

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

In the matter of an application made under
and in terms of Article 17 and 126 of the
constitution of the Democratic Socialist
Republic of Sri Lanka

Fathima Hishana

43, Buthgamuwa Road

Welikada, Rajagiriya

Appearing by her Next Friend

SC (FR) Application 97/2014

Mohamed hirzi Shahul Hameed

43, Buthgamuwa Road

Welikada, Rajagiriya

Petitioner

-Vs-

1. Nayana Thakshila Perera

Principal

Janadhipathi Balika Vidyalaya,

School Lane—Nawala, Rajagiriya

2. Ms. Hemamali

The Vice Principal

Janadhipathi Balika Vidyalaya,

School Lane—Nawala, Rajagiriya

3. Mrs. P. De. S. Naotunna
Class Teacher—Grade 7C
Janadhipathi Balika Vidyalaya,
School Lane—Nawala, Rajagiriya

4. J.M.C Jayanthi Wijethunge
Provincial Secretary of Education
Shrawasthi Mandiraya,
32, Marcus Fernando Mawatha,
Colombo 07.

4A. M.A.B. Daya Senerath
Provincial Secretary of Education
Shrawasthi Mandiraya,
32, Marcus Fernando Mawatha,
Colombo 07.

4B. S.G. Wijebandu
Provincial Secretary of Education
Shrawasthi Mandiraya,
32, Marcus Fernando Mawatha,
Colombo 07.

5. Mr. P.N. Ilapperuma
The Provincial Director of
Education,
Provincial Department of Education
76, Ananda Coomaraswamy
Mawatha, Colombo 7.

5A. Mr. Wiman Gunaratne,

The Provincial Director of
Education,
Provincial Department of Education
76, Ananda Coomaraswamy
Mawatha, Colombo 7.

6. Anura Dissanayake

Secretary to the Ministry of
Education, “Isurupaya”
Pelawatte- Battaramulla.

6A. Upali Marasinghe

Secretary to the Ministry of
Education, “Isurupaya”
Pelawatte-Battaramulla.

6B. W.M Banduseana

Secretary to the Ministry of
Education, “Isurupaya”
Pelawatte-Battaramulla.

7. Alavi Moulana

The Governor of the Western
Province, 98/4 Havelock Road,
Colombo 5.

7A. K.C. Logeswaran

The Governor of the Western
Province,

98/4 Havelock Road,
Colombo 5.

8. The Honourable Attorney General
The Attorney General's Department,
Colombo 12.

Respondents

BEFORE : BUWANEKA ALUWIHARE, P.C. J
K.T. CHITRASIRI J
PRASANNA JAYAWARDANE P.C.J

COUNSEL : Faiz Musthapha P.C with Hejaaz Hisbullah instructed
by S.Weerasooriya for the Petitioner
Manohara De Silva P.C for the 1st – 3rd Respondents
Thishya Weragoda for the 4th and 5th Respondents
Sanjaya Rajarathnam P.C SASG for the 6th,7th and 8th
Respondents

ARGUED ON: 15 -11-2016

DECIDED ON : 27-03-2018

ALUWIHARE PC J

When this matter was taken up for support, the learned President's Counsel appearing for the 1st to the 3rd Respondents raised two preliminary objections with regard to the maintainability of this application. The objections were that;

- (a) The document marked P4 was not a genuine document and that in itself is a ground to dismiss the application of the petitioner;

And

(b) That the Petitioner's application is time barred

The contention in relation to the first objection was that the document "P4", which the Petitioner in paragraph 21 of the Petition refers to as a circular issued by the Ministry of Education in 1995, is not genuine. The learned President's Counsel for the said Respondents argued that although the Petitioner has pleaded that P4 is the circular No. 37 issued in 1995, the date on the face of the document was 12/12/1980. It was his contention therefore, that the Petitioner's application must be dismissed *in limine* as the averments in the Petition and affidavits are false in so far as "P4" is concerned. It was further pointed out that the adjudicative process in the present application would be greatly prejudiced on account of the said false averments.

The said reference to "P4" in paragraph 21 of the Petition is as follows:

"Furthermore, the then Secretary to the Ministry of Education by *circular bearing no: 37/95 dated December 12, 1980* has permitted female Muslim students to attend school in their cultural attire"

As correctly pointed out on behalf of the Respondents, there is a glaring discrepancy on the face of "P4". Mr. Hisbullah, the learned counsel who appeared for the petitioner at the hearing, submitted that the same document marked "P4", has on a previous occasion been produced and relied upon by this Court in S.C F.R Application No.688/12 (S.C.minutes19. 02.2013) which dealt with an identical matter. Furthermore, it was pointed out by the learned Counsel for the Petitioner that the order of the Supreme Court in the said case makes explicit reference to the present "P4" document (which in the previous case was also marked and produced as "P4"). The relevant portion of the order of the Supreme Court in the case referred to, is as follows; " She (the learned State Counsel) also gives an undertaking to the Court that within one week to send the *circular issued by the*

Department of Education (marked as P4) which is annexed to the Petition dated 12/12/1980 which permits students to attire themselves in the traditional Punjabi costume and wear the hijab” (emphasis added).

Thus, it was strenuously argued by the Counsel for the Petitioner that the Petitioner cannot be faulted for producing the same document in the present case as she has in good faith relied on the order in SC FR 688/2012.

I believe there is merit in the argument put forth by the learned Counsel for the Petitioner. The order in SC FR 688/2012 is before us and there has been no dispute about the genuineness and/or the authenticity of the document “P4” in that case. This Court and the parties to the said action have validly relied on it. Furthermore, the document marked “P4” in fact bears the date “1980-12-12”. Thus, the Petitioner could not have had any other option but to rely on the said date as it appears on the face of it. I have perused the document marked and produced as P4 in these proceedings and the document marked and produced as P4 in SCFR application 688/2012 and I am satisfied that both are copies of one and the same document which is a letter purported to have been issued by the Secretary, Ministry of Education and Higher Education. Although, the said letter refers to the circular No. 37/95, for some inexplicable reason it is dated “1980.12.12”. In those circumstances, I do not see a basis to hold that the Petitioner has acted in bad faith or that she has not come before this Court with clean hands.

In any event, pursuant to this Court’s direction on 4th July 2016, the present Secretary to the Ministry of Education by affidavit dated 26th July 2016 has affirmed the existence and operational effect of the said Circular 37/95. He has also produced the correct Circular No. 37/95 and I observe that the content of the impugned “P4” and the document produced by the present Secretary to the Ministry of Education are identical. Therefore, the averment in Paragraph 21 of the Petition that “*the then Secretary to the Ministry of Education by circular bearing no: 37/95 dated December 12, 1980 has permitted female Muslim students to*

attend school in their cultural attire” cannot be deemed as misleading or false. As such no prejudice could be caused to the adjudicative process on account of the said averment.

The document marked “P4” has only a discrepancy with regards to the date of the issuance. If we uphold the objection of the Respondents and dismiss the Petitioner’s application on this technical ground, we would be causing grave injustice to the Petitioner. As Abrahams CJ pointed out in *Velupillai v The Chairman, Urban Council Jaffna 34 NLA 364*, the Supreme Court “is a Court of law and not an academy of law” and it should not be trammled by technical objections. In *Elias Vs. Gajasinghe & another SC Appeal 50/ 2008 (S.C. Minutes of 28.6.2011)* Justice Suresh Chandra, with whom their lordships, Justice Tilakawardane and Justice Amaratunga agreed, has also stated that: “*For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases.*” I am of the view that this Court should not be fettered by technical matters, particularly in relation to fundamental rights where it is vested with an equitable jurisdiction, unless it can be shown that the infirmity or the non-compliance complained of, is of such gravity that merits the dismissal of the application.

Accordingly, I overrule the first preliminary objection.

The second preliminary objection raised on behalf of the Respondents was that the Petitioner’s application is time barred under Article 126 (2) of the Constitution.

According to paragraphs 33 to 46 of the Petition of the Petitioner, she came before this Court against an alleged infringement that is said to have taken place on the 3rd March 2014 where the Petitioner was deprived by the 1st and the 2nd Respondents from wearing the traditional school attire for Muslim girls in Sri Lanka. The Petition is dated 18. 03. 2014 and *prima facie* well within the one-month, the period stipulated in Article 126 of the Constitution to invoke the jurisdiction of this court against any infringement of fundamental rights. However, it was contended

by the learned President's Counsel on behalf of the 1st to 3rd Respondents that the Petitioner's alleged infringement did not take place on 03. 03. 2014 but at the point where she was admitted to the school. It was his submission that the parents of the Petitioner were informed of the school uniform at the point of admission and having slept on their rights for years, they are now barred from coming before this Court to canvass their grievances.

The learned Counsel for the Petitioner in turn pointed out that the Respondents' argument on time bar is based on certain facts which are disputed by the Petitioner. As such, the Court cannot make a determination in this regard without going into the merits and inquiring into the factual veracity of the two claims.

I am in agreement with the submission made by the learned Counsel for the Petitioner. Preliminary objections are taken at the beginning of the adjudicative process to assist in the management of cases by determining those matters which can be determined in isolation of other issues in the case. Thus, where the objection in law is contingent on a fact in dispute which cannot be determined in isolation at the beginning of the case, this Court necessarily will have to rely on presumed facts if it was to rule on it. In my opinion, such an action would result in stifling the legitimate adjudicative process of this Court.

In the present case, the alleged infringement which gave rise to the cause of action is a fact in dispute, without the determination of which no ruling can be made on the issue of the time bar. I am of the view that in the interest of justice this preliminary objection should be considered along with the merits of the case.

In conclusion, I wish to quote Justice Shiranee Tilakawardena's words in the case of *Wijesekara v Gamini Lokuge [2011] 2 SLR 329* where her Lordship observed that;

“Indeed, in a matter where the violation is of a serious nature, affecting material rights which are pertinent and critical to the Petitioner, where mala fides, bias or caprice can be established and if it is a continuing violation, this Court will not

dismiss the case in limine, without at least considering the grievance of the Petitioners especially in a matter that affects youth and young persons.”

Therefore, I am not inclined to dismiss the present application *in limine* and overrule the second preliminary objection as well, raised on behalf of the Respondents.

Preliminary objections overruled

JUDGE OF THE SUPREME COURT

JUSTICE K.T. CHIITRASIRI

I agree

JUDGE OF THE SUPREME COURT

JUSTICE PRASSANA JAYAWARDANE P.C

I agree

JUDGE OF THE SUPREME COURT