SIRINAGA
v.
JAYASINGHE

SUPREME COURT
WIMALARATNE, J., RATWATTE, J., AND SOZA, J
S.C. 1/82
C.A. APPLICATION NO. 223/81
JUNE 15, 1982

Constitution – Article 114 – Scheduled public officer – Necessity for appointment by Judicial Service Commission.

The petitioner-appellant was an officer in Class I of the General Clerical Service employed as a Clerk in the District Court of Colombo. He was transferred by an order of the Director of Combined Services to the Metereology Department with effect from 1.1.81 because he was found to be unsuitable for employment in the Courts.

The petitioner-appellant made application to the Court of Appeal to quash the order by Writ of Certiorari on the grounds that he was a scheduled public officer by reason of the fact that he was employed in the District Court before the Constitution of 1978 came into force and therefore only the Judicial Service Commission could transfer him and that too only to another Court.

'Scheduled public officer' is defined in Article 114(b). This definition included a class of officers which was specified in the Fifth Schedule. Generally Clerks and Typists etc. working in the Courts were specified in the Fifth Schedule. All appointments, transfers, dismissals etc. of scheduled public officers were effected by the Judicial Service Commission.

Held -

(1) That in the absence of an appointment by the Judicial Service Commission the petitioner-appellant could not become a scheduled public officer.

(2) That the Director of Combined Services had the power to transfer the petitioner-appellant to a post in the Combined Services.

Cases referred to:

(1) *Kodeeswaran v. Attorney-General (1969) 72 N.L.R. 337*

(2) *Reilly v. The King (1934) A.C. 176, 180*

APPEAL from judgment of the Court of Appeal.

V.S.A. Pullenayagam with *Faiz Mustapha, Mangalan Kanapathipillai* and *Deepali Wijesundera* for petitioner-appellant

Sarath Silva, D.S.G. with Kalinga Wijewardena, S.C. for respondent-respondent.

Cur.adv.vult.

July 8, 1982.

WIMALARATNE, J.

Immediately before the commencement of the Constitution of the Democratic Socialist Republic of Sri Lanka (7.9.78) the petitioner-appellant, Palitha Sirinaga, was an officer in Class I of the General Clerical Service (G.C.S.) employed as a clerk in the District Court of Colombo. He was so employed until he was transferred to the Department of Metereology by order of the Director of Combined Services, the respondent, with effect from 1.1.81. The transfer had been ordered at the request of the Judicial Service Commission (J.S.C.) which had found the petitioner unsuitable for employment in the Courts.

The appointment, transfer, dismissal and disciplinary control of public officers, other than those public officers appointed by the President of the Republic of Sri Lanka, is vested by Article 55(1) of the Constitution in the Cabinet of Ministers. The Cabinet is empowered by Article 55(3) to delegate such powers, except in the case of Heads of Departments, to the Public Service Commission (P.S.C.); and the P.S.C. is in turn empowered by Article 58(1) to delegate such powers in respect of any category of public officers to a public officer. The Director of Combined Services is the public officer to whom the P.S.C. has delegated such powers over non-staff officers of the General Clerical Service. Public Administration Circular No.130 dated 18.10.78 issued on the orders of the Cabinet is the relevant document of delegation.

The Constitution of 1978 also created a category of public officers to be known as "scheduled public officers", and by Article 114(1) vested the appointment, transfer, dismissal and disciplinary control of this category in the J.S.C. Article 114(6) defines "scheduled public officer" to mean "the Registrar of the Supreme Court, The Registrar of the Court of Appeal, the Registrar of any Court of First Instance, or any public officer employed in the Registry of the Supreme Court, the Court of Appeal, or any Court of First Instance, included in a category in the Fifth Schedule, or in such other categories as may be specified by Order made by the Minister in charge of the subject of Justice, and approved by Parliament, and published in the Gazette". The Fifth Schedule includes Clerks, Fiscals, Interpreters, Stenographers, Typists and Binders. Family Counsellors have subsequently been added. There could be no doubt that the framers of the Constitution intended creating a closed service of those administrative and other

officers employed in the Courts who are required to carry out judicial orders.

The petitioner challenged the respondent's power to transfer him, and sought to have the transfer quashed by way of certiorari in the Court of Appeal. He challenged the order on the ground that by reason of being "employed" in the District Court of Colombo immediately before the commencement of the Constitution he was a "scheduled public officer"; that the power to transfer him is vested in the J.S.C.; and that the J.S.C. is empowered to transfer him only to a post which could be held by a scheduled public officer, that is, to a post in any of the Courts included in the definition clause in Article 114(6).

The respondent made and filed an affidavit in which he took up the position that as the petitioner had not been appointed by the J.S.C., the petitioner was not a scheduled public officer; and that he, as the authority empowered to transfer non-staff officers in the G.C.S. lawfully transferred the petitioner to a post in the public service.

Although the Supreme Court is vested with the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, the Court of Appeal did not refer to the Supreme Court the questions which arose for determination. Instead the Court of Appeal determined that by reason of being "employed" in the District Court the petitioner was a "scheduled public officer," and that 'appointments' by the J.S.C. are necessary only in the case of officers appointed after 7.9.78. But the Court of Appeal dismissed the petition for the reason that there is nothing in Articles 114 which prevents the J.S.C. from releasing him to the combined services from which he had been appointed to the District Court.

We are concerned in this appeal with only that category of public officers employed in the Registries of the Courts of Justice immediately before the commencement of the Constitution. What is the criterion to determine whether they are "scheduled public officers"? Whilst learned Counsel for the petitioner stressed the aspect of the fact of being employed in the Courts on the crucial date as the criterion, the learned Deputy Solicitor General argued that appointment by the J.S.C. is the only method by which the transformation of a public officer to a "scheduled public officer" can take place. The D.S.G. has thus invited us to overrule the first finding of the Court of Appeal, namely that the petitioner was a "scheduled public officer" on the date he was transferred.

When a public officer 'simpliciter' (if I may use that term) is transferred into a "scheduled public officer" there certainly is a change in his status. The authority vested with the power to transfer him, with the power to promote him, with the power to take disciplinary action against him, and with the power to dismiss him, changes. With that change of status may also take place a change in the terms and conditions of his service. Such alteration in his status and in his terms and conditions of service can take place, in my view, only with his consent; it cannot be foisted on him without his consent. Therefore the accident of being "employed" in any of the Courts on the date of the promulgation of the Constitution can never be a sound criterion for determining his status.

Continuity of service for public officers on the same terms and conditions or an option to retire on pension and gratuity when those terms and conditions were changed has been a significant feature in all our Constitutions since Ceylon attained Dominion Status. Under the Donoughmore Constitution the Secretary of State for the Colonies exercised a supreme authority over the public services of Ceylon. The right to dismiss at pleasure was implied and recognised, and the pay and conditions of service were regulated by or under delegated authority from him. The Soulbury Constitution changed the masters. The Ceylon (Constitution) Order-in-Council, 1946 (Cap.379) established a Public Service Commission and vested in it the power of appointment, transfer, dismissal and disciplinary control of public officers. Along with that change it provided by Article 63(2) that certain categories of officers who held appointments subject to the approval of the Secretary of State would have the option to retire on pension. When the Soulbury Constitution was replaced by the first Republican Constitution in 1972, whilst stipulating in section 107(1) that every state officer shall hold office during the pleasure of the President, it also provided in Chapter XV for the continuation in service of Judges, Public officers and others *under the same terms and conditions.* When the present Constitution was promulgated, continuity of service was provided for in a Chapter dealing with Transitional Provisions; Article 164(b) stipulates that every person who before the commencement of the Constitution was in the service of the Republic, or any local authority or public corporation shall continue in such service *under the same terms and conditions.*

Here, then, is a Constitutional guarantee of continuity in the public service under the same terms and conditions as before the commencement of the Constitution. "Under the same terms and

conditions" especially when these words occur in a written Constitution must necessarily have a clear meaning. What then are these terms and conditions? They cannot be any other than the terms and conditions of their contract of service with the State. If there had been any doubt as regards the existence of a relationship which possessed the legal characteristics of a contract between the then Crown and the persons appointed by the Government of Ceylon to serve in the civil administration, such doubts were cleared by the decision of the Privy Council in *Kodeeswaran Vs. Attorney General* (1). Under the Order-in-Council, 1946, public servants held office (as indeed they do now) at pleasure. But, as stated by Lord Atkin in *Reilly Vs. The King* (2), "a power to determine a contract at will is not inconsistent with the existence of a contract until so determined". This dictum was cited with approval by Lord Diplock in *Kodeeswaran* (at p.341). The position is not different under the Republican Constitution.

These terms and conditions attached to their contract of employment would be contained in documents such as the letters of appointment, the Establishment Code, Public Administration Circulars etc. issued or published by the authority empowered by the Constitution to issue or publish them. They would necessarily encompass such terms and conditions as relate to emoluments, allowances, increments, efficiency bars, leave, interdictions, dismissals or other forms of punishment, procedure at disciplinary inquiries, prospects of promotion and a host of other matters. The guarantee of continuity is a guarantee that the same terms and conditions would apply. Implicit in this guarantee is that if there is to be a change in these terms and conditions, public officers would be given an option of either accepting the new terms or continuing under the same old terms. I am therefore of the view that before a public officer's designation is altered to that of a scheduled public officer within the meaning of Article 114(6) his consent to the new terms and conditions is necessary. If he consents, then he has to receive a letter of appointment from the Judicial Service Commission.

In the background of this assurance of continuity the adoption of a criterion based upon the fact of being employed in the Courts immediately before the commencement of the Constitution leads to absurd results. Let me give an illustration. By virtue of Article 169(2) the former Supreme Court ceased to exist; so did the Registry of the former Supreme Court. What then, would be the position of those public officers employed in the Registry of the former Supreme

Court? In order to conform to the assurance of continuity as public officers they had, no doubt to be employed in one of the Courts, either established or recognised by the new Constitution. They had no alternative but to be so employed, lest they forfeited all their rights in the public service. But they were employed not on the terms and conditions applicable to scheduled public officers, because such terms and conditions were not in existence at the commencement of the Constitution. This illustration fortifies my conclusion that by appointment alone can a public officer change his status to that of a scheduled public officer.

My view is also supported by the absence of a "deeming provision". Deeming provisions are usually included to put beyond doubt a construction that might otherwise be uncertain. Whereas there are in the Constitution deeming provisions, such as that all persons who immediately before the commencement of the Constitution were Members of the National State Assembly shall be deemed to have been elected as Members of Parliament [Article 161(a)]; and that all Attorneys-at-Law admitted and enrolled under the provisions of the Administration of Justice Law No. 44 of 1973 shall be deemed to have been admitted and enrolled as Attorneys-at-Law of the Supreme Court created and established by the Constitution, [Article 169(11)]. There is no such deeming provision in relation to public officers employed in the Registries of the Courts immediately prior to the commencement of the Constitution, to the effect that they shall be deemed to be scheduled public officers within the meaning of Article 114(6). The reason appears to me to be that the framers of the Constitution, having given all public officers the assurance of continuity under the same terms and conditions, could not have included a deeming provision, which would necessarily have curtailed their freedom of contract, and would be contrary to such assurance.

I would therefore uphold the contention of the Deputy Solicitor General that in the absence of an appointment by the Judicial Service Commission the petitioner-appellant was not a "scheduled public officer", and that the respondent in his capacity as Director of Combined Services had the power to transfer him to a post in the Combined Services.

This finding would suffice to dispose of this appeal. The further question as to whether a scheduled public officer could be released by the J.S.C. and thereafter transferred by the Director of Combined Services would, to a large extent, depend upon the terms and

conditions laid down for "scheduled public officers". As those terms and conditions have not been brought to our notice it is not possible to provide an answer to that question.

This appeal is accordingly dismissed with costs

RATWATTE, J. – I agree.

SOZA, J. – I agree.

Appeal dismissed.