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

E. M. Haritha Prabath Ekanayake
No. 21/B, Heraliyawala,
Kurunegala.

PETITIONER

C.A 153/2013 (Writ)
152/2013
151/2013
150/2013

Vs.

1. Sabaragamuwa University of Sri Lanka
   P.O.Box 02,
   Belihuloya.

2. Prof. Mahinda S. Rupasinghe
   Vice Chancellor,
   Chairman of the Governing Council
   Sabaragamuwa University of Sri Lanka
   P.O. Box 02, Belihuloya.

And 17 others

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Saliya Peiris with A. Devendra for the Petitioner
N. Unamboowe D.S.G for the 1st, 2nd 4th – 12th, 14th,
16th, - 19th Respondents with S.C. Nayomi Kahawita

ARGUED ON: 23.10.2013

DECIDED ON: 19.02.2014

GOONERATNE J.

The Petitioners in the above applications are four 3rd year students of the 1st Respondent University in the faculties described in each of the above Petitions filed of record. They were office bearers of the Student Union of the 1st Respondent University, and being committee members organized a special general meeting of students, and held on 12.3.2013. All Petitioners were issued letters of suspension by the authorities concerned. A Writ of Certiorari is sought to quash the decision of the 2nd Respondent reflected in letter P15 which temporarily suspended their studentship for a period of 8 months. A Writ of Mandamus is sought directing the 2nd and or all the Respondents to allow the Petitioners to sit for the final examination of the 3rd academic year which commenced on July 2013. This application was supported for formal notice on 17.6.2013 and court granted notice and a limited interim order, was also issued.

The interim order was in fact issued to facilitate the Petitioners only to sit for the examination but releasing of results be suspended till the case is finally decided.

Periodically the interim order was extended. At the very outset, this court wish to state that it is in fact a futile exercise at this stage to consider the question of Writ of Mandamus, since by July 2013 examination dates have lapsed. Such a remedy cannot be granted in the circumstances and in the context of this case. The complaint of the Petitioners proceed on the basis of letter P2 which the Petitioner allege to have introduced 9 rules by the authorities concerned which was not notified to the Petitioners and students. Perusal of P2 dated 27.3.2013 would indicate that a minute introduced dated 05.03.2013 to same request for views. (Respondents have placed more material on letter P2 and produced as 2R3 identical letter with more minutes on same) Letter P3 is a letter where the student Union of the 1st Respondent University question P2 to be unreasonable.

It is pleaded that the above Students' Union called for a special general meeting on 12.3.2013 and the matters pleaded in paras 10 & 11 of the respective Petitions were discussed and the manner of holding the meeting is also stated. Therefore it is pleaded that the 2nd Respondent published notices P5 & P6 on 14.3.2013 in the university premises. P5 indicates that activities of the Students' Union, temporary suspended as from 14.3.2013, and a prohibition to

enter offices described therein. Para 12 & 13 provides more details of such temporary suspension. The other major complaint of the petitioner is P7 where the President and Secretary of the Students' Union had been suspended. Petitioner inter alia plead P5 & P7 does not give reasons (P8) for suspension. Letter suspending the several petitioners are produced marked P10A, P10B P10C, P10D & P11

Petitioners have addressed P12, being aggrieved by the decision stated above by the authorities concerned. A complaint P13 was also made to the Human Rights Commission as pleaded in para 21 of the petition. It is highlighted in the petition as from paras 22 -28 the disciplinary inquiry against the petitioners where petitioners seek to demonstrate irregularities/illegalities of the inquiry held and the inquiry procedure, and where more than one month after the suspension an inquiry conducted by a committee of inquiry (P14). Inquiry committee consisted of 5th , 7th , 18th & 19th Respondents. The 18th Respondent was the Chairman of the Committee. The following irregularities of the disciplinary committee are strongly urged

(1) Disciplinary Committee consists of members of the governing council which recommended suspension of Petitioners.
(2) Representation by an Attorney at Law denied

(3) Since the Students' Union was suspended the students' union's representations too not available.

(4) Petitioners not given an opportunity to cross-examine the complainant and witnesses, whose evidence the authorities relied on.

(5) Petitioners and other suspended students not given an opportunity to call witness and produce evidence on their behalf other than recording statements of Petitioners and 3 others.

(6) Statements of some others inclusive of one Sandaruwan recorded on a later date.

(7) Petitioners not issued the proceeding or the recommendation of the committee of inquiry.

In the petition it is also pleaded that Petitioners appealed to the 2nd Respondent on 06.05.2013, urging that decision in P15 be reconsidered. Another appeal was also preferred by P16. The grounds for the issue of a Writ of Certiorari based on P15 are contained in para 31. A variety of reasons contained in para 31 highlight the alleged grounds for the issue of Writ of Certiorari. Very many of the suggested grounds appear to proceed mainly on the basis of a breach of natural justice, procedural impropriety, disproportionate punishments (proportionality).

The position of the Respondents are gathered from the objections filed of record and the corresponding affidavit. This court note inter alia the following material from same. The by-laws, rules and regulations are produced

marked 2R1, 2R1A & 2R1B. The decision taken on 27.02.2013 as evidence in P2 is not a by-law and it is only a document calling for observations. Document 2R3 & 2R3A, identical to document P2 are produced. (It is apparent that the above documents are not rules or by-laws, and no finality as alleged by the Petitioners in P2). Letter P3 issued by the Petitioners is under a misconception and misunderstanding (this court is inclined to accept the Respondent's version based on 2R3 & 2R 3A).

Clause 7 of Rule 2R1B, a meeting beyond the stipulated time (8 .00 p.m) should be approved by the Vice Chancellor. 2R3 however attempts to relax the time period for male students up to 10.00 p.m. Earlier Students' Union by 2R4A, 2R4B & 2R4C made applications for approval. No approval proceeded on P2 or 2R3 and as such no notice required to be given. Respondents strongly urge that meeting held on 12.3.2013 is an unauthorized meeting of the Students' Union. Rule 2:6 of 2 R 5 required that permission of Vice Chancellor need to be obtained. Such unauthorized meetings held earlier as evidenced by 2R 6A, 2R 6B & 2R 6C caused destruction and damage to general public and university property. P4 unsigned, with no agenda. Minutes of the meeting indicate that the purpose was to instigate students.

Respondents emphasis on certain complaints received marked 2R7A to 2R7C and the Vice Chancellor having considered same decided to suspend the Petitioners and declared the university premises out of bound. Based on above 2nd Respondent issued letters P10A to P10D.

The said letters temporarily suspend the student leaders named therein (P10A – P10D)

The said letters which temporarily suspend the student leaders named therein (P10A – P10D) had to be issued by the 2nd Respondent, Vice Chancellor after considering the written complaints of Professor C.P. Udawatte – Student's Counselor, W.R.C. Wattegedera - Marshall, P. Premasiri O.I.C Security Services produced and marked as 2R7A, 2R7B, 2R7C.

Appeal marked P12 by the Petitioners were received and thereafter with the approval of the University council (2R9) a committee of inquiry was appointed, comprising of Mr. D.Jayasinghe Proctor – Head of Department of Marketing Faculty of Management Studies Dr. A.D. Ampitiyawatta Dean, Faculty of Agriculture M.R.M.W. Rathnayake Dean, Faculty of Management Studies. Respondents plead the following as regard the steps and conduct of the Committee of Inquiry.

(a) 20 Witnesses called 2R10A to 2R10 I

(b) Evidence/Statement of witnesses recorded 2R11A to 2R11 T

(c) Committee submitted a report 2R12

(d) According to 2R11 about 20 students and employees in their statements and evidence admitted that a meeting was held without prior approval.

(e) 19th Respondent not a member of the Committee of Inquiry. He was the Secretary of the Committee of Inquiry. Members of the committee of inquiry did not participate in the council decision to suspend students. 2R 14A to 2R 14B. Nor did the committee recommend a punishment

(f) No application made by the Petitioners before the Committee of Inquiry to call witnesses. No application made by petitioner to cross–examine witnesses. No allegation of this sort made before the submission of report 2R12.

(g) Copy of the proceedings of the inquiry and recommendations were requested only after submissions of report of the above committee.

(h) Only appeal submitted was by letter of 10.5.2013 (P16). The University Council meeting held on 31.5.2013 decided not to accede to the appeal – vide 2R15.

I have considered all the material placed before this court inclusive of the averments contained in the counter affidavit of the Petitioner. At the outset this court observes that complaints were received by the Vice Chancellor (2nd Respondent) by documents 2R7A-2R7C. Contents of 2R7A-2R7C gives a sufficient description of what took place on 12.3.2013. Further it disclose certain material

which gave rise to a situation where the Vice Chancellor decided to, based on the contents of the above letters, to suspend the Petitioners and to declare the university premises out of bounds. I cannot see any legal impediment for the 2nd Respondent to take such steps and actions which are provided in terms of University Grants Commission Circular 946 marked 2R13. It is a guide line on students discipline which includes the disciplinary procedure and punishment etc. (vide clause 4 of 2R13).The Respondents need to have such powers to maintain discipline in a university. 2nd Respondent took the initial steps as provided by regulations and he is perfectly within his powers to do so. Consequently P6, P7, and the like documents had been issued to all the Petitioners which temporarily suspend them as above. I would at this point of my Judgment refer to a decided case which relates to suspension of students pending inquiry and consequential steps. In De Saram Vs. Panditharatne & others 1984 2 SLR 107

Held –

The duty of maintaining discipline in the University is conferred on the Vice Chancellor by the Universities Act. Where a person is responsible for the maintenance of discipline in a particular institution, suspension pending inquiry would be an inherent or implied right flowing from such responsibility. The question whether the suspension pending inquiry is tainted with malice or unfairness is a different matter. However taking all the circumstances into consideration in the instant case. It cannot be said that the 1st respondent has acted unfairly or maliciously.

Section 131(1) of the Universities Act which makes provision for "any person" to be prohibited from entering the precincts of the University after giving such person an opportunity of being heard, applies not to students but to outsiders whose presence in the campus would be detrimental to the moral life of the student community. Hence, a student need not be given a hearing before a prohibition is imposed on him from entering the campus. The suspension imposed in the instant case is one pending inquiry and is not by way of punishment. This kind of suspension does not attract the principle of natural justice, audi alteram partem, whereas penal suspension would definitely do so, It cannot therefore be said that the suspension was arbitrarily imposed. It is necessary however that the 1st respondent did not act unfairly. Considering the circumstances of the case it is not possible to say that suspension was unfair.

The mere appointment by the disciplinary authority of a committee to inquire and investigate allegations is not improper. The authority must however, finally apply his own mind to the facts as found by the committee of inquiry and arrive at his own decision. The automatic acceptance of the recommendations of the committee without the exercise by the disciplinary authority of his own discretion would amount to a delegation of his powers. In the instant case, there has been no such delegation and the 1st respondent had the authority to appoint the 3rd respondent to inquire and investigate.

Then follows the next stage where the authorities concerned need to inquire into the allegations. This seems to be the point from which the Petitioner's complain of bias, procedural impropriety at the Disciplinary Inquiry, breach of natural justice. It is within the powers of the 2nd Respondent to appoint a Committee of Inquiry. In this instance 2nd Respondent has done so.

On receipt of letter P12 the 2nd Respondent with the approval of the Council, a Committee of Inquiry was appointed (2R9). It consists of at Mr. D.Jayasinghe Head, Department of Marketing & Proctor Dr. A.D. Ampitiyawatte Dean, Faculty of Agriculture Mr. R.M.W. Rahtnayake Dean, Faculty of Management Studies.

I would at this point also refer to affidavits of 2R14A & 2R14B. It is stated that Wasantha Ratnayake & Ampitiyawatte participated at the council meeting of 02.05.2013 and when the report was taken up for discussion as regards punishment they walked out since they were members of the Committee of Inquiry. I see no basis to reject such position. That indicates that the committee was aware of their responsibilities.

I will now consider the available notes or material placed before court to ascertain details of the inquiry procedure.

It is the position of the Petitioners that they requested that an Attorney at Law, namely Mr. Sunil Jayasena be allowed to participate at the inquiry, who was present at the inquiry. That was disallowed by the Committee of Inquiry. I cannot find any proof to substantiate such a position. If there was any difficulty in obtaining the proceedings, at least an affidavit of the named Attorney at Law should have been produced. Position in this regard of the Respondents is

that the relevant circular does not permit outsiders to represent the students. Rule 12 R3 also does not make specific reference for such representation. I am unable to make specific observations and rule on same as the rules are silent on this aspect. However the more serious allegations are (a) the denial of the right to cross-examine the witnesses and the complainants. Further it is also alleged that (b) the Petitioners were not given an opportunity to call witnesses or produce evidence on their behalf.

If (a) and (b) above had been, in fact denied to the Petitioners, it is a serious concern. If found to be established, no doubt there is a breach of rules of natural justice and the Petitioner would be definitely entitled to the relief prayed for in these application before court. It is unfortunate that proceedings are not made available by either party, other than statement recorded at the inquiry. Such an important application ('a' & 'b' above) should have been recorded or some letter or document addressed in that connection to the Committee of Inquiry should have been made available to court.

In answer to such an allegation Respondents in their objections as well as in their submissions take up the position that there was no such application made as regards (a) & (b) above to the Inquiring Committee, and that

such an allegation is an afterthought. In the case of University of Ceylon Vs. Fernando 61 NLR 506.

> There was no infringement of any principle of natural justice if the Plaintiff was not given an opportunity of cross-examining a material witness if no request was made by him to tender such witness for cross-examination.

Therefore I am not in a position to consider (a) & (b) above favourably towards the Petitioner. It appears to this court according to the material furnished that at no stage was such an application made to the Committee of Inquiry. Nor does letter P16 which was addressed to the 2nd Respondent contain any such denial of natural justice as per (a) & (b) above.

The submissions of Petitioner and as averred in the pleadings of the several Petitioners is that some dissatisfaction being expressed on letter P2, and by P3, Petitioners have sought clarification from the 2nd Respondent, Vice Chancellor. The position on these so called rules, (P2) as suggested by Petitioners are contained in para 9 of the objections. In the next para 10, it is pleaded that the Students' Union called for a Special general Meeting on 12.3.2013 (vide minute P4). The Committee of Inquiry has recorded the statements of 20 witnesses. This includes the statements of Petitioner in CA 153/2013 and several students who participated at the special general meeting of 12.3.2013.

Statements of students are marked 2R11D, and the rest of students inclusive of above, as 2R11a to 2R11 I. It cannot be denied that the above meeting was held without prior approval. Perusal of the statements of many students, there is no denial of above and all of them state that prior approval has not been obtained. It is stated in the above statements either directly and or indirectly from which one could arrive at a conclusion, of not obtaining approval. Thus violating the relevant rules and by-laws. There is also reference made by many who made statements to the committee that they were aware of the 8.00 p.m hostel rule, and the meeting held from about 8.00 p.m to 12.00 midnight and as such violated the hostel rule which require students to be in the hostel by 8.00 p.m.

The statements recorded of all concerned at the inquiry, no doubt gives an indication that the charges leveled against the Petitioner and others as in letters P10A to P10D are more or less established other than charge or Count No.2.

I have now to examine the Inquiring Committee report produced marked 2R12. It refer to the three (3) charges, similar to those contained in letters P10A to P10B. The second page of 2R12 gives the names of persons who made statements before the committee, inclusive of Petitioner's statements and officials. There is in that page itself of the person who could not make a statement

and that there was no response to 2nd Respondent's request to appear before the committee. The 3rd page of 2R12, refer to those persons who gave statements, and letters produced and the attendance register and it states based on same the Committee of Inquiry has arrived at a conclusion as follows:

(a) Exonerate students R.S.A. Hemantha.

(b) No material to convict or find guilty the Petitioners named therein on charge or Count No. 2 i.e without prior approval inviting outsiders to the University premises to participate.

(c) That on12.3.2013 the meeting was held between 8.00 p.m & 12 midnight and thereby breached the hostel rules by the Petitioner named therein and or aided and abetted students to flout above rules and as such Petitioners found guilty of count or charge Nos. 1 & 3, and punishment to be imposed.

This court observes that although the Petitioners have not specifically faulted report 2R12, this court is unable to ascertain whether the Inquiring Committee had in fact given its mind to Count No. 1 i.e absence of prior approval to hold a meeting. Report does not specifically and precisely consider Count No. 1. There is no doubt reference to the several statements of witnesses are made and by perusing same court finds that material had been placed as regard Count No. 1

and (3). But the report lacks adequate reasoning other than to merely refer to the several statement, from which one needs to infer, and arrive at a definite conclusion.

This court, since it is a discretionary remedy, which is sought, is not inclined to disturb the findings arrived at by the Respondents concerned, other than expressing views in the context of this case on the principles and applicability of the rule of proportionality. Nevertheless I am compelled to observe, though no real prejudice had been caused to the Petitioners in the conduct of the disciplinary procedure except due to their own inability to assert their proper legal rights at the correct time or moment, there does not appear to be strict compliance with University Grants Commission Circular No. 946 (2R13) in the conduct of disciplinary inquiries, more particularly schedule 1 of same. In the case in hand no formal charge sheet had been issued. However no prejudice caused since the 3 charges had been made known prior to the inquiry as referred to in letter P10A to P10D (it should not be the case). Proceedings of the inquiry should be made available, to either party to get adequately prepared. In the absence of such proceedings a party would suffer in the progress of the trial or inquiry. The authorities need not play 'hide and seek'. There should always be transparency in the conduct of the inquiry and it should be an all inclusive inquiry.

A right to be defended if a request is made should not be denied. Nor should the right to examine and cross-examine witnesses be denied, if requested. In any event it is desirable for the panel to inform the parties of each others' basic rights in the conduct of the inquiry, and have it recorded, as it is essential to establish due compliance with the rules of natural justice by any Administrative Tribunal. It does not mean just to give the bear minimum, and withhold what is essential, but give what is due in a meaningful manner.

Proportionality is fast becoming a recognized and an independent ground of review. No doubt it has the European influence, but our courts have time and again expressed its application in judgments and made it more meaningful when the need arises.

Courts have intervened to provide a remedy following the impositions of grossly excessive punishment in natural justice cases. In R Vs. Barnsley MBC, ex parte Hook (1976) 3 All ER 352, the lifelong deprivation of a man's livelihood for having misbehaved by urinating in the street and using abusive language is one familiar example. See also R Vs. Secretary for the Home Dept., ex-parte Herbage (No. 2) 1987 1 All ER 324, where a fundamental right not to be inflicted with cruel and unusual punishment was recognized.

I would however before I proceed to apply the principle of proportionality to the case in hand I prefer to quote a passage dealing with its nature in other jurisdictions which support my views on the subject.

Nature of the Principles of Proportionality

Text Book of Administrative Law – 2nd Ed Peter Leyland & Terry Woods

Pg. 217/218..

> At this point it is instructive to discuss the related principle of proportionality, which is widely accepted on the Continent, where it plays an important part not only in the domestic law of Germany and France, but also in European Union law and in the jurisprudence of the European Court on Human Rights. The concept originates in German administrative law and is in some respects closely related to irrationality, improper purpose and relevant and irrelevant consideration (see chapter 8). Proportionality works on the assumption that administrative action ought not go beyond the scope necessary to achieve its desired result. In other words, if measures are considered to do more harm than good in reaching a given objective, they are liable to be set aside. This is a useful concept to adopt when seeking to balance the exercise of the kind of discretion placed in the hands of administrators. Proportionality may be regarded as an extra safeguard which is activated only after it has been established that a public body has the legal power to act, or that the body is not pursuing an improper purpose, i.e, even if these grounds do not apply, it may still be relevant to consider whether the body concerned is acting proportionately (Craig 1994, p.414). At its simplest, the court may be called upon to perform a kind of balancing exercise to assess if the objective for an official decision justifies the means employed to achieve it, or whether the means can be deemed to be disproportionate. (For a discussion of

proportionality and the related concept of manifest error in French administrative law, see Brown and Bell 1993, pp.218 ff and 245 ff).

In the circumstances and in the context of this case, though I am somewhat critical of the report 12R12 and the procedure adopted to hold the inquiry, it is relevant to note that the Petitioners were all exonerated and or found not guilty of Count No. 2, i.e inviting outsiders to participate at the meeting without approval. This is the most serious charge out of all three. The Committee of Inquiry very correctly came to the conclusion that there is no material to proceed on same. This court is of the view that based on proportionality the punishment of 8 months is excessive in the circumstances of the case. Court makes order to reduce it to 4 months even though the period has lapsed and as for the record and the consequence that flow should be mitigated in favour of the students based only on a 4 months period. Discipline need to be maintained in a University. In doing so the authorities concerned need to take the required steps and students should obey the rules. On the other hand each student selected to a University has a future destined to achieve a goal. The civil society will frown on graduates after graduating from a University if they continue to resort to indiscipline acts thereafter. This court is of the view that having considered the

nature of the charges that were established, a period of 4 months would suffice, to enable the Petitioners to be reformed for the betterment of the civil society. Subject to above we proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL