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

SC [FR] Application 637 / 2009

In the matter of an application under Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Lake House Employees Union
2. B.M.D. Athula, President
3. Dharmasiri Lankapeli,
   General Secretary

All of Lake House Employees Union,
35, D.R. Wijewardena Mawatha,
Colombo 10.

PETITIONERS

-Vs-

1. Associated Newspapers of Ceylon Ltd,
   No.35, D.R. Wijewardena Mawatha,
   Colombo 10.
2. B. Padmakumara,
   Chairman / Managing Director.
3. Captain P. B. L. Silva,
   Deputy Security Manager,
   Associated Newspapers of Ceylon Ltd,
   No.35, D.R. Wijewardena Mawatha,
   Colombo 10.
4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE	**:**	Hon. Saleem Marsoof, P.C., J, Hon. Eva Wanasundera, P.C., J, and Hon. Buwaneka Aluwihare, P.C., J.
COUNSEL	**:**	J.C. Weliamuna with Pulasthi Hewamanna for the Petitioners. Palitha Kumarasinghe, P.C., with Priyantha Alagiyawanne for the 1st to 3rd Respondents. Nerin Pulle, Deputy Solicitor General, for the Attorney General.
Argued On	**:**	25.8.2014
Written Submissions	**:**	24.10.2011 (Respondents) 28.10.2011 (Petitioners)
Decided On	**:**	17. 12. 2014

SALEEM MARSOOF, P.C., J,

In this case, leave to proceed was granted to the Petitioners against all the Respondents for the alleged violation of their fundamental rights enshrined in articles 12(1), 14(1)(a) and 14(1)(c) of the Constitution. However, after the filing of objections and counter-affidavit, when the case was taken up for hearing on 19th September 2011, two preliminary objections relating to the maintainability of the application were raised by learned President's Counsel appearing for the 1st to 3rd Respondents and the learned Senior State Counsel appearing for the 4th Respondent. The preliminary objections that were raised were (1) that the application of the Petitioners is time barred, and (2) that the Petitioners are not entitled in law to complain of a violation of their fundamental rights based on an illegality which has been perpetrated by them.

After hearing submissions of learned President's Counsel for the 1st to 3rd Respondents and learned Senior State Counsel appearing for the 4th Respondent on the said preliminary objections, Court indicated to learned Counsel that since some of the matters relevant to decide on the preliminary objections overlap with the matters that are relevant for the purpose of considering the substantive application of the Petitioners alleging violations of their fundamental rights, that it would be prudent to rule on the preliminary objections after hearing the Counsel fully on the merits as well. Accordingly submissions of Counsel were first heard with respect to the preliminary objections and thereafter on the merits within somewhat of a restricted time frame agreed upon by Counsel in Court. Detailed Written submissions were also filed by all Counsel with respect to the preliminary objections as well as on the merits.

It is convenient to deal with the two preliminary objections raised on behalf of the Respondents at the outset, but before doing so, it will be useful to outline the factual background that had led to filing of this application by the Petitioners seeking relief in terms of Article 126 of the Constitution for the alleged violations of their fundamental rights.

Factual Background

The Petitioners have alleged that their fundamental rights enshrined in Articles 12(1), 14(1)(a) and 14(1)(c) of the Constitution have been violated by the Respondents. Article 12(1) of the Constitution provides that all persons are equal before the law and are entitled to the equal protection of the law. Article 14(1)(a) guarantees to every citizen the freedom of speech and expression including publication. Article 14(1)(c) guarantees to every citizen the freedom of association. These fundamental rights are of vital importance to a trade union such as the 1st Petitioner, the Lake House Employees' Union, as well as the 2nd and 3rd Petitioners, who are respectively the President and the General Secretary of the said trade union. The 1st Respondent is a public limited liability company, known as the Associated Newspaper of Ceylon Ltd (hereinafter sometimes referred to as ANCL), which employs over 2200 employees. The 2nd and 3rd Respondents are respectively the Chairman and the Deputy Security Manager of ANCL.

It is common ground that there are several major trade unions operating within the premises of ANCL, which include the Jathika Sevaka Sangamaya (Lake House branch), Inter-Companies Trade Union, Sri Lanka Nidahas Sevaka Sangamaya and the Lake House Employees Trade Union, which is the 1st Petitioner to this application. It appears from all the affidavits and documents filed in this Court that ANCL recognised the right of its employees to have membership in a trade union and to actively engage in trade union activities, and provided in its premises at its own expense, two notice boards for each of the said trade unions to facilitate such activities. These notice boards were provided for the purpose of

enabling the communication of union notifications and related information to the members of the unions and to keep the membership informed of union activities.

The Petitioners have in their petition and affidavit set out in some detail the actions taken by the 1st Petitioner union with a view to enhance the working conditions of the employees of ANCL, which included the entering into several collective agreements by the said union with the management of ANCL. They have also referred to the circumstances in which SC FR Application No. 109 / 2008 was lodged with the objective of having certain shares of ANCL divested to broad base its ownership. The Petitioners state that although they did not succeed in the said application as this Court refused leave to proceed, these activities did contribute to the development of some amount of hostility between the union and the management.

In paragraph 8 of their petition and affidavit, the Petitioners have also averred that such hostility resulted in the transfer of union activists to branch offices in or outside Colombo. The Petitioners have specifically stated that copies of the transfer letter dated 29th January 2009 marked P(8)(c) and the transfer letters dated 24th July 2009 marked P(8)(a) and P(8)(b) which were placed on the notice boards for the information of the members of the union were forcibly removed by the management of ANCL. They have alleged in paragraph 9 of the said petition and affidavit that certain correspondence exchanged between the 1st Petitioner trade union and various authorities including the President of Sri Lanka and the Minister for Information and Media during the period 16th December 2008 to 16th July 2009 marked P9(a) to P9(h), were also forcibly removed from the notice boards allocated to the 1st Petitioner trade union in violation of its fundamental rights.

It has been alleged in the affidavits filed by the Respondents that increasing incidents of certain trade unions using the notice boards assigned to them to publish false allegations and other defamatory statements against rival trade unions as well as the management of ANCL, made it necessary for ANCL to regulate the use of the notice boards by all trade unions. Admittedly, ANCL circulated a Notice dated 14th May, 2004 requiring that prior approval of the management of ANCL should be obtained for publishing notifications and other material on the assigned notice boards. The said circular is reproduced below in full:-

Ref. No. 0002/33/2004

NOTICE

> Prior approval from *the Chief Executive Officer or The Company Secretary* should be obtained for all notices (General notices or Union notices) which need to be displayed in the relevant Notice Boards.
>
> Sgd. / Company Secretary
> 14th May 2004

It is also common ground that the above Notice was amended by the subsequent Notice dated 6th January, 2006 which is also reproduced below in full:-

Ref. No. 0002/01/2006

NOTICE

> Prior approval from *the Chairman* should be obtained for all notices (General notices or Union notices) which need to be displayed in the relevant Notice Boards.
>
> Sgd. / Company Secretary
> 6th January 2006

It is in this context relevant to note that there is no express averment in the petition or the affidavit of the Petitioners or in their counter affidavit that the said communications had been placed on the notice boards with the approval of the Chairman of ANCL or that at least an attempt was made to obtain his permission as contemplated by the circular dated 06th January 2006. On the contrary they have clearly taken up the position that the aforesaid circulars were never implemented by the management of ANCL.

Be that as it may, it appears from paragraph 10 of the affidavit of the 3rd Petitioner filed on behalf of all the Petitioners, that the said Petitioner had made inquiries from the Security Department of ANCL as to why some of the communications referred to in paragraphs 8 and 9 of the said affidavit were forcibly removed from the notice boards by the management of ANCL. The Petitioners have produced marked P10(a) a letter dated 17th July 2009 received in response from the Deputy Security Manager of ANCL addressed to the Secretary of the 1st Petitioner union, which is reproduced below:-

ආරක්ෂක දෙපාර්තමේන්තුව,
2009/07/17.

අතුල ධර්මශ්‍රී,
ලේකම්,
ලේක්හවුස් සේවා සංගමය.

ආයතනය තුල දැන්වීම් පුවරුවේ ලිපි ප්‍රදර්ශනය කිරීම.

01. ආයතනයේ දැන්වීම් පුවරුවල ලිපි හෝ දැන්වීම් පළකිරීම පිළිබඳව පාලනාධිකාරිය මගින් 2006/01/06 වන දින නිකුත් කර ඇති අංක 0002/01/2006 දරණ චක්‍ර ලේඛනය සිහිගන්වම්. (පිටපත අමුණා ඇත)

ආයතනයේ ගරු සභාපතිතුමා වෙත යොමු කරන ලද ලිපි ගරු සභාපතිතුමාගේ ලිඛිත අවසරයකින් තොරව දැන්වීම් පුවරුවල මහජන ප්‍රදර්ශනය කිරීම සපුරා තහනම්.

මහජන ප්‍රදර්ශනය කිරීම සඳහා අවශ්‍ය වන්නේනම්, එම ලිපි ගරු සභාපතිතුමාගේ ලිඛිත අනුමැතිය ලබා ගත යුතුයි.

කපිතාන් පී. බී. එල්. එස්. සිල්වා, USP (විශ්‍රාමික)
නියෝජ්‍ය ආරක්ෂක කළමණාකරු.

In the above quoted letter, the ANCL management has taken up the position that in terms of the Notice dated 6th January 2006, a copy of which was also attached, the display of correspondence addressed to the Chairman of ANCL in the notice boards without his prior approval is prohibited.

The Petitioners have alleged in their petition that the aforesaid Notices are arbitrary and seek to confer an unfettered discretion on an executive officer of ANCL. They also allege that the forced removal of various notifications and documents from the notice boards allocated to them have resulted in the violation of their fundamental rights. The Respondents have denied these allegations, and have taken up the aforesaid preliminary objections against the maintainability of the application filed by the Petitioners. These preliminary objections have to be considered at the outset, as it will be unnecessary to go into the merits of the substantive application filed by the Petitioners complaining of the alleged violation of their fundamental rights, if one or both preliminary objections are upheld by this Court.

First Preliminary Objection - The Time Bar

As already noted, the first of the two preliminary objections taken up by the learned President's Counsel for the 1st – 3rd Respondents related to the time bar. It was submitted by learned President's Counsel that none of the communications alleged to have been forcibly removed from the notice boards were removed within the month preceding the date of filing this application. He pointed out that the communications marked P9(a) to P9(h) alleged to have been so removed from the notice boards are dated between 16th December 2008 and 16th July 2009, whereas the jurisdiction of this Court was invoked only on 25th August 2009, outside the mandatory time limit of one month set out in Article 126 of the Constitution.

Learned Counsel for the Petitioners has in response submitting that it was their case that the forced removal was not confined to the communications referred to in paragraphs 8 and 9 of the affidavit of the 3rd Petitioner, and that these were few of the several communications which had been removed from the notice boards. He has submitted that since the complaint of the Petitioners was in essence one of continuous violation of their fundamental rights, no time limitation can be reasonably be drawn based on the few communications expressly referred to in paragraph 9 of the said affidavit. He further submitted that the gravamen of the application filed by the Petitioners in this case is that the notice dated 6th January 2006 is arbitrary and seeks to confer an unfettered discretion on the Chairman of ANCL.

It is obvious that if the case of the Petitioners was that the Notice dated 6th January 2006 is arbitrary and confers an unfettered discretion on the executive, then the jurisdiction of this Court should have been invoked within one month from the date of the said Notice and not in the year 2009. In fact, as was submitted by the learned President's Counsel for the 1st to 3rd Respondents, even if the one month period applicable to a fundamental rights application such as this is computed from the date of the letter dated 17th July 2009, by which the attention of the relevant union was invited to the Notice dated 6th January 2006, still the application filed in this Court is out of time.

The learned Counsel for the Petitioners has sought to overcome this difficulty by submitting that the said Notice dated 6th January 2006, was never implemented by ANCL and hence the continuing conduct on the part of the management of ANCL of forcibly removing notifications and other documents placed in the notice boards amounted to a continuing violation of the fundamental rights of the Petitioners. He further submitted that in any event, the Notice dated 6th January, 2006 as well as its predecessors amounted to an unlawful pre-censorship of the publications of the 1st Petitioner in the exercise of its trade union rights in violation of Article 14(1)(a) of the Constitution. Accordingly, since the said continuing conduct of ANCL amounted to a continuing violation of the Petitioners' fundamental rights, and as such it did not attract any time limitation.

Learned President's Counsel for the 1st to 3rd Respondents responded to the submissions of learned Counsel for the Petitioner by stressing that the Petitioners have not sought to evoke the jurisdiction of this Court on the footing that there was any continuing violation of the Petitioners' fundamental rights. He submitted that the complaint of the Petitioners was that the particular communications adverted to in paragraph 9 of the Petition and marked P(9)(a) to P(9)(h) had been forcibly removed from the notice boards in question. He further submitted that as it is common ground that all the said communications were placed on the notice boards on the dates specified in them and that they were forcibly removed on the same day, and since the latest document in chronological order was a letter dated 16th July 2009, it must be presumed that it was removed on the same day, namely 16th July 2004, and hence the filing of

the application seeking relief under Article 126 of the Constitution on 25th August 2009 was outside the mandatory time limit of one month specified in the Constitution for making an application under the said article.

He also invited the attention of Court to the decision of this Court in *Samarasinghe v The Associated Newspaper of Ceylon Ltd and others* (2011) B.L.R 46, which is directly on point. In this case, the Petitioner who was a journalist attached to ANCL, and who also held office as the branch Secretary of the Jathika Sevaka Sangamaya, challenged his transfer to the outstation office of ANCL in Anuradhapura allegedly on the basis that he had violated the Notice dated 6th January, 2006 in posting notices and other material on the notice board allocated to that union without the prior approval of the Chairman of ANCL. Although the transfer order was made on 17th March 2008, the fundamental rights application was filed only on 6th May 2009. Dealing with the time bar issue, Sripavan J. made the following pertinent observation:-

> "The petitioner in paragraph 21 of the petition states that the Company Secretary of the first respondent Company on 17.03.2008 directed the petitioner to forward an explanation as to why disciplinary action should not be taken against the petitioner for the violation of the Notice dated 6th January 2006. Having averred in paragraph 22 of the petition that the petitioner or the Trade Union he represents have not received any such Notice dated 06.01.2006, the petitioner in paragraph (f) of the prayer to the petition seeks to quash the Notice dated 06.01.2006 marked P19(5) issued by the Secretary to the first respondent Company.
>
> If the petitioner's fundamental right has been violated by the direction issued on 17.03.2008 for not complying with the Notice dated 6th January 2006, the petitioner should have applied to this Court within one month from 17.03.2008 as provided in Article 126 (2) of the Constitution. The present application was filed on 06.05.2009. Having slept over his right for more than one year the petitioner cannot now be heard to complain of a direction dated 17.03.2008. I do not see any merit in the petitioner's application....."

It is equally clear that if the basis on which the Petitioners seek relief in this case is the alleged violation of their fundamental rights resulting from the forced removal of the particular communications dated 16th December 2008 to 16th July 2009 marked P9(a) to P9(h) referred to in paragraph 9 of the 3rd Petitioner's affidavit, their application has been filed outside the mandatory time limit of one month from the dates of the respective communications. It is noteworthy that the 3rd Petitioner has expressly stated in paragraph 9 of his affidavit that each of the said communications was placed on the notice boards on the very day it was despatched, and that each such letter was forcibly removed by ANCL Security on the same day, so the breaches would have occurred on the dates of the said communications.

It is in these circumstances that the learned Counsel for the Petitioners has strenuously argued that no time limitation would apply to the facts and circumstances of this case as what is complained by the Petitioners is a continuous violation of their fundamental rights as opposed to particular acts constituting a violation of such rights, has therefore to be considered carefully in all its seriousness, as otherwise this application is clearly time barred. Learned Counsel for the Petitioner has submitted that the Notice dated 6th January 2006 as well as its predecessor dated 14th May 2004 imposed a prior restraint in violation of the Petitioners' fundamental rights to expression enshrined in Article 14(1)(a) of the Constitution. Learned Counsel for the Petitioners relied on the decision of this Court in *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134 at 137.

In my opinion, if the gravamen of the complaint of the Petitioners is the prior restraint alleged to have been effected by the Notice dated 6th January 2006, then the application to this Court for relief under Article 126 should have been sought within one month from the date of the said circular, and would be time barred. However, the question arises in view of the submission of learned Counsel for the Petitioner that that the question of prior restraint should be considered in combination with the other submission of learned Counsel that this is a case of continuing violation of the fundamental rights of the Petitioners, arising from the alleged removal of the Notices and other material placed on the Notice-board.

In the absence of any decision of this Court on this point, I wish to adopt the distinction recognised by the courts in the United States between discreet acts of discrimination and continuing violations through a series of such acts. In *National Railroad Passenger Corp. v Morgan* 536 U.S. 101, at page 122, the United States Supreme Court grappled with the nuances of the continuing violation doctrine in a case brought under Title VII of the Federal Civil Rights Act of 1964. The plaintiff in *Morgan* alleged both discrete retaliatory and discriminatory acts, and a racially hostile work environment. In analyzing the statute of limitations issue, the Court differentiated between discrete acts and continuing violations, noting that some discrete acts, "such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify."The Court held that such incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice, and that accordingly, for limitations purposes, a discrete retaliatory or discriminatory act occurs on the day that it happens. In contrast, Court described a continuing violation as "a series of separate acts that collectively constitute one unlawful employment practice", and went on to hold that "such a cause of action accrues *on the date on which the last component act occurred*."

Adopting the reasoning of the United States Supreme Court in Morgan's case discussed above, I am inclined to the view that any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party affected invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of. In the circumstances of this case, the last act of the series of acts occurred on 16th July 2009, and therefore the filing of the application in this Court on 25th August 2009 is clearly time-barred.

Second Preliminary Objection - The Question of Illegality

The second preliminary objection taken up on behalf of the 1st to 3rd Respondents and the 4th Respondent is that the Petitioners are not entitled in law to complain of a violation of their fundamental rights based on an illegality which has been perpetrated by them. Although detailed submissions were made by learned Counsel in this connection, it is not necessary to rule on this matter in view of the fact that the petition has been filed out of time.

Conclusion

Due to the first of the two preliminary objections being upheld by this Court, the application of the Petitioners has to be dismissed, and it would not be necessary to deal with the merits of this case with respect to which submissions were made at the hearing.

Accordingly, I make order dismissing the application of the Petitioners, without costs.

JUDGE OF THE SUPREME COURT

EVA WANASUNDERA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

P. BUWANEKA ALUWIHARE, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT