NIZAM AND OTHERS
v.
ELKADUWA, SECRETARY, MINISTRY OF EDUCATION CENTRAL PROVINCE AND OTHERS

SUPREME COURT.
FERNANDO, ACJ.,
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPLICATION (F.R.) NO. 160/95
JULY 1 AND 30, 1997.

Fundamental Rights – Plantation Schools – Transfer of teachers – Classification of teachers for service in "estate schools" – Article 12(1) of the Constitution.

The petitioners were assistant teachers attached to several schools in the plantation sector in which the large majority of students were from the estates, even though those schools were not physically located on the estates. The petitioners were summarily transferred on the ground that they had been recruited for service only in "estate schools" viz. schools established and maintained on estates which were subsequently taken over by the government. The available documents including letters of appointments used expressions such as "plantation sector school" or "plantation school" but there was ambiguity as to whether the petitioners were recruited to serve only in "estate schools". In fact at the time of their transfer, the petitioners had been serving in schools which were not former "estate schools" from about two to five years.

Held:

1. All assistant teachers appointed between 1983-1988 were in the same class notwithstanding differences in phraseology in documents. Further, any ambiguity in the letters of appointment should be construed contra proferentem, and in favour of the petitioners.

2. When the 1st respondent caused the petitioners to be transferred to four "estate schools" he acted in the mistaken belief that they were eligible to serve only in the vested former "estate schools". The transfers were, therefore, wrongful, arbitrary and unreasonable, and violative of Article 12(1) of the Constitution.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonasekera., with *J. C. Weliamuna* and *Luxman Jothikumar* for the petitioners.

D. S. Wijesinghe, P.C., with *Manohara R. de Silva* for the 1st to 4th respondents.

Cur. adv. vult.

September 24, 1997.
FERNANDO, ACJ.

The six petitioners are assistant teachers who were serving in six different Tamil medium schools in the Nuwara Eliya District. Each petitioner received a letter dated 1.2.95 summarily transferring him/her; the reason given was that he/she had been recruited for service only in "estate schools" (වතු පාසල්). Consequent upon protests and objections, the transfers were deferred until May 1995. The petitioners complain that the transfers were contrary to Article 12(1) because they were irrational, arbitrary, and capricious, and to Article 12(2) because they were politically motivated.

It is not in dispute that the petitioners were liable to be transferred to other Tamil medium schools within the same District, and that the transfers were not routine year-end transfers. Several other assistant teachers were also transferred at the same time, and for the same reason, but they did not complain to this Court.

According to the statistics furnished by the petitioners these transfers aggravated the existing shortages of teachers in those six schools:

SCHOOL	NUMBER OF TEACHERS			SHORTAGE
	Required	Available	Transferred	
St Gabriel's BMV	23	23	8	8 (35%)
St Mary's MV	62	29	9	42 (68%)
Holy Rosary TV	37	24	2	15 (40%)
Highlands MV	61	54	15	22 (36%)
St Joseph's MV	47	30	8	25 (53%)
Sr John Boscoe MV	37	34	3	6 (16%)
TOTAL	267	194	45	118 (44%)

These figures speak for themselves. None of the schools had excess teachers, and the only one (St Gabriel's) which had the required number, ended up with a shortage of 35%, while St Mary's ended up with 68%. The school which was least affected had a shortage of 16%. When the schools are looked at collectively, they

initially had a teacher shortage of 27%; but despite that, a further 17% were transferred, increasing the shortage to 44%.

That is not all. The petitioners also claimed that the transfers were not designed to meet more serious shortages in the four schools to which they were transferred; they pointed out that the transfers created, and in one instance aggravated, excesses of teachers:

SCHOOL	NUMBER OF CLASSROOMS	NUMBER OF TEACHERS		EXCESS
		Available	Transferred	
Shannon TV	12	10	5	3 (25%)
Fruithill TV	8	8	1	1 (12%)
Panmour TV	19	22	5	8 (42%)
Dickoya TV	12	14	5	7 (58%)
TOTAL	51	54	16	19 (37%)

Only Shannon TV had a shortage of teachers, and there the transfers resulted in an excess of three. Considered collectively, these four schools had small excess of about 6%, and the transfers inflated that excess to 37%. The figures justify only one conclusion, that these four schools did not have a greater need than the former six.

In his affidavit, the 1st respondent, the Secretary to the Provincial Ministry of Education, denied the petitioners' averments relating to the above figures, and claimed:

> ". . . in almost all schools in the Central Province there is a deficiency of teachers. **In Estate Schools it is more acute than in other schools.** I annex hereto marked '1R9' statistics showing the deficiency of teachers in the Ambagamuwas Division to which the petitioners belong which shows that the deficiency of teachers in Estate Schools [is] more grievous than in other schools."

But no such documents was tendered to Court, and in the 1st petitioner's counter-affidavit he said that 1R9 had not been served on the petitioners, and reserved his right to reply to it.

The petitioners' position thus remains uncontradicted. The 1st respondent would have had ready access to all the relevant

statistics, but did not produce any. His claims – that there was a serious shortage of teachers in the four schools to which the petitioners were transferred, and that the shortage in the Estate Schools was more acute than in other schools – is therefore unsubstantiated and unacceptable. Contrary to common sense, teachers were being taken away from where they were really needed, and put where they were not, creating a shortage of 44% in the former and an excess of 37% in the latter. Accordingly, it is clear that the reason for the transfers was not the best interests of the children in the schools concerned, and it bears repetition that it is those interests which must always be paramount in any sensible system of education and educational administration. The power to transfer teachers is not unfettered; it exists for the purpose of ensuring fairplay for teachers, efficiency for schools, and, above all, a proper education for children; and it must be used for those purposes.

The petitioners contend that they were recruited to serve in "Plantation Sector Tamil medium schools" in the District, and not merely in what were formerly "estate schools"; when the former "estate schools" were taken over by the Government, they became Government schools – just like any other Government school, big or small, urban or rural; "estate schools" cannot now be construed as a reference to the former "estate schools" which had ceased to exist; and that expression now refers to Government schools in the plantation sector.

The respondents' position is that the petitioners were recruited to serve, and are entitled to serve, only in one category of Government Tamil medium schools in the District, namely, "estate schools"; those are the schools established and maintained on estates (to which Part VI of the Education Ordinance (Cap. 185) applied); although those schools were taken over by the Government between (1962 and 1990), the references in various notifications, letters of appointment and other documents to "estate schools" are to these former "estate schools", even though the schools, and perhaps even the estates, are now vested in the State; and while it is true that several different expressions have been used – වතු පාසල්, වතුකරයේ පාසල්, වැවිලිකරයේ පාසල් – all these refer to the former "estate schools".

In the absence of an applicable definition, I have to determine what "estate schools" meant, and whether the other expressions used were synonymous. Apart from physical location and characteristics, some consideration of the people whom those schools were intended to serve is not irrelevant. For that reason I must refer to a letter dated 28.2.95, written to the 1st respondent by a trade union formed to take up the cause of some of the teachers who were transferred, in which it was stated that, according to statistics provided by the respective Principals, the great majority of the students of the following schools "come directly from estates":

SCHOOL	PERCENTAGE OF STUDENTS FROM ESTATES
St Gabriel's BMV	75%
St Mary's MV	91%
Holy Rosary TV	100%
Highlands MV	85%
St Joseph's MV	88%
Sr John Bosco MV	79%

The 1st respondent did not contradict these figures. It seems to me that these schools were serving the children of those employed on estates almost to the same extent as other schools physically located on estates.

Where rules and regulations, or terms and conditions in agreements, are not free from ambiguity, subsequent practice may sometimes throw light on what was intended. It is not in dispute that at the time of the impugned transfers all six petitioners were serving in schools which were not former "estate schools", and had been so serving for periods ranging from about two to five years.

The 1st respondent did not deny that fact, but explained that some transfers had been made in violation of the letters of appointment; that such transfers aggravated the problems of insufficient teachers in the estate schools; and that the number of estate school teachers "who had gradually got themselves transferred out of the estate schools increased to such an extent that all the estate schools assistant teachers had to be re-transferred back to estate schools in

accordance with the terms of their letters of appointment". This confirms that there was a widespread practice of transferring teachers who were in the same category as the petitioners to schools which were not former "estate schools".

The 1st respondent produced a circular issued in February 1991 by the Education Service Committee of the Public Service Commission, as well as a letter dated 31.7.91 which he himself had written to the Provincial Director of Education of the Central Province. The gist of these two documents was that assistant teachers recruited to serve on "estate schools" were working elsewhere, and that this should be rectified. His own letter directed their transfer to estate schools in which there were vacancies. Nevertheless, even after that circular and that letter, four of the six petitioners had been transferred to other schools. To say, therefore, that they had "got themselves transferred out" is to imply that all the officers who, directly or indirectly, authorised the transfers bore no responsibility for those transfers. I see no reason why the petitioners should be deprived of the benefit of the presumption of the regularity of official acts, unless there is evidence to the contrary.

I must now turn to the documents directly relevant to the issues for determination. The 1st respondent produced a Cabinet decision dated 24.2.82 approving a Cabinet Paper on "Recruitment of Non-Graduate Teachers for Estate Schools taken over by the Government" (රජය භාරගත් වතු පාසල්) and granting approval "to fill the vacancies for non-graduate teachers in the Estate Schools" with such recruits. This establishes that the Cabinet had in mind the category of "estate schools taken over by the Government".

However, at the hearing on 1.7.97 we found that the Gazette notification issued immediately after that Cabinet decision was not available. Only one Gazette notification (dated 25.10.83) had been produced. That was by the petitioners, and was for the subsequent year. That was in English, and referred, in the heading and in two other places, to "Plantation Sector Schools"; it also referred in another place to a "Plantation School", but made no reference whatever to "estate schools", or to schools taken over by the Government.

The 1st respondent had not produced any of the Gazette notifications, but only copies of three drafts, in Sinhala; a copy of the notice published in the newspapers on 4.3.82, and copies of two notices, dated 25.10.83 and 1.11.85, sent to the Government Printer, for publication in the Gazette.

The Sinhala draft of 4.3.82 corresponded to the Cabinet decision. The 5th and 6th petitioners were recruited in pursuance of that notification.

However, the Sinhala drafts of 25.10.83 (in pursuance of which the 1st to 3rd petitioners were recruited in 1986) and of 1.11.85 (in pursuance of which the 4th petitioner was recruited in 1988) used different phraseology. Except for one place in the former draft, both drafts throughout referred to " වතුකරයේ පාසල්".

The letters of appointment issued to the petitioners, in 1983, 1986 and 1988, also displayed no consistency in language, using several different terms.

Mr. Wijesinghe, PC, for the 1st to 4th respondents, submitted that all those Sinhala terms, as well as "Plantation Schools", referred to the vested former estate schools.

Mr. Goonesekera for the petitioners contended otherwise, and referred to a report dated 18.8.95 submitted to the Ministry of Education by a committee appointed in June 1995 "to suggest a definition for plantation schools". That committee stated that there were "two categories of schools catering to the children from estates in the plantation area": namely, the vested former "estate schools" and the Government schools, which were either established by Government or taken over by Government from private institutions. The Committee's recommendation was:

> " ... there are no more estate schools and all are now state schools. The term "Plantation Schools" was evolved with a special concept and a purpose. The purpose is to mark the disadvantaged schools in the plantation area for development through positive discrimination. The concept encompassed all

disadvantaged schools in the plantation area. Therefore all schools falling under the first category (taken over estate schools) and schools that enroll majority of students from estates among the second category should be considered plantation schools until such time [as] they are developed to the level of other schools in the country."

The annex to that report stated that the appointment of Plantation School teachers was "first made according to the Cabinet Paper 306 of 1984 (Continuation) titled 'Plantation Sector Tamil Medium Schools – Recruitment 1,000 prospective teachers 1984'." The title suggested that there might be a difference between the appointments made at various times. However, neither the Cabinet Paper nor the decision was produced.

Mr. Goonesekera also referred to a project, which the Swedish International Development Authority (SIDA) and the Ministry of Education was engaged in, for the development of educational facilities for "plantation schools".

We accordingly adjourned the hearing to enable the respondents to produce the official documents which might help to resolve the ambiguity – such as the Cabinet Papers, schemes of recruitment and transfer, the published Gazette notifications, and the approved cadre and salary scales of these and other assistant teachers. But when we resumed we found that nothing more was forthcoming.

The submissions of learned Counsel raise the following questions:

1. Does the expression "estate schools" (and other similar expressions) refer only to the former "estate schools" now vested in the Government?

2. If so, do the terms and conditions of service of the petitioners disentitle them from serving in other schools?

1. It seems to me that the Cabinet intended in 1982 to recruit teachers to serve in only the vested former "estate schools". However, that intention should have been given effect either in the

form of a scheme of recruitment or a Gazette notification calling for applications; and the letters of appointment should have been in accordance with the scheme of recruitment, and failing that, with the Gazette notification. In the absence of those documents, the use of several different phrases *prima facie* tends to suggest that, after 1982, a different meaning was intended, and that the SIDA project was based on a different concept. The recruiting ambiguity is one which probably ought to be decided *contra proferentem*, against the employer, because it was the employer alone who drafted and issued those documents.

However, I need not decide that question in view of my finding in regard to the second.

2. Mr. Wijesinghe relied heavily on a declaration which, he submitted, every assistant teacher had to sign, including the petitioners. The 1st respondent produced a specimen of that declaration, but not the declarations which the petitioners are alleged to have signed. Mr. Goonesekera denied that they had signed any such declaration. In any event, that declaration was to the effect that the appointee clearly understood that he was being appointed for service in estate schools taken over the Government and declared that he would never apply for a transfer **to any other Government school.** Although Mr. Wijesinghe submitted that this was in terms of the letter of appointment, in fact the letters of appointment only required a declaration that the appointee would not apply for a transfer **to another District.**

One letter of appointment has a condition that the **appointment** is confined to plantation schools (වතුකරයේ පාසල්) in the District, and that even within the District the appointee has no right to a transfer to any other schools. The 1986 letter of appointment states that the appointment is confined to the District, and that the appointee has no right to a transfer outside the District; however, there is a handwritten and unauthenticated addition (in the printed form) that the **appointment** is confined to "estate schools" (වතු පාසල්) in the District. Such additions are of doubtful validity. The 1988 letter of appointment states that service is confined to plantation schools (වැවිලිකරයේ පාසල්) in the District. All the letters provide that the appointing authority had the power to transfer the appointee outside the District on promotion,

if upon such promotion the appointee's services were required outside the District.

Prima facie, all the assistant teachers appointed between 1983 and 1988, on the basis of the above three Gazettes, are in the same class, and no reason has been suggested why there should be any difference in their terms and conditions of service particularly in regard to transfer. Difference in phraseology in the gazettes and in the letters of appointment should not too easily be assumed to result in significantly different terms and conditions. Further, any ambiguity in the letters of appointment should be construed *contra proferentem*, and in favour of the appointees. Looked at broadly, those letters contain a restrictive condition which has two aspects: every appointment is confined to the District, and to one category of schools within that District. The first is clearly not absolute: while the appointee has no right to a transfer, the appropriate authority may transfer him/her, in specified circumstances. Service outside the District is therefore neither prohibited nor unlawful. In the absence of plain words, there is no reason why the second aspect should be construed as being absolute. If it is permissible for the appropriate authority to transfer the appointee to a school outside the District, why should the position be different in regard to a transfer to other schools within the District?

Another relevant fact is that, after the impugned transfer letters dated 1.2.95, the 1st respondent by letters dated 22.3.95 informed the petitioners that it had been decided, *inter alia*, to transfer teachers in the same category as the petitioners to "estate schools" in which there **were vacancies.**

I hold that, even if "estate schools" and similar expressions refer to the former vested estate schools, yet the respondents have failed to prove that the terms and conditions of service of the petitioners prohibited their transfer to other schools. The petitioners were therefore lawfully serving in the six schools to which they had been transferred; those schools, and the children in those schools, continued to need their services; when the 1st respondent caused them to be transferred to four "estate schools", he cited in the mistaken belief that they were eligible to serve only in the vested

former "estate schools", and not in those six schools; and if he had not made that mistake and had duly considered the needs of the schools and the students, he could not reasonably have concluded that the impugned transfers were necessary or proper. The transfers were therefore wrongful, arbitrary and unreasonable, and in violation of Article 12(1).

As for the allegation of discrimination on political grounds, although the petitioners have produced affidavits and other documents in support, it is clear that a large number of other similar transfers were effected on the same basis, which I now hold to be mistaken. Indeed, the respondents say that questions were raised in Parliament and in the Central Provincial Council as to why teachers recruited for service in the vested former estate schools were serving elsewhere. It is therefore more probable that the operative cause of the impugned transfers was that mistaken belief, and not anything else. I therefore reject that part of the petitioners claim.

Although the transfers were with immediate effect, eventually they were deferred for three months; the transfers were also within the same division of the Nuwara Eliya District, and not outside. There was genuine ambiguity about the legal issues. They have now served for over two years in their new stations, and it would not be in the best interests of the schools and their pupils that they should now be re-transferred. The only equitable remedy is therefore compensation. I award each petitioners a sum of Rs. 30,000 as compensation and costs, payable by the Ministry of Education of the Central Province within one month, and I direct the 1st respondent to make all the necessary arrangements for these payments.

WIJETUNGA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Relief granted.