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

S.C/F.R. No. 39/2013

Abdul Jabar Mohamed Sakir

No. 61, Dambulla Road,

Kurunegala

(On behalf of minor M.S.F. Shameeha)

PETITIONER

Vs.

1. The Principal

   Holy Family Convent

   Kurunegala.

2. The Zonal Director of Education

   Zonal Education Office,

   Kandy Road,

   Kurunegala.

3. Provincial Director of Education

   Office of the Provincial

   Director of Education,

   Kurunegala.

5. Hon. Attorney General
Attorney General's Department
Colombo 12.

11. P.M. Nazir
Deputy Director of Education
Provincial Education Office,
Kurunegala
And 05 others.

RESPONDENTS

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

COUNSEL: Mahanama de Silva for the Petitioner
Rajiv Goonetilleke S.S.C for the Attorney General

ARGUED ON: 12.02.2015

DECIDED ON: 23.03.2015

GOONERATNE J.

In this application the Petitioner complains of violation of a fundamental right, which arose in respect of admitting his daughter to year 1, Holy Family Convent, Kurunegala in the year 2013. The Petitioner invoked the jurisdiction given to this court by Article 126 of the Constitution and he alleges that it is a right infringed which is declared and recognized by Article 12(1) of the Constitution. The facts briefly are as follows.

The main complaint of the Petitioner was that the child of the 4th Respondent had been selected for admission to the above grade (year 1) over and above the Petitioner's child and according to the Petitioner's calculation of marks the 4th Respondent's child could not have been awarded marks over and above of what his child secured and in this respect the authorities concerned had erred. More particularly the Petitioner complains that 4 extra marks had been granted to the 4th Respondent's child for a deed produced as regards proof of residence. However the Petitioner does not contest the marks granted to his child, and also at the hearing it was conceded that he is not the most proximate to the

concerned school. Learned Senior State Counsel in his oral and written submissions strongly urged the following on behalf of the official Respondents.

1. The Petitioner does not reside at the given address; 61 Dambulla Road, Kurunegala, which is a business premises used as a Liquid Petroleum (LP) Gas distributor/sales outlet.

2. In any event, even if the 4th Respondent was not to be granted the marks for the deed as averred by the Petitioner, the Petitioner was not the most proximate to the school. There are others including the Petitioner who had scored the same mark who were more proximate to the school.

3. The 4th Respondent was entitled to the full 10 marks as the interview board had the discretion in interpreting the school admission circular. The admission circular made no mention of marks being reduced if a grandparent of the child (the applicant's father) had died and the parent of the child was to inherit such property.

Admission of students to the school in question is governed by circular annexed marked P1. (Circular No. 2012/19). By letter P2 Petitioner's application for admission of his child was rejected. Letter P2 indicates that the petitioner's child obtained 90 marks, and as per the selection procedure and interview the minimum marks required for admission of a child would be 93. As the Petitioner was not agreeable to the marks allocated in letter P2, Petitioner as pleaded, met the Chairperson of the Interview Board and informed him

accordingly. Thereupon the Petitioner was given letter P3, requesting him to attend an interview on the same day. Petitioner pleads that he produced all documents required by P3. However Petitioner states two other lists had been exhibited on the notice board of the school which included a temporary admission list of selectees and a 'waiting list'. By the temporary admission list the 4th Respondent's child had been selected and allocated 90 marks. In the waiting list (as in para 9 of the petition) the following names appear.

NAME	**MARKS ALLOCATED**
1. M.S.F. Shameeha (Petitioner's child)	90
2. M.F.F. Shamha	90
3. F.A Ashik	90

Petitioner at all stages of the selection procedure complains of the admission of the 4th Respondent's child. According to the Petitioner the 4th Respondent's child would be entitled to only 81 marks, and therefore the Petitioner's child having obtained 90 marks should be selected (P4). On or about 28.11.2012 Petitioner lodged an appeal on the above basis, and has maintained the above position even before the Appeals' Board. However on or about 13.12.2012 the final list of children admitted had been exhibited, and the 4th

Respondent's child had been allocated 92 marks and selected. The day after, on 14.12.2012 he lodged an appeal with the Human Rights commission (P6). Petitioner refers to Electoral registers P7A to P7E Applicable to the 4th Respondent and state, 4th Respondent's wife is not registered. As such only 25 marks could be allocated in terms of clause 6:1 of P1. The authorities have given 35 marks according to the information Petitioner had received. Another point

stressed is that 4th Respondent is residing in an address given by him and it was owned by 4th Respondent's father. In terms of Circular P1 Clause 6:IV only 6 marks could be given. 4th Respondent cannot be allocated the full 50 marks because of intervening schools close to his residence. Therefore Petitioner pleads selection of 4th Respondent's child is arbitrary and capricious and it violates Article 12(1) of the Constitution.

The subject of school admissions to Government schools have become highly competitive. It is evident that very many parents with the birth of their child, anticipate and plan well ahead of time to gain admission to a school of their choice. The growing population in the country has made it a difficult and a complex task for the authorities in the Education field to provide a school of one's choice. There were three matters highlighted by the learned Senior State counsel

in his submissions before this court, as described above. Consequent upon an appeal to the persons concerned by the Petitioner, a site inspection was carried out and it was found that the Petitioner was not resident within the premises relied upon by the Petitioner. The 3rd Respondent by an affidavit filed in this court states that the premises in question is a commercial premises used as a 'Gas' sales outlet (some photographs produced R2-R5). Whether such premises was used for both residential and commercial purposes would be a question of fact that the petitioner alone should establish. In fact he states he had moved out of such place due to road expansion.

Respondents also produce an important letter 14R3 which was annexed to the 11th Respondent's affidavit. Contents of 14R3 suggests that it is a commercial/business premises and cannot confirm that the Petitioner is resident in such premises. 14R3 is a letter issued by the Jumma Mosque of the area. Petitioner has also produced X20 which confirm that the petitioner is of Muslim origin. It is also gives details of family and the address. I do not think there is any conflict in the above two letters. More weight should be given to letter 14R3, which specifically refer to the question of a business premises.

Our attention was also drawn to Clause 8,3 (අ) and 10:8 of Circular P1, which requires the rejection of the Petitioner's application if residential requirement is found to be incorrect. Accordingly official Respondents submit that the Petitioner's application was rejected since he was not resident in the given address. The official Respondent's further plead that they also informed the Human Rights Commission of the above facts (R1 & 14R2).

I have also considered the submissions of learned counsel for the Petitioner that two additional marks had been added to the 25 marks already allocated to the electoral register. This position seems to have transpired before the Human Rights Commission. Our attention was also drawn to document 14R6 and more particularly cage 2 of same and the hand written portion below cage 2 of 14R6. I observe that it is not legible at all but even if it could be accepted that two more marks cannot be added or such calculation remains unexplained, I have to accept the argument put forward by the learned Senior State Counsel that the Petitioner was not the most proximate to the school in question. Further it is difficult for this court to draw mala fides on the part of the official Respondents, based on mere assertions. It would be essential that in the performance of a

public duty evidence should established something more than mere suspicions. In any event a high degree of proof should be placed before court, to enable court to arrive at such a decision based on mala fides.

There is this factor of proximity that cannot be ignored as regards school admissions. Proximity to the school in question, become highly competitive for those who profess the Islam faith since the religious quota permits only the admission of one Muslim child. The 4th Respondent's child was according to the authorities concerned the most proximate to the school and two other children with equal marks were more proximate, to the school than the Petitioner's child. As such the Petitioner's right to be selected on this basis becomes more diminished and no chance of success at all. Document 14R5 indicates that the parents of F.A Ashik who was the next most proximate child than the Petitioner's had filed a SCFR Application 41/2013 challenging the selection of 4th Respondent's child. This court had refused to grant leave to proceed on 16.05.2015, to the Petitioner in that application.

Learned counsel for the Petitioner strenuously argued that the 4th Respondent was only able to submit a deed of his late father (child's grand-father) and his entitlement would be only for 6 marks as per clause 6:1 (ii) of Circular P1,

and the authorities concerned could not have given 10 marks. In case of death of the parent's father or mother who had title to the property by way of a deed and who had by the relevant time passed away, the laws of succession is clear on the point as immediately on death the property of the deceased parent's would vest on the heirs. On the death of a person his estate in the absence of a will passes at once by operation of law to his heirs and the dominium vests in them. Once vested they cannot be divested of it except by several well-known modes recognized by law 10 NLR at 242.

Circular P1 does not contemplate such a situation. Clause 5:6 of P1 grants the Interview Board a discretion to interpret the circular and make a log entry. 11th Respondent had produced the log entry marked 14R8.

Article 12(1) would ensure that invidious distinction or arbitrary discrimination should be avoided, by the state. It seems to lay down a general rule of equality. It only guarantees a right to equality of opportunity for being considered, as in the case in hand for selection of a child to a Government school. In the process of selection of a child there could be and there may occur some mistakes or wrongs that could be identified. But I do not think that every wrong

or mistake could attract the fundamental rights jurisdiction guaranteed by the Constitution. In the case in hand this court was invited to consider certain aspects of admissions of Petitioner's child who had flagrant and vital lapses that could not have given an edge over all others in the run. i.e 'residency' requirement.

In fact emphasis of the Petitioner was on the basis of the 4th Respondent's child's selection and nothing else. On one hand Petitioner himself should have come with clean hands and not left room for court to doubt the 'residency' requirement. On the other hand the Selection Board had to perform a difficult task as the quota available was limited to select only one child from among the Muslim Community.

In the above circumstances before I conclude it would be important to also give our mind to the question as to when the Supreme Court or under what circumstances court will intervene, and to take cognizance of the distinction between ordinary rights and fundamental rights. I am guided by the following decided case, which amply demonstrate that the Petitioner cannot in any event, rely on the fundamental rights jurisdiction of this court, in the circumstances and context of this application.

In W.K. Nimala Wijesinghe Vs. A.G and Others. S.C Application 13 of 1979.

Held:

(1) The Supreme Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and its powers are given in very wide terms; but the authority of the Supreme Court is not absolute, for these powers are subject to certain well defined principles and it is conceded that there are limits which the Supreme Court cannot transgress, however hard and unfortunate a case may be. The Supreme Court has to take congnizance of the distinction between ordinary rights and fundamental rights and it is only a breach of a fundamental right that calls for intervention of Court.

Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgment, a person cannot be allowed, to come under Article 126 and allege that there has been a violation of the constitutional guarantees.

(2) The Petitioner may legitimately complain of a grave miscarriage of justice, but that is not enough to establish that the procedure adopted by theexecutive in discontinuing her has impinged on the fundamental rights secured to her by the Constitution.

Per Sharvananda, J.: "Though the Petitioner has suffered a miscarriage of justice, yet this Court is helpless in affording any relief. The jurisdiction of this Court under Article 126 of the Constitution is limited to hearing and determining only questions relating to the infringement of a fundamental rights."

In the above circumstances I have no alternative but to dismiss the Petitioner's application. The Respondents, however, will not be entitled to any 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