## CHANDRASIRI
## V.
## THE ATTORNEY-GENERAL

SUPREME COURT
TAMBIAH J, H. A. G. DE SILVA J. AND FERNANDO J.
S.C. APPEAL NO. 80 of 1986
S.C. (S.L.A.) APPLICATION NO. 165 of 1986
C.A. NO. 647 of 1982 (F)
D.C. GALLE NO. 4279/M
JUNE 28 AND OCTOBER 20, 1988.

*Constitution 1978, Article 55 (5) and Constitution 1972, Article 106 (5) — Dismissal — Ouster — Pleasure principle — Jurisdiction of Court — Date of appeal.*

**Held**

(1) While the provisions of the Constitution should be broadly and liberally interpreted so as to conserve rather than take away the rights of the citizen, including his right to invoke the jurisdiction of the Courts, nevertheless fundamental principles and the express provisions of the Constitution cannot be departed from in the course of " liberal " interpretation. In considering the scope

of " ouster " of the jurisdiction of the Courts effected by Section 106 (5) of the Constitution of 1972 it must necessarily be borne in mind that one fundamental principle of service under the State is that public office is held at pleasure, unless expressly provided otherwise. The ouster clause was intended to give effect to the " pleasure principle ". It prevents the ground of dismissal being questioned ; the ouster clause complements that principle by taking away the jurisdiction of the Courts to inquire into dismissals.

(2) But an order or decision made by an official having no legal authority to do so, is in law null and void and Article 55(5) and Article 106(5) is no bar to the Court declaring it a nullity.

(3) In the case before Court (dismissal of a Grama Sevaka appointed after 1.1.1977 in terms of a circular) there is no such want of authority or *mala fide* as would suffice to render the termination ultra vires or otherwise a nullity. The expression "dismissal" in Article 106 must include every mode of severance of the employer-employee relationship effected by or on behalf of the employer.

The termination in question was not ultra vires or a nullity, the ouster clause applied, and the District Court had no jurisdiction to inquire into, pronounce or otherwise call in question the dismissal of the Appellant.

(4) Unless there are circumstances indicating that the date set out in the date stamp is incorrect, that date must be assumed to be the date on which the petition of appeal was filed in preference to the date of the journal entry which is not necessarily the date of lodging the papers. The date of the date stamp shows the appeal was filed in time.

**Cases referred to:**

1. *Abeywickrama v. Pathirana* — [1986] 1 SRI LR 120, 136, 139.
2. *Elmore Perera v. Jayawickrema* — [1985] 1 SRI LR 285, 301
3. *Bandaranaike v. Weeraratne* — [1981] 1 SRI LR 10, 16.
4. *Abeywickrama v. Pathirana* — [1986] 1 SRI LR 120, 155-7; (also [1984] 1 SRI LR 215, 217).
5. *Wijesiri v. Siriwardene* — [1982] 1 SRI LR 171,178.

**APPEAL** from judgment of the Court of Appeal.

*Prins Gunasekera* with *R. K. Sureshchandra* and *K. Abhayapala* for the Plaintiff-Respondent-Appellant.

*Shibly Aziz*, Deputy Solicitor-General, with *N. Kariapper*, S.C., for the Defendant-Appellant-Respondent.

*Cur. adv. vult.*

November 11, 1988.

**FERNANDO, J.**

The Appellant was selected for appointment as a Grama Sevaka with effect from 1.2.1977, and was informed that he would be trained for a period not exceeding three months. Thereafter, the Government Agent, Galle, by letter dated 29.4.77, appointed him as a Grama Sevaka in the Galle District with effect from 2.5.77, and set out the terms and conditions of appointment ; the appointment was permanent and pensionable, and was subject to a three-year probationary period. It was further stipulated that his services could be terminated either during or at the end of that period, if his services during that period were unsatisfactory ; and that if his services were satisfactory, he would be confirmed at the end of that period in terms of the Establishments Code.

Soon after the General Election of 1977, newly elected Members of Parliament had expressed their objections to the appointment of Grama Sevakas made after 18.5.77 (the date of dissolution of the National State Assembly). A Ministry of Public Administration Circular dated 8.8.77 sent to all Government Agents directed them to revoke all appointments of Grama Sevakas made after 18.5.77. The Appellant's appointment did not fall within the scope of that Circular; his application for that post having been made in response to a Gazette notification in October 1975. Another Circular dated 30.8.77 was sent, conveying a decision of the Minister directing the revocation of all appointments of Grama Sevakas made after 1.1.77. The Government Agent, Galle, by letter dated 5.9.77 informed the Appellant that his services were " terminated " with immediate effect, and referred to the aforesaid Circular dated 30.8.77.

It is admitted that at the relevant time the appointing authority had the power to terminate the services of a public officer without assigning any reason, during the probationary period ; this condition of employment was (and continues to be) recognised by the Establishments Code, and was expressly mentioned in the aforesaid Gazette notification.

The Appellant instituted action in the District Court, praying for a declaration that the termination of his services was unlawful, ultra vires, unjust and null and void, and/or for damages in a sum of Rs. 60,000.

The question for determination by us relates to the defence pleaded in the answer, that the Court had no jurisdiction by reason of the provisions of Section 106 (5) of the Constitution of 1972 :

> " No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers. "

By an amended answer, Article 55 (5) of the 1978 Constitution was also pleaded, and the issue was raised at the trial that the Court had no jurisdiction to hear and determine the action by reason of that Article ; no reference being made to section 106 (5).

It had thus to be determined whether the " termination " of the services of the Appellant was a " dismissal " within the meaning of section 106 (5) ; if so, no Court had jurisdiction to inquire into, pronounce upon or in any manner call in question such dismissal. The Appellant contended that " dismissal " did not include " termination " ; that " dismissal " implied that the severance of the employer-employee relationship was on account of misconduct or fault, whereas " termination " did not.

The learned District Judge determined the matter by reference only to Article 55 (5) of the 1978 Constitution ; he held that the " termination " of the Appellant's services did not constitute a " dismissal " and held that the Court had jurisdiction. Having answered other issues in favour of the Appellant, he entered judgment in favour of the Appellant.

In the Court of Appeal, Counsel for both parties agreed that the relevant constitutional provisions that were operative at the time of the appointment and termination of the Appellant were those of the 1972 Constitution, and invited the Court to act on the basis that the learned District Judge had interpreted section 106 (5) of the 1972 Constitution in his judgment, and to hear the appeal as though it were an appeal from a decision pertaining to an interpretation of that section. The Court of Appeal held that, although the two provisions were similar, the learned District Judge had in fact interpreted Article 55 (5), and that in view of his failure to act in terms of Article 125, the judgment would have to be set aside on that ground alone.

The Court of Appeal further held, following *Abeywickrama v. Pathirana* (1), that, under section 106 (5); it is only in origin that Government service is contractual ; that once appointed a state officer acquires a status to which the rights and duties imposed by public law attach ; and that all state officers held office during the pleasure of the President :

> " The general principle in public service is that a public officer holds office at pleasure. The constitutional doctrine that public officers hold office during pleasure has two important consequences :
>
> 1. The Government has a right to regulate or determine the tenure of its employees at pleasure notwithstanding anything in their contract to the contrary ;
>
> 2. Secondly the Government has no power to restrict or fetter its prerogative power of terminating the services of the employee at pleasure, by any contract made with the employee. "

Thus the express terms of the contract cannot override the fundamental basis of the tenure of office of public officers. Although that decision related to Article 55 (1) of the 1978 Constitution, these observations are equally applicable to section 107 (1). Indeed, the only difference is that Article 55 (5) introduced a significant exception : that though public office is

held " at pleasure ", powers of appointment, transfer, dismissal and disciplinary control must not be exercised in violation of fundamental and language rights, and that in respect of any such violation a public officer may invoke the jurisdiction of this Court, under Article 126 (1) : *Elmore Perera v. Jayawickrema* (2).

Accordingly, it was rightly held that not only had the judgment of the learned District Judge to be set aside, but that the Appellant's action had also to be dismissed.

Having held that the Appellant was liable to be dismissed, " at pleasure ", from the public service, the Court of Appeal did not decide whether the " termination " of the Appellant's services amounted to a " dismissal " within the meaning of section 106 (5), and if so whether section 106 (5) ousted the jurisdiction of the District Court.

Counsel for the Appellant contended that section 106 (5) being a provision ousting the jurisdiction of the Courts ought to be strictly construed, so as to limit the extent of the ouster ; that " dismissal " should be confined to those modes of severance of the employer-employee relationship arising from the alleged misconduct or fault of the officer ; and that " dismissal " should not be held to include " termination "of services without any such allegation of misconduct or fault. He relied heavily upon the Sinhala words used in the letter of termination and in the Constitution, and upon certain provisions of the Establishments Code ; he referred to Chapter V of the Establishments Code now in force which, we were assured, was in these respects the same as the provisions in force at the relevant time for his submission that there were three modes in which the employer could bring the employer-employee relationship to an end : " termination " of the appointment or services of an officer holding a temporary or probationary appointment (section 6), " vacation of post " by officers who absent themselves from duty without leave (section 7), and " dismissal " of officers for misconduct (section 8). Different consequences flowed from each of these : for instance, a " dismissed " officer could not be re-employed, while one whose services were terminated while on probation could be re-employed.

The Deputy Solicitor-General submitted that the rules set out in the Establishments Code regarding the delegation and the exercise of the powers of dismissal and disciplinary control had been formulated under the provisions of section 106 (3); that these provisions referred to were thus within the ambit of " dismissal and disciplinary control "; and therefore " termination " by the employer was one mode of " dismissal ".

While the provisions of the Constitution should be broadly and liberally interpreted, so as to conserve rather than take away the rights of the citizen, including his right to invoke the jurisdiction of the Courts, nevertheless fundamental principles and express provisions of the Constitution cannot be departed from in the course of " liberal " interpretation. In considering the scope of the " ouster " effected by section 106 (5), we have necessarily to bear in mind that one fundamental principle of service under the State is that public office is held at pleasure, unless expressly provided otherwise. The ouster clause was intended to give effect to the " pleasure principle ", and not to whittle it down. The application of the " pleasure principle " prevents the ground of dismissal being questioned; the ouster clause complements that principle by taking away the jurisdiction of the Courts to inquire into dismissals — on other grounds, such as that rules and procedures had not been complied with. Further, " appointment, transfer, dismissal and disciplinary control " in section 106 (5) cannot be considered in isolation : those words occur in subsections (1), (2), (3) and (4) as well, and similar words have been used in the corresponding Constitutional provisions in the Orders-in-Council of 1931 and 1946. If " dismissal " in section 106 (1) is restrictively interpreted so as not cover every kind of termination of services by or on behalf of the employer, serious anomalies and omissions would result. On that view, who whould be legally authorised to " terminate " the services of a probationary officer ? Or to issue a " vacation of post " notice ? Is " compulsory retirement " something other than " dismissal ", and if so who can make such an order ? If " dismissal " is given a limited meaning, how could the Cabinet, under section 106 (3), make rules regarding " termination ", " vacation of post ", and " compulsory retirement " ? Of course, termination by the employee would not in any event be included and can be the

subject of inquiry by a Court, as held in *Abeywickrama v. Pathirana* (1).

The scope of such ouster clauses has been considered in previous decisions of this Court. Thus the preclusive clause contained in Article 81 (3) has been given a wide interpretation (3), possibly because that clause concerned legislative action as well. In regard to section 106 (5), Wanasundera, J., observed in his dissenting judgment in *Abeywickrama v. Pathirana* (1) :

> " Every person acquainted with the post-independence period of our history, especially the constitutional and legal issues that cropped up during that period, would know how the actions of the Government and the Public Service Commission dealing with practically every aspect of their control over public officers were challenged and taken to the courts. A stage came when the Government found itself practically hamstrung by injunctions and court orders and not given a free hand to run the public service and thereby the administration as efficiently as it would wish. The 1972 reforms came undoubtedly as a reaction to this. The thinking behind the framers of the Constitution was that the public service must be made the exclusive domain of the Executive without interference from the courts. "

While these observations may correctly pinpoint the object of section 106, it is clear from the majority decision in the same case that the scope of section 106 (5) was too widely stated. A necessary qualification to the ouster effected by Article 55 (5) was recognised, in terms equally applicable to section 106 (5) : an order or decision made by an official, having no legal authority to do so, is in law null and void, and Article 55 (5) is no bar to a court declaring it to be a nullity. (4)

The ouster clause applies only to a " recommendation, order or decision ", of certain specified persons and authorities, in regard to " appointment, transfer, dismissal and disciplinary control ", and not to any other matters, and certainly not to all matters connected with the public service. In the present case, there was an order or decision by a state officer — the Government Agent

Galle — in regard to a matter concerning dismissal. Although the learned District Judge answered in the affirmative the following issue —

> " Was the said notification [dated 5.9.77 by the Government Agent Galle (a) malicious, (b) invalid, (c) unlawful?"

neither the documents produced nor the oral evidence established or suggested any such want of authority or *mala fides* as would suffice to render the termination ultra vires or otherwise a nullity.

Consistently with the legislative history of this phrase, and the long-established " pleasure principle ", and the need to interpret section 106 self-consistently, I am of the view " dismissal " must include every mode of severance of the employer-employee relationship, effected by or on behalf of the employer. The termination in question was not ultra vires or a nullity, the ouster clause applied, and the District Court had no jurisdiction to inquire into, pronounce upon or otherwise call in question the dismissal of the Appellant.

Counsel for the Appellant finally submitted that the petition of appeal of the Respondent (in the District Court) had been filed out of time. It had been filed in time if the date of filing was taken to be that set out in the date-stamp appearing on the petition of appeal, but not if, as contended for the Appellant, the date of the journal entry was regarded as the date on which the petition of appeal was filed. This submission, which is in effect a preliminary objection to the appeal being entertained by the Court of Appeal, was not made *in limine* in the Court of Appeal, but only after judgment had been reserved. In any event, unless there are circumstances indicating that the date set out in the date stamp is incorrect, that date must be assumed to be the date on which the petition of appeal was filed ; the party tendering the petition of appeal has no control over the process whereby the petition of appeal reaches the relevant record and the making of the appropriate entry therein. There is no reason to assume that in the normal course such entry would have been made the very same day, and the date of the journal entry thus cannot be

presumed to be the date on which the petition of appeal was in fact filed. This submission must fail.

The appeal is dismissed, but — as the Appellant's dismissal was without fault, and as an important question of law was involved — without costs.

**TAMBIAH, J.**, — I agree.

**H. A. G. DE SILVA, J.**, — I agree.

*Appeal dismissed.*