

DR. MARIO GOMEZ

v.

UNIVERSITY OF COLOMBO AND OTHERS

SUPREME COURT

S.N. SILVA, C. J.

ISMAIL, J. AND

EDUSSURIYA, J.

SC FR APPLICATION NO. 833/99

7TH AND 14TH DECEMBER, 2000

Fundamental rights - Appointment of a University Lecturer - Condition for acquiring proficiency in Sinhala/Tamil - Termination of services for failure to acquire proficiency - Article 12(1) of the Constitution - Time bar.

By letter dated 3rd April 1990 the petitioner was appointed a Probationary Lecturer in Law in the University of Colombo. Clause 8 of the said appointment required the petitioner to pass the prescribed proficiency test in Sinhala/Tamil within a period of one year from the date of appointment or obtain exemption from sitting the test by teaching in Sinhala or Tamil during the first year of appointment. That clause also stipulated that failure to pass the proficiency test or to gain exemption from the test would result in the termination of appointment without compensation.

Even by 16th April 1999, the petitioner had not complied with the aforesaid conditions of appointment. He sat the proficiency test once around 1998 but without success. He had been permitted several extensions of time to acquire the requisite languages proficiency. In June, 1998 he sought exemption on the basis of his pass in Sinhala at the N.C.G.E. but the University replied him that exemption could be considered only if he agreed to lecture in Sinhala. However, he avoided lecturing in Sinhala. In the circumstances, on 23rd August 1999, the Vice-Chancellor of the University (the 2nd respondent) informed the petitioner that the Council had decided to terminate the petitioner's services with effect from 1st September 1999 as he had failed to obtain proficiency in Sinhala as required by Clause 8 of his letter appointment dated 3rd April 1990.

On 23rd September 1999 the petitioner came before the Supreme Court complaining that the termination of his services was violative of his fundamental rights.

Held :

It cannot be said that the termination of the petitioner's services by itself was an infringement of his fundamental rights. As the termination was only a consequence of his failure to comply with Clause 8 of his appointment letter, the court has to first hold that the said Clause is an infringement of fundamental rights. The petitioner was aware in April 1990 of the implications of Clause 8. He, however, did not seek a declaration from the court that the said Clause infringed his fundamental rights. Hence the application dated 23rd September 1999 is time barred.

APPLICATION for relief for infringement of fundamental rights.

Romesh de Silva, P.C. with *Htran de Alwis* and *Sugath Caldera* for petitioner.

H.L. de Silva, P.C. with *C. Crossett Thambiah* and *Aravinda Athurupana* for 1st and 2nd respondents.

M. Gopallawa, State Counsel for 3rd respondent.

Cur. adv. vult.

May 25, 2001.

EDUSSURIYA, J.

The Petitioner had been appointed by the Council of the University to the post of Probationary Lecturer in Law in the University of Colombo, Sri Lanka and by letter dated 3rd April 1990 (C) the Petitioner was so informed by the then Vice Chancellor.

Clause 8 of the said document 'C' required the Petitioner to pass the prescribed proficiency test in Sinhala/Tamil within a period of one year from the date of appointment or obtain exemption from sitting the test by teaching in Sinhala or Tamil during the first year of appointment.

Clause 8 further set out that failure to pass the proficiency test or to gain exemption from the test would result in the termination of the appointment without compensation.

By letter dated 14th July 1997 (D8) the Vice Chancellor with reference to the said Clause 8 in document 'C' had called upon the Petitioner to indicate within one week of receiving D8 a date on which the Petitioner was prepared to sit the proficiency test, so that arrangements could be made.

On 27th July 1997 the Petitioner had replied to D8 by D11 stating that he would like to sit the proficiency test in Sinhala in the first week of November.

The proficiency test had then been fixed for 30th September 1997. On 2nd October 1997 by D13 the Petitioner had asked for more time to prepare for the test and the said proficiency test had been refixed for 30th November 1997 by D14 of 21st October 1997. Then, on 2nd November 1997 the Petitioner had asked for time till the end of January 1998 to sit the proficiency test on the grounds of ill-health and by D16 dated 26th November, time had been granted till 31st January 1998 and requested the Petitioner to obtain a date to sit the said test after discussions with the Head of the Department of Sinhala.

Then after a lapse of several months on 7th June 1998 (D17) the Petitioner had inquired from the Vice Chancellor whether he could be exempted from sitting the proficiency test in view of his pass in Sinhala at the N.C.G.E. By letter dated 13th July 1998 (E) the Vice Chancellor had replied stating that the Probationary Study Leave Committee had considered the Petitioner's request and had decided that the Petitioner's said request would be considered only if the Petitioner agreed to take lectures in Sinhala. Then, by D19 of 5th August 1998 the Vice Chancellor had invited the attention of the Petitioner to the letter of 13th July 1998.

By letter dated 15th July 1998 (F) the Petitioner had replied the letter E, indicating his willingness to take lectures in Sinhala. Then, from the letter dated 4th August 1998 (R2) addressed by the Petitioner to the Vice Chancellor it appears that the Petitioner

had sat the proficiency test without success and requested that he be permitted to sit again.

The Acting Registrar of the University has replied the same by D18 of 16th September 1998 informing the Petitioner that the Vice Chancellor had allowed the Petitioner to re-sit the proficiency test. So that, by 4th August 1998 it is clear that the Petitioner had decided not to deliver lectures in Sinhala but to re-sit the proficiency test in Sinhala and the process of fixing a date for the proficiency test had started again as is evident from R3 of 24th September 1998, R5 of 17th November 1998 and R6 of 16th April 1999. These are all letters written by the Petitioner asking for further time over and over again, to re-sit the proficiency test. I may also add that all this correspondence from 1997 to April 1999 shows that the Petitioner was engaged in an exercise of both avoiding to sit the Sinhala proficiency test as well as avoiding to deliver lectures in Sinhala. Then on 23rd August 1999 by letter marked G the Vice Chancellor had informed the Petitioner that the University Council had decided at its 283rd meeting held on 5th August 1999 to terminate the Petitioner's services with effect from 1st September 1999, as the Petitioner had failed to obtain proficiency in Sinhala, as required by Clause 8 of the letter dated 3rd April 1990.

On 23rd September the Petitioner came before this Court seeking redress on the ground that his fundamental rights as guaranteed by Articles 12, 13 and 14 have been violated and to have the decision terminating his services set aside, for compensation etc.

At the hearing of this application Counsel for the 1st and 2nd Respondents, namely, the University of Colombo and Professor Savitri Goonasekera, the Vice Chancellor of the University of Colombo, raised the following preliminary objections;

- (1) that the Petitioner had failed to name the members of the 1st Respondent Council as Respondents since the Petitioner's services were terminated by the 1st Respondent Council,

- (2) that the Petitioner had failed to comply with Rule 44 (1) (a) of Part IV of the Supreme Court Rules 1990 and specify the specific provisions of the Constitution under which the Petitioner claims that his fundamental rights have been infringed,
- (3) that the application of the Petitioner to this Court for relief is time barred.

I propose to deal with the third (3rd) preliminary objection first, namely that the Petitioner's application to this Court complaining of a violation of his fundamental rights is out of time.

It is clear on a reading of the Petition that the Petitioner was fully aware from the date of his appointment that he had to comply with the requirements of Clause 8 of the letter of appointment marked 'C' dated 3rd April 1990.

It is as a result of the Petitioner failing to comply with the said requirement that his services were terminated in accordance with the terms and conditions laid down in the letter of appointment of 3rd April 1990 since the said Clause 8 categorically sets out that the failure to pass the proficiency test or to gain exemption from the proficiency test would result in the termination of the Petitioner's services.

Thus, the Petitioner cannot now be heard to say that this requirement was redundant because he attended to the work allocated to him in English and that he could continue to do so without complying with the said requirement. The Petitioner has stated in paragraph 41 of his affidavit "..... at the time I signed the contract of employment I could not have rejected a particular clause if I wished to accept the post. If I wished to be a Lecturer I had to sign the letter as set out." So that quite apart from anything else, this confirms that the Petitioner was fully

well aware in April 1990 of the implications of Clause 8 of the letter of appointment "C" which is alleged to be violative of his fundamental rights, and that if he did not comply with the requirements of Clause 8 his services would be terminated. However, not only did the Petitioner accept the post, but also did not come before this Court seeking a declaration that the said Clause 8 was an infringement of his fundamental rights as alleged. The termination of the Petitioner's services by letter dated 23rd August 1999 was effected under Clause 8 of document 'C', which according to the Petitioner was an infringement of his fundamental rights. (Paragraph 35 of the Petitioner's affidavit).

The termination of the services of the Petitioner was a direct consequence of the Petitioner's failure to comply with Clause 8 which according to the Petitioner himself is violative of his fundamental rights.

Counsel for the Petitioner sought to make out that whilst Clause 8 violated the Petitioner's fundamental rights, the termination of the Petitioner's services was also such a violation and that the Petitioner came to this Court within one month of the termination of his services. This contention is not tenable since, it must be borne in mind that before the Petitioner can be granted any redress, this Court will have to first hold that Clause 8 of document 'C' is an infringement of the Petitioner's fundamental rights and then hold that the termination of the Petitioner's services which followed thereupon cannot therefore stand. Therefore, it cannot be said that the termination of the Petitioner's services by itself was an infringement of the Petitioner's fundamental rights. It is his terms of employment that were violative of his fundamental rights, if at all.

I therefore hold that this application is time barred.

In the circumstances, it is not necessary for this Court to deal with the other two preliminary objections raised by the Respondent's Counsel.

For the above mentioned reasons this application is dismissed with costs fixed at Rs. 5,000/-.

S.N. SILVA, C. J. - I agree.

ISMAIL, J. - I agree.

Application dismissed.