

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

In the matter of an application under and  
in terms of Article 126 of the Constitution  
of the Democratic Socialist Republic of Sri  
Lanka.

1. Kariyawasam Widanarachilage  
Gathidu Ugeeshwara Perera,  
No. 80/1, 12176,(T20)  
Kassapa Road,  
Colombo 05.
2. Kariyawasam Widanarachilage  
Dimuthu Sanjeewa Perera,  
No. 80/1, 12176,(T20)  
Kassapa Road,  
Colombo 05.

*Petitioners*

S.C.F.R. Application 27/11

Vs.

1. Upali Gunasekera,  
Principal,  
Royal College,  
Colombo 07.
2. Director National Schools  
Isurupaya, Battaramulla.
3. Secretary,  
Ministry of Education,  
Isurupaya, Battaramulla.
4. Honourable Attorney-General,  
Department of Attorney General,  
Colombo 12.

*Respondents*

**BEFORE** : K. Sripavan, J.  
E.Wanasundera P.C., J.  
B. Aluwihare, P.C., J.

**COUNSEL** : Saliya Pieris with Thanuka Madawa for the  
Petitioners.  
  
Viraj Dayaratna Deputy Solicitor General for the  
Respondents.

**ARGUED ON** : 06.05.2014

**WRITTEN SUBMISSIONS**

**FILED** : By the Defendants-Petitioners- Petitioners  
on 24<sup>th</sup> July 20124  
By the Plaintiff-Respondent-Respondents  
on 20<sup>th</sup> June 2014

**DECIDED ON** : 18.09.2014

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**K. SRIPAVAN, J.**

The Petitioners filed this Application on 24<sup>th</sup> January 2011 seeking inter alia, a direction from this Court to admit the First Petitioner Kariyawasam Widanarachilage Gathidu Ugeeshwara Perera, to Grade 1 at the Royal College, Colombo in the year 2011. The basis of the Petitioners' claim was that as enumerated in the Petition, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in refusing to admit the 1<sup>st</sup> Petitioner allegedly violated the Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Leave to proceed was granted on 1<sup>st</sup> February 2011 for an alleged violation of Article 12(1) of the Constitution. When the application was taken up for hearing on 31<sup>st</sup> January 2014, Learned Deputy Solicitor General appearing for Respondents raised a preliminary objection to the maintainability of the application on the ground that necessary parties have not been named as Respondents and that itself was a fatal irregularity leading to the dismissal of the application "in limine."

Learned Deputy Solicitor General relied on Rule 44(1)(b) of the Supreme Court Rules 1990 which reads as follows :

*“ Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126(2) of the Constitution, for relief or redress in respect of an infringement or an imminent infringement, or any fundamental right or language right, by executive or administrative action, he shall name as respondents the Attorney General and the person or persons who have infringed or are about to infringe such right.”*(emphasis added)

Thus, Counsel submitted that as per the Rules of the Supreme Court, it is a must to name the persons who have infringed the Fundamental Rights of the Petitioners as Respondents. The word “shall” as referred to in the Rule must normally be construed to mean “shall” and not “may” for the distinction between the two are fundamental. Granting the application of mind, there is little or no chance that one who intends to leave a lee-way will use the language of command in the performance of an act. But, since, even lesser directions are occasionally clothed in words of authority, it becomes necessary to delve deeper and ascertain the true intent and meaning of this Rule. The obligatory nature of the requirement that the particular step/act should be taken is indicated by the word “shall”. This expression is generally used to impose a duty to do what is prescribed, and not a discretion to comply with it according to whether it is reasonable or practicable to do. As observed in *L.A. Sudath Rohana Vs. Mohamed Zeena and Others* (S.C. H.C. C.A.L.A. No.

11/2010- S.C. Minute of 17.3.2011), Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of the Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.

Accordingly, where there has been non-compliance with the Rule, serious consideration must be given for such non-compliance as it would lead to an erosion of well established court procedures maintained throughout several decades. It may be relevant to reproduce below the observation made by Dr. Shirani A, Bandaranayake, C.J. (as she then was) in the case of *Batugahage Don Udaya Shantha Vs. Jeevan Kumaratunga and Others* (S.C. Spl. L.A. 49/2010 – S.C. Minute of 29.03.12).

*“It should be borne in mind that the procedure that should be followed. when filing applications before the Supreme Court cannot be easily dis-regarded as that is administered on the basis of the Rules that are made under the provisions stipulated in the Constitution. The said Rules, which have been made for the purpose of assisting the administration of court procedures should be followed and when they are not complied with, it cannot be said that objections raised on the basis of non-compliance are mere technical objections.”*

The Petitioners allege that admission to Government schools for the year 2011 was regulated by a Circular issued by the Secretary, Ministry of

Education, marked **P12**. In terms of the said Circular, the Second Petitioner was interviewed by an “Interview Panel” of four members whose names and addresses were not known to the Petitioner. When the provisional list was published, the First Petitioner's name was not amongst the students who were selected to Royal College. The Second Petitioner thereafter, preferred an appeal to the “Appeal Board” comprising of five members, the names of those members too were not known to the Petitioners. Thus, if there was any prejudice that had been caused to the Petitioners, it was due to the decisions taken by the “Interview Board” and the “Appeal Board”. When the authority who passed the impugned order is not impleaded no relief could be granted to the Petitioners for the Court cannot adjudicate on the validity of an act of an authority in its absence.

Having prayed for an order from the Court to direct the First Respondent in terms of paragraph “C” of the prayer to the petition to submit a list of names of the Members of the relevant “Interview Panel” and the “Appeal Board”, the Petitioners failed to support the application for such direction. While I agree with the learned Counsel for the Petitioners that this Court is empowered to grant such relief or make such direction as it may deem just and equitable and to add parties without whose presence questions in issue cannot be completely and effectually decided, once pleadings are complete and the application is taken up for argument, no latitude could be shown to the Petitioners for failure to show due diligence. In my view, the Petitioners should have supported the application and obtained an order in terms of paragraph “C” of the prayer to the petition either prior to or the least, the date on which leave

to proceed was granted. There can be no doubt that the Fundamental Rights guaranteed by the Constitution must be safeguarded and protected by the Supreme Court. However, lapse of time and delay are most material factors to be considered. Almost, three years have lapsed since the grant of leave to proceed. If the Petitioners are not vigilant and there is no diligence on their part in pursuing a remedy, the Court may decline to intervene and grant relief in the exercise of its equitable jurisdiction.

For the reasons stated, I hold that the failure to implead the “Interview Board” and the “Appeal Board” justify the rejection of the petition without going into the merits of the case. The preliminary objection is thus upheld.

The application is dismissed without costs.

**JUDGE OF THE SUPREME COURT.**

**E.WANASUNDERA, P.C.J.,**

I agree.

**JUDGE OF THE SUPREME COURT.**

**B.ALUWIHARE, P.C. J**

I agree.

**JUDGE OF THE SUPREME COURT.**

