

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

In the matter of an application under Article 126 of the Constitution for relief and redress in respect of the violation of the fundamental right under Article 12 (1) of the Constitution.

H.R.S. Dharmasiri,
No.25/2, Galapitamada Road,
Avissawella.

PETITIONER

SC FR APPLICATION No. 414/2010

-Vs-

1. Provincial Director of Health Services of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura.
2. Deputy Provincial Director of the Health Services (Finance) of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura.
3. Governor of the Sabaragamuwa Province, Office of the Governor of the Sabaragamuwa Province, Ratnapura.
4. Chief Secretary of the Sabaragamuwa Province, Office of the Chief Secretary of the Sabaragamuwa Province, Ratnapura.
5. The Secretary to the Ministry of Health of the Sabaragamuwa Province, Office of the Secretary to the Ministry of Health of the Sabaragamuwa Province, Ratnapura.
6. Hon. Attorney General, Attorney General's Department, Colombo 12.

RESPONDENTS

BEFORE : Hon. N.G Amaratunga J,
Hon. S. Marsoof, P.C., J, and
Hon. S. E. Wanasundara, P.C., J.

COUNSEL : Dr. Sunil Cooray for the Petitioners
Viraj Dayaratne, DSG for the Respondents

ARGUED ON : 27.02.2013

DECIDED ON : 05.08.2013

SALEEM MARSOOF J:

In this application filed by the Petitioner against the Provincial Health Authorities of Sabaragamuwa Province, the Petitioner has alleged that his fundamental rights to equality guaranteed by Article 12 (1) of the Constitution of Sri Lanka has been violated by the 1st and /or 2nd and /or 5th Respondents. This Court granted leave to proceed to the Petitioners against the said Respondents for the alleged violation of his fundamental right to equality. The Petitioner has stated in his petition filed in this Court that he had tendered for the supply of certain food items for the year 2010 to certain hospitals including the Karawanella Base Hospital and the Kithulgala District Hospital, coming within the Sabaragamuwa Province. According to him, the tender conditions were contained in the Tender marked P2 and in the Instructions to Bidders and Additional Conditions marked P3. He further alleges in paragraph 2 of his petition that tenders closed on 4th November 2009 at 10 am, and that his separate tenders with respect to the Karawanella Base Hospital and the Kithulgala District Hospital "contained the lowest in price in respect of most food items". In paragraph 3 of his petition he has alleged that he was requested to attend a discussion with the 2nd Respondent on or about 18th December 2009, which he duly attended, but at the said discussion he was asked to supply most of the food items for which he had tendered at the prices specified by the prices committee, which were much lower than the prices quoted by him.

It is the position of the Petitioner that he had at the said discussion informed the 2nd Respondent that he "was unable to supply the food items specified by the prices committee", which position he reiterated in his letters dated 22nd December 2009 (P4 and P5) addressed to the 1st Respondent with respect to the said two hospitals. The Petitioner has stated in the petition that by his letter dated 24th December 2009 (P6 and P7) he informed the 3rd Respondent, Governor of the Sabaragamuwa Province, and the 4th Respondent, Chief Secretary of the said Province, of his inability to supply the food items at prices lower than those tendered for by him, and specially that he cannot agree to supply the food at the prices determined by the prices committee.

Dr. Sunil Cooray, who appeared for the Petitioner at the hearing before this Court, has submitted that the grievance of the Petitioner, stems from the conditional acceptance of the tenders by the 1st and the 2nd Respondents as evidenced by the 1st Respondent's letter dated 28th December 2009 marked P8 and P9, and the insistence of the 1st and the 2nd Respondents that the Petitioner should commence supplying food items at the prices specified by the Prices Committee from 1st January 2010, despite the position clearly and consistently taken up by the Petitioner that it is uneconomical and impossible for him to do so. Dr. Cooray further submitted that when the Petitioner refused to sign the Agreements and commence the supply of items to either of the aforesaid hospitals, by the letters dated 01st April 2010 marked P10 and P11, the 1st Respondent informed the Petitioner that the latter's failure to supply the food items was unsatisfactory, and that if the Petitioner wished to have a favourable change of prices he should first supply the food items at the prices determined by the Prices Committee, and then request for a price revision. He was also informed that unless the Petitioner attends the office of the 1st Respondent and signs the Agreements for the supply of the food items to the said two hospitals on or before 19th April 2010, the tender will be awarded to the second lowest tenderer and the Petitioner's refundable deposits will be forfeited to the State. The Petitioner was also warned

that an adverse decision will be taken in respect of the Petitioner for causing inconvenience to the Department of Health Services when the said Department calls for tenders in the future.

It was the contention of Dr. Cooray that the aforesaid conduct of 1st and/or 2nd and /or 5th Respondents, and in particular their conditional acceptance of the tenders of the Petitioner for the supply of food items to the Karawanella Base Hospital and the Kithulgala District Hospital at the prices quoted by the Petitioner for the year 2010, was a violation of tender procedure. He further submitted that the subsequent action taken by them to black list the Petitioner which deprived him of the opportunity of participating in the tender process with respect to any of the hospitals coming within the Sabaragamuwa Province in subsequent years, has resulted in the violation of the Petitioner's fundamental rights to equality and has caused him irreparable loss.

Mr. Viraj Dayaratne, Deputy Solicitor General, who appeared for the Respondents, has submitted that there has been no violation of tender procedure or the Petitioner's fundamental right to equality, and relied heavily on the Instructions to Tenderers and Additional Conditions, marked P3, clause (5) of which provided as follows:

ඔබ විසින් ඉදිරිපත් කරනු ලබන මළ ගණන් වර්තමාන වෙළඳපලේ මළ ගණන් හා සයදා බැලිමෙදු අකාමානය ලෙස මළ වැඩිවිම හෝ අඩුවිම නොවනයේ මළ ගණන් ඉදිරිපත් කළ යුතුය. එවත් අකාමානය මළ වෙනය්කම තිබේ නම් දෙපාර්තමේන්තු මළ කම්ටුවට නිරද්‍යෝගන්ට අනුකූලව මළ සංයෝධනය කිරීමට ඔබ එකාග්‍රය යුතු වේ. සැම ආහාර වර්ගයක් සඳහාම මළක් සඳහන් කළ යුතු අතර, නොමැලයේ යන්න සඳහන් කිරීම ලංසුව ප්‍රතික්ෂේප කිරීමට හේතුවක් වේ.

When translated into English, the above quoted clause requires that when submitting tenders, the prices quoted should not be unusually higher or lower than the current market price of each item to be supplied, and that if there is any unusual variations in price for any quoted item, the tenderer should agree to amend the price of any such item according to the recommendation of the Departmental Prices Committee. He pointed out that the said clause made it mandatory for a price to be quoted for every item, and quoting no price for an item or stating that it is supplied free, would justify the rejection of the tender.

In this connection, Mr. Dayaratne invited the attention of Court to the affidavit of the 1st Respondent Dr. Kapila Bimal Kannangara, who was at the relevant time the Provincial Director of Health Services for the Sabaragamuwa Province, wherein it is specifically stated that although the tender submitted by the Petitioner was the lowest according to the total value, the prices quoted by the Petitioner for some of the food items were unusually higher than the prices recommended by the Prices Committee of the Department of Health Services in respect of such food items. Mr. Dayaratne submitted that this was in violation of the above quoted clause (3) of the Instructions to Tenderers and Additional Conditions, marked P3. He submitted that at the discussion held on 18th December 2009, the Petitioner was informed that the prices he had quoted for some of the food items were unusually higher than current market prices for the relevant items, and brought to his attention the need to supply those food items at the prices recommended by the Prices Committee in keeping with the undertaking contained in paragraph 5 of the Special Instructions issued to all tenderers. He explained that the Petitioner's tenders for the Karawanella Base Hospital and the Kitulgala District Hospital were accepted by the 1st Respondent's letters dated 28th December 2009 marked respectively P8 and P9, and that from paragraph 02 of the said letters it is clear that the acceptance of the said tenders was expressly subject to the amendment of the prices of certain items of food to accord with the maximum prices quoted for those items by the Departmental Prices Committee.

Mr. Dayaratne has stressed that since the Petitioner had failed to comply with the request to sign the Agreements and commence supply of food items to the said Hospitals even by the end of March 2010, by the letters dated 1st April 2010, the 1st Respondent had requested him to commence supply, and had also warned the Petitioner that if he fails to do so, the tender will be awarded to the second lowest tenderer for the two hospitals, and the Bid Bonds given by the Petitioner will be forfeited. However, since the second lowest tenderer too was not in a position to commence food supplies to the two hospitals and the Department of Health Services was not able to find a suitable person to supply food item to them in spite of calling for fresh tenders in the middle of the year 2010, the Department was compelled to purchase the items from co-operative societies at a higher price resulting in inconvenience and loss to the Government. Mr. Dayaratne submitted that at all times the Respondents had acted reasonably and in good faith, and had no malice towards the Petitioner. He specifically emphasised that for the year 2011, the wife of the Petitioner Mrs. G.S.M. Abeywardena had submitted a Bid and she has been selected at the successful Bidder.

In the circumstances, on the basis of the available material, there does not appear to be any violation of the Petitioner's fundamental right to equality enshrined in Article 12(1) of the Constitution. The procedure adopted by the Respondents is in accord with clause (05) of the Instructions to Tenderers and Additional Conditions, marked P3, by which the Petitioner is bound, and it is clearly stated in paragraph 02 of the letters dated 28th December 2009 marked P8 and P9 that the acceptance of the tenders is subject to the amendment of the tendered prices of items of food that are found to be unusually higher than the market price to accord with the maximum prices quoted for those items by the Departmental Prices Committee. This Court does not have before it any material to examine whether the prices specified by the Prices Committee of the Department of Health Services for the Sabaragamuwa Province with respect to the two hospitals which were attached in schedules to the letter marked P8 were reasonable. I also note that the actual prices tendered by the Petitioner with respect to the two hospitals are also not before Court as the purported Tender marked P2 is in a blank form. Court is not even in a position to compare the prices tendered by the Petitioner with the prices specified by the Departmental Prices Committee details of which are attached to P8 and P9, to make any finding as regards the degree of variation between the tendered and specified rates.

In all these circumstances, the application of the Petitioner alleging the infringement of his fundamental rights to equality has to be dismissed. I would not make any order for costs.

JUDGE OF THE SUPREME COURT

N.G. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT