

ARULAMPALAM
V.
AMARATUNGE AND OTHERS

COURT OF APPEAL
GOONEWARDENÉ, J., AND PALAKIDNER, J.
C.A. APPLICATION NO. 988/80
NOVEMBER 19 and 20, 1987.

Writ of Mandamus — Termination of services by Competent Authority of business vested in Government, after prior interdiction and inquiry — Appeal to the Public Service Commission — Can Commission decline to entertain appeal? — Public Officer — Article 170 of the Constitution — Public Administration Circular No. 130.

The Petitioner was the Marketing Manager of the Wellawatte Spinning and Weaving Mills Ltd. This business undertaking was vested in the Government under the provisions of the Business Undertaking (Acquisition) Act No. 35 of 1971 and a Competent Authority (not a party to the application) was appointed. The Competent Authority interdicted the petitioner and on the same day framed charges against him. Thereafter he nominated an Attorney-at-Law to hold an inquiry and on the findings of the Attorney-at-Law terminated the petitioner's services. The petitioners appealed to the Public Service Commission but its Secretary notified petitioner that it had no authority to entertain the application. The petitioner filed this application for Mandamus against the Members of the Public Service Commission.

Held:

(1) The powers of appointment, transfer, dismissal and disciplinary control of public officers are vested in the Cabinet of Ministers — Article 55(1) of the Constitution. The Cabinet is precluded from delegating these powers in respect

of Heads of Department (Article 56 (2)) but could delegate these powers in respect of other public officers to the Public Service Commission — Article 56(3). Powers so delegated to the Public Service Commission may in respect of any category of Public Officer be sub-delegated by it or a Committee appointed by it to a public officer — Article 56(1). Paragraph 2.11. of Public Service Commission Circular No. 130 sets out the whole position in regard to delegation, designating the authority that would exercise the powers in question in respect of various categories of public servants.

(2) The categories of officers contemplated in paragraph 2.11.1 of the circular 130 are wide enough to include the petitioner and accordingly the Public Service Commission would not be the authority capable of dismissing the petitioner.

(3) Even if petitioner is not in a category specified in the tabulation of paragraph 2.11.1. of the Circular No. 130 the argument that these powers referred to remained in the Public Service Commission cannot be accepted.

(4) Whatever powers there may be that are exercisable by the Public Service Commission they are necessarily powers derived by it only by a delegation thereof by the Cabinet of Ministers to it. If the sub-delegation by the Public Service Commission to a Public Officer did not include the category to which the petitioner belonged in terms of the circular then the delegation by the Cabinet of Ministers to the Public Service Commission did not include that category either and then these powers would still be with the Cabinet of Ministers. Whatever view is taken the powers in question were not with the Public Service Commission.

APPLICATION for writ of mandamus against the Public Service Commission.

H. L. de Silva P.C. with Miss. L. N. de Silva, for Petitioner.

Shibly Aziz D.S.G. with D.M. Karunaratne S.C., for Respondents.

Cur. adv. vult.

January 19, 1988.

GOONEWARDENE, J

The petitioner seeks an order of mandamus against the 1st to 6th respondents, all members of the Public Service Commission established under Article 56(1) of the Constitution. His application is made against the following background.

Prior to times material hereto he was employed as Marketing Manager of the Wellawatte Spinning and Weaving Mills Ltd. Colombo, a Company duly registered under the Companies Ordinance. By gazette notification dated the 10th of March 1976

(Document A) the business undertaking of this Company was vested in the Government with effect from that date under the provisions of the Business Undertakings (Acquisition) Act No. 35 of 1971 and a Competent Authority was appointed in terms of the said Act to manage and run this business undertaking.

The petitioner continued in service, when on the 13th of December 1978 the Competent Authority (no party to this application) interdicted him and on the same day framed charges against him. The Competent Authority thereafter nominated an Attorney-at-Law to inquire into these charges and consequent upon findings after such inquiry adverse to the petitioner, he by his letter of the 21st of December 1979 (Document B) terminated the services of the petitioner with effect from the 13th of December 1978.

On the 14th of February 1980 the petitioner appealed against his dismissal to the Public Service Commission (Document D) but by letter dated the 1st of April 1980 (Document E) the Secretary to such Commission acting under its direction notified him that it had no authority to entertain such appeal and it is that notification which is assailed here.

At the hearing before us it was contended by learned Counsel for the petitioner that the central issue here is whether the petitioner was a 'public officer' (which in his submission the petitioner at the material time was) within the meaning of that expression as defined in Article 170 of the Constitution. A public officer is there defined to mean a person who holds any paid office under the Republic other than a judicial officer but not including certain designated persons of no importance here. Mr. Aziz for the respondents conversely contended that whatever was the position of the petitioner vis a vis the Republic he was by no means a 'public officer' within the meaning of the definition in the Constitution. It may no doubt be true to say that the petitioner was paid out of funds provided by the State and the argument for him was that the business undertaking acquired under this Statute having no legal personality, by virtue of the definition in the Constitution all persons employed in the undertaking had then to be 'public officers'. But whether that is

necessarily so I am not convinced. The words 'paid office under the Republic' used in the definition to my mind suggest something more than merely receiving a pay out of funds provided by Government. They tend to suggest some kind of contractual ties giving rise to a particular relationship such as of employer and employee or master and servant but, for reasons which will become apparent later, it becomes unnecessary to embark upon a decision on this question.

The petitioner's contention is that by failing to consider his appeal, the Public Service Commission declined jurisdiction and thus the respondents as members of that Commission rendered themselves amenable to mandamus. Mr. Aziz however argued that the Public Service Commission is a body created by the Constitution and the duties imposed upon it are only those set out in the Constitution. He contended that the only duty cast in this regard is that arising out of the appellate function assigned to it by Article 58(2) which is with respect to any order made by a Public Officer to whom the Public Service Commission or any Committee thereof has delegated its powers. That not being the case here, he submitted that Article 58(2) does not help the petitioner and that there is no other provision in the Constitution which casts a duty on the Public Service Commission, with respect to the petitioner. The applicable principle being that there can be no appeal unless such a right has been expressly conferred by the Constitution. To that extent there is substance in his contention.

Mr. Aziz also put forward an argument based upon the assumption (not implying any concession to that effect) that if the petitioner was a public officer as claimed, then Article 55(5) precluded any inquiry into or pronouncement upon a decision of the Public Service Commission. Mr. de Silva's rival submission with respect to this was that this privative provision applies only to decisions actually made in the exercise of jurisdiction but has no application to instances where the Public Service Commission has declined jurisdiction, which in his submission was what the Public Service Commission did here.

These submissions to my mind could well be thought to involve interpretation of a provision of the Constitution the exclusive jurisdiction to do which is conferred upon the Supreme Court by Article 125(1). The question whether the petitioner in the circumstances in which he was placed was one who fell within the definition of 'public officer' in Article 170 and therefore whether the interpretation of the expression 'public officer' vis a vis the petitioner is also one to which Article 125(1) has application is not altogether without difficulty either.

It is perhaps fortunate therefore that this application can be disposed of, as indeed it has to be, without journeying pointlessly into areas possibly involving an interpretation of certain of the provisions of the Constitution which, if the need arose, would have had to be done by the Supreme Court.

I will commence by assuming the stance the petitioner adopts that he is a 'public officer' and then proceed to consider whether the proper respondents have been brought before this Court by him. To do so it becomes necessary to refer to certain of the provisions of the Constitution relating to the Public Service Commission and to consider Public Administration Circular No. 130 (Document C) annexed to the papers filed by the petitioner, and relied upon by him as being applicable to him.

The powers of appointment, transfer, dismissal and disciplinary control of public officers are vested in the Cabinet of Ministers — Article 55 (1).

The Cabinet of Ministers is precluded from delegating these powers in respect of Heads of Department — Article 55(2).

The Cabinet of Ministers is empowered to delegate these powers with respect to other public officers to the Public Service Commission — Article 55(3).

Powers so delegated to the Public Service Commission may in respect of any category of public officers be sub delegated by it or by a Committee of it to a Public Officer — Article 58(1).

Against the background of these provisions Public Administration Circular No. 130 (Document C), the legality of which the petitioner himself claims, can appropriately be examined.

That the provisions of Articles 55 to 59 of the Constitution apply to all public officers other than (a) those appointed by the President (b) members of the armed services and (c) 'Scheduled Public Officers' as that expression is used in Article 114(6) of the Constitution is stated in paragraph 1:3 which goes on to provide that the circular would therefore apply to all public officers other than those included in these three categories. Not losing sight of the assumption made, that the petitioner was a public officer as claimed by him, the circular must clearly be thought to apply to him and indeed it has been so contended on his behalf.

Paragraph 2:4 of the circular repeats what is contained in Article 55(2) of the Constitution I have already referred to, that the powers of appointment, transfer, dismissal and disciplinary control of Heads of Departments remain vested in the Cabinet of Ministers.

Paragraph 2:5 provides that the Cabinet of Ministers will 'directly deal' with matters of appointment, transfer, dismissal and disciplinary control of (a) Additional Secretaries to Minister (b) Government Agents in charge of Districts and (c) Senior Assistant Secretaries to Ministries.

Paragraph 2:10 is as important and is reproduced thus "In regard to other Public Officers, the Cabinet of Ministers has delegated the powers of appointment, transfer, dismissal and disciplinary control to the Public Service Commission and the Public Service Commission has delegated its powers of appointment, transfer, dismissal and disciplinary control to Public Officers as detailed in Paragraph 2:11 below".

Paragraph 2:11 tabulates "the position as far as the Whole Public Service is concerned" based on,

1. Article 55(2) of the Constitution (prohibiting delegation of powers with respect of Heads of Department)

2. The decision of the Cabinet of Ministers for the retention of these powers (with respect to certain categories of public officers namely Additional Secretaries to Ministries, Government Agents in charge of Districts and Senior Assistant Secretaries to Ministries).

3. The delegation of powers by the Cabinet of Ministers to the Public Service Commission.

4. The delegation of powers by the Public Service Commission to Public Officers.

and, with respect to the powers of appointment, dismissal and disciplinary control at paragraph 2:11:1 the result is shown thus:

Category	Description	Authority
1.	Heads of Departments, Additional Secretaries to Ministries, Government Agents, Senior Assistant Secretaries to Ministries	Cabinet of Ministers
2.	Public Officers in Staff Grade in the Combined Services	Secretary to the Ministry of Public Administration
3.	(a) Public Officers in Staff Grade not in the Combined Services	Secretary to the Ministry concerned/Head of the Department if not under a Ministry.
	(b) Public Officers in Staff Grade in the Auditor General's Department and the Department of Elections, not in the Combined Services.	Secretary to the President
4.	Public Officers not in the Staff Grade in the Combined Services	Director, Combined Services
5.	Public Officers not in Staff Grade and not in the Combined Services	Head of the Department

The argument of Mr. de Silva, Counsel for the petitioner was that upon an examination of these provisions, it becomes clear that the petitioner fell into an amorphous category (to use his expression) and that while the circular applied to the petitioner, these powers with respect to him had to be exercised by the Public Service Commission itself. In my understanding of what Mr. de Silva claimed, if therefore the Public Service Commission decided to decline to grant the petitioner relief by way of appeal, since the power of dismissal of the petitioner could have been exercised in terms of the circular only by the Public Service Commission itself, and certainly not by the Competent Authority as he purported to do here, then it was the duty of the Public Service Commission to go into the complaint of the petitioner made to it and grant some redress on the footing that what the Competent Authority did was tantamount to a usurpation of these powers of the Public Service Commission with respect to the petitioner. Mr. de Silva could not however contend that if properly these powers had to be exercised by any other (other than the Public Service Commission), the petitioner could maintain this application, nor did he endeavour to do so. In his argument it is by reason of the petitioner belonging to this amorphous category, which he surmised could have been as a result of such category not having been envisaged when the delegation was decided upon that these powers with respect to the petitioner's category had to be exercised by the Public Service Commission and not either by the Cabinet of Ministers on the one hand or by a Public Officer upon a sub-delegation by the Public Service Commission, on the other.

I cannot agree and the terms of the circular militate against such a view. Although Mr. de Silva contended differently, in my view the categories of officers contemplated in paragraph 2:11:1 are wide enough to include the petitioner and thus his position would place him in one or other of the categories of 'authority' enumerated there, so as not to make the Public Service Commission the authority capable of exercising the power of dismissal with regard to him. The words "The position as far as the whole Public Service is concerned is as follows" appearing in paragraph 2:11 are in this regard of significance.

But let me assume as was contended, that the petitioner does not find a place in this tabulation and upon that basis examine the resultant position. When we pointed out at the hearing that paragraph 2:10 has the effect of sub-delegating in turn to Public Officers all powers delegated to the Public Service Commission itself, Mr. de Silva argued that the sub-delegation would not apply to the petitioner as he did not find a place anywhere in the tabulation in paragraph 2:11:1, and thence it was that these powers remained with the Public Service Commission. Not to have done so would have seen the bottom falling out of the petitioner's case to the effect that the correct parties are before this Court as respondents.

Is there then a basis for interpreting the circular to mean that there was a delegation of these powers by the Cabinet of Ministers to the Public Service Commission with respect to the category to which the petitioner belonged, which really is the foundation of Mr. de Silva's argument here? Does the circular upon its language expressly so provide? It certainly does not. Does it imply such a view? I do not think so either. The petitioner in my view is limited to two provisions in the circular upon which it can be thought that he could rest his contention here. One such provision is contained in paragraph 2:5 which, as I have already referred to, is to the effect that the Cabinet of Ministers will 'directly deal' in the exercise of these powers with three categories of public officers, namely, Additional Secretaries to Ministries, Government Agents in charge of Districts and Senior Assistant Secretaries to Ministries. Can this provision be understood to mean that these three classes are exhaustive of the categories with respect to which powers are not delegated, so as to secure delegation of powers with respect to all else to the Public Service Commission? The words 'directly deal' hardly lend themselves to such a meaning and can scarcely be thought to have been intended to exclude all other categories. Against the background of the terms of Article 55(1) of the Constitution which makes clear that these powers with respect to all public officers are without exception and to begin with vested in the Cabinet of Ministers the position contended for can hardly have acceptance, based upon this provision.

The other provision which might at first glance be thought to lend support to the petitioner's contention is that contained in paragraph 2:10 of the circular. It is to the effect that in regard to 'other' public officers (that is public officers other than Heads of Departments, Additional Secretaries to Ministries, Government Agents in charge of the Districts and Senior Assistant Secretaries to Ministries) the Cabinet of Ministers had delegated these powers to the Public Service Commission. Does that conclude the question so as to drive one to think that with respect to the petitioner's category there was a delegation from the Cabinet of Ministers to the Public Service Commission? As I see it the use of the word 'other' has to assume a significance that necessarily leads up to that result only if the category to which the petitioner belonged was clearly contemplated up to the stage of delegation by the Cabinet of Ministers to the Public Service Commission, a view I do not form upon an examination of the language of the circular. Indeed if it was not contemplated, having regard to the further terms of this provision one must also necessarily conclude that it was intended that there should be a sub-delegation of these powers by the Public Service Commission to a Public Officer. If the category to which the petitioner belonged was as I have to conclude, not in contemplation as being included in the delegation by the Cabinet of Ministers to the Public Service Commission, can it be said that the mere use of the word 'other' could bring about by a process of implication the effect of including the petitioner's category among those with respect to which there was a delegation by the Cabinet of Ministers to the Public Service Commission? I think not. In the interpretation of statutes, an intention is sometimes attributed to the legislature when it expresses none. This canon of construction sometimes referred to as 'implied enactment' has clear limitations. As Maxwell in "The Interpretation of Statutes" 11th Edition at page 348 points out " . . . this extension of an enactment is confined to its strictly necessary incidents or logical consequences". Even if one were to extend the application of this maxim to the circular as one could perhaps do if it were treated as a statutory instrument, I find it impossible to say that there is justification for implying this effect. Its language just does not lend itself to such a view. I am of the view that the provisions of paragraph 2:0 and 2:10 of the circular matter taken

separately or in combination do not help the petitioner here, and in so saying I keep in mind that whatever powers there may be that are exercisable by the Public Service Commission they are necessarily powers derived by it only by virtue of a delegation thereof by the Cabinet of Ministers to it. To state the resultant position shortly in other terms, if the sub-delegation by the Public Service Commission to a Public Officer did not include the category to which the petitioner belonged, in terms of the circular the delegation by the Cabinet of Ministers to the Public Service Commission did not include that category either, and then, these powers with respect to the category to which the petitioner belonged had to remain with the Cabinet of Ministers. Any other view I think savours of artificiality in thinking and giving effect to such view would be, as I see it, to distort the intent of the circular read and understood as a whole.

The conclusion then in my view is inescapable that whoever else it was that had the authority to exercise these powers (assuming here of course that the petitioner's claim that he is a public officer is correct) the Public Service Commission was certainly not it. The wrong parties against whom in any circumstances no relief can be granted have been brought before this Court and this application must stand dismissed with costs.

PALAKIDNAR, J.

I agree