

**PRIYANGANI
V.
NANAYAKKARA AND OTHERS**

SUPREME COURT.

FERNANDO, J.

DHEERARATNE, J. AND

WIJETUNGA, J.

S.C. APPLICATION NO. 3398/95.

AUGUST 21, 1996.

Fundamental Rights - Sudden and arbitrary transfer - Constitution, Article 12 (1) - Service at difficult school - Re-transfer to difficult school.

Petitioner, a Primary school teacher completed a five year period at a school classified as a difficult school and applied for and obtained a transfer to a school close to her husband's home in February 1995. On 29.06.95 she received a letter dated 13.06.95 issued by the 2nd Respondent the Director of Education of the Puttalam Zone of the North Western Province (NWP) transferring her back to the old difficult school with immediate effect. Also no travelling expenses were to be paid. Transfers within the NWP were governed by a Circular dated 18.03.95 (the Transfer Circular) sent by the 1st Respondent the Provincial Director of Education of the NWP to all Principals in the Province. By a Circular issued by the 1st Respondent in March 1995 captioned "Selection of Excess Teachers" 1st Respondent directed all Principals in the Province to identify excess teachers. In yet another Circular captioned "Transfer of Excess Teachers" dated 04.05.95

the 1st Respondent stated that teachers who had already completed "difficult" service' should not be named as excess teachers.

Held:

- (1) There was no justification for treating the Petitioner as not having served in a difficult" school or otherwise disregarding that service because her parents' home was in the vicinity of the 'difficult' school.
- (2) The Court is not concerned with contractual rights but with safeguards based on the Rule of Law which Article 12 provided against arbitrary and unreasonable exercise of discretionary powers.

Per Fernando, J.:

"Discretionary powers can never be treated as absolute and unfettered - unless there is compelling language; when reposed in public functionaries such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred - not at the whim and fancy of officials, for political advantage or personal gain. Education, as the Transfer Circular emphasises, concerns the child; the power to transfer teachers exists to promote the education of the child; a fair and reasonable system of teacher transfers, implemented according to established principles and criteria, will promote the education of the child; and the absence of such a system will undermine good education".

- (3) The primary teachers, from whom one or more had to be identified as excess, constituted a class. Whether mandatory or not there were established guidelines for the identification of excess teachers. It was only fair and reasonable, but necessary - if equal treatment and fair play were to be ensured - that there should be guidelines, dealing with matters such as those to be exempted, and the order of priority for selection from among the rest. The selection of a teacher who was exempted by those guidelines was clearly arbitrary and unreasonable.
- (4) The Petitioner's right to equality was violated: she was identified as excess, although exempted, while others who apparently were not exempt, were not identified as excess.

Per Fernando, J.

"... powers have been exercised with scant regard for the rights of the individual, and so I cannot but recall that "it is excellent to have giant's

power, but it is tyrannous to use it like a giant" (Measure for Measure 11,ii, 107) especially when the ultimate victim is the nation's children".

APPLICATION for relief in respect of violation of fundamental rights guaranteed by Article 12 of the Constitution.

N.M. Idroos for Petitioner.

Y.J.W. Wijayatilleke, S.S.C. for the 1st to 5th and 7th Respondents.

Cur.adv.vult.

August 30, 1996.

FERNANDO, J.

The Petitioner is a Primary School Teacher who joined the service in January 1990. She complains that her fundamental right under Article 12(1) has been violated by reason of a sudden and arbitrary transfer. She served at Kottucachchiya MV ("KMV"), which was classified as a "difficult" school. She later married from Anamaduwa and moved to her husband's home. Having completed five years service at KMV, she requested and obtained a transfer to Anamaduwa Adarsha Kanishta Vidyalaya ("AAKV") with effect from February 1995. On 29.6.95 she received a letter dated 13.6.95 issued by the 2nd Respondent, the Director of Education of the Puttalam Zone of the North Western Province (NWP), transferring her back to KMV with immediate effect. No reason was given and she was told that travelling expenses would not be paid.

Transfers within the NWP are governed by a Circular dated 18.3.95 ("the Transfer Circular") sent by the 1st Respondent, the Provincial Director of Education of the NWP, to all Principals in the Province. This Circular recited that it had been formulated by the NWP Teacher Transfer Board in order to fulfil the need for a more systematic transfer procedure, after giving due consideration to the Establishments Code, National Policy, pronouncements and circulars, by the Ministry, the Education Services Committee, and the Governor.

In respect of the transfer of excess teachers, the following is a summary of the relevant provisions of the Transfer Circular:

Paragraph 2: No teacher transfer should be made in a manner prejudicial to the educational needs of the students. Since frequent transfers in the course of the year are a hindrance to the educational activities of the students, transfers on application should only be at the beginning of the year. Except upon transfers of excess teachers, on no account should a transfer be effected without a suitable replacement. An application for a transfer by a new teacher should only be made after at least four years in a "difficult" school, or three years in a "very difficult" school, or in the area to which that school belongs.

However the Provincial Director of Education has the power to make any transfer on account of the exigencies of the service or discipline. The Director of Education in charge of the Zone may make such transfers with the prior approval of the Provincial Director of Education, or in case of emergency, with his covering approval.

Paragraphs 7 and 8: The following criteria were proposed in regard to the selection (identification) of "excess" teachers:

Except at their own request, teachers should not be identified as "excess" if they are over 53 years of age; or are handicapped; or are ill and have been undergoing continuous medical treatment for a long time; or have over three years of "very difficult" service in the zone or outside; or four years of "difficult" service; etc.

After excluding the foregoing, "excess" teachers should be identified in the following order of priority: those who have no "difficult" service; those having less than one year of "difficult" service; those having less than two years of such service; and less than four years of such service. Further, within each of these categories, the order of priority was: unmarried males, unmarried females, married males, and married females.

That Circular went on to make other provisions to cover situations in which all the teachers considered had over three/four years of "difficult" service.

By a circular issued by the 1st Respondent in March 1995, captioned "Selection of Excess Teachers", the 1st Respondent directed all Principals in the Province to identify excess teachers. He directed that this should be done strictly according to the criteria laid down in paragraph 7 of the Transfer Circular, and impartially without regard to their personal likes or dislikes. In yet another circular captioned "Transfer of Excess Teachers" dated 04.05.95, the 1st Respondent drew attention to the Transfer Circular and stated that teachers who had already completed "difficult" service should not be named as excess teachers. Thus in respect of AAKV, it was the 5th Respondent, as the Principal, who had the authority and the duty to identify excess teachers.

It appears that after receiving the circular dated 4.5.95 the 5th Respondent by letter dated 5.6.95 had named the Petitioner and another teacher as excess teachers. (The other teacher also filed a fundamental rights application and this Court held that in any event she was not liable to be transferred as being an excess teacher, since she had already served for seven years in an "difficult" school, for the guidelines required teachers who had served in such schools not to be designated as excess teachers; holding that she had been transferred arbitrarily in violation of Article 12(1), the transfer was cancelled, and the 1st Respondent was directed to pay Rs.5,000/- as compensation and Rs.2,000/- as costs: SC 339A/95 SCM 29.3.96). By letter dated 8.6.95; the 2nd Respondent requested the 1st Respondent for permission to transfer the Petitioner to KMV. This was received on 13.6.95; and on the same day the 1st Respondent granted permission, and the 2nd Respondent issued transfer orders to the Petitioner.

The Petitioner's case is that in determining her to be an excess teacher, the provisions of the Transfer Circular were violated. The Petitioner contends that because she had previously served five years in a "difficult" school, when it had to be determined which teachers were excess, paragraph 7 of the Transfer Circular required that she be excluded from consideration.

The Respondent's reply that although KMV was, technically, a "difficult" school, yet for the Petitioner it was not: because during her period of service in that school, she was living in her parental home which was in close proximity to the school; that in any event KMV had

been taken off the list of "difficult" schools by January 1994 (relying on an assertion in the 1st Respondent's affidavit, unsupported by any document); that paragraph 2 of the Transfer Circular conferred on the 2nd Respondent the power to transfer a teacher on account of the exigencies of service notwithstanding other provisions of that Circular; that the impugned transfer was on account of the exigencies of service, and was therefore valid; that this power was not subject to paragraphs 7 and 8, but that even if it was, these provisions were not mandatory but "only guidelines"; and that disregard of these guidelines could not constitute a violation of fundamental rights.

We were not referred to any provision in the Transfer Circular, or any other rule or regulation, suggesting that a school designated as "difficult" would cease to be so in relation to a particular teacher, if for the time being she was resident in the vicinity. Nor was it suggested that difficulty in securing accommodation was the only criterion for determining whether a school was "difficult". I hold that there was no justification for treating the Petitioner as not having served in a "difficult" school, or otherwise disregarding that service.

As for the assertion that KMV had ceased to be "difficult" in January 1994, all that need be said is that the Petitioner had served there for four years prior to that - when, admittedly, it was "difficult", and that the Respondents failed to produce the relevant official order, circular or other document which would have recorded any such decision, if there was one, that it was no longer "difficult". On the evidence placed before us, KMV was, during the entirety of the relevant period from 1990 to January 1995, a "difficult" school. (I must note that two degrees of "difficulty" appear to be recognised - "difficult" and "very difficult"; while it is not clear how "difficult" KMV was, there is no doubt that it was at least "difficult", and that is sufficient for the purposes of this case).

It is unnecessary to decide whether paragraphs 7 and 8 of the Transfer Circular embodied mere "guidelines", or mandatory requirements. We are not concerned with contractual rights, but with the safeguards based on the Rule of Law which Article 12 provide against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated as absolute and unfettered -

unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred - not at the whim and fancy of officials, for political advantage or personal gain. Education, as the Transfer Circular emphasises, concerns the child; the power to transfer teachers exists to promote the education of the child; a fair and reasonable system of teacher transfers, implemented according to established principles and criteria, will promote the education of the child; and the absence of such a system will undermine good education.

The primary teachers, from among whom one or more had to be identified as excess, constituted a class. Whether mandatory or not, there were established guidelines for the identification of excess teachers. It was not only fair and reasonable, but necessary - if equal treatment and fair play were to be ensured - that there should be guidelines, dealing with matters such as those to be exempted, and the order of priority for selection from among the rest. The selection of a teacher who was exempted by those guidelines was clearly arbitrary and unreasonable. Selection should have been from among the others, and even if all the others had also been found to be exempt - and that is not the Respondent's case - nevertheless the Petitioner should not have been selected, and the other procedure laid down in paragraph 8 of the Transfer Circular should have been followed. The Petitioner's right to equality was therefore violated - she was identified as excess, although exempted, while others who apparently were not exempt, were not identified as excess.

Learned Senior State Counsel contended that disregard of paragraph 7 was immaterial, because paragraph 2 of the Transfer Circular superseded paras 7 and 8; because, he claimed, it was an exemption not only to the preceding part of paragraph 2, but to the entirety of the Transfer Circular. I cannot presume that the NWP Teacher Transfer Board took so much trouble to prescribe such detailed guidelines, with the intention that they could so lightly be ignored. The last provision of paragraph 2 appears to be only an exception to its preceding provisions. However, it is unnecessary to decide that question, because paragraph 2 does not deal with the powers of the Principal, and the decision impugned in this case depends wholly on the validity of the

5th Respondent's act. When he was called upon to identify excess teachers, the Transfer Circular required him to apply paragraphs 7 and 8; and, indeed, that is what he was specifically asked to do, by the Circulars sent in March and May 1995. Even assuming that the 1st and/or the 2nd Respondent was entitled to ignore paragraphs 7 and 9, the 5th Respondent, as Principal, could not ignore them. His decision was therefore flawed. The 2nd Respondent did not take an independent decision, after examining the facts; instead he simply adopted the Principal's decision. It was therefore vitiated by that same flaw.. Likewise the 1st Respondent gave approval without independent consideration. The entire process was thus flawed. Even if the 1st Respondent or 2nd Respondent could have ignored paragraphs 7 and 8 - which I doubt - they would have had to ascertain the facts (in regard to the service record and relevant personal circumstances of each teacher) and determine, on a rational basis, which teachers were excess; it was not claimed that anything of that kind had been done.

Learned Counsel for the Petitioner commented on other unsatisfactory features of the entire process; the rapidity with which it was done; no reasons were stated, and no notice was given; payment of travelling expenses was denied; and the lack of date stamps or folio numbers on some of the documents allegedly produced from the official files. It is unnecessary to probe those matters because, anyway, the impugned decision cannot stand for other and more substantial reasons.

Learned Senior State Counsel submitted that the Petitioner had not been treated unfairly, because the Respondents had transferred her from KMV to AAKV at her own request, and therefore sending her back to where her parental home was, did not prejudice her. This is irrelevant. The Petitioner was entitled to ask for a transfer, after five years in a "difficult" school. Having given her that transfer, it was not open, four months later, to claim that transferring her to AAKV was some sort of favour. That transfer did not in any way justify or mitigate the subsequent transfer.

I hold that the Petitioner's fundamental right under Article 12(1) has been violated by the 1st, 2nd and 5th Respondents, and quash the transfer order dated 13.6.95. The Petitioner will be entitled to resume

work at AAKV immediately. She is entitled to compensation. In assessing the compensation, I must note that malice or other improper motives have not been proved. However, powers have been exercised with scant regard for the rights of the individual, and so I cannot but recall that "it is excellent to have a giant's power, but it is tyrannous to use it like a giant" (*Measure for Measure*, II,ii,107) especially when the ultimate victim is the nation's children. It was not argued that the Provincial Administration, rather than the State, was liable. Accordingly I direct the State to pay the Petitioner compensation in a sum of Rs.15,000/- . I further direct the 1st, 2nd and 5th Respondents to pay her a sum of Rs.6,000/- as costs (at the rate of Rs.2,000/- each).

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Order of transfer dated 13.6.95 quashed.

Relief granted.