

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

In the matter of an application for the relief and redress under Articles 126(2) of the Constitution in respect of the violation of the Fundamental Rights to equality before the law and to the equal protection of the law guaranteed to the Petitioner under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Disapala Medagedara,

No. 124/25, Veediya Bandara Mawatha,

Nattandiya.

And also at,

National Livestock Development Board,

Official Quarters,

Welisara Farm,

Welisara.

Petitioner

SC /FR/ Application No 55/2016

Vs,

1. National Livestock Development Board,
No. 40, Nawala Road,
Narahenpita, Colombo 05.
2. Prof. H.W. Cyril,
Chairman,
National Livestock Development Board,
No. 40, Nawala Road,
Narahenpita, Colombo 05.
3. D.U. Jayawardena,
General Manager,
National Livestock Development Board,
No. 40, Nawala Road,
Narahenpita, Colombo 05.

4. Mrs. T.D.S. Wasantha,
Audit Superintendent,
Auditor General's Department,
Polduwa Road,
Sri Jayawardenapura Kotte,
Battaramulla.
5. W.C. Ranjan,
No. 348/9 Maligathenna,
Gurudeniya, Kelaniya.
6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: **Sisira J. De. Abrew J**
 Anil Goonaratne J
 Vijith K. Malalgoda PC J

Counsel: Dr. S.F.A Cooray for the Petitioner
 Ronald Perera PC with A. Kaluarachchi and Chandana Perera for 2nd and 5th
 Respondents
 Viraj Dayarathne SDSG for the Attorney General

Argued on: 07.11.2017

Judgment on: 12.12.2017

Vijith K. Malalgoda PC J

Petitioner Disapala Medagedara has filed the present application before the Supreme Court alleging the violation of the Fundamental Rights to the equal protection of law guaranteed under Article 12 (1) of the Constitution.

When this matter was supported on 14.03.2016 for notices, this court after granting leave for alleged violation under Article 12 (1) of the Constitution, had further granted interim relief as

prayed in paragraph (f) to the prayer preventing the 1st to the 3rd Respondents from recruiting anyone to the post of Deputy General Manager (Corporate Operations) pending the final hearing and determination of this application.

When the matter was taken up before this court for argument, the Respondents objected for the filling of additional documents by the Petitioner without obtaining prior approval of court. Based on the above objection, the court decided, not to consider new material submitted by the Petitioner by way of the said two motions dated 11th August 2017 and 11th September 2017. However in the same manner the 2nd and 5th Respondents too had filed a motion dated 29th August 2017, and submitted additional material with regard to a complaint made on behalf of the 1st Respondent against certain documents relied by the Petitioner and the said matter was once again raised before us in the written submissions too. However stick to the decision taken with regard to the additional material placed before this court by the Petitioner, I decided not to consider any fresh material submitted by either party in my judgment.

The 1st Respondent National Livestock Development Board by an advertisement published on 18th May 2012 in the English news paper "Daily News" had called for applications for the post of Deputy General Manager- Corporate Operations. (P-1)

In the said notice the qualifications required for the above post was advertised as follows;

"Bachelor's degree in Agriculture/Plantation Management/ Veterinary Science/ Animal Husbandry/ Management/ Public Administration/ Business Administration/ Commerce with a Postgraduate qualification (Masters) or membership of a recognized professional institute or fellow/ Associate Member of ICASL/CIMA/ACCA with a minimum of 18 years experience in managerial level out of which three years post qualifying experience in a senior management level."

The Petitioner who was holding a Bachelor's Degree in Agriculture from the University of Peradeniya as well as a Masters Degree in Agriculture from the same university applied for the above post as he thought that he had the sufficient qualifications and experience to apply for the above post.

At the time the said application was tendered, the Petitioner was working at the Coconut Cultivation Board as a lecturer at Coconut Development Training Center Lunuwila. The Petitioner

was called for an interview by the 1st Respondent Board and he attended the said interview. By letter dated 9th August 2012, the 1st Respondent Board had informed the Petitioner that he has been appointed to the post of Deputy General Manager (Corporate Operations) with effect from 3rd September 2012.

After accepting the said post at the 1st Respondent Board, the Petitioner made all endeavors to discharge his duties to his maximum, and his services were commended by the 1st Respondent Board and its Chairman on several occasions (P-13 and P-14). During this period the Petitioner was able to increase the profits of the 13 farms, 82 million in 2014 to 93.6 million in the year 2015 (P-12) and the Petitioner was granted his annual salary increments for the years 2013 and 2014.

The relationship between the Petitioner and the 1st Respondent Board was disturbed towards the end of the year 2015 and the documentation submitted by both the Petitioner and the Respondents confirms this position. The Petitioner while explaining the reason for this change had submitted that the Petitioner was requested by the 2nd Respondent Chairman, to recommend a proposal of the 2nd Respondent to purchase poultry feed for the National Livestock Development Board farms from a supplier by the name 'Gold Coin Feeds Mills (Lanka) Limited.'

In view of the high price quoted and the adverse reports of the laboratory tests regarding the quality of the feeds, the Petitioner refused to recommend the said proposal of the 2nd Respondent. Over this issue the 2nd Respondent threatened the Petitioner of serious consequences. However the said proposal was implemented by the 2nd Respondent and by letter dated 22.09.2015, (P-19) Acting General Manager informed all farm managers, the decision to purchase Poultry Feed from Gold Coin Feeds Mills (Lanka) Limited.

Although this letter was copied to all the Assistant General Managers of the four regions, it was not copied to the Petitioner, under whom the said Assistant General Managers were functioning.

During the same period, Petitioner went on a pilgrimage to India with his family members. The said pilgrimage was scheduled between 17th August to 24th August 2015 and the Petitioner had applied overseas leave well in advance on 22nd June 2015. The said application was approved by the General Manager of the 1st Respondent and was communicated to the Petitioner by letter dated 09.07.2015 (P-21). Accordingly the Petitioner had left Sri Lanka on the said pilgrimage as scheduled, but during his absence on approved overseas leave, by letter dated 21st August 2015,

the Acting General Manager (3R) had issued a letter, calling for explanation from the Petitioner, for leaving the country on overseas leave without obtaining Prime Minister's Approval. (P-22)

Even though the Petitioner had taken up the position that under section 23.5 of Chapter XII of the Establishment Code it is the duty of the sanctioning authority to forward the sanctioning letter to the Prime Minister's Office, the 2nd Respondent by letter dated 09th September 2015 (P-25) rejected the Petitioner's explanation and taken disciplinary action against the Petitioner by extending the probation period by one year. Even though the Petitioner had appealed to the 2nd Respondent against the said decision by letter dated 23rd September 2015, it was not replied to.

During this period the responsibilities and duties entrusted on the Petitioner, including the farm supervision and tender board activities were removed and was stopped being called for meetings and kept in the pool without entrusting any duties.

By letter dated 16th November 2015 the 3rd Respondent informed the Petitioner that as per the Report of the Auditor General's Department, a preliminary inquiry was to be held on the 17th of November 2015, with regard to the Petitioner's service experience and his academic qualifications for the post of Deputy General Manager- Corporate Operations, and requested the Petitioner to be present for the said inquiry with the necessary certificates and other documents to establish his service experience and academic qualifications.

The preliminary inquiry referred to above was conducted by the 5th Respondent, and the Petitioner took part in the said inquiry and submitted documentation to support his academic qualifications and service experience before the inquiring officer. By letter dated 1st January 2016 the 2nd Respondent wrote to the Petitioner informing that,

“it is transpired from the preliminary inquiry conducted based on the Audit quarry, that the Petitioner does not possess the senior managerial experience for three years after obtaining the Masters Degree and therefore he has not fulfilled the requirement to confirm him in his post under Chapter 11.7 of the Establishment Code and therefore calling his explanation as to why his services should not be terminated within 07 days.” (P-28)

As revealed before this court, the Petitioner has requested two weeks time to reply the said letter, but the said request was turned down by the 2nd Respondent by letter dated 05.01.2015.

However the Petitioner had submitted his explanation (P-32), within the stipulated time but by letter dated 21.01.2016 the services of the Petitioner was terminated by the 2nd Respondent with effect from 31.01.2016.

When going through the matters referred to above by the Petitioner, it appear that the services of the Petitioner was terminated under section 11.7 of Chapter II of the Establishment Code which reads as follows;

11.7 if the officer is not judged as fit and qualified for confirmation in all respects, either his appointment should be terminated or the period of probation or the acting period should be further extended by the appointing authority subject to the section 11:9 or 11:10 and

The said termination under section 11.7 has come into operation with effect from 31.01.2016, four months after the probation period of the Petitioner was extended by one year as revealed by document produced marked P-25. As further observed by this court, at the time P-25 was issued there was no inquiry pending against the Petitioner but within two months an inquiry was commenced based on an audit quarry raised by the Auditor General.

As complained by the Petitioner before this court, the audit quarry raised by the Auditor General was not made available to the Petitioner at any stage of the inquiry or even thereafter.

A copy of the said Auditor General's Report dated 30th October 2015 received by the Chairman's office of the 1st Respondent on 5th November 2015 is produced by the 2nd Respondent before this court marked R-1. When going through R-1, I observe that it is a 33 page report containing several observations with regard to the functioning of the 1st Respondent Board and the farms managed by the 1st Respondent Board and in page 12 of the said report, under clause 2.5 (j) it was raised that,

2.5 (ඒ) "බඳවා ගැනීම් පටිපාටිය අනුව තනතුර සඳහා අවශ්‍ය වෘත්තීය සුදුසුකම් සපුරා නොමැති නිලධාරියෙකු නියෝජ්‍ය සාමාන්‍යාධිකාරී (සංස්ථා හා මෙහෙයුම්) තනතුර සඳහා මණ්ඩලය විසින් 2012 වර්ෂයේදී බඳවා ගෙන තිබුණි"

The above observation by the Auditor General is not clear as to whether it refers to the professional qualifications required for the above post or it refers to any other requirement under the scheme of recruitment. However as referred to above, according to the paper

advertisement (P-1) there is a requirement either to have a Master Degree or fellow/ associate member of ICASL/CIMA/ACCA. Since the Petitioner relied on the first limb, question of obtaining professional qualifications as referred to in second limb won't arise in the case in hand.

However the 1st Respondent Board has understood the above observation as the Petitioner not obtaining 3 years post qualifying experience in the Senior Management Level, and made an attempt to submit before this court that the inquiry referred to above was held to ascertain whether the Petitioner holds the necessary requirements with him when he applied for the above post.

As revealed before this court the preliminary inquiry referred to above was commenced on 17th November 2015 and the Petitioner's services were terminated with effect from 31.01.2016 and therefore it is understood that the proceedings of the preliminary inquiry conducted by the 5th Respondent was concluded by January 2016. However the 2nd Respondent along with his statement of objection had submitted several documents obtained in May 2016 with regard to the Petitioner's previous employments, indicating the interest the 2nd Respondent had taken to obtain information with regard to the Petitioner, which was not available even after the preliminary inquiry.

The second Respondent had produced marked R-10 the mark sheet of the interview held by the 1st Respondent and raised the following issues against the Petitioner;

- a) At the interview, marks were given only to the Petitioner. The other applicants were not given any marks at the interview
- b) The interview board consisted of only two persons, the Minister's Co-ordinating Secretary and the then Chairman of the 1st Respondent. It did not include any permanent officer of the 1st Respondent Board
- c) This interview Board was constituted in irregular manner as stated above
- d) This interview has thus deprived the rights and or opportunities of suitably qualified internal applicants by not selecting any one of them to the post of Deputy General Manger (Corporate Operations) at the 1st Respondent Board
- e) This interview board did not consider the internal applicants who attended this interview who had fulfilled the Higher Management Level experience and educational qualifications as stated in P-1

However when going through the documents placed before this court and the oral submissions made by both the President's Counsel who represented the 2nd and 5th Respondents and the Senior Deputy Solicitor General who represented the 1st, 3rd and 6th Respondents I observe that the said Respondents have failed to substantiate any of the above submissions placed before this court. As further observe by me, the Respondents cannot find fault with the Petitioner if there is any laps in the interview conducted by the 1st Respondent Board and that has to be taken against those who are responsible for conducting the interviews in a disorganized manner.

The 2nd Respondent whilst taking up the position that the Petitioner did not possess the required qualifications of 18 years experience as required to be appointed as the Deputy General Manager had submitted marked R-8 a letter of termination dated 23.03.2011 where the services of the Petitioner had been terminated on disciplinary grounds by his previous employer the Coconut Cultivation Board.

However the above position taken by the 2nd Respondent was challenged by the Petitioner and submitted marked P-42 (c)-(g) documents to establish that the Petitioner was re-instated with all back wages at the Coconut Cultivation Board and was in active service at the time he submitted his application for the post of Deputy General Manager through his employer the Coconut Cultivation Board.

When considering the material placed before this court it is observed by me that,

- a) The Petitioner had applied for the post of Deputy General Manager (Corporate Operation) based on an advertisement appeared in "Daily News" news paper
- b) There is no material to rule out that the interview to select the Petitioner was conducted by a panel consist the following;
 1. Mr. M.G.D. Meegoda Advisor to the Hon. Minister
 2. Mr. Kulasiri Fernando Senior Assistant Secretary
 3. Dr. B. Sivayoganathan Director (Animal Breeding)
 4. Mr. R.M.B. Ellegala Chairman NLDB
- c) The said interview panel after considering the material submitted by the Petitioner and having interviewed him, selected him for the above post
- d) The Petitioner had a pleasant working relationship with the 1st Respondent Board until early part of 2015

- e) In the month of May 2015, the Petitioner was issued with a warning letter reprimanding him for using abusive language to an Assistant Manager after having a disciplinary inquiry by an outside inquirer
- f) Between August and September 2015, the responsibilities and duties entrusted on the Petitioner including farm supervision and tender board activities had been removed
- g) Explanation was called from the Petitioner by 3rd Respondent for leaving the country without informing the Prime Minister's Office between 17th to 24th August even though the Petitioner had obtained approval from the 1st respondent Board
- h) Immediately after his return the Petitioner replied the above letter indicating the necessary provisions of the Establishment Code but the 2nd Respondent by letter dated 9th September rejected the explanation

When considering the sequence of events took place in the year 2015 as referred to above, it appears that, the relationship between the Petitioner and the 1st Respondent Board, specially with the 2nd Respondent, had deteriorated during this period and the 2nd Respondent with the help of the 3rd Respondent had harassed the Petitioner. In this regard this court is further mindful of the fact that the Petitioner was the most senior Deputy General Manager at the 1st Respondent Board, only below the Chairman and the Director Board and the General Manager. As submitted by the Petitioner, the 3rd Respondent who was appointed the acting General Manager was six months junior to him in the position of Deputy General Manager when the General Manager's post become vacant in July 2015.

In the said circumstances it is observed by me that the punishment imposed on the Petitioner by P-25 is disproportionate and issued with *mala-fides*. It is further observed by me that the 1st Respondent Board had (specially the 2nd and 3rd Respondents) made use of the Auditor General's Report to victimize the Petitioner having made use of the decision conveyed to the Petitioner by P-25, without affording him an opportunity to face a proper inquiry, following the rules of natural justice which indicates the *mala-fides* on the part of the 2nd and 3rd Respondents.

In the case of **Sanasirithissa Thera Vs. P.A. de. Silva (1989) 2 Sri LR 356** the Supreme Court discussed the term *mala-fides* in the context of a Fundamental Rights violation as follows:

“In its narrow sense *mala-fides* means personal animosity, spite, vengeance, personal benefit to the authority itself or its relations and friends. At times the courts use the

phrase '*mala-fides*' in the broad sense of any improper exercise or abuse of power, it does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. Where power is used unreasonably or for improper purpose such conduct is *mala-fide* even though the authority may not be guilty of intentional dishonesty."

Article 12 (1) of the Constitution deals with right to equality and states as follows;

"All persons are equal before the law and are entitled to the equal protection of the law"

However, this concept does not mean that all persons in a society are always equal. As such a mechanical concept may create unnecessary injustices in a society. The true meaning of the concept therefore is that equals should not be treated as unequals and similarly unequals should not be treated as equals.

In the said context, it is evident that the decision conveyed to the Petitioner by P-33 was reached in violation of the Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law.

I therefore declare that the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) had been violated by the conduct of the 1st to the 3rd Respondents as discussed in this judgment and make order directing the said Respondents to re-instate the Petitioner in the post of Deputy General Manager (Corporate Operations) with effect from 31st January 2016 with all back wages, on or before 31st January 2018. I further direct the payment of Rupees 1.5 million as compensation to the Petitioner by the 1st Respondent Board. The second and third Respondents are directed to pay Rs. 200,000/- each as compensation to the Petitioner in their personal capacity.

The 1st Respondent is further directed to pay a sum of Rupees 100,000/- to the Petitioner as cost.

Judge of the Supreme Court

Sisira J. De. Abrew J

I agree,

Judge of the Supreme Court

Anil Goonaratne J

I agree,

Judge of the Supreme Court