

PODINILAME (CHIEF MINISTER SABARAGAMUWA
PROVINCIAL COUNCIL)
V.
MATHEW (GOVERNOR SABARAGAMUWA PROVINCE)

COURT OF APPEAL
DR.R.B. RANARAJA, J.
C.A. 503/95,
JULY 02, 1996.

*Provincial Councils Act No. 42 of 1987 - S.32(1) (8), S. 33 (3) 33(1) 34-
Constitution - Article 154 (B), 154 C, 154 (F) - Provincial Public Service
Commission - Removal of Members by Governor - Validity - Writ of Quo
Warranto-Certiorari*

By four letters dated 1.6.95 the 1st Respondent - Governor - Purported to remove the 5th - 8th Respondents from office as members of the Provincial Public Service Commission - (PPSC). Thereafter the 1st Respondent - appointed 2nd to the 4th Respondents as members of the reconstituted PPSC. The 1st Petitioner - Chief Minister 2nd -5th Petitioners the Ministers constituting the Board of Ministers of the Sabaragamuwa Province sought Writs of *Quo Warranto* and *Certiorari* alleging that the purported removal and appointment of the members of the P-PSC were done in contravention of Art 154 F (1) and S 33 (1) 33 (3) of the Provincial Councils Act and therefore ultra vires, mala fide, arbitrary and unreasonable.

Held :

(1) The 1st Respondent had not assigned any reason other than requesting the 5th -8th Respondents to resign from office to enable him to reconstitute the Commission. There are no absolute or unfettered discretions in Public Law; discretions are conferred on public functionaries in trust for the public to be used for the public good, and the propriety of the exercise of such discretion is to be judged by reference to the purpose for which they were entrusted.

(2) The reasons for removal of 5th - 8th Respondents from office must be of so serious a nature which prevents them from performing their duties in the manner as the public expect them to. The members of the P-PSC cannot be removed by the Governor merely because he is so minded but because reason dictates him to do so.

The cause given in the letters is no cause at all, unless he specified the reasons why he wanted to reconstitute the membership of the P-PSC.

(3) The first time any reasons of sorts he has designed to give, was in his affidavit. He stated that to his knowledge the 5th to 8th Respondents had strong political affiliations and participated in active politics which was detrimental to the proper functioning of a Commission, but he has failed to produce a single complaint against the 5th - 8th Respondents from any member of the Public Service or the province or a member of the Public that they were unfairly treated or victimised due to their political affiliations. This explanation too does not bear scrutiny.

(4) The 1st Respondent has acted *ultra vires* the provisions of S.33(3) in removing the 5th - 8th Respondents. It follows that the appointments of the 2nd -4th Respondents were made consequential upon an illegal removal of the former members of the Commission.

Per Ranaraja, J.

"The power vested in the Governor under S.32 is a specific power and not merely an executive function extending to matters regarding which a Provincial Council has the power to make statutes etc; under Art 154 C or other functions to be performed by the Governor under Art 154 B. The question of referring this matter to the Supreme Court therefore does not arise."

APPLICATION for Writs in the nature of *Quo Warranto/Certiorari* and *Mandamus*.

Cases referred to :

1. *Premachandra v. Major Montague Jayawickrema and another* (1994)2 SLR 90.
2. *Associated Provincial Picture Houses Ltd., v. Wednesbury Corporation* - 1948 1 KB 223 (CA).

R.K.W. Goonasekera for Petitioner.

P. G. Dep for 1st Respondent.

D.W. Abeykoon, PC with *Priyadarshani Premaratne* for 2 - 4th Respondents.

L.C. Seneviratne, P.C. with *N.D.S. Jayasinghe* for 6th Respondent.

Cur. adv. vult.

July 02, 1996.

DR. RANARAJAH, J.

The 1st Petitioner is the Chief Minister and 2nd to 5th Petitioners are the Ministers constituting the Board of Ministers of the Sabaragamuwa Province. The 5th to 8th Respondents were serving as members of the Provincial Public Service Commission for a period of 5 years from 01.02.94.

By letters P2 to P5 dated 01.06.95, the 1st Respondent purported to remove the 5th to 8th Respondents from office as members of the Provincial Public Service Commission with immediate effect. The letters P2 to P5 which are similar read;

"By virtue of the powers vested in me under **section 33 (3)** of the Provincial Councils Act No. 42 of 1987, I do hereby remove you from office as member of the Sabaragamuwa Provincial Public Service Commission with effect from 1st June, 1995, **in order to enable me to reconstitute the Provincial Public Service Commission of the Sabaragamuwa Province**".

Thereafter the 1st Respondent purportedly appointed the 2nd to 4th Respondents as the members of the reconstituted Provincial Public Service Commission, by letters marked P7 (a) to P7 (c) which read;

"By virtue of the powers vested in me under **section 33 (1)** of the Provincial Councils Act No. 42 of 1987, I have pleasure in appointing you as a member of the Provincial Public Service Commission of the Sabaragamuwa Province with effect from 2nd June 1995. Your appointment shall be for a period of five years unless revoked earlier in terms of section 33 (3) of the Act".

The 1st Respondent also purported to remove the 5th Respondent from the Chairmanship of the said Public Service Commission by letter P2 and replace him with the 2nd respondent by letter P7 (a).

It is the contention of the Petitioners that the purported removal and appointment of the members of the said Public Service Commission were done in contravention of Article 154 F (1) of the Constitution

and sections 33 (1), 33 (3) of the Provincial Councils Act, No. 42 of 1987, and therefore ultra vires, mala fide, arbitrary and unreasonable. They submit the action of the 1st Respondent is void and of no effect in Law, in as much as;

(a) The 1st Respondent is mandated to act on the advice of the Board of Ministers in terms of Article 154 F (1) of the Constitution.

(b) The 1st Respondent by removing the 5th to 8th Respondents from membership of the Provincial Public Service Commission without cause assigned, contravened section 33 (3) of the said Act.

(c) The 5th to 8th Respondents were not afforded a hearing prior to their purported removal, as such there was a violation of the principles of natural justice.

(d) The 5th to 8th Respondents having been appointed for terms of five years, had a legitimate expectation of continuing till the expiry of that period.

The Petitioners allege that the 2nd to 4th Respondents have not been validly appointed as Chairman/Members of the Provincial Public Service Commission.

They pray inter alia, that this Court,

(a) Issue a mandate in the nature of a writ of quo warranto directing the 2nd and 3rd to 4th Respondents to show cause by what legal rights they claim to hold office as Chairman and members respectively of the said Provincial Public Service Commission and perform any of the powers, functions, duties and responsibilities as such. A declaration that they are not entitled to be appointed to the said offices.

(b) Quash the orders removing the 5th to 8th Respondents from the respective offices in the Provincial Public Service Commission.

(c) Quash the appointments of the 2nd to 4th Respondents to the said offices in the Provincial Public Service Commission.

The 1st Respondent has filed affidavit admitting the purported removals of the 5th to 8th Respondents from the said office and the purported appointments of the 2nd to 4th Respondents to the said office. He denied any substantial constitutional question requiring in-

terpretation of articles 154 C or 154 F of the Constitution has arisen. The 2nd to 4th Respondents filed affidavits on the lines of that filed by the 1st Respondent. The 5th to 8th Respondents filed no objections.

Section 33 (1) of Act No. 42 of 1987 provides;

"There shall be a Provincial Public Service Commission for each Province which shall consist of not less than three persons appointed by the Governor of that Province. The Governor shall nominate one of the members of the Commission to be the Chairman".

Section 33 (3) reads;

"Every member of a Provincial Public Service Commission shall hold office for a period of five years from the date of his appointment, unless he earlier resigns his office by a writing under his hand addressed to the Governor of the province or is removed from office by such Governor for cause assigned, but shall be eligible for re-appointment".

It is not disputed that the original appointments of the 5th to 8th Respondents were made in terms of section 33 (1). In the circumstances, they had the right under section 33 (3) to hold office for a period of five years, unless they chose to resign from office by writing addressed to the Governor. It is not the position of the 1st Respondent that the 5th to 8th Respondents so resigned. The only other way, they could have been deprived of the right given by law to hold office for five years, was by removal for cause assigned by the Governor. That is, the serving members must be informed they are being removed for specific reasons, in order that they may make representations to the Governor, or any other relevant authority, of the cause given by the Governor is for instance, frivolous, unfounded, arbitrary or unreasonable.

The 1st Petitioner has alleged that on or about 2.5.95, the 5th Respondent had informed him that, at a meeting with the 1st Respondent, the latter had indicated to the 5th Respondent that he and the 6th Respondent, should resign or run the risk of removal. The 1st Respondent admitting that allegation states, he requested the 5th to 8th Respondents to resign from office to enable him to reconstitute the Commission. This is also the only reason given in letters P2 to P5.

The 1st Respondent has not assigned any other cause for the removal. The questions that arise are, why was it necessary to reconstitute the Commission? Were the members of the Commission incapable of discharging their functions properly or guilty of any offences? It is a fundamental principle of Public Law that there is nothing called absolute or unfettered discretion.

"There are no absolute or unfettered discretions in Public Law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretion is to be judged by reference to the purposes for which they were entrusted In applications for *quo warranto*, *certiorari* and *mandamus*, the Court of Appeal has power to review the appointment, inter alia, for unreasonableness or if made in bad faith, or in disregard of the relevant evidence or on irrelevant considerations or without evidence" (See *Premachandra v Montague Jaywickrema and another*⁽¹⁾.)

As seen, letters P2 to P5 give no valid cause for the removal of the 5th to 8th Respondents. In this context, it is relevant to note that even the President of the country cannot be removed from office under Article 38 (2) (a) of the Constitution, except where he is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that he has been guilty of intentional violation of the Constitution, treason, bribery, misconduct or corruption involving the abuse of the powers of office or any offences under any law involving moral turpitude.

In other words, the reasons for removal of the 5th to 8th Respondents from office must be of so serious a nature which prevents them from performing their duties in the manner as the public expect them to. The members of the Public Service Commission cannot be removed by the Governor merely because he is so minded, but because reason dictates him to do so.

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "Unreasonable" in a rather comprehensive sense, It has frequently been

used as a general description of the things that must be done. For instance, a person entrusted with a discretion must so to speak, direct himself properly in Law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and is often said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within his powers or the authority" -per Lord Greene M.R. - in *Associated Provincial Picture Houses Ltd., v Wednesbury Corporation*⁽²⁾.

The cause given in P2 to P5 is no cause at all unless he specified the reason why he wanted to reconstitute the membership of the Provincial Public Service Commission. The 1st Respondent has failed to elaborate the reasons in the said letters. He has not said there were complaints of any sort against the 5th to 8th Respondents from the public or from that matter from any one that the 5th to 8th Respondents were incapable of performing their functions effectively before he chose to remove them from office.

The first time any reason of sorts he has deigned to give, was in his affidavit. He states that to his knowledge the 5th to 8th Respondents had strong political affiliations and participated in active politics which was detrimental to the proper functioning of a body which was in charge of the public service of the province and which would affect the independence expected of it. Strong words coming from a nominee of Her Excellency the President herself. But he has failed to produce a single complaint against the 5th to 8th Respondents from any member of the public service of the province or a member of the public that they were unfairly treated or victimised due to the political affiliations of the 5th to 8th respondents. The Governor is obviously unaware of the powers that have been vested in him by section 32 (8) of the Act, to alter, vary, or rescind any appointment, order of transfer or dismissal or any order relating to a disciplinary matter made by the Provincial Public Service Commission of that Province. Thus the explanation given in the affidavit for removing the 5th to 8th Respondents too does not bear scrutiny.

The 1st Respondent has acted ultra vires the provisions of section 33 (3) in removing the 5th to 8th Respondents from office as Chairman

and members of the Provincial Public Service Commission. It follows that the appointments of the 2nd to 4th Respondents were made consequential upon an illegal removal of the former members of the Commission. Those appointments have to be quashed as the 2nd to 4th Respondents have no legal authority to hold the posts of Chairman and members respectively of the Provincial Public Service Commission.

Ex facie the 1st Respondent has the power to appoint and remove members of the Provincial Public Service Commission solely under the Provisions of Act No. 42, of 1987. Under section 32 (1) it is the Governor who is vested with the **power** to appoint etc; of public officers of the province. He can at his discretion delegate those **powers** to the Public Service Commission. The Board of Ministers in such circumstances has **no power** vested in it to advise the Governor or the Public Service Commission on the appointments of officers to the Provincial Public Service. In fact, section 34 of the Act precludes interference, in such appointments by the Public Service Commission, by any outsider, including a Minister of the Provincial Council. Thus, neither Article 154C nor 154F is applicable to the functioning of the Provincial Public Service. The **power vested in the Governor** under section 32 of the Act is a specific power and not merely an **executive function** extending to matters regarding which a Provincial Council has the power to make statutes etc; under Article 154C or **other functions** to be performed by the Governor under Article 154 B. The question of referring this matter to the Supreme Court therefore does not arise.

The application is allowed in terms of prayers (c) and (d) to the petition only with costs fixed at Rs. 5000/- payable by the 1st respondent to the 1st to 5th Petitioners.

Appointment of the 2nd - 4th Respondents quashed.

Application allowed.