

**KOTAKADENIYA**  
**v.**  
**KODITHUWAKKU AND OTHERS**

COURT OF APPEAL.  
DE SILVA, J.  
CA 1135/99.  
24<sup>TH</sup>, 31<sup>ST</sup> MARCH, 2000.

*Writ of Certiorari - Transfer of Police Officers - Delegation of power by the Public Service Commission to the Inspector General of Police - Could a Senior Deputy Inspector General of Police be transferred by the Inspector General of Police? - Ultra vires - Ouster clause - Applicability of Article 55 - Constitution - Interpretation Ordinance S.22 - Mala fides.*

The Petitioner who is a Senior Deputy Inspector General of Police, was transferred by the Inspector General of Police (I.G.P.). The Petitioner alleged that the purported transfer was in effect a demotion and the I.G.P has no authority/power to transfer him as that power/authority is given to the Public Service Commission (P.S.C.) and the P.S.C has not delegated that function to the I.G.P.

It was contended by the 1<sup>st</sup> Respondent (IGP) that the rank of Senior Deputy Inspector General (S/DIG) falls within the Rank of Deputy Inspector General (DIG), the reason being that S/DIG's are in fact 'D.I.G.'s' and the P.S.C. has delegated the power of transfer of D.I.G's to the I.G.P. (1<sup>st</sup> Respondent).

It was further contended that Article 55(5) of the Constitution ousts the jurisdiction of court to inquire into or call in question any order of any Public Officer in regard to any matter concerning '... transfer ...' of a Public Officer.

**Held :**

(1) It would appear that upto December 1992 , the P.S.C. had exercised the power over all gazetted officers namely, S/DIG's, DIG's, S.S.P's etc.. In 1992 the then I.G.P has requested that the delegation of power of transfer of all officers of and below the rank of D.I.G to be given to him. The P.S.C had obliged by delegating the power of transfer of all Police officers of and below the rank of D.I.G to the then I.G.P even though at that time the S/DIG rank was in existence.

(2) Considering the documents placed before Court it appears that the ranks, (S/DIG's and D.I.G.), are distinct and separate, the S/DIG being senior to the D.I.G and is in a separate cadre.

(3) The ouster clause would be of no effect if the order is made by an officer who does not have legal authority to do so. In such a case, the decision is null and void.

(4) The I.G.P. has no power or authority to transfer a S/DIG and the decision therefore is *ultra vires*; therefore court has jurisdiction to hear and determine the question in issue.

*Per De Silva, J.*

"The clarification by the P.S.C(1R3) does not withstand much scrutiny in the face of all the material and I am of the view that a document issued on second thought does not have the effect of validating an invalid act by the I.G.P namely the transfer of the Petitioner."

(5) Allegation of *mala fides* demands proof of a higher degree.

**APPLICATION** for a Writ of Certiorari.

**Cases referred to :**

1. *Abeywickrema vs Pathirana* [1986] 1 Sri.L.R. 120
2. *Athapattu vs Peoples Bank* [1997] 1 Sri.L.R. 208
3. *Chandrasena vs Attorney General* [1989] 1 Sri.L.R. 120
4. *Gunarathne vs Chandrananda de Silva* (1998) 3 Sri.L.R. 265
5. *Gunasinghe vs Dissanayake* [1994] 2 Sri.L.R. 132

*Chula de Silva, P.C., with Rohan Sahabandu, Chandana Liyanapatabendi and Athula Perera* for Petitioner.

*Saleem Marsoof P.C., Additional Solicitor General with Nerin Pulle* S.C for 1<sup>st</sup> and 4<sup>th</sup> Respondents.

R.K.W. Gunasekera for 2<sup>nd</sup> Respondent.

*Cur. adv. vult.*

May 5, 2000.

**DE SILVA, J.**

By this application the petitioner, a Senior Deputy Inspector General seeks a mandate in the nature of a writ of

prohibition to prohibit the transfer by the first respondent Inspector General of Police by order dated 07. 11. 1999 from Senior Deputy Inspector General in Charge of crime and Intelligence officer to be in charge of Criminal Record Office and Technical Branches and also for a mandate in the nature of a writ of *certiorari* quashing the said decision/determination contained in the document marked (P. 8). The petitioner alleges that the said transfer or the purported transfer is in effect a demotion to him and the Inspector General has no power to demote him.

The petitioner is a very senior police officer. He joined as an ASP in 1966 and was confirmed in 1969. Thereafter he was promoted to the rank of SP in 1975, SSP in 1980 and DIG in 1987. In 1995 he was promoted to the rank of Senior Deputy Inspector General with effect from 02. 08. 1994.

As Deputy Inspector General the petitioner had been in charge of the Southern Range, Northern Range, Uwa Range, Police HQ, and Logistics Range, As Senior Deputy Inspector General he was in charge of the Colombo Range, the SL Police Reserve, Civil Defence Force, Eastern Range, and since 14. 09. 1998 Crimes, Criminal Intelligence and Organized Crime.

The petitioner's promotion to the rank of senior Deputy Inspector General was made in terms of P1, a letter from the Secretary Public Service Commission dated 11. 09. 1995. The letter reads as follows, ". . . . . is promoted to the rank of Senior Deputy Inspector General with effect from 2nd August 1994. . . . .".

The petitioner states *inter alia* that the Criminal Record Division to which he has been transferred comes under S/DIG Crimes and Intelligence, which post he was holding at the time of the transfer. The petitioner has annexed the Organizational Structure of the Police Department as evidence there of marked P2.

The petitioner had also annexed an extract from the Public Administration circular No. 2/97 which indicates the hierarchy of the Police Department and according to the said circular the highest rank is the IGP, next comes the S/DIG and then the DIG and so on. The said document also indicates the salary scales applicable to the relevant respective ranks and shows that the scale of the S/DIG is higher than that of the DIG.

In terms of document P5, it appears that as at 03. 07. 1989 there had been three S/DIG's and nineteen DIG's and as at 01. 07. 1992 there had been three S/DIG's and twenty DIG's.

The petitioner also relies on the Police Telephone Directory, issued by the 1<sup>st</sup> respondent which again lists the officers in terms of the aforesaid hierarchy. The petitioner submits that all these documents bear testimony to the fact that the S/DIG ranks above the post of DIG.

On 08. 11. 1999 the petitioner received P8, dated 07. 11. 99, from the 1<sup>st</sup> respondent IGP which was a directive temporarily transferring the petitioner from S/DIG Crimes and Criminal Intelligence to be in charge of the Criminal Record Office and Technical Branches and would be based at the CRD building. The directive further contained that the petitioner should occupy the room formerly used by S/DIG Dharmadasa Silva who was compiling a book on the Police Department.

In terms of P9, Public Service Commission Circular No. 4 of 17. 02. 93, the transfers and disciplinary control of all staff grade officers came under the control of the Public Service Commission. In terms of P10, the Public Service Commission, on 14. 12. 1992 delegated the power with regard to transfers of "... all Police officers of and below the rank of DIG. ..." To the IGP "... in view of the exigencies specific to the Police Department". Accordingly, the petitioner claims that the power of transfer of S/DIG's has not been delegated by the Public Service Commission to the 1<sup>st</sup> respondent IGP. The Petitioner

states that the IGP has acted *ultra vires* his powers in transferring the petitioner who is a S/DIG and that the IGP has no power or jurisdiction to transfer him. The petitioner states that in terms of P10, the IGP can transfer only officers of and below the rank of DIG and that accordingly the petitioner being a S/DIG does not come within the ambit of P10. The Petitioner states that he verily believes that the Public Service Commission has not delegated its powers of transfer of S/DIG's to IGP or any other person.

The petitioner also states that the Criminal Record Division came under him as S/DIG Crimes and Criminal Intelligence and that it was headed by a SSP and as such the transfer tantamounts to a demotion for the petitioner, and that in terms of the office to which he is transferred his functions are of a trivial nature and are not commensurate with the duties of a S/DIG. He also alleges *mala fides* on the part of the 1<sup>st</sup> respondent in effecting the said transfer. The petitioner states that the actual reason for the transfer was that he took part in a television discussion and made certain remarks. This position the Inspector General has denied.

Consequent to this application by the petitioner, a stay order was issued by this Court staying the transfer until the determination of this application.

In reply to the petitioner, resisting the issue of a stay order, the 1<sup>st</sup> respondent claims that the rank of S/DIG falls within the rank of DIG the reason being that S/DIG's are in fact DIG's.

With his affidavit Inspector General produced a document marked 1R1, a circular from the Public Service Commission, No. a/7/1, dated 14<sup>th</sup> December 1992, wherein the power of transfer of DIG's has been delegated to the IGP. The relevant portion reads:

"2. Transfers - The powers of transfers of all police officers of and below the rank of DIG are delegated to the IGP in view of the exigencies specific to the Police Department."

This is the full text relevant to P10. The affidavit of Inspector General states that he is advised that DIG refers to S/DIG as well. He has also annexed marked 1R2 a query to the Public Service Commission seeking an affirmative clarification to 1R1 that the rank DIG as used in 1R1 includes S/DIG's as well to which the Public Service Commission had written to the Defence Ministry that "DIG" as used in 1R1 includes S/DIG's as well and that transfers of S/DIG's are never referred to the Public Service Commission. This letter of clarification has been annexed as 1R3.

In his objections proper, Inspector General has admitted that from the rank of DIG the Petitioner was promoted to the rank of S/DIG on 11. 09. 1995 with effect from 02. 08. 1994. (para 7) The posts held by the petitioner from the time he joined the Police department as per the 1<sup>st</sup> respondent appear substantially the same as claimed by the petitioner though the 1<sup>st</sup> respondent sets out certain disciplinary actions that had been taken against the petitioner.

The question to be dealt with by this count is whether the IGP is empowered to transfer a Senior Deputy Inspector General.

In his objections proper, the 1<sup>st</sup> respondent reiterates his position that the rank of DIG includes that of S/DIG. The 1<sup>st</sup> respondent states that in terms of the Police Ordinance the reference "IGP" shall be deemed to include DIG and that the Police Ordinance provided only for DIG's, SP's and ASP's etc. With the increase in cadre the rank of DIG was sub divided into S/DIG and DIG with two different salary structures "but necessarily and descriptively the post of S/DIG is the same as any person who is categorized as and falls into the rank of DIG".

The 1<sup>st</sup> respondent has annexed marked 1R11 a list of S/DIG's including the petitioner who has, in the past, been transferred by the IGP whilst being S/DIG's and states that the Public Service Commission has never exercised any power regarding the transfer of a S/DIG.

The 1<sup>st</sup> respondent has admitted documents P3, P4, P5, P6, and P8 respectively and states that the Criminal Records Office had to be updated due to the increase in the volume of crime and to be on par with modern technology and that as such it was decided to appoint a senior officer to be in charge.

In reply to the objections the petitioner filed a counter affidavit and produced a number of fresh documents which are of relevance in determining this application. The petitioner produced as P16, a letter from the 1<sup>st</sup> respondent dated 19. 12. 1999 whereby DIG T. N. de Silva had been posthumously promoted to the rank of S/DIG along with others who had died in the course of duty at the Town Hall bomb blast during the last Presidential Election. The letter reads:

“The following deceased officers are posthumously promoted to the under mentioned rank with immediate effect:

01. Late DIG Mr. T. N. de Silva as Senior Deputy Inspector General of Police.
02. . . . .”

P20 is a letter to Secretary/Defence addressed by the then IGP dated 29. 06. 94 setting out the permanent cadre in the Police Staff: The relevant portion reads as follows:

“Secretary/Defence.

### **PERMANENT CADRE IN THE POLICE DEPARTMENT**

I refer to your letter dated 9<sup>th</sup> June 1994 on the above subject. The required particulars are given below:

#### **01. Approved Cadre of the Regular Police (with STF)**

Snr/DIGG	03
DIGG	33
Supernumary DIGG	12
. . . . .	. . . . .
	Sgd/TPF de Silva/IGP

P21: Document showing strength of the Police Department as at 30. 11. 94 by Director Personnel to IGP. It also sets out the cadre as 05 S/DIG'S, 29 DIG's and 12 Super. DIG's and so on. P22, the Administrative Report of the Police for the Year 1991, P23 for 1992, and P24 for 1993 certified by the respective IGP's and in all these reports the ranks of S/DIG and DIG are distinctly listed the latter following the former in hierarchy. P25 is the circular regarding Badges of Rank. In terms of P25:

S/DIG: State Emblem, Star and floral wreath with cross battens, Gorget patches of black velvet with "Palapethi" design in Silver on either side and a Thick Silver line at the center with Chromium plated small button.

DIG: State Emblem with floral wreath cross battens, Gorget patches of black velvet with "Palapethi" design in Silver on either side and a thick silver line at the center with Chromium plated small button.

It would appear that the badge of the S/DIG is different from that of the DIG in that the badge of the DIG is minus the Star as is in the S/DIG badge.

In terms of document P5(a), a report prepared by Mr. Earnest Perera former Inspector General of Police it appears that as at 03. 07. 1989 there had been three S/DIG's and nineteen DIG's. The three Senior DIG's referred to in that report are Mr. T. P. F. de Silva appointed as Senior DIG on 15. 02. 1987, Mr. M. E. P. Perera appointed on 21. 07. 1987 and Mr. R. B. Rajaguru appointed on 01. 08. 1988. This shows two things, firstly (1) that the post of S/DIG had been in existence even in 1987 and secondly (2) the most Senior Police Officers are appointed to these posts. When Mr. Earnest Perera wrote to the Public Service Commission on 10. 12. 1992 the three most Senior Officers who were holding the post of S/DIG's were Mr. T. P. F. de Silva, Mr. M. Ariyasingha and Mr. M. Selvaratnam (P5(b)). Subsequently P. B. Ekanayaka had been promoted with effect from 01. 08. 1992.

As stated earlier the main question arising out of this application is whether the IGP has the power and authority to transfer a S/DIG. The petitioner's position is that the Public Service Commission delegated the power of transferring DIG's to the IGP and that the rank of S/DIG does not fall within the rank of DIG but is higher than the rank of DIG. The 1<sup>st</sup> respondent takes a directly opposed stand and takes the position that the Public Service Commission delegated its power of transfer of DIG's to the IGP and that the S/DIG comes within the general rank of DIG and accordingly the IGP has the power of transferring a S/DIG.

It would appear that up to December 1992 the Public Service Commission had exercised the powers of transfer of all gazetted officers namely S/DIG's, DIG's, SSP's, SP's and ASP's and probationary ASP's. In sequence of events, as per the documents marked in this application, in 1992 the then IGP Mr. E. E. B. Perera wrote to the Public Service Commission requesting that the delegation of power of transfer of all officers of and below the rank of DIG to be given to him. The Public Service Commission obliged by delegating the power of transfer of all Police officers of and below the rank of DIG to the IGP. This was in 1992. Apparently after 1992 the IGP had exercised the power of transfer of S/DIG's consequent to the delegation on the assumption that he had powers to do so and in that exercise had also transferred S/DIG's as well as the petitioner on some occasions. It is to be observed that R11, document tendered by the Inspector General refers to transfers done after 1995. No documentary evidence was placed before this Court to establish the fact that the person who sought and got the authority viz Mr. Earnest Perera or his successor Mr. Frank De Silva had effected any transfer of S/DIG's from 1992-1995. The petitioner's acquiescence in these transfers cannot be construed as a bar to his complaining of lack of authority of the IGP in a subsequent transfer by the IGP. The petitioner complains here because he alleges that he had been stripped of his authority and placed in charge of a unit that was earlier manned by a SSP.

Considering the documents placed before the Court by the petitioner, namely P1, whereby the petitioner has been "promoted" to the rank of S/DIG from DIG, the Organizational Structure of the Police Department wherein the ranks of S/DIG and DIG have been distinctly listed, the Public Administration Circular which sets out the hierarchy to the Police Department which also lists the S/DIG above the DIG in separate ranks, the different salary scales applicable in terms of that circular, the Reports of several Inspectors General of Police where S/DIG's have been named above the DIG's and the Telephone Directory, for whatever it is worth as evidence which again differentiates between S/DIG's and DIG's, it would appear that the rank of S/DIG is senior to and distinct from that of DIG.

This is more emphasized by the documents filed by the petitioner in his counter affidavit where P19 has "promoted" DIG T. N. de Silva posthumously to S/DIG, P20 where the IGP had forwarded a report of Permanent Cadres to the Secretary Defence and listed S/DIG above and over DIG's, P21 by Director Personnel again listing S/DIG's separately, and the Administrative Reports for 1991, 1992, 1993 marked P22, 23, and 24 certified by the respective IGP's again setting out the S/DIG cadre separate and over the DIG cadre and finally the differences in the badges of the two ranks - S/DIG and DIG, all go to establish that the rank of S/DIG is quite different and distinct from that of DIG.

The clarification by the Public Service Commission produced by the respondent marked (1R3) does not withstand much scrutiny in the face of all the above mentioned factors and I am of the view that a document issued on second thought cannot have the effect of validating an invalid act by the IGP - namely the transfer of the petitioner. Furthermore, the letter requesting the delegation of power of transfer by IGP E. E. B. Perera, marked x, did not refer to S/DIG which rank even at that time was in existence. Accordingly, it would appear in the face of the documents that IGP E. E. B. Perera himself has

chosen to omit the S/DIG's who are second only to the IGP, in his request for a delegation of power. It is not possible now for the Public Service Commission to include in its delegation a category not mentioned in the request itself. Nor does the document advise us of the nature of the discussion referred to therein.

The position taken up by the 1<sup>st</sup> respondent that the rank of DIG includes S/DIG is untenable and cannot be sustained because it appears from the documents tendered to Court that the ranks have been distinct and separate, the S/DIG being senior to the DIG and being in a separate cadre. I hold that the Inspector General had acted in excess of his authority when he transferred a Senior Deputy Inspector General.

Question was also raised with regard to the jurisdiction of this Court to hear and determine this application. Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the language of Article 55(5) of the Constitution is sufficiently wide to oust jurisdiction of Court to inquire into, pronounce upon or call in question any order of any public officer in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer. Additional Solicitor General Mr. Marsoof relied on several judgments starting from *Abeyawickrama vs Pathirana*<sup>(1)</sup> to *Athapattu vs Peoples Bank*<sup>(2)</sup> He also submitted that Article 55(5) of the Constitution had to be understood in the light of Section 22 of the Interpretation Ordinance where it states "order, decision, determination, direction or finding made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal". It was the submission of Counsel that even if the 1<sup>st</sup> respondent did not have actual authority he did have apparent authority to make the order or decision marked P8 and therefore the jurisdiction of this Court is ousted. Mr. Gunasekara did not support the argument that Section 22 of the Interpretation Ordinance is applicable. However he contended that the present situation is covered by Article 55 (5).

There are several decisions of the Supreme Court where it has been held that the ouster clause would be of no effect if the order is made by an officer who does not have legal authority to do so. In such case the decision is null and void and the preclusive clause in the Constitution is no bar to review. In *Chandrasena vs Attorney-General*<sup>(3)</sup> the Supreme Court held that ouster clause in Article 55(5) would not protect an administrative act which was *ultra vires*. In *Gunaratna vs Chandrananda de Silva*<sup>(4)</sup> where a public officer was sent on compulsory leave by the Secretary Defence, where it ought to have been by Public Service Commission the Court held that the act was *ultra vires* and the ouster clause did not apply.

In the instant case I have held for the reasons set out above that the Inspector General has no power or authority in terms of letter dated 14. 12. 1992 to transfer a S/DIG and the decision is *ultra vires*. In these circumstances I hold that this Court has jurisdiction to hear and determine the question in issue.

At the hearing of this case the learned Senior Counsel for the petitioner did not labour the issue of *mala fides*. Allegation of *mala fides* demand proof of a higher degree. In *Gunasinghe vs Dissanayaka*<sup>(5)</sup> it was held that one who alleges *mala fides* should establish it to the satisfaction of Court. The petitioner in this case apart from the mere allegation of *mala fides* has not established the same to the satisfaction of this Court. I hold that the Inspector General's action in transferring the petitioner has been done without malice.

For the reasons stated above I allow the application of the petitioner and quash the decision on P8 which refers to the transfer of the petitioner. I make no order with regard to costs.

*Application allowed.*

**Ed. Note**

*The Supreme Court on - 21. 11. 2000 in SC SPLLA 108/2000 refused special leave to the Supreme Court.*