

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

In the matter of an application under Article
17 and 126 of the Constitution.

1. Herath Mudiyansele Ajith Rohitha
Bandara Herath,
Hewapola,
Pilessa.
2. Weerasooriya Arachchilage Padmini
Damayanthi Weerasoriya,
Hewapola,
Pilessa.
3. J.M.N. Bandara,
No. 53, 'The Breeze',
Kiriwawula, Thorayaya,
Kurunegala.

Petitioners

SC FR Application 101/2014

-Vs-

1. K. Thawalingam,
Former Surveyor General,
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.
2. S.M.P.P. Sangakkara,
Additional Surveyor General,
(Title Registration),
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.
- 2A. S.K.Wijesinghe,
Additional Surveyor General
(Title Registration),
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,

Narahenpita, Colombo 5.

- 2B. P. A. N. De Silva,
Additional Surveyor General,
(Title Registration)
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.
3. R.T.P. Herath,
Former Provincial Surveyor General,
Provincial Surveyor Generals' Office,
South Circular Road,
Kurunegala.
- 3A. A.M.R.B.K Atapattu,
Provincial Surveyor General,
Provincial Surveyor Generals' Office,
South Circular Road,
Kurunegala.
4. E.M.D.M Ekanayake
Former Senior Supritendent of Surveys,
District Survey Office,
South Circular Road,
Kurunegala.
- 4A. E.M.P.U.K. Tennakoon,
Senior Superintendent of Survey,
District Survey Office,
South Circular Road,
Kurunegala.
5. H.P.S. Hettiarachchi,
'Kusumsiri', Wadakada Road,
Pothuhera.
6. E.A.M. Perera,
74/30J, Rajamal Uyana,
Colombo Road, Kurunegala.
7. B.D. Premaratne,
No. 50, Rideegama Road,
Mallawapitiya.

8. R.D.M.P.R. Rajapaksha,
19/3A, Mallawapitiya,
Kurunegala.
9. S.M. Ariyadasa,
Akkara Ata,
Kalugamua.
10. A.S.K. Paranage,
Temple Road, Hiripitiya,
Nikadalupotha.
11. K.L.S. Rathnayaka,
'Sandalu', Daragala,
Welimada.
12. P.A.N. Gunasiri,
Hewanellagara,
Nakkawatta.
13. E.M. Gunawathie,
128, Welangollawatta,
Welagedara Uyana,
Kurunegala.
14. P.P. Weerakkody,
Kithulheragama,
Nagallagamuwa.
15. M.V. Ariyaratne,
Rideegama Road,
Mallawapitiya, Kurunegala.
16. S.B. Abeykoon,
Pannala-Kuliyapitiya Road,
Kankaniyamulla,
Walakumburumulla.
17. H.M.S. Priyadarshana,
Muwanwellegedara,
Awulegama.
18. K.A. Amarathunga,

567/4, Sewendana,
Maharachchimulla.

19. W.M.P.B Wijekoon,
50/10, Negombo Road,
Kottagas Junction,
Uhumeeya.
20. A.P. Kumarasinghe,
Dunukelanda, Welagane,
Maspotha.
21. P.B. Dissanayaka,
234/10, Wilgoda Road,
Kurunegala.
22. K.S. Dasanayaka,
13/12, Jaya Pathirana Mawatha,
Buddhaloka Road,
Kurunegala.
23. R.M. Rathnapala,
'Prasansani', Bamunawala,
Kurunegala.
24. L.W.I. Jayasekara,
2nd Land, Athuruwalawatta,
Dambadeniya.
25. J.A.R. Jayalath,
1, Sri Indrajothi Mawatha,
Udubaddawa.
26. J.A.S. Jayalath,
75, Kuliyaipitiya Road,
Udubaddawa.
27. R.M. Pushpadewa,
Dangolla, Horombawa.
28. J.D. Hapuarachchi,
Nugawela,
Maharachchimulla.

29. L.G. Ranathunga,
111, Kandy Road,
Kurunegala.
30. M.P.I.K. Pathirana,
272, Lake Road,
Theliyagonna, Kurunegala.
31. H.V.A. Jayalath,
33, Thalgodapitiya Mawatha,
Malkaduwwa, Kurunegala.
32. Attorney General,
Attorney General's Department,
Colombo 12.
33. Nihal Gunawardena,
Former Surveyor General,
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.
- 33A. P.M.P. Udayakantha,
Surveyor General,
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.

Respondents

Before: Buwaneka Aluwihare, PC. J.,
Priyantha Jayawardena PC. J, and
Murdu N.B.Fernando, PC. J.

Counsel: Pubudini Wickramaratne with Yamindri Perera for the Petitioner.
Rajitha Perera SSC, for the 2B, 3A, 4A, 32 and 33A Respondents.

Argued on: 14.01.2019

Decided on: 12.03.2021

Murdu N.B. Fernando, PC. J.

The Petitioners filed this application before this Court, seeking inter-alia a Declaration that the 1st to 4th and 33rd Respondents or any of the said Respondents have infringed the Fundamental Rights guaranteed to the Petitioners under Article 12(1) of the Constitution. Leave to Proceed was granted by this Court to the Petitioners on 13-02-2015.

The relevant facts as stated in the Petition dated 25.03.2014 *albeit* brief is as follows: -

01. The three Petitioners are Registered Licensed Surveyors. They are holders of an annual practicing license issued in terms of the Survey Act No 17 of 2002. They are also empowered to conduct cadastral surveys and have been issued with Certification of Accreditation to conduct surveys for the purpose of the Registration of Title Act No. 21 of 1998. Such Certificates were issued to the Petitioners by the Surveyor General after being satisfied of their competence.
02. All three Petitioners were Government Surveyors now retired and engaged in conducting private surveys.
03. In terms of the Registration of Title Act No.21 of 1998 conducting of surveys and preparation of cadastral plans and maps in the island for registration of title fell within the purview of the Survey Department. This project is referred to as the 'Bim Saviya programme'.
04. When the Survey Department launched the said programme in the Kurunegala District, the Petitioners were deployed and assigned work for the below mentioned years:
 - 1st Petitioner - 2009 to 2012
 - 2nd Petitioner - 2011 and 2012
 - 3rd Petitioner - 2012
05. In 2012, the Surveyor General called for applications for the engagement of Surveyors for the said programme **with regard to the year 2013**. Selections were made and a priority list for Kurunegala District was prepared. In the said list of Registered Licensed

Surveyors (“the Surveyors”) only the names of the 2nd and 3rd Petitioners were included. The 1st Petitioner was not among the selected Surveyors. However, no surveys were assigned to any of the Surveyors named in the list, including the 2nd and 3rd Petitioners as surveys were not carried out in the Kurunegala District under the Bim Saviya programme for the year 2013, due to financial constraints.

06. **For the year 2014** too, applications were called by the Surveyor General by letter dated 07-11-2013 (P8). The three Petitioners applied and were selected to conduct surveys in the Kurunegala District and were placed at the 23rd, 24th and 25th positions respectively in the ‘**Priority List**’ (P12).

07. The grievance of the Petitioners before this Court, is their placement in the priority list and the Petitioners plead that they are entitled to be placed higher in the said priority list (P12).

08. The Petitioners also plead that the scheduled work in the Kurunegala District for 2014 is only to be assigned to 17 Surveyors and that it would be assigned to the Surveyors placed at the top 17 places in the priority list (P12) and not to the Petitioners who are placed at the lower end of the priority list. The said 17 Surveyors who are placed at the top end of the priority list have been named as the 5th to 21st Respondents in the petition filed before Court.

09. Hence, the Petitioners are challenging the priority list (P12) and specifically the placement of seven of the said Respondents, viz 16th, 17th, 18th, 19th, 21st, 23rd and 24th Respondents before Court. The names of the said seven Respondents appear at the 12th, 13th, 14th, 15th, 17th, 19th and 20th positions in the priority list. The said seven Surveyors are placed over and above the three Petitioners who are slotted in at the 23rd, 24th and 25th places in the priority list.

10. Thus, the Petitioners plead that, determining the order of priority in the priority list (P12) and the selection and/or the assignment of work to the 5th to 21st Respondents is arbitrary, capricious, unreasonable and has no force or effect in law and violates the fundamental

rights of the Petitioners guaranteed under Article 12(1) of the Constitution, for the below mentioned reasons: -

- a) The guidelines (P11) for selection of Registered Licensed Surveyors to carry out cadastral surveys under the Bim Saviya programmes in 2014 specifies that first preference should be given to Surveyors who have conducted surveys under the said program for 2011, 2012 and 2013 and the Petitioners have conducted such surveys and are entitled to receive first priority in terms of the selection criteria marked P11;
- b) The 16th, 17th, 18th, 19th, 21st, 23rd and 24th Respondents have not conducted any surveys under the said Bim Saviya programme during the said years and therefore, could not have been selected and placed ahead of the Petitioners in the priority list;
- c) Some of those selected do not possess the eligibility criteria and could not have been selected; and
- d) The Petitioners have a legitimate expectation that they would be selected in terms of the selection criteria in P11.

11. Therefore, the Petitioners pray;

- a) for a declaration that the fundamental rights of the Petitioners guaranteed under Article 12(1) have been violated;
- b) for a declaration that the Petitioners are entitled to receive first priority to conduct cadastral surveys for the year 2014;
- c) for a declaration that the priority list (P12) is null and void;
- d) make order to direct the 1st to 4th and 33rd Respondents to determine the order of priority; and
- e) interim relief restraining, assigning of work under the said program to the 5th to 21st and/or 22nd to 31st Respondents, in the Kurunegala District for the year 2014.

Having referred to the facts stated by the Petitioners, let me now move onto consider the case of the Respondents.

The journal entries bear out that when this application was first taken up for support, the learned Senior State Counsel appearing for the 32nd Respondent, the Hon. Attorney General submitted to Court that the three **Petitioners have failed to show effective work progress during the relevant years, i.e. 2011, 2012 and 2013** as stipulated in the document marked P11 and moved to file a copy of the ‘Evaluation Sheet of the Effective Work Progress of the Surveyors’. This application was permitted by Court. The Petitioners were also permitted to counter the contents in the said Evaluation Sheet.

The Evaluation Sheet of Effective Work Progress was thus filed in Court prior to the date of support of this application and the Petitioners countered same by filling an affidavit annexing a number of documents and challenged the computation of the effective work progress of the Petitioners reflected in the Evaluation Sheet.

Consequent to Leave to Proceed being granted by this Court to the Petitioners, objections were filed on behalf of the 1st to 4th and the 33rd Respondents. Objections were not filed by the 5th to 31st Respondents nor were they represented before this Court.

The position of the 1st to 4th and the 33rd Respondents (“the Respondents”) as reflected in the objections is that the **Priority list (P12) was prepared based upon the selection criteria laid down in P11.**

Clause 2.1 of P11 stipulates that when selections are made **first priority** should be given to Surveyors who have conducted surveys under the Bim Saviya programme during the years 2011, 2012 and 2013 and **have maintained an effective work progress**. The Respondents plead that the three Petitioners did not possess the said threshold requirement i.e. the average effective work progress of 40 lots per month and were thus not considered under the said category (referred to as category I) for which first preference was given.

Clause 2.3 of P11 indicates that **second preference** should be given to Surveyors who have conducted surveys under the supervision of the Surveyor General during the years 2009 to 2013 but have not been assigned work nor exposed to the Bim Saviya programme earlier. The three Petitioners did not fall within the said category (referred to as category II) either. Thus, the Petitioners could not be accommodated under category I or II and were slotted in thereafter, under category III in terms of P11, the selection criteria.

The Respondents also contended that in the priority list (P12) all three categories of Surveyors were included. The first ten names were of the Surveyors who met the average effective work progress to be considered as “efficient” and fulfilled the applicable criteria and were thus given first priority and fell within category I. The next ten names were of the Surveyors who had the required qualifications and had conducted surveys under the supervision of the Survey Department but had not been given the opportunity or exposure to conduct Bim Saviya programmes previously by the Surveyor General. Thus, they fell within category II and were given the second priority, in terms of the selection criteria and an opportunity and exposure to conduct Bim Saviya surveys in order to demonstrate their efficiency. The Surveyors who had conducted Bim Saviya programmes earlier and specifically during the period of evaluation, viz 2011, 2012 and 2013 but failed to meet the average target were next placed in the priority list together with other Surveyors and consisted of the last segment of the Surveyors (Category III) totaling a list of thirty Surveyors in the priority list (P12).

The Respondents further contended that it was not in the best interest of the Bim Saviya programme to give priority to Surveyors who failed to meet the average target and hence considered ‘inefficient’. The said Surveyors were not accommodated among the 1st set of Surveyors but were placed below the 2nd set of Surveyors, i.e. category II Surveyors who have conducted surveys under the Surveyor General during the last five years, but not deployed for the Bim Saviya programme. Thus, the Petitioners who fail to pass the threshold mark fell within category III and were slotted in after category II, in which the 16th to the 24th Respondents were placed. Therefore, the Respondents aver that placing the 16th to 24th Respondents ahead of the Petitioners is in order and in terms of the relevant circular P11.

Hence, the Respondents contended that the priority list (P12) was prepared based upon the applicable criteria and thus, was not arbitrary, capricious or unreasonable and did not violate the fundamental rights of the Petitioners.

The case presented by the Counsel for the Petitioners at the hearing before us, was materially different to the case enumerated in the petition. It is observed according to the petition, the main grievance of the Petitioners was failure to grant preference over and above the 16th, 17th, 18th, 19th, 21st, 23rd and 24th Respondent. However, the Petitioners main contention at the hearing was that the **Evaluation Sheet of Efficient Work Progress marked R1 was compiled erroneously**, in so far as the Petitioners were concerned which resulted the Petitioners

being placed low in the priority list. Thus, the Petitioners primary challenge before us was the Evaluation Sheet and its compilation. The Petitioners also contended that the priority list (P12) prepared based upon the said Evaluation Sheet is erroneous, grossly unfair, arbitrary, discriminatory and unreasonable.

Hence, the question that this Court is now called upon to determine is whether the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution, have been violated by the Respondents in the above stated circumstances.

Article 12(1) of the Constitution reads as follows: -

“All persons are equal before the law and are entitled to the equal protection of the law.”

It is trite law, that equality postulated in Article 12(1) is the right of a person to be treated alike among equals and there should not be any discrimination among those who are equally circumstanced. Similarly, it is trite law, that such guarantee of equality doesn't forbid reasonable classification, which is founded on intelligible differentia, since the concept of equality only forbids actions which are arbitrary, capricious and unreasonable and not the classification which is reasonable. These concepts of reasonable classification have been considered in many judicial decisions and writings and I do not wish to repeat same except to reiterate;

“Article 12 of the Constitution forbids hostile discrimination, but does not forbid reasonable classification...Reasonable classification is inherent in the concept of ‘equality’, because all persons are not similarly situate”

Rienzie Perera and another V. University Grants Commission and another
1978.79.80 (i) SLR 128

“It is now settled law that the Equal Protection Clause prohibits discrimination not only by substantive law but also by a law of procedure. What is forbidden is class legislation, not class classification. A permeable classification must satisfy two

conditions, (i) it must be founded on an intelligible differentia that distinguishes persons or things that are grouped together from others left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved. The differentia and object are different elements and as such the object by itself cannot be the basis for classification.”

Fundamental Rights in Sri Lanka – Jayampathy Wickramaratne (1st Edition) page 290.

Having considered the nature of Article 12(1), let me now turn to examine the grievance of the Petitioners. Is there an infringement in terms of the said clause as complained by the Petitioners before this Court or has the provisions of Article 12(1) been violated by the Respondents in any manner by their alleged conduct?

The case presented and the matter for determination in my view, revolves around the priority list (P12). Hence, the next issue I wish to examine pertains to the priority list (P12). **Was the priority list prepared, in accordance with the guidelines laid down and in terms of the law as contended by the Respondents or is it erroneous, unfair and arbitrary as contended by the Petitioners?**

In the first instance, I wish to look at the procedure involved in the issuance of the priority list (P12) in detail.

Under the Bim Saviya programme, the role of the Survey Department is to survey and prepare cadastral maps and plans in terms of the Registration of Title Act. This programme was initiated in certain areas in the island on a time line basis. In the selected areas where the programme was being implemented, if there was a dearth of Surveyors at the Survey Department to carry out the surveys in order to meet the time lines laid down, Surveyors who were not in public service or retired from public service and now engaged in conducting surveys as freelance private Surveyors were deployed and this process began by calling for applications.

Thus, by **P8**, the Surveyor General extended an invitation to Registered Licensed Surveyors who fulfill the eligible criteria, to survey and prepare cadastral maps and plans for the Bim Saviya programme for the year 2014 in the Districts and divisions referred to in the said notice. Upon applications received, selections were made by the Surveyor General based

on the selection criteria. Priority lists were prepared and communicated to the respective Provincial Surveyor Generals for implementation of the Bim Saviya programme. P10 is the letter sent by the Surveyor General to the North-West Provincial Surveyor General for such purpose. The document P11 and P12 were also sent together with P10.

Whilst **P10** gives a detailed description of the functions to be performed by the provincial office to execute agreements, supervise work performed and payment to be made to the private Surveyors, **P11** is captioned qualification, selection, conditions pertaining to registration of Registered Licensed Surveyors for 2014 and **P12** gives the name list of selected Surveyors to be assigned work in the District of Kurunegala for the year 2014.

With regard to selection of Surveyors, two clauses in P11 are material. They are Clauses 2.1 and 2.3. Whilst clause 2.1 of document **P11** indicates that **priority will be given to Surveyors who have conducted surveys under the Bim Saviya Programme during the last three years i.e. 2011, 2012 and 2013 and importantly have shown an effective work progress**, Clause 2.3 of P11 indicates that Surveyors who have conducted surveys under the supervision of the Surveyor General during the last 5 years i.e 2009 to 2013 will be given priority thereafter. The rest of the Surveyors will be considered next in order to be assigned work under this special project.

The contention of the learned Counsel for Petitioners is that the Petitioners fall within the first category since the three Petitioners have conducted surveys under the Bim Saviya programme during the relevant three years i.e 1st and 2nd Petitioners in 2011 and 2012 and the 3rd Petitioner in 2012. Thus, the Petitioners argue that they should get priority over seven Respondents, viz 16th,17th,18th,19th,21st,23rd and 24th Respondents who come under the said category II, as the said seven Respondents have not conducted any surveys under the Bim Saviya programme. It is noted that for some unexplained reason the 20th and 22nd Respondents have been left out from the said category. Further, the Petitioners argue that the said seven Surveyors can only be considered, if and only if, there aren't any Surveyors, who have had previous experience in the said programme.

On the other hand, the contention of the learned Senior State Counsel for the Respondents is that although the Petitioners have conducted surveys under the Bim Saviya programme, that the **Petitioners have not maintained an 'effective work progress' and thus cannot be considered under the first category to be given preference over category II**

Surveyors. Further the Surveyors were classified based upon their performance and the performances of the Petitioners was far below the average considered as effective work progress and therefore the three Petitioners could not be categorized under the first category but could only be considered under the third category of the selection criteria laid down in P11.

The learned Senior State Counsel also contended that the 'effective work progress' of the Surveyors who conducted surveys under the Bim Saviya programme were evaluated based on a standard mathematical formula which was used island wide, and only the Surveyors who passed the threshold, i.e. maintained the average of 40 lots surveyed per month were considered as having an 'effective work progress' and placed under category I. The Surveyors who could not pass the said threshold were not considered under the said category and thus, not given first priority in the final list of selections.

The case of the Respondents was with regard to the preparation of the priority list P12 for Kurunegala District, the same yardstick was used. P12 was compiled based upon the performance data of each Surveyor for the three years under review and the average effective work progress per month. As stated earlier only the Surveyors who maintained an average survey of 40 lots per month were placed under category I to be given first priority. The Petitioners average effective work progress was 32.8, 30.9 and 24.3 respectively which was far below the threshold of 40 lots per month and thus could not be given first priority and placed in category I of the eligibility criteria reflected in clause 2.1 of P11. Therefore, the submission of the Respondents was that the priority list (P12) which reflects such decision, is neither arbitrary, capricious, unreasonable nor violative of the fundamental rights of the Petitioners.

I see merit in the said submission. **If a Surveyor cannot achieve the threshold mark to be considered as having an effective work progress, such a Surveyor cannot expect to be given preference and be placed among Surveyors who have achieved the threshold mark.** If a Surveyor has failed to achieve the target required to be placed at a particular point, then the said Surveyor has to face the consequences. In the instant matter, the Petitioners failed to achieve the threshold. Thus, the three Petitioners could not be slotted in under category I and given preference in the priority list P12.

I would pause at this moment and look at P12 the priority list from another angle. It has 30 names of selected Surveyors in the order of merit. There is no dispute that for the year 2014,

the North-West office of the Surveyor General, could assign work only for 17 Surveyors for conducting of Bim Saviya surveys in the Kurunegala District (vide P10). Thus work had to be assigned to the first 17 Surveyors in the priority list (P12). Out of the said 17 Surveyors, the top 10 Surveyors as discussed earlier were classified under category I, having conducted surveys under the Bim Saviya programme and maintaining the average effective work progress for the years 2011, 2012 and 2013 as stipulated in P11 and more fully reflected in R1 the Evaluation Sheet. The next 7 Surveyors came under category II, i.e the Surveyors who had performed surveys under the Surveyor General for the last five years but were not given the opportunity to conduct any surveys under the Bim Saviya programme. Nevertheless, with a view to give an exposure to this programme, they were considered next in the order of preference as stipulated in P11.

In the priority list the Petitioners were placed at the 23rd, 24th and 25th positions and the three Petitioners did not come within the said 17 Surveyors. The grievance of the Petitioners as reflected to in the petition is not against the first 10 Surveyors i.e. the category I Surveyors who had maintained the average effective work progress but against the next set of 7 Surveyors i.e. the Surveyors who were considered under category II and who were placed next in the order of preference and were slotted in at the 12th, 13th, 14th, 15th, 17th, 19th, and 20th positions. The grievance of the Petitioners is against priority being given to these seven Respondents viz-a-viz the Petitioners. The submission of the learned Counsel for the Petitioners is whatever may be the Petitioners performance, the Petitioners should get priority and be placed under category I, over and above the Surveyors of category II.

This brings me to the crux of the issue before this Court for determination - classification. **Is the classification reasonable? Can Surveyors be classified in this manner? Is it founded on intelligible differentia? Can classifying Surveyors on performance be termed ‘an intelligible classification’?**

In simpler terms, **should a Surveyor maintain an ‘effective work progress’ and be deemed ‘efficient’ to obtain priority in P12?** Or could a Surveyor who has not maintained the average effective work progress and deemed ‘inefficient’ handling surveys under the Bim Saviya programme be treated equally and be **given priority in P12, the list of selectees under the same category of classification of the Surveyors who have maintained the average effective work progress?**

In my view, the criteria for selection as spelt out in P11 is rational. It is well defined and precise. In order to obtain the object sought to be achieved through this programme, an effective work progress is mandatory. Mere conducting of surveys under the Bim Saviya programme is not sufficient. Efficiency of handling a survey is *sine-qua-non* to be considered for selection in a subsequent occasion. The Petitioners are freelance Surveyors, handling private work. When such freelance Surveyors are co-opted and tasked to do work for the State and the Surveyor General for remuneration, laying down a yardstick, a transparent system or a marking scheme and placing the Surveyors on a merit list is laudable and salutary, especially because this programme is a time lined project, based on a concept which is novel and pioneering in respect of the land regime in Sri Lanka.

In the instant case, the Surveyor General has resorted to such a mechanism of classification. The Surveyor General has evaluated the performance of the Surveyors during the last three years, i.e. 2011, 2012 and 2013 and placed only the Surveyors who have maintained the average effective work progress in Bim Saviya surveys, in the order of merit, based on the average obtained, subject to a threshold cut-off mark in category I. The Surveyors who have not been assigned surveys under the Bim Saviya programme but nevertheless worked under the supervision of the Surveyor General by conducting many surveys during the 5 year period 2009 to 2013 have been placed next in the order of priority (category II). The rest of the Surveyors, including the Surveyors who have not reached the effective work progress in the relevant years under the Bim Saviya programmes have been placed thereafter (category III). Thus, the Petitioners fall within the 3rd category. I see no fault in resorting to such a scheme. In my view such a mechanism or classification to achieve the object of the Bim Saviya programme is neither arbitrary nor unreasonable, capricious, grossly unfair as suggested by the Petitioners and it does not violate the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

Corollary, if the Surveyor General did not follow a reasonable classification or arbitrarily dished out work at his whim and fancy to persons of his choice and placed them in a list at his discretion, then in such a situation a person could challenge such a scenario for being discriminatory or violative of his fundamental rights.

‘Classification’ as discussed earlier was considered by this Court in the case **Ananda Dharmadasa and Others V Ariyaratne Hewage and Others [2008] 2 SLR 19** where the non-appointment of the petitioners therein to a particular class of the public service, was the point of issue in a fundamental rights application. In the said case Shirani Bandaranayake, J (as she then was) observed as follows: -

“The concept of equality postulates the basic principle that equals should not be placed unequally and at the same time unequals should not be treated as equals.”

In the said judgement reference was made to the oftquoted statement of Bhagawati, J in **Royappa v State of Tamil Nadu (AIR 1974, S.C. 555)** that,

“Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positive point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.”

In **Ananda Dharmadasa’s case**, after an in depth study of the equal protection clause and case law, this Court went on to observe as follows: -

“It also has to be borne in mind that every differentiation would not constitute discrimination and accordingly classification could be founded on intelligible differentia.” (vide page 33)

I am in agreement with the above observations and especially **that every differentia of persons would not constitute discrimination.**

Hence, the main ground of challenge referred to in the petition that the Petitioners who have conducted surveys and had previous experience under the Bim Saviya programme, should not be discriminated but be considered and placed in category I irrespective of their efficiency ahead of the 16th,17th,18th,19th,21st,23rd and 24th Respondents (of category II) who lacked previous experience in Bim Saviya surveys, in my view has no force or effect in law. Similarly, the Petitioners contention that merely because the Petitioners had conducted surveys for the

Bim Saviya programme previously, that the three petitioners should be placed in category I, is erroneous and unfounded.

The selection criteria P11 specifically states that the Surveyors who have conducted surveys under the Bim Saviya programme should in addition to the necessary certification, demonstrate an effective work progress in conducting of such surveys. Thus, classification of Surveyors, based on laid down conditions and criteria as category I, II and III by the Surveyor General will not amount to discrimination as it is based on clear and identifiable criteria. Similarly, evaluating the Surveyors on such a yardstick, prioritizing on efficiency and classifying them as 'efficient' and 'not so efficient' and placing the Surveyors who have shown an efficient work progress ahead of the 16th to 24th Respondents (selected under category II) and the three Petitioners who have not shown an efficient work progress after the 16th to 24th Respondents cannot be deemed discriminatory, arbitrary or unreasonable. It is observed that in making the selection, equals were neither placed unequally nor unequals treated equally. Hence it did not affect the equal protection guaranteed by the Constitution to the Petitioners.

Thus, the one and only ground the Petitioners pleaded and relied upon in the petition to challenge the priority list (P12) in my view is without reason, baseless and unfounded. Moreover, classifying and prioritizing the Surveyors upon their work progress is to achieve the object of the Bim Saviya programme. Therefore, considering performance and efficiency of Surveyors is just and fair and is in accordance with the selection criteria referred to in P11. Hence, in my view, the Petitioners have failed to establish that the priority list (P12) violates the Petitioners fundamental rights guaranteed under Article 12(1) of the Constitution and upon the said ground alone, this application should be dismissed.

However, in the submissions presented before Court, the learned Counsel for the Petitioners also **challenged the formula used by the Surveyor General to mark and measure the performance of the Surveyors** who had conducted surveys for the Bim Saviya programme. Thus, the Counsel for the Petitioners challenged the award of marks of the Petitioners reflected in R1 Evaluation Sheet and the placement of category I Surveyors in the positions one to ten in the priority list (P12) i.e. the placement of the 5th to 15th Respondents before Court in the first ten places in the priority list (P12) *viz-a-viz* the award of marks and placement of the Petitioners at 23rd, 24th, 24th, and 25th positions in the priority list (P12).

Initially, the Petitioners case was against the placement of the 16th to 24th Respondents ahead of the Petitioners. The Petitioners new ground of challenge is basically against the placement of the 5th to 15th Respondents in the priority list (P12) viz-a-viz the Petitioners.

Hence, an entirely a new case was presented by the Petitioners before Court and I would now consider the said case in the interest of justice.

In order to justify the said contention, the Petitioners main submission is that the **effective work progress of the Surveyors reflected in the Evaluation Sheet (R1) has been erroneously computed by the Respondents.** Thus, the Petitioners argue that the said wrongful computation was to the detriment of the three Petitioners and resulted in them being placed very much lower in the priority list (P12).

The Counsel for the Petitioners relied on two grounds to put forward its contention.

Firstly, use of two different modes of computation of the ‘effective work progress’ of Surveyors by the Respondents; and

Secondly, the administrative delays of the Survey Department.

The Petitioners contention with regard to the 1st point is that the effective work progress has not been calculated as indicated by the Respondents by dividing the total number of lots surveyed and carried out during the year by twelve, the total number of months of the year. The Petitioners aver according to the Evaluation Sheet (R1) for the years 2012/2013 the effective work progress has been computed by dividing the total lots surveyed by a variable figure over and above 12 being the number of months of the year. Therefore, two different methods of calculations have been adopted by the Respondents which the Petitioners contend is grossly arbitrary, unfair and to the detriment of the Petitioners.

The Petitioners 2nd point of contention is that the administrative delays of the Survey Department immensely prejudiced the three Petitioners. In its written submissions filed before Court, the Counsel for the Petitioners laid down a litany of woes and shortcomings which the Petitioners alleged, amounted to administrative delays of the Survey Department in completing the preparatory steps of the Bim Saviya programme, examples being delays in signing agreements, conducting public awareness programmes, installing and releasing of GPS

controlling points. The Petitioners referred to the assignments given to the 2nd Petitioner by dates and months in order to substantiate its contention. The Petitioners therefore aver that when calculating the effective work progress, 'the actual number of months' taken to complete the survey physically on the ground should be considered and not the average effective work progress of twelve months or a percentage as has been relied upon by the Respondents.

Having referred to the contention of the Petitioners put forward at the hearing, I would now move onto consider the second ground relied upon by the Petitioners to establish its position.

The facts relied upon by the Petitioners to present its argument, in respect of the **administrative delays** as indicated earlier is not referred to in the petition nor substantiated by an affidavit. It is only referred to in the written submissions. Thus, there is no evidence before Court pertaining to the said facts and I see no reason to rely on such unsubstantiated facts. The Petitioners have also not distinguished themselves individually or as a core group to draw a comparison and substantiate that the alleged administrative delays had an impact on the Petitioners alone, compared with the rest of the 16 Surveyors referred to in the Evaluation Sheet R1. There is also no evidence before Court to establish the position that the purported administrative shortcomings referred to by the Petitioners, were caused by the Survey Department to the detriment of the three Petitioners only or that the standard formula used island wide by the Surveyor General in computing the effective work progress was in any way affected by the said administrative delays.

Hence, I see no merit in the contention that the administrative delays the Petitioners aver, had a prejudicial impact on the Petitioners alone. If at all there were shortcomings, it was common to all 19 Surveyors referred in the Evaluation Sheet R1. The formula used to compute the effective work progress treated all alike and the Petitioners have failed to establish a discrimination or a violation of a fundamental right based upon such ground. Moreover, the Petitioners have failed to establish how the said delays could make the formula of computation of the effective work progress erroneous which the Petitioners submit resulted in them being placed at the lower end of the priority list (P12).

The other ground the Petitioners argue to establish that computation of the effective work progress was erroneous, is the **use of two different methods of calculation** by the Respondents.

The selection criteria for the year 2014 as reflected in P11, clearly indicates that selections will be based on the performance of the work carried out in the years 2011, 2012 and 2013 and the Surveyors possessing an 'effective work progress' will be given first priority. It is common ground that new assignments were not given in the Kurunegala District for the year 2013 due to financial constraints. Thus, selections had to be made only on the work assigned for the years 2011 and 2012. The said fact is clearly embodied in the postscript in the Evaluation Sheet (R1).

The Evaluation Sheet also demonstrates that for the year 2011, work was only assigned to the 1st Petitioner. The 2nd and the 3rd Petitioners were not selected nor assigned any work in 2011. It is observed that though in the petition and in the affidavit of the 2nd Petitioner filed in Court, it is averred that the 2nd Petitioner carried out surveys in 2011, the curriculum vitae of the 2nd Petitioner annexed to the petition and the written submissions filed before this Court by the Petitioners themselves, reflect otherwise. Thus, the Petitioners have misrepresented facts to this Court with regard to the selection and assignment of work of the 2nd Petitioner for the year 2011.

The Evaluation Sheet (R1) further demonstrates that **for the year 2011**, the 1st Petitioner conducted surveying of 706 lots. In order to ascertain the effective work progress of the 1st Petitioner for the said year, such number of lots has been divided by 12, the number of months per year, which give an average of 58.8 per month. It is observed that the same yard stick of measurement has been used in respect of all the Surveyors without any exception. Thus, in order to compare and contrast the work progress of the Surveyors, the average effective work progress per month has been obtained by dividing the number of lots surveyed by 12, the number of months in the year in a uniform manner.

It is also observed that, **for the year 2012** work has been assigned to all three Petitioners. The R1 Evaluation Sheet postscript demonstrates that in order to obtain the effective work progress of Surveyors for 2012/2013 in the Kurunegala District, the work assigned in 2012 but completed in 2013 was also considered in view of the fact that new assignments were not given

in 2013. Thus, for 2012/2013 the 1st Petitioner completed a total of 82 lots, the 2nd Petitioner a total of 402 lots and the 3rd Petitioner 292 lots. Whilst the 1st and 3rd Petitioners have completed the 2012 assigned work in the year 2012 itself, the 2nd Petitioner has utilized an extra month to complete the work assigned. In arriving at the effective work progress for 2012/2013 in respect of the 1st and 3rd Petitioners, the number of lots surveyed had been divided by 12, whereas for the 2nd Petitioner it has been divided by 13 (12+1), considering the extra month the 2nd Petitioner spent in completing the assigned work in 2012.

The R1 Evaluation Sheet further signifies that this mode of computation has been used not only for the Petitioners but also for the rest of the Surveyors as well. Out of the 19 Surveyors evaluated in R1, 10 have completed the assigned tasks on time and in 2012 itself, whereas the rest of the Surveyors have delayed their assignments and completed the work only in 2013.

Thus in order to arrive at the effective work progress for 2012/2013, of the ten Surveyors who completed the work on time, i.e. in 2012 itself, which includes the 1st and 3rd Petitioners, the formula, total lots surveyed divided by 12 (the number of months per year) has been used. This mode of computation is the same formula used in the year 2011 as discussed earlier and there is no variation whatsoever with regard to the method of calculation as averred to by the Petitioners.

However, with regard to the nine **Surveyors who delayed the assignments of 2012 an exemption has been made**. It is observed that five Surveyors have utilized an extra one month in 2013, two Surveyors have utilized extra five months in 2013 and the balance two Surveyors have utilized six months and eleven months respectively in 2013 to complete their assigned duties of 2012. Hence, in order to arrive at the effective work progress of 2012/2013 of the said Surveyors who delayed their assignments and completed the work in 2013, the total number of lots surveyed by the said Surveyors have been divided by 13 (12+1), 17 (12+5), 18 (12+6) and 23(12+11) respectively, considering the extra time utilized in 2013 to complete the assignments. This is similar to the computation of effective work progress of the 2nd Petitioner who also delayed completion of the assigned work of 2012. Thus, one yardstick has been used in respect of all Surveyors who delayed their assignments. It is also observed if not for this computation, the work assigned in 2012 and not completed on time in 2012 would not have been taken into

consideration at all, in arriving at the effective work progress for 2012 with regard to these nine Surveyors.

The above method of granting an exemption and considering the extra time utilized for completion of the work in 2013 for work already assigned in 2012, is what the Petitioners refer to as **using two different methods**, which the Petitioners aver makes the computation of effective work progress erroneous. I see no merit in such contention. The material before Court clearly envisage that only one method was used to obtain the average effective work progress of 2011 as well as for 2012. However, when calculating the average effective work progress of 2012 as stated earlier an exemption has been made in respect of Surveyors who delayed their assignments. The effective work progress of the said Surveyors has been computed by considering the extra time utilized to complete the assignments. (If not for this exemption, the work of the aforesaid nine Surveyors partially performed in 2012 would not have been evaluated when arriving at the effective work progress of 2012.) Thus, extending an exemption to a uniform and a standard method used island wide, in my view would not amount to using two methods as averred to by the Petitioners.

The same exemption has been given to the 2nd Petitioner and I am of the view that the Petitioners have failed to establish how such an exemption would affect the rest of the Petitioners viz-a-viz the rest of the Surveyors referred to in (P12) the priority list. In the said circumstances, I see no merit in the submissions of the Petitioners pertaining to the use of two methods, which the Petitioners averred was wrongful and unfair.

Corollary, the learned Counsel for the Petitioners put forward another contention and in its written submissions went to a great extent to elaborate and establish the said argument. i.e as discussed earlier since utilizing extra time was considered favourably by the Respondents, only the 'actual time spent on a survey' should be considered in arriving at the effective progress of work and not to rely on an average figure. Thus, the Petitioners contention was if a Surveyor physically surveys 100 lots in 3 months then 100 divided by 3 should be the effective work progress and not 100 divided by twelve (the number of months in a year) in order to arrive at the average effective work progress per month.

The general meaning of the word 'average' is the standard or the central or the typical value in a set of data and in particular the median or the mean of a set of numbers and figures,

arrived at by dividing the total number by a standard unit. That is the concept that has been utilized in arriving at the monthly average work progress of Surveyors to consider their efficacy. It is a standard mathematical formula, scientifically and statistically used. Thus, I see no reason or merit whatsoever, in the contention of the Petitioners that such computation of average is erroneous and should not be resorted to in arriving at the average effective work progress in order to assess the work progress of Surveyors.

Moreover, the data in the Evaluation Sheet R1 indicate that certain Surveyors have been given a higher number of lots to be surveyed whereas certain Surveyors have been given a lesser number of lots to be surveyed. *Thus, in order to compare and contrast the performance of the Surveyors, obtaining the cumulative average of the two years and arrive at the effective work performance is the most suited methodology.* Upon the said ground too, I see no basis or reason in the submissions of the Petitioners that only the ‘actual time spent on the survey’ should be considered in arriving at the effective work progress and not an average figure.

Further, the data in the Evaluation Sheet R1 demonstrates that the 2nd and 3rd Petitioners had only one years (2012) work for evaluation whereas the 1st Petitioner had two years (2011 and 2012) work for evaluation. Further the 1st Petitioner had a high average of effective work progress for 2011, but the work progress for 2012 was significantly low compared to the rest of the Surveyors evaluated in R1, thus, giving him a low cumulative average for 2011 and 2012. It is observed that these varying factors could be standardized when a specific methodology is used and that is exactly what the Respondents have resorted to in this instance. It is also noted that there are six other Surveyors placed below the Petitioners in the priority list in category III, i.e. the 25th to 31st Respondents before this Court about whom no submissions were made for or against by the Petitioners.

Therefore, I see no reason or rationale in the contention of the Petitioners that only the actual time taken for a survey, should be considered in arriving at the average effective work progress. Hence, I see no basis or merit in the submissions of the learned Counsel for the Petitioners that the method of calculation reflected in the Evaluation Sheet R1 was arbitrary, unfair and erroneous.

In the above circumstances, I am of the view that the Petitioners have failed to establish the new and the alternative case put forward by the Petitioners. The Petitioners have also failed to establish that the average effective work progress of Surveyors which is the pivotal factor upon which priority was determined and the Surveyors placed in the order of merit in the priority list (P12) is erroneous or violated the fundamental rights of the three Petitioners.

The selection criteria P11, clearly lays down that 'efficiency' is the key factor and 'effective work progress' is the yardstick to evaluate such efficacy; The data presented before this Court and documented in the Evaluation Sheet R1 also clearly symbolizes that the average effective work progress of the Petitioners is far less than the rest of the Surveyors. This resulted in the category I and II Surveyors being placed ahead of the Petitioners in the priority list P12.

Thus, in my view classifying the Surveyors in terms of the selection criteria and placing them under different stratas in the priority list P12 is fair and reasonable. Similarly, first preference given to Surveyors whose average effective work progress is above the threshold and thereafter, second preference given to Surveyors who have previously not been exposed to the Bim Saviya programme but worked under the Surveyor General for a period of five years is also just and reasonable. Such methodology based on selection guidelines in my view does not violate the equal protection clause nor discriminate the Petitioners against category I and II Surveyors. The Petitioners have failed to pass the threshold in the selection criteria and therefore could not be grouped under category I or II.

Hence, for reasons adumbrated in this judgment, I see no reason nor merit in the contention of the Petitioners that the priority list P12, is arbitrarily, irrational, discriminatory or erroneous and has been prepared contrary to the criteria laid down in the selection guidelines issued by the Surveyor General.

Therefore, I hold that the Petitioners have failed to establish that the fundamental rights guaranteed under Article 12(1) of the Constitution of the Petitioners have been violated by the 1st to 4th and 33rd Respondents.

For the aforesaid reasons, the application of the Petitioners is dismissed. I make no order with regard to costs.

The application is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, PC.J.

I agree.

Judge of the Supreme Court