

HBTTIARACHCHI
v.
MAHAWELI AUTHORITY OF
SRI LANKA AND OTHERS

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
GUNASEKERA, J.
SC APPLICATION NO. 131/2000
SEPTEMBER 11TH, 2000

Fundamental Rights - Refusal to permit use of public property for apolitical purpose - Punishment of an employee for such refusal - Article 12(1) of the Constitution.

The petitioner was an Assistant Security Supervisor employed by the Mahaweli Authority of Sri Lanka working at the Resident Project Manager's Office at the Mahaweli "H" Division, Thambuttegama, On 18. 01. 99 when he was on night duty at the office at about 1 a.m., abus load of persons arrived. The evidence shows that they consisted of 16 security officers and 11 members of the Embilipitiya branch of the Sri Lanka Nidahas Sevaka Sangamaya. They were on their way to attend a political meeting of the ruling party at Nikaweratiya in support of a candidate of that Party for the election of the North-Western Provincial Council. Five of them including one Saliyananda an Assistant Security Supervisor and the driver of the bus met the petitioner and requested the petitioner's permission to stay the night at the said office. The petitioner refused to grant such permission in the absence of any instructions from his superiors. They then demanded that they be allowed to use the office telephone which was also refused. Thereafter they wanted to know whether they could stay at the Mahaweli circuit bungalow. The petitioner told them that permission had to be obtained from the Resident Project Manager (RPM), and as he was on duty he could not accompany them to meet the RPM.

A few days thereafter, Saliyananda and three other persons complained against the petitioner to the effect that when they with others **were** travelling from Embilipitiya to Thambuttegama in connection with an official duty of the Minister of Mahaweli Development the petitioner refused to allow them accommodation at the Project Manager's Office, **did** not permit the use of the telephone and refused to accompany them to the circuit bungalow despite being told that they had come upon **the** Minister's order. On the basis of a report made on that complaint by **the** 6th respondent (Senior Security Officer in charge of Mahaweli "H*

Division) and without informing the petitioner of the nature of the misconduct and without holding a disciplinary inquiry, despite a request made by the petitioner for an inquiry, the 3rd respondent (Executive Director, Mahaweli Authority of Sri Lanka) by his letter dated 19. 01. 2000 fined the petitioner and transferred him.

Held :

(1) The complaints on which the respondents commenced disciplinary proceedings did not contain any allegation of misconduct.

Per Fernando, J.

"... what was alleged to be a Ministerial duty was nothing more than political activities at Nikaweratiya in connection with a pending election in which the Minister was interested ... The real grievance which they (the complaints) reveal is displeasure that the petitioner had resisted an improper attempt to influence him to provide accommodation at the office, despite Ministerial duty being invoked"

2. The respondent failed to comply with the disciplinary rules prior to imposing a punishment on the petitioner.

3. The petitioner's fundamental right under Article 12(1) has been infringed.

Per Fernando, J.

"The use of State and Corporation resources (whether land, buildings, vehicles, equipment, funds or other facilities; or human resources) directly or indirectly for the benefit of one political party or group would constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals."

Case referred to :

Deshapria v. Rukmani (1999) 2 Sri L.R. 412, 418

APPLICATION for relief for infringement of fundamental rights.

Shyamal A. Collure for the petitioner.

Rajiv Goonatilleke, S.C. for the respondents.

Cur. adv. vult.

September 15, 2000.

FERNANDO, J.

The Petitioner is an (Assistant Security Supervisor) employed by the Mahaweli Authority of Sri Lanka, the 1st Respondent, working at the Resident Project Manager's Office at the Mahaweli "H" Division, Thambuttegama. He complains that his fundamental right under Article 12(1) was infringed by orders made on 19.01.2000 and 07.02. 2000, imposing a fine of three days' pay, and transferring him to Embilipitiya (without expenses as the transfer was on disciplinary grounds).

The impugned orders were made in consequence of an incident which occurred in the early hours of the morning of 19. 01. 99. There is no dispute as to the facts.

On 18. 01. 99 the Petitioner was on night duty at the Office. At about 1.00 a.m. oh 19. 01. 99 five persons came to the Office: one Saliyananda, an Assistant Security Supervisor working at Embilipitiya, three other employees of the 1st Respondent, and one Hinnimahattaya, the driver of a bus parked nearby in which there were about 25 others.

According to the Petitioner, Saliyananda informed him "that they were on their way to Nikaweratiya to participate in a political meeting of the ruling party scheduled to be held the following day in support of the candidates of the said political party contesting the Provincial Council Elections in the North Western Province, and wanted the Petitioner's permission for them to stay the night in the said office." He added that, except for the said Hinnimahattaya, almost all the rest were heavily intoxicated.

The Petitioner replied that he had not received any instructions from his superiors to allow them to stay in the Office and that therefore they could not be permitted to do so.

They then demanded that they be allowed to use the Office telephone, but he explained that no outgoing calls could be taken at that time of the night. They then "wanted to know whether they could stay at the Mahaweli Circuit Bungalow to which the Petitioner replied that. . . prior permission had to be obtained from the Resident Project Manager... and advised them to speak to the caretaker . . ."

They then demanded that the Petitioner should come with them to meet the Resident Project Manager, but he told them that he could not as he was on duty; he showed the driver the way.

There was only one affidavit filed on behalf of the Respondents, and that was by the 2nd Respondent, the Director-General of the 1st Respondent. He had no personal knowledge of that incident, and did not deny the Petitioner's account, merely stating that "the Respondents are unaware of the incident..."

Between 23. 01. 99 and 31. 01. 99 Saliyananda and three other persons made complaints against the Petitioner, to the effect that 16 security officers and 11 members of the Embilipitiya branch of the Sri Lanka Nidahas Sevaka Sangamaya had been travelling from Embilipitiya to Thambuttegama in connection with an official duty of the Minister of Mahaweli Development; that, needing overnight accommodation, they came to the Project Manager's Office; that they said that they had come in connection with an official function of the Minister and requested suitable accommodation for the night. The Petitioner had replied that they could not stay at the Office, even if accommodation had been available there; when they wanted to use the telephone to contact the Resident Project Manager, he had said there was no telephone; when they asked whether they could stay at the Circuit Bungalow, the Petitioner had said he did not know and to go there and find out; and when they asked him to

accompany them, he refused. They expressed amazement that despite being told that they had come upon the Minister's order, their requests had been turned down.

By letter dated 26. 02. 99, the 5th Respondent (the Director Mahaweli Security Organization) forwarded to the 6th Respondent (the Senior Security Officer-in-charge, Mahaweli "H" Division) copies of the four complaints made to the 2nd Respondent, and requested him to submit a *report* in regard to those complaints to the 2nd Respondent. Upon the 6th Respondent's request, the Petitioner appeared before him on 23. 03. 99.

The 6th Respondent submitted his report on 23.03.99. He referred to the several complaints, but expressed no opinion as to whether they disclosed that a *prima facie* case of misconduct had been established; nor did he state that he had informed the Petitioner of the misconduct alleged against him. He reported that the Petitioner had refused to make a statement on the ground that as the matter involved an incident between security officers it should have been inquired into by a different inquiry officer. The 6th Respondent did not state what order he had made in respect of that submission, or that he had overruled the objection and called upon the Petitioner to make a statement. However, he concluded that the refusal to make a statement was in breach of the written order of the Director of the Mahaweli Security Organization, and forwarded to that officer his report of the *preliminary investigation*.

By letter dated 03. 11. 99, signed by the 3rd Respondent (the Executive Director, Administration and Finance) on behalf of the 2nd Respondent, the Petitioner was informed that the *preliminary investigation* had disclosed that when a group of persons (including the Assistant Security Supervisor, Embilipitiya, and the Chairman of the Embilipitiya branch trade union) had come in connection with an official duty of the Minister, the Petitioner had taken no steps to provide accommodation or to assist them. It was stated that it was

extremely unsatisfactory that he had treated those persons who had come on official duty in this manner. It was noted, further, that the Petitioner had refused to make a statement at the preliminary investigation. Accordingly, he was asked to show cause (within 14 days of receipt) why disciplinary action should not be taken against him.

Having received that letter on 11. 11. 99, on 23. 11. 99 the Petitioner replied to the 2nd Respondent, through the 6th Respondent (the Head of his section). There is clear evidence that that letter had been received by the 6th Respondent, and forwarded. He pleaded that he was not guilty of the charges, and requested a disciplinary inquiry to enable him to establish his innocence. Nevertheless, by letter dated 19. 01. 2000 the 3rd Respondent claimed that the preliminary investigation had established that on 19. 01. 99 the Petitioner had not provided accommodation to persons who had come to the Resident Project Manager's Office in connection with official duty of the Minister, or taken steps to assist them to meet the Resident Project Manager in order to obtain accommodation. This was stated to be a breach of his duties. Further, he had not made a statement at the preliminary investigation; nor had he replied to the letter dated 03. 11. 99. Accordingly, he was fined and transferred. The Petitioner immediately protested, pointing out that he had submitted a reply, requesting an inquiry. The 3rd Respondent replied stating that the order made on 19. 01. 2000 could not be changed. He did not claim that the Petitioner's reply had not been received. The transfer was confirmed by letter dated 07. 02. 2000.

This application was supported on 05. 05. 2000 for leave to proceed as well as interim relief. The State Counsel who appeared on that occasion stated that the instructions he had received from the 1st Respondent did not indicate what the official Ministerial duty referred to in the impugned letter dated 19. 01. 2000 was, or that it was any part of the Petitioner's functions, whilst on duty at the Office, to provide accommodation facilities to anybody.

However, in the affidavit which he later filed in these proceedings the 2nd Respondent claimed that the Petitioner "has not extended his due *obligation* to the group of personnel who came to the area *on duty*", and that although he was entrusted with security functions he was bound to extend his co-operation to other employees of the Authority as and when required.

The 2nd Respondent's position is entirely untenable. As a security officer on night duty at the Office, the Petitioner was not empowered to provide accommodation to other employees, or to leave his post in order to take them to meet the Resident Project Manager: and indeed not merely did the Petitioner have no discretion in the matter, but it would have been a serious breach of duty to have done so. Learned State Counsel did not attempt to justify the impugned orders on that basis, but depended solely on the Petitioner's refusal to make a statement to the 6th Respondent.

Having regard to the pleadings and documents in this case, it is probable that what was alleged to be a Ministerial duty was nothing more than political activities at Nikaweratiya in connection with a pending election in which the Minister was interested. Learned State Counsel was unable to point to any allegation in the four complaints made against the Petitioner which suggested the slightest lapse (let alone misconduct), or lack of courtesy. The complaints themselves disclosed that the Petitioner acted perfectly correctly, and rightly refused to be overawed by references to the Minister or Ministerial duty. The real grievance which they reveal is displeasure that the Petitioner had resisted an improper attempt to influence him to provide accommodation at the Office, despite Ministerial duty being invoked.

I hold that the four complaints on which the Respondents commenced disciplinary proceedings did not contain any allegation of misconduct. The decision to commence such

proceedings was a gross abuse of power. Indeed, the complaints themselves showed that the Petitioner should have been commended for resisting improper attempts to depart from the path of duty.

Learned State Counsel strenuously argued that the impugned orders were justified by reason of the Petitioner's refusal to make a statement to the 6th Respondent; that the proceedings held by the 6th Respondent constituted a *summary inquiry* (within the meaning of the 1st Respondent's Disciplinary Rules); and that the 6th Respondent's finding thereon was sufficient reason for transfer.

Those Rules provide for *preliminary investigations* for the purpose of ascertaining whether there exists a *prima facie* case of grave misconduct; *summary inquiries* in respect of misconduct; and *formal inquiries* in respect of grave misconduct. Learned State Counsel's submission that the 6th Respondent held a *summary inquiry*, is untenable. The 6th Respondent was not authorized to hold a *summary inquiry*, he was only asked to submit a *report* on the complaints made to the 2nd Respondent. It appears that he had gone beyond his mandate, and held a *preliminary investigation*, because his report itself as well as the letters dated 03. 11. 99 and 19. 01. 2000 refer to his proceedings as a *preliminary investigation* (although he failed to state in his report whether there was a *prima facie* case, and what the offence was).

Even if I were to accept the submission that the 6th Respondent held a *summary inquiry*, that inquiry was fundamentally flawed because he did not comply with the Rules, which require that "the employee shall know the case against him" - the nature of the misconduct alleged against him was not disclosed to the Petitioner. Besides, before the Petitioner could have been faulted for refusing to make a statement, the 6th Respondent should have ruled on the Petitioner's preliminary objection.

I hold that the Respondents failed to comply with the Disciplinary Rules prior to imposing a punishment on the Petitioner.

I hold that the Petitioner's Fundamental Right under Article 12(1) has been infringed. In determining what relief should be granted, it is necessary to consider the context in which the infringement took place. The attempt to influence the Petitioner to allow the misuse of Corporation premises occurred not just in general but in connection with a pending election. The use of State and Corporation resources (whether land, buildings, vehicles, equipment, funds or other facilities, or human resources) directly or indirectly for the benefit of one political party or group, would constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals (see *Deshapriya v. Rukmani*,^m. Penalizing the Petitioner for resisting improper influence in such circumstances aggravated the infringement of his fundamental right; and conveyed a wrong message, that improper political influence should not be resisted.

I therefore quash the impugned transfer orders dated 19. 01. 2000 and 07. 02. 2000, and direct the 1st Respondent to pay him a sum of Rs. 100,000 as compensation. I further direct the 2nd Respondent personally to pay him a sum of Rs. 25,000 as costs.

In his counter-affidavit the Petitioner claimed that 275 employees of the 1st Respondent participated in the political meeting, referred to in the conversation on 19. 01. 99, which was held at Nikaweratiya, and that meals were provided for them at the expense of the 1st Respondent. Although the Petitioner had produced certain bills and vouchers in support, we did not permit learned Counsel for the Petitioner to rely on those allegations for the purposes of this case, as the Respondents had not had an opportunity of replying to them.

That allegation warrants investigation, and accordingly I direct the Registrar to forward copies of this judgment and of the pleadings to the Auditor-General for inquiry as to whether there has been any misuse of the resources of the 1st Respondent.

AMERASINGHE, J. I agree.

GUNASEKERA, J. - I agree.

Relief Granted.