

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

**LANKA**

In the matter of an Application for under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**S.C. (F.R.) Application No. 141/2017**

Dr. Indika Mudalige,  
391/3C, 2<sup>nd</sup> Lane, Ekamuthu Mawatha,  
Thalangama North, Battaramulla.

**Petitioner**

**Vs.**

1. National Water Supply and  
Drainage Board,  
Ratmalana.
2. G.A Kumararatna,  
General Manager,  
National Water Supply and  
Drainage Board,  
Ratmalana.
3. Mangala Abeysekera,  
Project Director,  
National Water Supply and drainage  
Board,  
Ratmalana.

4. Sarath Chandrasiri Vithana,  
Secretary,  
Ministry of City Planning and Water  
Supply,  
No.05, 'Lak Diya Medura',  
New Parliament Road,  
Pelawatte, Battaramulle.
5. K.D Ebert and Sons Holdings (Pvt) Ltd,  
No. 5/41, Madiwela Road,  
Embuldeniya, Nugegoda.
6. JITF-KDESH JV (Pvt) Ltd,  
No.5/41, Madiwela Road,
7. Asian Development Bank (ADB)  
Sri Lanka Resident Mission,  
23, Independence Avenue,  
Colombo 07.
8. Hon. Attorney General,  
Attorney General's Department  
Colombo 12.

**Respondents**

Before: B.P Aluwihare, PC, J.  
Priyantha Jayawardena, PC, J.  
L.T.B Dehideniya, J.

Counsels: Senany Dayaratne with D. Imbuldeniya for the Petitioner.

Sanjeeva Jayawardena, PC with Nilshantha Sirimanne for the 5<sup>th</sup> and 6<sup>th</sup>  
Respondents instructed by K. Upendra Gunasekara.

N. Pulle, DGS for the AG.

Argued on: 09.01.2019

Decided on: 25.11.2022

**L.T.B. Dehideniya, J.**

The Petitioner invokes the jurisdiction of this court alleging the infringement of Fundamental Rights guaranteed under the Article 12(1) and the Article 14(A) of the Constitution by the Respondents.

The Petitioner is a Medical Doctor and Consultant Psychiatric by Profession. The Petitioner has filed the instant application on the ground that a grave irregularity has been committed in relation to the tender contract No. GSWWMIP/AFD/AMB/CIVIL/ICB/04 (document marked as **P-3**) awarded by the National Water Supply and Drainage Board (hereinafter sometime referred to as the 1<sup>st</sup> Respondent) to the 5<sup>th</sup> and 6<sup>th</sup> Respondent companies. The said tender was proposed to implement the project of *'AFD Contractual Co- Financing- Ambatale Water Supply System Improvement and Energy Saving Project – Supply and Laying of 9km of DI Pipes (1200mm) from Ambatale to Colombo City Limit'*.

Petitioner states that as a mandatory requirement, a party who awarded a tender contract must comply with all the technical standard specifications in order to precede the project. Petitioner submits that according to the specifications for DI pipes and fittings (document marked as A),

the Restrained Self Anchoring Joints which are to be used in the project must comply with ISO10804:2010 standards or equivalent. The Petitioner's position is that the Respondent companies which were awarded the tender do not comply with the necessary standards of the equipment. The Petitioners contention is that the 1<sup>st</sup> - 4<sup>th</sup> Respondents have acted illegally attempting to change the standards, conditions and requirements set out at the time of calling for tenders, after awarding the said tender.

It was further submitted by the Petitioner that as a result of the high pressure of the water contained within the pipes, and the weight of the pipes themselves, the joints on the pipe line must be of very superior manufacture and quality to prevent the joints from breaking and leaking. Moreover, the Petitioner states that since the Ambathale water pumping station is situated adjacent to the Kelani river, such waterlogged soil will necessarily provide very poor support for the heavy iron pipes and therefore the Restrained Self Anchoring Joints which are to be used to connect the pipes used in the said project will have to be of superior quality.

The Petitioner argues that the decision to award the contract to the 5<sup>th</sup> and 6<sup>th</sup> Respondents have a severe effect of endangering the safety of the public and unlikely to cause immense hardship to the water consumers who utilize the water supplied by the 1<sup>st</sup> Respondent for their daily needs and cause a great financial loss to state and citizens of Sri Lanka. The Petitioner states that he has a right to prosecute this application on his own behalf and behalf of citizens of Sri Lanka in the Public Interest.

When this matter was taken up for support, the Respondents raised several preliminary objections with regard to the maintainability of this application, in particular, the jurisdiction of the Supreme Court to entertain and hear the Petitioner's Application. The principal objection was that the Application of the Petitioner has been filed outside the mandatory period of one month

stipulated in **Article 126(2)** of the Constitution and on that basis, the Respondents moved to have this application dismissed in limine.

**Article 126(2)** of the Constitution reads as follows:

*“Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement..” (emphasis added)*

To consider whether the Petitioner has complied with Article 126 (2), in relation to the alleged conduct of the Respondents that the Petitioner is challenging, this Court has to carefully examine the dates which have been submitted by the Respondents.

The Respondents submit that the invitation to bid for the Tender in question was called for by the Chairman of the Standing Cabinet Appointed Procurement Committee and it was publicly advertised on or about 30.06.2014 (document marked as **X-2**). The 5th and 6 Respondents submitted their bid on 09. 09. 2014. Through a letter dated 06.10.2014 the 1<sup>st</sup> Respondent had sought clarification from several potential bidders, including the 5th and 6 Respondents, with regard to the type test approval done in accordance with the ISO 10801:2010 standard in respect of restrained pipes and fittings (document marked as **X-4**). It was submitted that once clarifications were provided, the 1<sup>st</sup> Respondent referred it to the Technical Evaluation Committee for evaluation and the 5<sup>th</sup> and 6<sup>th</sup> Respondents’ bid was accepted on or about 15. 12.

2014. The Standing Cabinet Appointed Procurement Committee approved the awarding of tender to the 5th and 6th Respondents on or around 23. 06. 2015. Thereafter one of the unsuccessful bidders appealed to the Procurement Appeal Board. In appeal, the Procurement Appeal Board gave its decision and approved the Tender award to the 5th and 6th Respondents on 10. 08. 2015 (vide document marked **X-16**). After forwarding the decision of the Procurement Appeal Board and the recommendation of the Cabinet Appointed Procurement Committee to the Cabinet of Ministers, the Cabinet of Ministers approved the awarding of the tender to the 5<sup>th</sup> and 6<sup>th</sup> Respondents on 05.11.2015. The said Decision of the Cabinet was published in newspapers and made to the public on 07.11.2015 (vide the Cabinet Memorandum and the announcement marked **X-17**).

It is noteworthy that the accuracy of the aforementioned dates have not been contested by the Petitioner. Therefore, it seems at first glance that the alleged infringement of the Fundamental Rights stated by the Petitioner has continued for more than a year, with the very last stage of approval taking place on **05.11.2015** and the same being communicated to the public on **07.11.2015**. The Petitioner in his submissions has provided an explanation for the objection of the time bar. The Petitioner submits that at the beginning, all that the Petitioner had was a suspicion that the 1<sup>st</sup> Respondent was acting illegally in sanctioning the use of sub-standard equipment by the 5<sup>th</sup> and 6<sup>th</sup> Respondents and therefore; the Petitioner did not invoke the jurisdiction of this Court at the time.

According to the Petitioner's submissions, after having a suspicion on the actions of 1<sup>st</sup> Respondents, the Petitioner made a request to the 1<sup>st</sup> Respondent under the Right to Information Act No.12 of 2016 regarding the information pertaining to the tender in question on or around 21.03.2017 (vide the letter of request marked as **P-8** and the postal article receipt marked as **P-**

**8(a)**). The Petitioner further submits that, the said request for information gave the 1<sup>st</sup> Respondent a time period of two weeks to respond to the queries of the Petitioner, which was up to 04.04.2017 and since the Petitioner did not receive any response, the Petitioner filed the present application on 11.04.2017. Therefore, the Petitioner argues that he invoked the jurisdiction of this Court within one month of posting the said request for information from the 1<sup>st</sup> Respondent.

When considering all the circumstances discussed above, it appears that it has taken nearly two years to the Petitioner to make a request for information from the 1<sup>st</sup> Respondent, from the final Decision of the Cabinet was published in newspapers and made to the public on 07.11.2015. If the Petitioner had a strong desire to inquire about violation of fundamental rights, the said request for information under the Right to Information Act No. 12 of 2016 could have been made within a reasonable time after the final decision of granting the tender was made public. Almost two years from the final decision had been made to public cannot be considered as a reasonable time.

Judicial view of the objection of time bar in a Fundamental Rights application has been discussed in a range of case law.

In the case of *Edirisuriya v. Navaratnam* (1985) 1 Sri LR 100 at p.105-106 it was held that this Court has consistently proceeded on the basis that the time limit of one month set out in Article 126(2) of the Constitution is mandatory. Further, in the case of *Ilangaratne vs. kandy Municipal Council* [1995 BALJ Vol.VI Part 1 p.10] his Lordship Justice Kulatunga observed that, the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – i.e. after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is

complained of and if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application.

A similar view has expressed in the case of *Demuni Sriyani de Soyma and others v. Dharmasena Dissanayake* (SC/FR 206/2008, SC Minutes dated 09.12.2016)

Per Justice Prasanna Jayawardena PC at p.8

*“Article 126(2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may ... “within one month thereof” ... apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126(2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.*

*The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution.*” (emphasis added)

However, the court has in exceptional circumstances exercised its discretion to consider applications for fundamental rights when the Petitioner was prevented from taking actions that would have allowed the filing of a petition within one month of the alleged violation and if there had been no lapse on the part of the Petitioner. This principle was laid down in the case of



*Gamaethige vs. Siriwardena* (1988) 1 Sri L.R 384, where Justice Mark Fernando held that, while the time limit is mandatory, in exceptional cases, on an application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the Petitioner, this Court has a discretion to entertain an application made out of time.

It is important for this Court to decide whether there are any exceptional circumstances to look into in the present application. When considering the required standard to prove exceptional circumstances, in the case of *K.H.G Kithsiri v. Hon. Faizer Musthapha MP, Minister of Provincial Councils and Local Government and Others* (SC/FR Application No.362/2017, SC minutes dated 10.01.2018) it was held that;

At p. 8

*“If the facts and circumstances of an application make it clear that a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from that date on which he should have become aware of the alleged infringement.”*

The Petitioner in the instant application has not submitted any evidence on exceptional circumstances occurred, which led to a late application of fundamental rights. And in the period of nearly two years that has passed before filing this application, no evidence has been presented regarding any other attempt by the Petitioner to question the legality of the tender in question.

While the Fundamental Rights are an integral part of the Constitution, it would be incorrect to term them as unconditional. These rights, by the Constitution itself, are restricted by conditions which aim to balance the individual freedom and rights to the necessity of public good and

welfare. In such a background, This Court cannot be justified to allow such an attempt to bring in a fundamental rights application that has already time barred due to a limitation established by the Constitution itself.

In the above circumstances, I uphold the preliminary objection on time bar raised on behalf of the Respondents and dismiss the Application of the Petitioner in limine.

**Judge of the Supreme Court**

**B.P. Aluwihare, PC, J.**

I agree

**Judge of the Supreme Court**

**Priyantha Jayawardena, PC, J.**

I agree

**Judge of the Supreme Court**