RAJAGURU, INSPECTOR-GENERAL OF POLICE
v.
RANGE BANDARA AND OTHERS

SUPREME COURT
FERNANDO, J.,
WIJETUNGA, J. AND
A. DE Z. GUNAWARDANA, J.
S.C. APPLICATION NO. 128/96

Application for revision/review – Judgment of the Supreme Court – Fundamental Rights – Interpretation of Articles 15 (8), 55 (5) and 126 of the Constitution.

The petitioner (Inspector-General of Police) who was the 2nd respondent in the above application and whose order for the summary transfer of the petitioner in that application (a Sub Inspector) was quashed by the Court later applied for a review of the judgment and for an interpretation of certain Articles of the Constitution by a fuller Bench.

Held:

1. Article 15 (8) of the Constitution does not permit derogation from Article 12 in the case of members of the Police Force otherwise than by means of law. For the purpose of Article 15 (8) "Law" means only legislation.

2. Article 55 (5) does not purport to impose any limitation on the jurisdiction of the Court under Article 126.

3. Before he invoked the jurisdiction under Article 126 the petitioner need not have exhausted all other remedies such as redress from the Minister of Defence, the President, the Public Service Commission or the Inspector-General of Police.

Per Fernando, J.

> "The Questions of Law and fact sought to be raised by the Inspector - General of Police for the first time are patently untenable, and do not merit consideration by a fuller Bench. The application is thus wholly devoid of merit, quite misconceived and inexcusably delayed. . ."

APPLICATION for revision and/or review of a judgment of the Supreme Court.*

Cur. adv. vult.

*1997 – 1 – SLR

May 21, 1998

ORDER OF COURT

For the reasons stated in our judgment dated 26.9.97, in which the facts are fully set out, we quashed the order of the 2nd respondent (the Inspector-General of Police) summarily transferring the petitioner (a Sub-Inspector) from Weerambugedera to Moratuwa. In this order, the parties are referred to as in the original application SC No. 128/96.

More than six months later, on 2.4.98, the 2nd respondent filed this application – which is described as being "an application for revision and/or review, and an application under article 132 of the Constitution for consideration by a fuller Bench, and an application for the interpretation of Article 15 (8), under Articles 118, 125 and 126 read with Article 12 of the Constitution and an application to interpret sections 114 (*e*), (*f*) and (*h*) and section 63 (2) of the Evidence Ordinance, as matters of general and public importance".

The petitioner had been serving as officer-in-charge, Weerambugedera, from August, 1992; by a Police message received on 5.1.96, he was informed that the 2nd respondent had ordered his transfer to Moratuwa, as a sub-inspector (supernumerary) with effect from 5.1.96. He filed an application under Article 126 on 30.1.96 alleging that that transfer was not in terms of the Establishments Code and the Departmental regulations, but had been made at the request of the 3rd respondent, an Attorney-at-law and the SLFP chief organizer for Polgahawela. Leave to proceed was granted on 5.2.96, and an interim order staying the transfer was made on 16.2.96.

The petitioner says that on 6.1.96 he "called on the 3rd respondent". The 3rd respondent admits that he gave the petitioner a letter dated 6.1.96 (P7), addressed to the 1st respondent, the Deputy Minister for Defence, stating that at the 3rd respondent's request one sub-inspector Ratnatilleke had been transferred from Puttalam to Weerambugedera (in the Polgahawela electorate) with effect from 6.1.96, and that in consequence the petitioner had been transferred to Moratuwa. He requested that the transfer of the petitioner, who was a good, honest and efficient (or enthusiastic) officer, to Moratuwa be cancelled and that he be transferred to a place like Kegalle, Kandy or Anuradhapura.

The petitioner says that he posted that letter to the 1st respondent on 13.1.96, along with a covering letter (P7A) addressed to the 1st respondent.

The relevant portions of the affidavits of the 1st and 2nd respondents, dated 8.3.96 and 12.3.96, have been quoted in our judgment. The 1st respondent did not frankly admit or deny the receipt of P7 and P7A, but claimed that he had no personal recollection as to whether P7 had been received by him. He did not say what steps he had taken to have his files checked to see whether there had been any such correspondence, and if so what action had been taken. The 2nd respondent said that he was unaware of P7 and P7A, necessarily implying that even if P7 and P7A had reached the 1st respondent, the 2nd respondent had not received them (or copies) from the 1st respondent.

Neither the 1st nor the 2nd respondent suggested any reason why the 3rd respondent should have falsely stated that he had made a request for the transfer of SI Ratnatilleke.

The petitioner then filed a counter-affidavit dated 19.4.96, and produced (as P8) a letter dated 6.2.96 signed by Major S. M. Wijeratne, as private secretary to the 1st respondent, addressed to the petitioner. The subject-matter was stated to be the variation of the transfer of the petitioner. That was an acknowledgement of the receipt of a letter (date unspecified) addressed to the 1st respondent. P8 stated that, on the instructions of the 1st respondent, that letter had been referred, for suitable action, to the Inspector-General of Police, to whom all future queries should be addressed, and P8 also indicated that, on the directions of the 1st respondent, a copy of P8 was being sent to the Inspector-General of Police, for suitable action and reply, together with the letter in question (presumably, the original).

During the sixteen months between then and the hearing, the 1st and 2nd respondents made no attempt to contradict that affidavit; or to clarify the position as to the receipt of P7 and P7A by the 1st respondent, and their transmission to the 2nd respondent, and whether P8 referred to P7 and P7A or to some other letter.

As for the petitioner's transfer, the 2nd respondent's position was that it was "a continuation of the end of the year transfers for 1995"; that the decision to transfer him "to a distant station" was taken after

considering two reports (made in October, 1994), and because he "was made aware that some other complaints against the petitioner were pending"; and that he considered a transfer necessary "so that proper inquiries could be conducted".

Several questions of fact arose. Had SI Ratnatilleke been transferred at the 3rd respondent's request? Had P7 and P7A reached the 1st respondent? Had P7 and P7A been forwarded on the 1st respondent's instructions to the 2nd respondent? Had the 1st and 2nd respondents denied or adequately explained the 3rd respondent's statement that SI Ratnatilleke had been transferred at the 3rd respondent's request? Finally, were the transfers of SI Ratnatilleke and the petitioner normal year-end transfers for 1995?

In the 2nd respondent's recent affidavit dated 2.4.98, he makes reference both to the letters P7, P7A and P8, as well as to the 1995 year-end transfers. He claims that the 1st respondent had, in his affidavit dated 8.3.96, "admitted having received a letter from the petitioner and the fact that his Private Secretary, Major S. M. Wijeratne acknowledged that letter by P8". That averment is quite incorrect, because the 1st respondent had made no such admission. Further he admits that "According to P8, P7 and P7A had been forwarded to the 2nd respondent . . . for necessary action". However, elsewhere in the same affidavit he says, inconsistently, that "P8 . . . did NOT prove that it referred to P7 and P7A. Copies of P7 and/or P7A were NOT sent to the IGP by either registered mail or ordinary mail or in any other manner". He also says that P7A is not a true copy of the covering letter which the petitioner sent to the 1st respondent, but does not produce that covering letter even now to verify the truth of his allegation.

These are all matters which were within the knowledge of the 1st and 2nd respondents: Did the 1st respondent receive P7 and P7A? What exactly was acknowledged by P8, and forwarded to the 2nd respondent with a copy of P8? Did the 2nd respondent receive that copy of P8, and if so what – if anything – was annexed thereto? They had ample opportunity to clarify the position and to produce the relevant documents from the official files, between 19.4.96 and 21.8.97. The 2nd respondent did not do so then, and has not done so even now. His present affidavit does not frankly admit or deny whether P8 and its enclosure(s) were received by him, and does not annex whatever document he did receive if P8 reached him.

There is thus absolutely no reason to reconsider our finding that the 3rd respondent probably did request the transfer of SI Ratnatilleke to Weerambugedera; that as a result it became necessary to transfer the petitioner out of Weerambugedera; and that the petitioner's transfer was thus the consequence of the 3rd respondent's request.

As for the 1995 year-end transfers, the 2nd respondent now refers to new material in support of this claim that the petitioner's transfer was just one of 69 year-end transfers. Since SI Ratnatilleke's name was on the same list of transfers, it must necessarily follow that his transfer too was one of the 1995 year-end transfers. The 2nd respondent has produced a circular dated 11.7.95 signed by him in his (then) capacity of Senior DIG (Administration) for the Inspector-General of Police. That circular stipulates the following, ***inter alia:***

(*a*) Such transfers will be made either on application by the officer concerned, or upon a nomination by supervisory officers (there was never a suggestion that the petitioner made any such application);

(*b*) Nominations were possible only in respect of two categories:

(i) those whose work and conduct were considered unsatisfactory and whose transfer out of the Division was considered desirable: these had to be in Form 51 (pink);

(ii) those who had completed 8 years, service in the Division: these had to be in Form 51 (white);

(*c*) The OIC Divisions had to forward nominations, with his personal comments and recommendations, to the Range DIG by 31.7.95; the latter had to send them to Headquarters by 10.8.95; Transfer Board decisions had to be conveyed by 1.9.95; the closing date for appeals was 20.9.95; and Appeal Board decisions had to be communicated by 15.10.95;

(*d*) No nominations were to be entertained after the closing date, unless delay was due to unforeseen or unavoidable circumstances.

There are two significant aspects of this scheme. The first is the safeguard of a decision by the Transfer Board subject to an appeal as well. If nothing else, the grant of a right of appeal implies a duty to give reasons. The second is that the scheme contemplated that in general there would be no summary transfers; an officer would know that he was being transferred by mid October, more than two months before the commencement of the next year, thus facilitating his arrangements about housing, spouse's employment, and, most important, children's schooling. Indeed, the circular specified, among other guidelines, that "the ages of children must be given and if a transfer would affect schooling it must be clearly indicated with reasons". The scheme did not contemplate that an officer could be denied the safeguards implicit in the scheme, by delaying or withholding a "nomination", and then summarily dealing with his transfer as a "continuation of the end of the year transfers"; the same safeguards applied, ***mutatis mutandis.***

Since SI Ratnatilleke's name was on the same list, it follows that there should have been either a pink or a white form for him. His form, as well as the petitioner's, has not been produced even now; and there is no explanation why the petitioner's transfer was delayed beyond the stipulated deadline. But we do have the 3rd respondent's categorical assertion that transfer was at the 3rd respondent's request.

As for the reasons for the petitioner's transfer, the only two reports which the 2nd respondent mentioned were those of October, 1994; the second, dated 28.10.94, was from DIG, Kurunegala, to the 2nd respondent. He has now produced the sequel to that report. By a memorandum dated 21.12.94, the DIG, Personnel, asked the DIG, Kurunegala, what action had been taken on the seven complaints referred to in that report. The reply, minuted on 3.1.95, was that all the allegations had been dealt with, except a 316 charge pending before the Mediation Board; reference was made to a report "appearing at pages 3 to 4", which has **not** been produced. There are two handwritten minutes, of February, 1995, "lay by". Those are the same allegations in respect of which the 2nd respondent said in his original affidavit: "many of the complaints had to be dropped due to lack of evidence whilst some other complaints had been withdrawn or settled on a later date before steps could be taken to conduct a fuller inquiry or to prosecute the petitioner".

Assuming that a "nomination" under the 1995 year-end transfer scheme was nevertheless possible on the basis of those allegations, the process should have commenced by July, 1995; the Transfer Board decision and reasons should have been communicated by 1.9.95; and the petitioner ought not to have been deprived of his right of appeal, and of his right to a timely decision on appeal by 15.10.95. The fact that 2nd respondent has produced neither the relevant pink nomination form, nor any part of the proceedings of the Transfer Board or the Appeal Board, indicates that some other transfer procedure had been followed for the petitioner, and perhaps also for SI Ratnatilleke.

The new material produced by the 2nd respondent thus confirms that, beyond doubt, the petitioner's transfer was not in accordance with the circular which he himself issued on 11.7.95. It confirms the petitioner's claim that his transfer was not in terms of the departmental regulations.

There is thus no reason whatever to consider issuing notice of the 2nd respondent's present application on the other parties.

As noted in our judgment, that judgment does not preclude disciplinary proceedings against the petitioner for any past misconduct, or his transfer, in accordance with the applicable rules and regulations.

It is, however, necessary to refer to some other aspects of this application. A petitioner has to lodge an application under article 126 within one month. Here eighteen months elapsed between the grant of leave to proceed and the hearing; the 2nd respondent had ample opportunity to place all the material he wished to before the Court, but he did not seek to reply to the petitioner's counter-affidavit of 19.4.96. After judgment was delivered on 26.9.97 the petitioner, although represented by the Attorney-General, apparently took no steps to obtain advice about seeking review, for nearly four months until 21.1.98. While the proxy he had given the state attorney remained in force, another attorney-at-law (presumably on the instructions of the state attorney, cf. Rule 4 of the Code of Conduct and Etiquette for attorneys-at-law) advised him on the merits of a revision application. That delay of nearly four months in seeking advice is unacceptable, as is the subsequent delay of over two months in filing this application. However, the 2nd respondent seeks to explain that delay, by giving all sorts of reasons. One is that "the Jayasikuru operation was **to recapture the Northern and Eastern Provinces**

from the LTTE terrorists. . . I was extremely busy with the attendant work in the operations"; another is that **"the Provincial Council Elections in the North-Eastern Provinces** doubled the work of the Police Department". Errors and omissions are possible in affidavits, but the Head of the Police Force should have been able, without any difficulty, to describe correctly the objective of the Jayasikuru operation, as well as the nature of the elections which took place recently in the Jaffna District. Such a lack of care and accuracy, in a 23 page affidavit stated to have been drafted by counsel and "read over **and explained**" by a DIG (instead of an independent Justice of the Peace), creates doubts as to the reliability of the other averments therein.

Having delayed for over six months to file this application until 2.4.98 – which was one but the last working day for the first term – it was tendered with a letter addressed to the Registrar from the new registered attorney-at-law stating that counsel who would be appearing to support the application was a practitioner in Australia; that he was "long overdue in Australia to appear in the cases he has undertaken to do there"; that cases in which he is appearing are adjourned until his arrival in Australia; and that "any day in April would be convenient". Since the second term commenced on 27th April, the Court was in effect being asked to fix this application for one of the last four days of April – regardless of benches already constituted, and other cases set down, much earlier, for hearing during that period, as well as of the need to issue notice on the other parties giving them adequate time for preparation. Undoubtedly, the judiciary in the course of its service to the community in the administration of justice does consider the convenience of Attorneys-at-law, but never to the extent of subservience to their convenience.

In support of that request two facsimile messages from Australia were annexed to the 2nd respondent's affidavit, in order "to emphasise the need to obtain priority to get this case listed at your earliest". One facsimile message is dated 13.2.98 and refers to an appointment in District Court chambers on 17.2.98, while the other is dated 16.3.98 and refers to a hearing on 10.4.98. The messages do not indicate that counsel was required for either matter. In any event, they have no bearing on counsel's alleged inability to appear in Sri Lanka in May or thereafter.

Other submissions have been simply thrown into the 2nd respondent's petition. One is that Article 15 (8) permits derogation from Article 12, in the case of members of the Police Force, otherwise than by means of legislation: that is patently untenable, because "law" is defined; in regard to the entire chapter on fundamental rights, "law" includes only legislation, save in the exceptional cases where emergency regulations are expressly included; and the definition of "written law" is totally irrelevant. Another is that Article 157 recognises bilateral treaties, and that the court should therefore have considered the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. In what way that would have affected our decision is not stated. An examination of Article 157 reveals that it is confined to bilateral investment treaties (entered into for the specific purpose of promotion and protection of foreign investments in Sri Lanka) after approval by Parliament in the manner prescribed therein, and has no application in this instance. A third argument is that Article 55 (5) gives only a limited power to this Court in respect of transfers of police officers. It is enough to say that Article 55 (5) does not purport to impose any limitation on the jurisdiction of this Court under Article 126. Finally, it is urged that "an applicant must exhaust all the other remedies under the law, if available, before he invokes [the jurisdiction under Article 126] . . ." and the petitioner failed to [first] seek redress from the Minister of Defence, Her Excellency the President, the Public Service Commission or the Inspector-General of Police or the District Court". All these contentions are wholly devoid of merit, and were quite rightly not urged by learned state counsel who appeared at the original hearing.

The material now furnished by the 2nd respondent confirms the findings of this Court in its judgment delivered on 26.9.97. The questions of law and fact sought to be raised for the first time are patently untenable, and do not merit consideration by a fuller bench. The application is thus wholly devoid of merit, quite misconceived, and inexcusably delayed, and there is therefore no reason to issue notice on the other parties. The application is rejected.

FERNANDO, J. – I agree.

WIJETUNGA, J. – I agree.

GUNAWARDENA, J. – I agree.

Notice refused.

Application rejected.