

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

S.C/FR Application No. 204/2011

J. A. Lionel Chandraratne (Library Assistant ,
Galgammulla Public Library)
Ranasgalla,
Nakkawatta.

PETITIONER

Vs.

1. Mr. Tissa R. Balalla
The Governor of the North Western Province
Governor's Office,
Kurunegala.
2. Mr. Gamini Wattegedera
The Chairman
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.
3. Mr. H. M. Mettananda Nilame
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

4. Mr. Sarath Stanley
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.
5. Mr. M. Iqbal
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.
6. Ms. Kanthi Vehalla
The Secretary
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.
7. Mr. T. G. U. B. Tambugala
The Chief Secretary of the North Western Province,
Office of the Chief Secretary
Kurunegala.
8. W. M. M. B. Weerasekera
The Commissioner of Local Government
Department of Local Government of the
North Western Province
Kurunegala.
9. Mr. Vijitha Bandara Ekanayake
The Secretary
Kuliyapitiya Pradeshiya Sabha,
Kuliyapitiya.

10. Hon. The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

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

COUNSEL: Jeffry Alagaratnam P.C. with
Lasantha Gurusinghe for Petitioner

Rajitha Perera Senior State Counsel with
Suren Gnanaraj S.C. for 1st – 8th and 10th Respondents

WRITTEN SUBMISSION FILED ON:

01.04.2015 (Respondents)

DECIDED ON: 20.05.2015

GOONERATNE J.

The Petitioner was employed as a Library Assistant in the North Western Provincial Public Service and claims that he has about 30 years service in the Provincial Public Service, without being duly promoted to the post of Librarian Grade III (per sub para 'c' of the prayer to the petition). It is the position of the Petitioner that the denial of the due post to him is a violation of his fundamental rights to equality and equal protection of law guaranteed by Article 12(1) of the Constitution. Leave to proceed was granted on 13.5.2012. The gist of the Petitioner's argument was that 11 acting Librarians who were much junior to the Petitioner in service and who held inferior positions were appointed as 'Librarian Grade III'. Petitioner also claim that he possess the required qualifications to be promoted for the post in question since 1986, but had been over looked. When this application was taken up for hearing on 11.03.2015, parties agreed to conclude this application based on written submissions. Accordingly court granted months time to file written submissions.

It would be necessary to find out details of the Petitioner's service record as pleaded and stated in his written submissions. He was initially

appointed to a post called "Library in Charge" on 02.01.1980, and absorbed to the above Provincial Council. On or about 1986 Petitioner applied for the post of 'Librarian Grade III', according to the procedure contemplated in documents P20 & P21 (Gazette). It is admitted that Petitioner's services were disrupted (as pleaded) from 23.10.1986 to 08.06.1993 and 19.12.1996 to 17.11.1997. Petitioner states such disruption was due to an abortive disciplinary inquiry and thereafter on an irregularity in reinstatement. Petitioner states that all this happened due to baseless allegations resulting from political animosity for which the 2nd to 6th Respondents were responsible. However petitioner argues that he successfully challenged the disciplinary inquiry before the Human Rights Commission and before the Parliamentary Committee on Public Petitions. He relies on documents P6, P7, P10 P11 & P16. As a result Respondents were directed as stated by the Petitioner to be reinstated with back wages. Petitioner blames the Respondents for partially carrying out the Human Rights Commission directive. In this regard the petitioner draws the attention of this court to 4 matters.

- (i) the Petitioner was not reinstated but only re-appointed as a new employee to the post of 'Library Assistant' which is lower than his original post 'Library in Charge' and (vide P15)

- (ii) only increments and not the back wages were paid for the first disruption of service and,
- (iii) the Petitioner was not re-designated/placed in the proper salary scale in the original post (i.e Library in Charge) and,
- (iv) the Petitioner was not considered for the promotion as Librarian Grade III for which he initially applied in 1986.

Petitioner argues that there were two disruptions of service and two re-appointments as a new employee, and the Petitioner with 30 years in service is only a Library Assistant. It is also pleaded that on 01.10.1996 (P27) the relevant Provincial Public Service Commission appointed him as Acting Librarian Grade III but within two months the Commission dismissed him, on 19.12.1996. (P12 & P13). He further pleads that he was even recommended for the post of 'Librarian Grade III' by his superiors and produce documents P29, P32A, P32B & P32C in proof of such recommendations. When all this was pending, Petitioner allege that the 6th Respondent by letter of 11.6.2008 appointed 11 acting Librarians who were very junior to the Petitioner in service. Petitioner of course continuously agitated for his promotion but the 8th Respondent by P33 dismissed the Petitioner's application on 15.01.2010 (P33).

There is reference made to Gazette marked P20 which refer to the qualifications required for appointment of 'Librarian Grade III'. It was revised on 31.10.1994. Petitioner states that 50% of the available vacancies were reserved for internal candidates. Petitioner claims he is duly qualified in terms of Circular P20 and the subsequent Circular of 31.10.1994. It is further pleaded that the Provincial Public Service Commission again varied the eligibility criteria for internal candidates for Librarian Grade III by Gazette of 23.7.1999 increasing the service requirement from 5 years service to 10 years, and increasing the qualification from 3 credit passes to 6 credit passes. Petitioner state that he and several other candidates as a result of the above change in 1999 became ineligible. Nevertheless the 6th Respondent by his letter of 11.6.2008 appointed 11 Acting Librarians to the post of Librarian Grade III based on former criteria disregarding the criteria gazette on 23.7.1999.

Petitioner allege that he also should have been considered for appointment along with the 11 persons mentioned above. Petitioner highlight in his petition at paras 36 & 37 his qualifications [(P23 A – D) and P36 (A) and P36(B)]. Petitioner urge that the authorities never disputed his qualifications. It is the position of the Petitioner that the above 11 persons appointed and were

Acting Librarians with lesser service/qualifications to the post of Librarian Grade III and were appointed on 11.6.2008 overlooking the Petitioner.

Petitioner also argue, as in his written submissions, that as required by gazette dated 23.07.1999 nine (9) ineligible internal candidates who were only Acting Librarians filed a Writ Application bearing No. HCW/12/2001 in the High Court of the North Western Province challenging the eligibility criteria gazetted on 23.07.1999 and sought promotions to the post of 'Librarian Grade III'. However it is stated that due to an understanding between the Petitioners in the above application and the 6th Respondent the above High Court application was withdrawn (Q3, P32C). It is the Petitioner's position that none of the above 9 petitioners were qualified according to the gazette of 23.07.1999 but the 6th Respondent appointed them as Librarian Grade III. Petitioner also contends that two others were also promoted to the above post. Petitioner having ascertained the position as stated above requested that he also be promoted but the 8th Respondent by letter P33 rejected Petitioner's request, as the above 11 persons were promoted by a decision of the Board of Ministers in view of the High Court case and as such it is personal to the said 11 persons.

I have also noted the contents of paras 11 & 38 of the amended petition in which it is stated “that at that time for the promotion Petitioner was not considered by the Provincial Public Service Commission due to political animosity or ulterior purposes and an abortive disciplinary inquiry”. I observe that such a statement would require the Applicant or Petitioner to establish that discrimination on ground of political opinion or for ulterior purposes must be deliberate and with material to prove malice on the part of the person who did so. Mere assertions and bare statements would not suffice, in the absence of substantiating such a fact in issue.

I have noted the following, gathered from affidavits filed in these proceedings by the 2nd and 7th Respondents.

(a) Petitioner at various stages served as, and held the posts of

- (1) Library in Charge
- (2) Library Assistant
- (3) Acting Librarian Grade III

(b) Respondents deny that Petitioner served for 30 years as a Library Assistant

(c) These Respondents specifically state and deny that Petitioner served for 30 years without a promotion due to the lapse of the Respondents

(d) No application produced to establish that Petitioner applied for the post of Librarian Grade III in the year 1986.

(e) Petitioner was interdicted on or about 23.10.1986 and para 11 of Petitioner's affidavit is admitted by the above Respondents as regards misappropriation of building material.

(f) Documents P2 & P3 admitted

(g) P2 & P3 are not the subject matter of these proceedings as these events happened in 1987.

(h) Documents P6 & P7 admitted (letter by the committee on public petitions) on the recommendation of the said committee petitioner accepted the position and was appointed as a new employee to the post of "Library in Charge" as from 08.06.1993.

(i) Letter P10 & P11 admitted. It states the period between 01.01.1980 to 30.11.1986 to be added to Petitioner's service, and the period 01.12.1986 to 06.06.1993 to be added to his service without pay.

(j) These Respondents state documents P36a and P36b cannot apply to the petitioner. It applies to Clerks and parallel grades and the Official Languages Department and not to the Library Service.

(k) The Petitioners in the High Court case referred to by the Petitioners were all Acting Librarians. The Petitioner was only a Library Assistant. The decision in documents 7R1 & 7R2 are also relevant in this regard.

The learned Senior State Counsel in his written submissions emphasis the fact that in view of prayer 'c' of the petition of the Petitioner the burden to establish same is on the Petitioner, which had not been discharged by the Petitioner. The said prayer 'c' is sought, to direct the 1st to 9th Respondents to appoint the Petitioner to the posts of Librarian Grade III. Further it is emphasized that the proof of qualifications of the Petitioner required as per the scheme of recruitment alone would not suffice. Learned Senior State Counsel state it would only give entry to sit for the examination for selection to the above posts. The Petitioner had not sat for any examination as required by the scheme of recruitment or could not have sat for the required examination as he was not qualified for gaining entry to sit for an examination.

It is also urged on behalf of the Respondents that the scheme of recruitment applicable to the above post is not document P20 as contended by the Petitioner but document marked 2R1. One of the main requirements to recruit for the post of Librarian Grade III is by an open competitive and a limited competitive examination. Learned Senior State Counsel also argue that the Petitioner only hold the post of "Library Assistant" (P15 of 17.11.1997). As such the petitioner is not similarly circumstanced with the Petitioners of the

High Court case who were holding the post of “Acting Librarians’. Documents 7R1 & 7R2 are relevant and 7R1 and 7R2 identifies 11 persons holding the post of Acting Librarian. Grade III. What should be noted is that it is personal appointments to them who were the appointees as a settlement reached between parties.

This court having considered the case of either party wish to observe that in a case where appointments to the public service are in question, a court should not approve or declare appointments and promotions which are outside a scheme of recruitment, applicable to various posts in the Government sector. The material furnished to this court indicates that the Petitioner had, at least two long disruption of services during his career in the library service. Although he was exonerated by some means, whenever the Petitioner was reinstated he had been posted to a lower grade in the library service. One could observe it is unfortunate but courts cannot rule on matters purely on sympathetic grounds. On the other hand the application of the Petitioner to this court seems to be time barred. I have also no reason to doubt the submissions of learned Senior State Counsel, in a gist on the following.

1. The Petitioner does not have the qualifications required to face the examination for the post of Librarian Grade III in terms of circular 2R1 which is the applicable scheme to the Petitioner.
2. The Petitioner is not similarly circumstanced as the other Petitioners in the High Court application as the others were clearly Acting Librarians Grade III and the Petitioner was a Library Assistant holding appointment based on P15.
3. The Petitioner has been unable to establish that his Fundamental rights have been violated by any of the Respondents.

Petitioner has not established to the satisfaction of this court that he has fulfilled the requirements in the scheme of recruitment applicable to the post in question. It is obligatory for the Petitioner to prove that he has been treated differently to succeed in terms of Article 12(1) of the Constitution. In the case of C.W. Mackie & Co. Ltd. Vs. H. Mologoda, Commissioner General of Inland Revenue 1986 (1) SLR 300, it was held that in order to sustain the plea of discrimination based on 12(1), a party will have to satisfy court the following two points.

- (a) That he has been treated differently from others.
- (b) That he has been differently treated from persons similarly circumstanced without a reasonable basis.

The Petitioners referred to in the High Court case, relied upon by the Petitioner are not persons similarly circumstanced. In all the above facts and circumstances of this application, I am not inclined to grant relief to the Petitioner.

The application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. , J.

I agree

JUDGE OF THE SUPREME COURT

Upali Abeyratne J.

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Petitioner allege that he also should have been considered for appointment along with the 11 persons mentioned above. Petitioner highlight in his petition at paras 36 & 37 his qualifications [(P23 A – D) and P36 (A) and P36(B)]. Petitioner urge that the authorities never disputed his qualifications. It is the position of the Petitioner that the above 11 persons appointed and were

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Petitioner also argue, as in his written submissions, that as required by gazette dated 23.07.1999 nine (9) ineligible internal candidates who were only Acting Librarians filed a Writ Application bearing No. HCW/12/2001 in the High Court of the North Western Province challenging the eligibility criteria gazetted on 23.07.1999 and sought promotions to the post of 'Librarian Grade III'. However it is stated that due to an understanding between the Petitioners in the above application and the 6th Respondent the above High Court application was withdrawn (Q3, P32C). It is the Petitioner's position that none of the above 9 petitioners were qualified according to the gazette of 23.07.1999 but the 6th Respondent appointed them as Librarian Grade III. Petitioner also contends that two others were also promoted to the above post. Petitioner having ascertained the position as stated above requested that he also be promoted but the 8th Respondent by letter P33 rejected Petitioner's request, as the above 11 persons were promoted by a decision of the Board of Ministers in view of the High Court case and as such it is personal to the said 11 persons.

I have also noted the contents of paras 11 & 38 of the amended petition in which it is stated “that at that time for the promotion Petitioner was not considered by the Provincial Public Service Commission due to political animosity or ulterior purposes and an abortive disciplinary inquiry”. I observe that such a statement would require the Applicant or Petitioner to establish that discrimination on ground of political opinion or for ulterior purposes must be deliberate and with material to prove malice on the part of the person who did so. Mere assertions and bare statements would not suffice, in the absence of substantiating such a fact in issue.

I have noted the following, gathered from affidavits filed in these proceedings by the 2nd and 7th Respondents.

(a) Petitioner at various stages served as, and held the posts of

- (1) Library in Charge
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(b) Respondents deny that Petitioner served for 30 years as a Library Assistant

(c) These Respondents specifically state and deny that Petitioner served for 30 years without a promotion due to the lapse of the Respondents

- (d) No application produced to establish that Petitioner applied for the post of Librarian Grade III in the year 1986.
- (e) Petitioner was interdicted on or about 23.10.1986 and para 11 of Petitioner's affidavit is admitted by the above Respondents as regards misappropriation of building material.
- (f) Documents P2 & P3 admitted
- (g) P2 & P3 are not the subject matter of these proceedings as these events happened in 1987.
- (h) Documents P6 & P7 admitted (letter by the committee on public petitions) on the recommendation of the said committee petitioner accepted the position and was appointed as a new employee to the post of "Library in Charge" as from 08.06.1993.
- (i) Letter P10 & P11 admitted. It states the period between 01.01.1980 to 30.11.1986 to be added to Petitioner's service, and the period 01.12.1986 to 06.06.1993 to be added to his service without pay.
- (j) These Respondents state documents P36a and P36b cannot apply to the petitioner. It applies to Clerks and parallel grades and the Official Languages Department and not to the Library Service.
- (k) The Petitioners in the High Court case referred to by the Petitioners were all Acting Librarians. The Petitioner was only a Library Assistant. The decision in documents 7R1 & 7R2 are also relevant in this regard.

The learned Senior State Counsel in his written submissions emphasis the fact that in view of prayer 'c' of the petition of the Petitioner the burden to establish same is on the Petitioner, which had not been discharged by the Petitioner. The said prayer 'c' is sought, to direct the 1st to 9th Respondents to appoint the Petitioner to the posts of Librarian Grade III. Further it is emphasized that the proof of qualifications of the Petitioner required as per the scheme of recruitment alone would not suffice. Learned Senior State Counsel state it would only give entry to sit for the examination for selection to the above posts. The Petitioner had not sat for any examination as required by the scheme of recruitment or could not have sat for the required examination as he was not qualified for gaining entry to sit for an examination.

It is also urged on behalf of the Respondents that the scheme of recruitment applicable to the above post is not document P20 as contended by the Petitioner but document marked 2R1. One of the main requirements to recruit for the post of Librarian Grade III is by an open competitive and a limited competitive examination. Learned Senior State Counsel also argue that the Petitioner only hold the post of "Library Assistant" (P15 of 17.11.1997). As such the petitioner is not similarly circumstanced with the Petitioners of the

High Court case who were holding the post of “Acting Librarians’. Documents 7R1 & 7R2 are relevant and 7R1 and 7R2 identifies 11 persons holding the post of Acting Librarian. Grade III. What should be noted is that it is personal appointments to them who were the appointees as a settlement reached between parties.

This court having considered the case of either party wish to observe that in a case where appointments to the public service are in question, a court should not approve or declare appointments and promotions which are outside a scheme of recruitment, applicable to various posts in the Government sector. The material furnished to this court indicates that the Petitioner had, at least two long disruption of services during his career in the library service. Although he was exonerated by some means, whenever the Petitioner was reinstated he had been posted to a lower grade in the library service. One could observe it is unfortunate but courts cannot rule on matters purely on sympathetic grounds. On the other hand the application of the Petitioner to this court seems to be time barred. I have also no reason to doubt the submissions of learned Senior State Counsel, in a gist on the following.

1. The Petitioner does not have the qualifications required to face the examination for the post of Librarian Grade III in terms of circular 2R1 which is the applicable scheme to the Petitioner.
2. The Petitioner is not similarly circumstanced as the other Petitioners in the High Court application as the others were clearly Acting Librarians Grade III and the Petitioner was a Library Assistant holding appointment based on P15.
3. The Petitioner has been unable to establish that his Fundamental rights have been violated by any of the Respondents.

Petitioner has not established to the satisfaction of this court that he has fulfilled the requirements in the scheme of recruitment applicable to the post in question. It is obligatory for the Petitioner to prove that he has been treated differently to succeed in terms of Article 12(1) of the Constitution. In the case of C.W. Mackie & Co. Ltd. Vs. H. Mologoda, Commissioner General of Inland Revenue 1986 (1) SLR 300, it was held that in order to sustain the plea of discrimination based on 12(1), a party will have to satisfy court the following two points.

- (a) That he has been treated differently from others.
- (b) That he has been differently treated from persons similarly circumstanced without a reasonable basis.

The Petitioners referred to in the High Court case, relied upon by the Petitioner are not persons similarly circumstanced. In all the above facts and circumstances of this application, I am not inclined to grant relief to the Petitioner.

The application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. , J.

I agree

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Upali Abeyratne J.

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JUDGE OF THE SUPREME COURT

