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

S.C . (FR) Application
No.117/2011

1. T.G. Samadi Suharshana Ferdinandis,
   No.W/2/1, Anderson Flats,
   Kirula Road,
   Colombo 05.

2. T.G.R. Prasanna Ferdinandis
   No.W/2/1, Anderson Flats,
   Kirula Road,
   Colombo 05.

Petitioners

Vs.

1. Mrs. S.S.K. Aviruppola,
   Principal,
   Visakha Vidyalaya,
   Vajira Road,
   Colombo 04.

2. Director National Schools,
   Isurupaya,
   Battaramulla.

3. Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

4. Hon. The Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

BEFORE	:	Dr. Shirani A. Bandaranayake, CJ. P.A. Ratnayake, PC., J. & R.K.S. Suresh Chandra, J.
COUNSEL	:	Saliya Pieris with Thanuka Nandasiri for Petitioners Avanti Perera, SC., for Respondents
ARGUED ON	:	01.08.2011
WRITTNE SUBMISSIONS TENDERED ON	:	Petitioners : 05.10.2011 Respondents : 03.10.2011
DECIDED ON	:	25.06.2012

Dr. Shirani A. Bandaranayake, CJ

The petitioners, who are the minor child and the father of the said child respectively, alleged that by failing to admit the 1st petitioner to Grade I of the Visakha Vidyalaya,

Colombo 4 for the year 2011, the respondents have violated their fundamental rights guaranteed in terms of Article 12 (1) of the Constitution for which Leave to proceed was granted by this Court.

The facts of this case, as submitted by the petitioner, *albeit* brief, are as follows:

The 2nd petitioner had made an application, at the time applications were called for admissions of students to Grade I of the National Schools for the year 2011, for the admission of the 1st petitioner to Grade I of Visakha Vidyalaya, Colombo 4. The said application was made under the category of Chief Occupant's Children, whose parents were residing in close proximity to the school.

The petitioners were called for the interview, which was held on 08-09-2010 and at the said interview, the 2nd petitioner was informed that they were allotted 50 marks. The 1st petitioner's name was in the provisional list of students to be admitted and the marks allocated to the 1st petitioner was indicated under the reference No.C0146. The petitioners had not taken any steps to appeal regarding the marks that were not allotted to them as the 1st petitioner's name was included in the provisional list.

The petitioners submitted that an objection had been raised against the 1st petitioner's admission. Accordingly, the 2nd petitioner was called before the Board of Appeals and Objections on 18-11-2010.

Thereafter the permanent list of applicants who were selected was published in the school's Notice Board and the 1st petitioner's name had been removed from that.

The 2nd petitioner therefore had made a complaint to the Human Rights Commission against the 1st and 3rd respondents stating that the petitioner's fundamental rights have been violated by the said respondents by failing to admit the 1st petitioner to Visakha Vidyalaya.

An inquiry was held at the Human Rights Commission on 15-02-2011. At the said inquiry, the 2nd petitioner had come to know that the petitioners had been given only 45 marks after he went before the Board of Appeals and Objections. The 1st respondent had informed at the Human Rights Commission that initially they had allotted 35 marks to the petitioners under the criteria of Residence and later on upon the objections received against the petitioners that it was found that the said allocation of marks was incorrect and therefore had deducted 7 marks for the year 2008 as in 2008 both names of the parents of the 1st petitioner had not been in the electoral Register.

The petitioners submitted that at the inquiry before the Human Rights Commission the 1st respondent had submitted the Mark Sheet (P8) for their perusal. At that time it was also revealed that the original 50 marks that were allocated was reduced to 45 marks as 5 marks had to be deducted from the petitioners on the basis of the school known as Lanka Sabhawa being situated in close proximity to petitioners residence.

It was submitted by the learned Counsel for the petitioner that at the time of hearing as well as initially during the leave to proceed stage that the only ground that was raised had been on the basis of 5 marks being deducted for the school known as Lanka Sabhawa.

Accordingly, the petitioners alleged that the respondents had failed to award the entirety of the marks they were entitled to under the Circular issued by the Ministry of Education (P2) and that their fundamental right guaranteed in terms of Article 12 (1) had been violated by the respondents in failing to admit the 1st petitioner to Grade I of Visakha Vidyalaya, Colombo 4 for the year 2011.

It is not disputed that the admission to Grade I of the Government Schools were carried out on the basis of the Circular marked P2. Clause 6 of the said Circular deals with the basis of admission of the children whose parents are residing in close proximity to the relevant school. The main issue that had been raised at the stage of leave to proceed

and later at the stage of hearing was based on the provision laid down in paragraph 6 (1) B (iv) of the Circular. The said provision refers to the proximity to school from residence in question. The said provision is as follows:

> **"පදිංචි ස්ථානයේ සිට පාසලට ඇති ආසන්නතාවය**
>
> පදිංචිය සනාථ වන්නේ නම් පදිංචි ස්ථානයේ සිට ඉල්ලුම් කරනු ලබන පාසලට වඩා ආසන්නයේ අදාළ දරුවාට ඇතුළත් වීමට හැකි ප්‍රාථමික අංශ සහිත වෙනත් රජයේ පාසල් නොමැත්තේ නම් උපරිම ලකුණු ලබා දෙනු ඇත. . . ."

In terms of the aforesaid provision, if there are no Government Schools for which the child could be admitted, closer in proximity to the applicant's residence, then the applicant is entitled to the full 50 marks allocated under this category.

It is however, important to note the contents of the second limb of this provision, which states as follows;

> " ඉල්ලුම් කරන පාසලට වඩා පදිංචි ස්ථානයට ආසන්නයේ දරුවාට ඇතුළත් වීමට හැකි ප්‍රාථමික අංශ සහිත වෙනත් රජයේ පාසල් පිහිටා ඇත්නම් උපරිම ලකුණු ප්‍රමාණයෙන් ආසන්න එක් පාසලක් වෙනුවෙන් ලකුණු 05 බැගින් අඩු කරනු ඇත. අදාළ දරුවාට ඇතුළත් වීමට හැකි ප්‍රාථමික අංශ සහිත වෙනත් රජයේ පාසල් යනුවෙන් අදහස් කරන්නේ එම දරුවාට ඇතුළත්වීමට අවශ්‍ය මාධ්‍යය සහිත පාසලක්ද තමන්ට

අදාල ගැහැණු හෝ පිරිමි පාසලක්ද මිශ්‍ර පාසලක්ද යන්න සහ අදාළ ළමයා අයිති ආගම වෙනුවෙන් 10% හෝ ඊට වැඩි ප්‍රතිශතයක් ඇතුලත් කර ගන්නා රජයේ පාසල් වේ."

Accordingly, in the event if there are schools which are closer in proximity to the residence of the applicant than the school he had applied for and provided the said school falls within the relevant categories of language, gender composition and the religious ratio, 5 marks each would be deducted from the allocated maximum marks of 50.

Paragraph B of the document marked P8 lists out the schools which are closer in proximity to petitioners' residence. The said schools are as follows:

1. Sirimavo Bandaranaike Vidyalaya
2. Dudley Senanayake Vidyalaya
3. Mahamathya Maha Vidyalaya
4. Sujatha Balika Vidyalaya
5. Sri Parakramabahu Maha Vidyalaya
6. Vidyathilake Vidyalaya
7. St. Paul's Balika Vidyalaya
8. Lumbini Maha Vidyalaya
9. Lanka Sabhawa Vidyalaya

At the time the applications were made, 5 marks each had been deducted with regard to the aforementioned nine (9) Schools, which were considered as schools that were closer in proximity to the petitioners' residence than was the Visakha Vidyalaya. A total of 45 marks had been therefore deducted from the total of 50 marks and for the said category the petitioners were given only 5 marks.

Learned State Counsel for the respondents submitted that at the interviews held to select the students, the school listed as No.7 in the above list was excluded from and among the said nine (9) schools and therefore a total of 10 marks out of the 50 marks had been awarded to the petitioners.

Learned State Counsel for the respondents further contended that although the petitioners have now raised objections for the deduction of 5 marks for the Lanka Sabhawa Vidyalaya being in close proximity to petitioners' residence than the Visakha Vidyalaya, that the petitioners had not raised that question at the time they faced the interview or later before the Objections and Appeals Board.

Learned Counsel for the petitioners contended that petitioners had claimed that they had information that at the time the petitioners were called for the interviews, Lanka Sabhawa Vidyalaya was closed and the students in that school had been admitted to Mahamathya Vidyalaya, Colombo 5 and St. Lawrence College, Colombo 5. Learned Counsel for the petitioners further contended that in 2011, a Tamil medium school known as Kumara Udayan Tamil Vidyalaya was opened in the same premises where Lanka Sabhawa had been functioning. The contention of the learned Counsel for the petitioners was that since the medium of instructions of the said school is in Tamil, the 1st petitioner cannot be admitted to that school as she has to study in the Sinhala medium. It was also submitted on behalf of the petitioners that discussions were on since September 2010 regarding the closure of the said school and the final decision was taken in December 2010.

The contention therefore was that the respondents could not have deducted five (5) marks on the basis that Lanka Sabhawa Vidyalaya is also situated in closer proximity to the petitioners' residence than to Visakha Vidyalaya, if a decision to close the said school had been contemplated during that time.

Both the 1st and 3rd respondents, being the Principal of Visakha Vidyalaya and the Secretary of the Ministry of Education, respectively had averred in their affidavits as to the events that had taken place prior to the closure of the Lanka Sabhawa Vidyalaya.

According to the affidavit of the 3rd respondent, Lanka Sabhawa Vidyalaya, being a Sinhala medium school had called for applications for Grade I students for admissions in the year 2011. The said school however had not received any applications. On 27-12-2010, a decision had been taken to close the said school and transfer its students to other schools.

The Zonal Director of Education had referred to this decision in his letter sent to the Secretary of the Ministry of Education which is as follows:

"....

> කොළඹ අධ්‍යාපන කලාපයට අයත් ලංකා සභා විදුහලේ 2010 වර්ෂයේ අගෝස්තු මාසය වන විට 1 ශ්‍රේණියේ සිට 11 ශ්‍රේණිය දක්වා සිටි ශිෂ්‍ය ශිෂ්‍යාවන් ගණන 62 කි. 2011 වර්ෂය සඳහා 1 ශ්‍රේණියට සිසුන් බඳවා ගැනීම සඳහා 2010.06.30 දින දක්වා අයදුම්පත් කැඳවා තිබුනද, එකද අයදුම්පතක්වත් ලැබී නොතිබුන බැවිනුත් පාසැලේ ඒ වන විට සිටි ශිෂ්‍ය සංඛ්‍යාව ඉතා අඩු මට්ටමක පැවති බැවින්ද, භෞතික හා මානව සම්පත්වල ඌන උපයෝජනය අවම කර ගැනීම සඳහාත් දරුවන්ට විධිමත් අධ්‍යාපනයක් ලබාදීම අරමුණු කර ගනිමින් එම සිසුන්ගේ මව්පියන්ගේ කැමැත්ත අනුව එම දරුවන් අවට ඇති පාසැල්වලට

අනුයුක්ත කිරීමට 2010.12.27 වන දින කොළඹ අධ්‍යාපන කලාපයේ සංවර්ධන කමිටු රැස්වීමේදී තීරණය කරන ලදී. මෙම තීරණය ස්ථිර වශයෙන් ගැනීමට පෙර 2010 සැප්තැම්බර් 01 දිනෙන් පසු ප්‍රදේශය නියෝජනය කරන මන්ත්‍රීතුමන්ලා මව්පියන් හා කලාප සංවර්ධන කමිටුව විසින් වාර කිහිපයක්ම මේ පිළිබඳව සාකච්ඡා කළ බවද තවදුරටත් දන්වමි."

It is not disputed that the petitioners had been called before the Appeals and Objections Board on 18-11-2010. According to the 1st respondent, who is the Principal of Visakha Vidyalaya, Colombo 4, Lanka Sabhawa Vidyalaya was included in the list as a Sinhala medium school that should be taken into consideration for the purpose of ascertaining whether the petitioners are resident in closer proximity to other schools for which they are eligible to apply.

Considering the aforementioned, it is apparent that the respondents have strictly adhered to the conditions laid down in the Circular issued by the Ministry of Education. It is also evident that the decision to close Lanka Sabhawa Vidyalaya had been taken on 27-12-2010. By that date not only the interviews, but also the appeals had been considered by the 1st respondent. It is also to be noted that 5 marks had been deducted not only for the petitioners on the basis of Lanka Sabhawa Vidyalaya situated in closer proximity to the residence of the applicant, but also for 146 other applicants to Visakha Vidyalaya. Moreover, the 1st respondent in his affidavit had averred that, if those 5 marks had not been deducted in all those applications, the admission cut-off mark to the 1st respondent school would have been higher than 50 marks. If that had been the situation, even if 5 marks had been added to the full marks to make it 50 marks, the 1st petitioner would have faced the same predicament as at now since 50 marks would not be sufficient for the 1st petitioner to gain admission, as with the

change of the deduction of 5 marks, the cut-off marks to the 1st respondent school also would have got changed.

Learned Counsel for the petitioner contended that in terms of Clause 6.1.II of the Circular issued by the Ministry of Education (P2), marks were allocated on the basis of the nature of Residency of the applicant and if the applicant submitted a title deed in order to prove permanent residency full marks were allocated to him. However ten marks are given on other instances such as the title deed, being in the name of a parent or the residence being taken on a lease agreement.

Learned Counsel further submitted that considering the documents submitted by the petitioners it has been clearly established that they were permanently residing at the given address and therefore they should have been given more marks.

It is not disputed that the petitioners had submitted a lease agreement with regard to their residency.

Clause 6.1 (II) of the Circular is as follows:

> “ **පදිංචිය තහවුරු කරන ලේඛන**
>
> අදාළ පුද්ගලයාගේ නමට පදිංචිය තහවුරු කරන ලේඛනය පැවරී වසර 05 හෝ ඊට වැඩි කාලයක් ගත වී ඇත්නම් සම්පූර්ණ ලකුණුද වසර 05 අඩු හා වසර 03 ක් හෝ ඊට වැඩි කාලයක් ගත වී ඇත්නම් මුලු ලකුණු ප්‍රමාණයෙන් 75% ක්ද වසර 03 ට අඩුනම් මුලු ලකුණු ප්‍රමාණයෙන් 50% ක ලකුණු ප්‍රමාණයක්ද ලබා දෙනු ඇත.

පදිංචි ස්ථානයේ හිමිකම් ඔප්පුව

ඉල්ලුම්කරුගේ/කලත්‍රයාගේ නමට පදිංචි ස්ථානයේ හිමිකම් ඔප්පුව ඇත්නම් (පැවරුම්/තෑගී) - ලකුණු 10

ඉල්ලුම්කරුගේ/කලත්‍රයාගේ මවගේ හෝ පියාගේ නමට පදිංචි ස්ථානයේ හිමිකම් ඔප්පුව ඇත්නම්
(පැවරුම්/තෑගී) - ලකුණු 03
(අනෙකුත් අයගේ නමට ඇත්නම් මෙම ලකුණු ලබා නොදෙනු ඇත).
පත්ඉරු හා දෙවන පිටපත් පරීක්ෂා කර තහවුරු කරගනු ඇත.

ලියාපදිංචි බදු ඔප්පුව/රජයේ නිල නිවාස ලේඛනය -
ලකුණු 04
(තනිකඩ නිල නිවාසවල පදිංචිකරුවන් අදාල කර නොගැනේ).

ලියාපදිංචි නොකළ බදු ඔප්පුව - ලකුණු 02
(උපරිම ලකුණු 10)”

The aforementioned Clause 6.1 (II) clearly shows that for a registered lease agreement only 04 marks would be allocated. As stated earlier, the 1st respondent had admittedly allocated 4 marks for the petitioners on the basis that they were having a registered lease agreement. As could be clearly seen, in this type of an application, what is being challenged is only the application and the interpretation of the relevant Clause of the

Circular in question and not the reasonableness or the arbitrariness of the provisions of the said Circular.

A perusal of the material facts and a careful consideration of the said facts and the submissions, clearly indicate that the 1st respondent had strictly adhered to the provisions laid down in the Circular pertaining to the admission of children to Grade I for the year 2011 issued by the Ministry of Education. The provision in Clause 6.1 (II) is quite clear and there are no complexities on its application. Also one cannot find fault with the interpretation given by the 1st respondent in the allocation of marks under Clause 6.1 (II). Learned Counsel for the petitioners submitted that under Clause 6.1 (II) of the Circular, additional 5 marks are given for additional documents such as National Identity Card, Electricity Bills, Water Bills, Telephone Bills, Marriage Certificate etc. It was contended that the said additional documents are for the purpose of further strengthening the residency of the applicant, which had been already proved by the other documents and therefore no purpose is served by submitting Water, Electricity and Telephone Bills for a period of 5 years.

It is to be noted as stated earlier, the said submission is challenging the reasonableness of the Circular issued by the Ministry of Education. That should have been carried out within one month of the issuance of the said Circular in terms of Article 126 of the Constitution. The validity or the arbitrariness of the Circular cannot be challenged at this stage and the only question that has to be looked into is as to whether marks had been allocated to the petitioners in terms of the Circular.

Considering the facts and the submissions of this application there is no doubt that the authorities have allocated the relevant marks to the petitioners in terms of the provisions laid down under the Circular issued by the Ministry of Education.

The petitioners' grievance was that since the 1st petitioner was not admitted to Visakha Vidyalaya that her fundamental rights guaranteed in terms of Article 12 (1) had been violated by the respondents.

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

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

The Constitutional provision guarantees the concept of equality before the law, which has been recognized as a dynamic concept with many facets within the concept itself.

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 these circumstances, reasonable classification cannot be rejected as a violation of Article 12 (1) of the Constitution, if it is a valid classification that is not arbitrary. As has been repeatedly stated referring to the well known decision in **Ram Krishna Dalmia v Justice Tendolkar** (A.I.R. 1958 S.C. 538), it is necessary to satisfy two conditions for such a classification to be valid.

1. The classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

2. That the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved.

Therefore an act cannot be attacked on the basis of violation of the right to equality stating that there had been differentiation. Considering Article 14 of the Indian Constitution, which is similar to Article 12 (1) of our Constitution, the Indian Supreme Court in **Union of India v Valliappan** (A.I.R. 1999 S.C. 2526) had observed that,

> " It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."

The grievance of the petitioners is based on the marks allocated to them under the Circular issued by the Ministry of Education, that they were discriminated as the 1st petitioner was not admitted to Visakha Vidyalaya, Colombo 4.

It was shown very clearly earlier as to how the marks were allocated under different headings in terms of the Circular issued by the Ministry of Education, and how much marks that the petitioners were entitled to under the said scheme. The petitioners had also alleged that the categorisation of marks under the Circular was not correct. It is however to be noted that the petitioner did not show that he was singled out for such hostile discrimination.

Our Constitution has clearly spelt out the concept of equality before the law and there are numerous instances where that right had been accepted and upheld. In the process this Court has also noted that if a person complains of unequal treatment the burden is on that person to place before this Court material that is sufficient to infer that unequal treatment had been meted out to him. Accordingly, it is necessary for the petitioners not only to establish that they had been treated differently from others, but

also that such treatment was so different as the others were similarly circumstanced and there were no grounds to differentiate them from him.

In **Ashutosh Gupta v State of Rajasthan** ((2002) 4 S.C.C. 41) the Indian Supreme Court referred to this principle in connection with the right to equality and had stated thus:

> " There is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles. The presumption of constitutionality stems from the wide power of classification, which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people."

The petitioners therefore must show that there were others who were situated similarly as the petitioners, but were treated differently. There was no material placed before this Court indicating that five (5) marks were not deducted for Lanka Sabhawa Vidyalaya, from other applicants, whose residences were in closer proximity to the said school. On the contrary, as stated earlier, the 1st respondent had averred that 5 marks in relation to the Lanka Sabhawa Vidyalaya had been deducted from 146 applicants including the 1st petitioner. When there is no such material in proof of the alleged discrimination, it would not be correct to cast that burden on the State, to show that there are no other persons who are similarly circumstanced as the petitioners.

Referring to such a situation, the Indian Supreme Court in **Deena v Union of India** (A.I.R. 1983 S.C. 1154) had stated that,

> " To cast the burden of proof in such cases on the State is really to ask it to prove the negative that no other persons are situated similarly as the petitioner and that the treatment meted out to the petitioner is not hostile."

For the reasons stated above, I hold that the petitioners have not been successful in establishing that their fundamental right guaranteed in terms of Article 12 (1) of the Constitution had been violated by the respondents.

This application is accordingly dismissed. I make no order as to costs.

Chief Justice

P.A. Ratnayake, PC., J.

I agree.

Judge of the Supreme Court

R.K.S. Suresh Chandra, J.

I agree.

Judge of the Supreme Court