was held on 26.04.2011 (P8). Petitioner pleads that before the interview may be several days before he had inquired from the 6th Respondent about the selection criteria and the scheme adopted, but he had not disclosed and had indicated that it would be disclosed at the interview. As such Petitioner pleads that he had no opportunity to challenge the scheme of interview and the new selection criteria. Our attention was drawn to clause 72 and 73 of P14 (procedural rules of PSC). The said rules envisage of including the marking scheme in the advertisement calling for applications to fill vacancies. Learned Counsel for the Petitioner argues that this was a serious lapse in the entire selection process as no such marking scheme was advertised or made known to candidates, prior to the interview.

The Petitioner has also pleaded 'Mala Fides' and state in para 23 of his original petition that he objected to certain corrupt practices that was prevalent in the Maintenance Division of the concerned department. It is also stated that this refers to the period the Petitioner was functioning as the Acting Maintenance Engineer. He relies on document P12 & P13 to explain above. In P12 the Petitioner has not approved payments. P13 focus not so much on any irregularity but refer to a request for additional payments for the Petitioner in view of the effort made by him in the work place in spite of certain difficulties

within the organization. The question is whether court could draw any inference of bad faith from the material placed before court by the Petitioner? Does P12 and p13 suggest an act performed fraudulently or dishonestly. Material should indicate something more than suspicion. Merely pleading mala fides would not suffice unless properly demonstrated and explained.

It appears from the material placed before this court and on perusing the objections of the Respondents, a preliminary objection has been raised in the affidavit of the 2nd Respondent submitted to this court with the motion dated 14.09.2012. It is stated in para 5 of the said affidavit that 2nd to 5th Respondents named by the Petitioner being members of the interview panel, and from that the 3rd to 5th Respondents were not members of the interview panel, and two others who should be in the panel are not made parties to this application. It is the position of the Respondents that such a failure to name the correct persons in the interview panel is fatal to this application and the Petitioner has obtained leave to proceed by misleading court. Necessary parties are not named.

Court observes that on the day this application was supported (17.01.2012) no such objection had been raised by the counsel for the state, who represented the Hon. Attorney General. On 22.11.2012 this matter had been

mentioned in court and learned counsel for Petitioner had moved court to amend the caption since a right to amend had been reserved by the Petitioner in para 3A of his petition dated 28.09.2012. Court had directed the Petitioner to file amended caption. Even on the said date Respondent does not seem to have raised the preliminary objection. The Petitioner had with the amended caption filed of record, has also added the members of the PSC. (motion dated 14.12.2012). However the objection raised by the Respondent as regards necessary parties cannot be considered at this point of time since the Petitioner has filed amended caption and court granted permission to do so without any formal objection being raised or recorded by the Respondents on 22.11.2012.

The position of the official Respondents as stated in the affidavit of the 2nd Respondent and the written submissions filed of record, in a gist is that the Petitioner did not possess the requirements and requisites to be appointed as the Mechanical Engineer of the concerned department. The case of the 7th Respondent had been supported by the official Respondents, although a person called P.N.K. Kariyawasam was selected, as he scored the highest marks at the interview but did not assume duties for the reasons stated in letter annexed to letter of 04.05.2011. Thereafter the next person in the list being the 7th

Respondent who came 2nd at the structured interview had been requested to assume duties. Respondents support their case by stating that there were three (3) others who obtained higher marks than the Petitioner and they ought to obtain priority over the Petitioner and one other candidate called W.R.A.S.R. Ranasinghe obtained the same marks as the petitioner. Interview Panel notes/marks are produced marked 2R11. It indicates that 9 candidates were interviewed and seven had been given marks from the highest to the lowest point marks. Petitioner and the said Ranasinghe received the same marks (44) and so was candidate Nos. (3) and (9) who received 51 marks.

I find that to a valid question posed by the Petitioner that he had no prior notice to the marking scheme and that it is obligatory on the part of the official Respondents to disclose to the candidates the relevant marking scheme prior to the interview, seems to be replied as follows by the official Respondents.

- (a) Candidates who satisfied the basic qualifications (set out in Gazette marked P6) and who submitted a complete application were called for the structured interview held on 26.04.2011.
- (b) Marking scheme that was adopted at the said interview had been previously approved by the 1st Respondent.
- (c) The marking scheme was not disclosed to any candidate, thus all candidates were treated equally. (marking scheme and approval produced as 2R9 and 2R10) .

Further to above a comparison of marks received at the interview has also been demonstrated in the affidavit of the 2nd Respondent as follows. In this regard I prefer to incorporate para 13(a) to (f) of the 2nd Respondent's affidavit.

- (a) a total of 9 candidates (including the Petitioner) were called for the interview that was held on 26.04.2011;
- (b) the interview panel which consisted of the persons mentioned earlier and their findings dated 26.04.2011 were submitted to the 1st Respondent;
- (c) the above mentioned interview was satisfactorily and properly conducted;
- (d) as there was no decision or agreement or decision to disclose to the candidates the marks they scored at the said interview there was no basis to disclose the said marks to the Petitioner;
- (e) the placements as per the said interview was as follows – Mr. P.N.K. Kariyawasam came 1st, the 7th Respondent came 2nd, Mr. W.A. Niroshan came 3rd and Mr. G. Austin and Mr. M.A.K. Senadheera came 4th (two persons) and Mr. W.R.A.S.R. Ranasinghe and the Petitioner were placed 5th (also two persons) respectively;
- (f) as is apparent from the above, there were persons far more competent than the Petitioner at the interview.

I do not agree and cannot support the Respondents as regards the preliminary objections raised in the written submissions. The Petitioner has filed amended caption, and he reserved the right to add the correct parties in his original petition. However I find a very valid point raised by the Petitioner of non-disclosure of the relevant marking scheme. Ordinarily this would be a ground to be considered very seriously. As such this court need to consider whether in fact the Petitioner was prejudiced by such, non disclosure, and whether all other candidates were treated equally in this respect and all respects of the interview process. Another point to be considered is whether the interview panel has correctly evaluated the qualifications of candidate and whether there was a failure to allocate marks according to the marking scheme. In that regard Petitioner also has been critical of documents 2R14 to 2R17 and state that 7th Respondent had no prior working experience. The question of 'mala fides' and 'bias' has been raised and I have expressed my views on same but would consider same in my conclusions, also.

In the context of the aforesaid material contained in this judgment, the first document to be examined is Gazette marked P6. It is the Gazette that invites applications for the post of Maintenance Engineer in the concerned

department. What matters would be the qualifications referred to in item 4 of P6. Two important criteria is contained under educational and other qualifications, i.e a degree in Mechanical Engineering and 5 years experience in maintenance of Plant and Machinery in a factory/workshop. To this application important documents such as Degree Certificate, Certificates of Professional and or Technical Qualifications that confirmed experience need to be attached. Let me look at 2R9 and 2R11 being the scheme of marks (reverse of 2R9) and interview marks respectively. Highest marks are given to persons with a degree, (20 marks) professional qualifications (30 marks) and experience (30 marks). It is clear that the Petitioner and all others except the candidate who was placed No. (4) in the list had obtained 10 marks, for the degree certificate. That is for the reason, candidates placed as No. (4) in the order of priority had a 2nd class, but all others an ordinary pass. Therefore he received 15 marks (yet not selected)

This court cannot fault the interview panel for allocation of marks for degree certificate. In fact a candidate placed No. (4), and not selected had obtained more marks than all others. Then comes the professional qualifications. (30 marks) 2R9 describes the several categories no doubt which has to be well known in the Engineering field and among other professionals. Candidate placed

as No. (1) (did not assume duties) and the 7th Respondent has obtained 15 and 10 marks respectively. Petitioner had not been allocated any marks for this category. Obviously he does not qualify to get marks for this category, and the documents submitted by Petitioner, even to this court does not indicate fulfillment of that requirement. As such it is clear that all this had to be done on presentation of the required certificates. In the absence of tendering the required certificate marks cannot be allocated. As such this court will not unnecessarily blame the interview panel as the Petitioner did not possess any professional qualifications. The 7th Respondent to this application has disclosed that he had obtained a Post Graduate Diploma from the University of Katubedda in the year 2007 (Electrical Engineer). Accordingly the panel has given 10 marks. I note that only three candidates have been awarded marks under this category, and accordingly marks were allocated to candidates who were placed 1st, 2nd and the 4th in the list, and no other. Not even the candidate placed as No. 3 in the list, were awarded marks under the said category.

The 3rd important category in 2R11 and 2R9 is 'experience' which carries 30 marks. The 7th Respondent's certificates produced and marked 2R14 to 2R19 and the other documents filed along with the motion dated 29.09.2014

gives a clear indication of his experience and the panel has awarded 25 marks. The Petitioner has been awarded 20 marks for his experience. The candidate placed 4th and the other candidate placed 5th (not the Petitioner) have been given 20 and 15 respectively. It is observed that Petitioner's experience had been accepted and given marks on what is due to him. I have to observe at this point that Article 12 of the Constitution forbids hostile discrimination but does not forbid reasonable classification. Equality before the law does not mean that the same set of laws should apply to all persons under every circumstance, ignoring differences and disparities. Reasonable classification is inherent in the concept of 'equality' because all persons are not similarly situated. It is my considered view that marks had been allocated under the above category in a very reasonable manner by the interview panel.

In *Deradason Vs. Union of India* AIR (1964) SC 179 at 185. Mudhalkari J. observed: what is meant by equality in this Article is equality among equals. It does not provide that what is aimed at is an absolute equality of treatment to all parties in utter disregard in every conceivable circumstances of differences such as age, sex, education and so on and so forth and as may be found among people in general.

The next category in 2R11 and 2R9 is knowledge of English. Petitioner cannot complain of that, since he has obtained 10 marks being the maximum. The balance categories for selection are knowledge of computer and leadership. Each of them carry 5 marks. Petitioner has obtained 2 marks for each of them. 'Leadership' would be a subjective assessment. It is a matter to be left in the hands of any interview Board.

I see no basis to fault the interview panel in allocating marks in the context of this case. All candidates had been treated equally in all respects. Further three (3) other candidates were placed above the Petitioner and another obtained the same marks as the Petitioner. As such four others are in a better position than the Petitioner. It would be discriminatory against the three other candidates if the Petitioner's argument is to be accepted, as non disclosure of the marking scheme has not prejudiced any one or more of the candidates who were called for the interview. The Gazette Notification P6 on the other hand discloses the importance of producing the Degree Certificate, any other certificates to prove one's professional qualifications and material to establish the required job experience. These three aspects have attracted the highest marks to be awarded at the interview. As such, candidates who apply for the post need to be mindful of same.

Inequality, per se, does not violate equal protection; for every selection of persons for regulation pronouncing inequality in some degree. The inequality to offend the principle of equality, must be actually and palpably unreasonable and arbitrary. *Arkansas Gas Co. V. Railway Commissions*, 261. U.S. 379 at 384. A classification having some reasonable basis does not violate this principle merely because, in practice, it results in some inequality – *Lindsay Vs. Natural Carbonic Gas Co.* (1910) 2004 US 61 at 78,79.

To survive equal protection attack the different treatment of two classes of persons must be justified by a relevant difference between them.

On the question of 'mala fides' the two documents P15 & P16 had been produced relating to purported disciplinary action. However the Respondent Department had by 2R24 tendered an apology and withdrew the allegations, and documents 2R25 & 2R26 fortify the position of the official Respondents. Petitioner also attempt to connect a repair to a vehicle and expect to get some advantage from same but letter 2R27, 2R28 & 2R29 seems to explain the position. I do not think any 'mala fides' could be drawn from above. In the public service, Government servants may have to put up with unwanted situations and face difficulties in the performance of one's duties. It is not possible to draw a parallel

with the selection procedure merely in the way Petitioner attempt to take cover by focusing mala fides. Selection process has been very reasonable and marks had been allocated in a fair transparent manner for all the candidates, without the Petitioner being penalized. In these circumstances Petitioner has not been successful in establishing any violation under Article 12(1) of the Constitution. Therefore we proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT