

RAJAPAKSE
v.
TISSA DEVENDRA,
CHAIRMAN, PUBLIC SERVICE COMMISSION AND OTHERS

SUPREME COURT
FERNANDO, J.,
AMERASINGHE, J. AND
GUNASEKERA, J.
S.C. APPLICATION NO. (FR) 310/96
MAY 28, 1999.

Fundamental Rights – Interdiction of an officer – Appropriate procedure for taking disciplinary action – Article 12 (1) of the Constitution.

The petitioner who was a Director of Customs was interdicted from service by the Public Service Commission and a charge-sheet containing five allegations was served on him. The petitioner was required to show cause within a month why he should not be dismissed or otherwise punished. The petitioner did not respond to that communication but instead, filed an application before the Supreme Court. He complained that no statement was recorded from him; nor was he asked to explain before he was interdicted; and no preliminary investigation was conducted before serving the charge-sheet.

Held:

The allegation that there was no preliminary investigation prior to the interdiction of the petitioner was without foundation. There was no discrimination; and there was no need for the petitioner's statement to be recorded for that was not a prescribed requirement.

APPLICATION for relief for infringement of fundamental rights.

Romesh de Silva, PC with Palitha Kumarasinghe for the petitioner.

R. K. W. Goonesekera with J. C. Weliamuna for the 10th respondent.

S. Marsoof, PC, Addl. Solicitor-General for the 1st to 9th and 11th and 12th respondents.

Cur. adv. vult.

June 23, 1999

AMERASINGHE, J.

The petitioner joined the Customs Department as a casual clerk in 1965 and was promoted to the posts of Class I Customs Officer, Superintendent of Customs, Assistant Director of Customs and Deputy Director of Customs. On the 20th of April, 1993, the petitioner was informed that he had been allowed one year's extension of service until the 2nd of May, 1994, when he would reach the age of fifty-eight. The then Director-General of Customs, Mr. L. A. Heengama, by a publication dated the 28th of January, 1993, called for applications for four posts of Director of Customs from Deputy-Directors who satisfied certain specified requirements. There were eleven applicants, of whom ten presented themselves for interview. The Interview Board made the following recommendations:

" . . . We found that [the petitioner] had an exemplary performance after his promotion to the grade of Deputy Director. None of the other candidates had any record equal to that of [the petitioner]. However, we find that there is a requirement that the applicants should have a service of five years in the Staff Grade. [The petitioner] has only 3 years of such service. If the Appointing Authority feels that he should be promoted in view of his excellent service record and waive the service requirement, we recommend that he be promoted above the others."

By letter dated the 27th of May, 1993, the Secretary to the Public Service Commission informed the Secretary to the Ministry of Finance, and the Director-General of Customs of the appointment of four persons, as Directors of Customs. The petitioner was not one of them. In SC Application No. 274/94, the petitioner challenged the decision of the Public Service Commission.

My brother Fernando, J. for the reasons set out in his Lordship's judgment, held that the petitioner had been denied equal treatment in violation of Article 12 (1) of the Constitution in insisting on a service qualification in excess of what was stipulated in the publication of the

28th of January, 1993, calling for applications for the posts of Director of Customs, and by denying him the opportunity of establishing that he had the qualifications to be appointed Director of Customs. The Public Service Commission was directed, among other things, to issue the petitioner a letter appointing or promoting him as Director of Customs (with effect from the same date as the four officers referred to in the Commission's letter dated the 27th of May, 1993. The petitioner was declared entitled to resume work forthwith, as Director of Customs, and to continue to work as if he had received two annual extensions of service up to the 2nd of May, 1996. My brother, Dheeraratne, J. and I concurred with the opinion of our brother Fernando, J.

Pursuant to the decision of this Court, by a letter dated the 8th of November, 1995, the petitioner was appointed a Director of Customs. He was appointed as Director of Customs (Air Cargo), Katunayake.

The petitioner alleged that he requested the 10th respondent, Mr. P. Weerasekera, the Director-General of Customs, not to transfer him to Katunayake "since there were numerous threats on the petitioner's life . . . but he did not pay any heed to this request". The petitioner was attacked by certain persons and suffered severe physical injuries.

After recovering from the injuries he had sustained, the petitioner reported for duties on the 4th of January, 1996. On the 15th of February, 1996, he was served with a charge-sheet alleging the commission of five offences. On the 16th of February, 1996, the petitioner received a letter from the Secretary of the Public Service Commission together with a covering letter from the Director-General of Customs, the tenth respondent, interdicting him from further service. The correspondence stated, among other things, that a charge-sheet would be served on the petitioner in due course.

A charge-sheet dated the 14th of February, 1996, was served on the petitioner containing five allegations of misconduct. The petitioner was required to submit an explanation within a month why he should not be dismissed from service or otherwise punished. The petitioner

did not respond to that communication but, instead, filed the application before me.

Learned counsel for the petitioner endeavoured in a most persuasive manner to explain away each of the five charges against the petitioner. Such explanations ought, in my view, to be submitted to the Public Service Commission, for it is that body that was empowered to issue the charge-sheet, consider the explanations of the petitioner and decide what further action it should take. It is my considered opinion that I should refrain from commenting on matters referred to in the charge-sheet, lest I should either encroach on the functions of the Public Service Commission or even unwittingly prejudice the disciplinary inquiry.

Article 55 of the Constitution, among other things, states as follows:

- (1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.
- (2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.
- (3) The Cabinet of Ministers may, from time to time, delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission. . .
- (4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers . . ."

Vo1. II, ch. XLVIII, section 2 of the Establishments Code issued by the Secretary to the Ministry of Public Administration under the authority of the Cabinet of Ministers in 1981 states as follows:

- "2 : 1 The power of dismissal and disciplinary control of public officers is vested in the Cabinet of Ministers, who will directly exercise these powers in respect of –
- Additional Secretaries to Ministries, Heads of Departments, Government Agents and Senior Assistant Secretaries.*
- 2 : 2 The Cabinet of Ministers has delegated its powers of dismissal and disciplinary control in respect of all other categories of officers to the Commission.
- 2 : 2 : 1 The Commission has delegated its powers of dismissal and disciplinary control in respect of all other such categories of officers in Staff Grades to Secretaries to Ministries, except . . ."

On the 26th of February, 1992, the Public Service Commission in a circular letter (No. 01/92) addressed to all Secretaries, Heads of Departments and Government Agents stated:

"The Cabinet of Ministers has vested the Public Service Commission (PSC) with the powers of appointment, transfer, dismissal and disciplinary control of all public officers other than the Heads of Departments and above in terms of Article 55 (3) of the Constitution."

Circular No. E. 01/92 lays down certain "guidelines" in order to implement the decision of the Cabinet with effect from the 1st of March, 1992. On the face of it, the "guidelines" were intended to apply to "All Island Services" specified in the Circular; "Combined Services (Non-Staff)" and "Officers other than those in the All Island Services and the Combined Services".

The petitioner filed Circular No. E. 01/92 and Circular No. 03/92 as part and parcel of his petition and stated that "in terms of the said circulars of the Public Service Commission a preliminary investigation must be conducted by the 11th respondent (*sic*) and notes and report of such investigations must be forwarded to the Public Service Commission". The petitioner stated that "No preliminary inquiry has been conducted in respect of the alleged offences by the 10th respondent and/or the 11th respondent and/or the Public Service Commission; as such there was no report and/or notes of preliminary investigation by the 11th respondent (*sic*) in respect of the alleged offences".

It was not, as supposed by the petitioner, incumbent on the 11th respondent, the Secretary to the Ministry of Finance, or the Public Service Commission itself, to make any preliminary investigation prior to the issue of the charge-sheet.

The petitioner's case is based on the assumption that Circular No. E. 01/92 and Circular No. 03/92 on the question of "Disciplinary Control" were applicable to his case. Circular No. E. 01/92 stated as follows:

"3 : 5 : 1 Secretaries to Ministries should conduct preliminary investigations and interdict officers where necessary. The draft charge-sheet together with the connected papers should be forwarded to the PSC. As the PSC is the Disciplinary Authority in respect of the aforementioned services, the PSC will issue a charge-sheet."

Circular No. 03/92 stated as follows :

"Following clarifications are made on instructions given under para. 3 : 5 of the Public Service Commission Circular No. E. 01/92:

3 : 1 Where disciplinary action is contemplated against an officer it is incumbent on the Secretary to the Ministry to cause preliminary investigations to be carried out and completed with the least possible delay . . .

3 : 2 All draft charge-sheets should conform substantially to Form A appended hereto, and when forwarded for Public Service Commission approval should bear the certificate of the staff officer who drafted it to the effect that they are correct and in order. Certified copies of notes and the report of the preliminary investigations, along with any other relevant documents should be forwarded together with the draft charge-sheet STRICTLY (*sic*) under confidential cover. . ."

It will be seen that there was no duty on the Secretary, the 11th respondent, himself to hold the preliminary investigation; he was required to "cause preliminary investigations to be carried out". As we have seen, the Cabinet of Ministers retained disciplinary powers over certain categories of officers and delegated their powers in respect of other officers to the Public Service Commission. Sections 3 - 5, ch. XLVIII, vol. II of the Establishments Code separately set out (a) the procedure for disciplinary action by the Cabinet of Ministers; (b) the procedure for disciplinary action by a Secretary to a Ministry; and (c) the procedure for disciplinary action by a Head of Department/Public Officer holding delegated authority. What would be relevant in the case of a person like the petitioner would be the "Procedure for Disciplinary Action by the Secretary to a Ministry". With regard to the matter under consideration, namely, whether there was compliance with the relevant provisions governing disciplinary action by the Secretary, section 4 states as follows :

"4 : 1 Where the disciplinary action is contemplated against an officer . . . the Head of Department will cause to be made such preliminary investigations as are necessary.

4 : 2 If a *prima facie* case against the officer is disclosed the disciplinary authority will furnish the officer with a statement of the charges against him, and call for his explanation to the charges within the stipulated period . . ."

As we have seen, the relevant disciplinary authority, namely, the Public Service Commission, furnished the petitioner with a statement of the charges against him. The petitioner's complaint is that this was done without a preliminary investigation. The Additional Solicitor-General,

Mr. Marsoof, assisted us by drawing attention to the fact that the subject of "Preliminary Investigations into Alleged Offences" is dealt with in section 9, ch. XLVIII, vol. II of the Establishments Code. It states as follows :

"9 : 1 Investigations of the type referred to in section . . . 4 : 1 . . . are purely a fact finding process and do not constitute a preliminary inquiry. They are meant to be a search for material that may disclose an offence and provide evidence for the charges that may be framed against an officer under suspicion. This may involve the recording of statements of witnesses and the search for an examination of documents. The suspect officer or any other person on his behalf need not be present when any statements are recorded. . . ."

The tenth respondent, the Director-General of Customs, who was the petitioner's Head of Department, stated in his affidavit that the "correct procedure was followed in the disciplinary matter and forwarding the charge-sheet." The first respondent, the Chairman of the Public Service Commission, in his affidavit stated that the charge-sheet was issued "in accordance with the recommendations made in pursuance of the preliminary investigations made in respect of aforesaid charges".

It is evident from the statement of charges that the charges were based on the evidence of the witnesses and the documents mentioned therein. The petitioner was expressly invited to examine the documents mentioned in the charge-sheet. The petitioner in the circumstances cannot be heard to complain that there was no preliminary investigation before the statement of charges was issued. I am unable to accept the petitioner's averment that the charge-sheet was merely "the end result of several malicious and *mala fide* acts of the 10th respondent".

The Public Service Commission issued the petitioner a letter of interdiction. Section 3 of Public Service Commission Circular No. 03/92 states that a preliminary investigation should be carried out with the least possible delay. It is further stated as follows : "Where it is considered undesirable that an officer should continue to exercise

the functions of his office he may forthwith be interdicted by the Secretary and covering approval of the Public Service Commission obtained therefor promptly, after reporting the full circumstances that led to such interdiction". Section 21 : 1 of ch. XLVIII, vol. II, of the Establishments Code states as follows :

"Where it is considered undesirable that an officer should continue to exercise the functions of his office, he may forthwith be interdicted from office by the disciplinary authority provided that disciplinary proceedings or criminal proceedings have been initiated or are about to be initiated on charges which if established are sufficiently serious to warrant his dismissal . . ."

The petitioner prayed that this Court directs the 1st to 10th respondents "to withdraw the letter of interdiction dated 14th February, 1996, marked "A18" and/or to set aside the said letter of interdiction . . ." The petitioner alleged that "no statement was recorded from the petitioner nor was he asked to explain either by the 10th respondent or 11th respondent or by the Public Service Commission before serving the letter of interdiction on him. No preliminary investigation whatsoever was conducted by the 1st to 10th respondents before serving the charge-sheet". He stated that "no officer in the Customs Service has ever been interdicted without preliminary inquiries". The petitioner stated that the letter of interdiction was "illegal and/or *ultra vires* in that provisions in para (3) (Disciplinary Proceedings) of Public Service Commission Circular No. 3/92 . . . have not been adhered to by the Secretary in this instance". The petitioner stated that the letter of interdiction was "discriminatory, *mala fide*, arbitrary and capricious".

The 10th respondent in his affidavit stated that "there was an inquiry to the satisfaction of the Department before the interdiction of the petitioner". The first respondent, the Chairman of the Public Service Commission, in his affidavit stated as follows :

6 (a) . . . in pursuance of preliminary investigations conducted by the 10th respondent in respect of allegations of irregularities and misconduct levelled against the petitioner, recommendations were made finding the petitioner guilty of the charges submitted along with

the letter of the 10th respondent dated 6. 2. 96. I annex marked 1R1 the said recommendations made in consequence of the said preliminary investigations conducted in this regard.

(b) . . . upon receipt of the said proceedings relating to the investigations and the recommendations made thereon and upon being satisfied with the evidence adduced in support of the said charge, an order was made interdicting the petitioner with effect from 14. 02. 96. I annex marked 1R2 the said letter of interdiction issued to the petitioner . . ."

The procedures laid down in the Public Service Commission Circulars and in the Establishments Code have been followed in interdicting the petitioner : his allegation that there was no preliminary investigation, as we have seen, is without foundation, and therefore his allegation that he was the only officer in the Customs Service who had been interdicted without a preliminary investigation, must be rejected. There was no discrimination. There was no need for the petitioner's statement to be recorded, for that was not a prescribed requirement. The letter of interdiction was issued by the Public Service Commission, and it did so on the basis of the investigations and recommendations of the Head of the petitioner's Department, and was not arbitrary or capricious.

For the reasons stated in my judgment, I hold that the petitioner's fundamental rights guaranteed by Article 12 (1) of the Constitution have not been violated and I dismiss the application.

The petitioner has made very serious charges against the 10th respondent personally, more for the purpose of generating heat than for shedding light on matters relevant to his application. Consequently, the 10th respondent has ben compelled to have his interests watched by learned counsel. I, therefore, make further order that the petitioner shall pay the tenth respondent a sum of Rs. 25,000 as costs.

FERNANDO, J. – I agree.

GUNASEKERA, J. – I agree.

Application dismissed.