

**ATHUKORALA
V.
JAYARATNE AND OTHERS**

SUPREME COURT.

FERNANDO, J.,

WADUGODAPITIYA, J., AND

ANANDACOOMARASWAMY J.

S.C. APPLICATION NO. 645/95.

30 AUGUST, 1996.

Fundamental rights - Article 12(2) of the Constitution - Public Officers who are entitled to exercise political rights - Right of such officer, elected as a member of a Local Authority to work at a place close to the Local Government Body - section. 3.7 of Chapter XXXII of the Establishments Code.

The Petitioner, a clerk working at the Hanwella Divisional Secretariat and a member of the Seethawaka Pradeshiya Sabha, representing the United National Party complained that she had been summarily transferred to the Homagama Divisional Secretariat by the 2nd Respondent, Chief Secretary of the Western Provincial Council who is the Authority competent to transfer her. The Hanwella Divisional Secretariat from which she was transferred out is situated within the territorial limits of the Seethawaka Pradeshiya Sabha. The Petitioner alleged that the said transfer was not the decision of the 2nd Respondent but was upon a direction of the 1st Respondent, Secretary, Ministry of Public Administration because of her political opinion, to restrain her from fully participating in her duties as a member of the Pradeshiya Sabha.

Held:

1. The Petitioner was transferred contrary to the provisions of section 3.7 of Chapter XXXII of the Establishments Code on the ground of alleged misconduct namely, political partiality in the discharge of her official duties, she was transferred without informing her of the allegation against her or inquiry, because of the views held by the 1st and 2nd respondents as to her political opinion and activities.
2. The Petitioner is entitled to a declaration that her right under Article 12(2) has been infringed.

Case referred to:

1. *Madurapperuma v. A. G. S.C. 90/79 S.C. Mins. of 5.2.80.*

APPLICATION for relief for infringement of fundamental rights.

Buddhika Kurukularatne for Petitioner.

Ms. I.D. de Silva, S.C. for 1st and 5th Respondents.

Chandra Gamage with *Francis Ekanayake* for 2nd, 3rd and 4th Respondents.

Cur. adv. vult.

20th September, 1996.

FERNANDO, J.

The Petitioner, a clerk working at the Hanwella Divisional Secretariat, alleges that she was summarily transferred to the Homagama Divisional Secretariat in violation of her fundamental right under Article 12(2). She was, since October 1992, a member of the Seethawaka Pradeshiya Sabha representing the United National Party. The Hanwella Secretariat was within the territorial limits of that Sabha.

It is not in dispute that the power to transfer clerks, which is vested in the Governor of the Western Province Provincial Council, had been duly delegated by him to the Provincial Public Service Commission, which in turn duly sub-delegated that power to the 2nd Respondent, the Chief Secretary of the Provincial Council, in terms of section 32 of the Provincial Councils Act, No. 42 of 1987.

The 3rd and 4th Respondents, the Deputy Secretary (Administration) and the Director (Administration), acting on behalf of the 2nd Respondent sent the Petitioner a letter dated 31.10.95, transferring her with immediate effect to Homagama. It disclosed no reason and it stated that travelling expenses and allowances would not be paid. Among the persons to whom that letter was copied was the 1st Respondent, the Secretary, Ministry of Public Administration, reference being made to his fax message dated 30.10.95 (No. SPA/10).

The Petitioner alleged that the decision to transfer her was contrary to section 3.7 of Chapter XXXII of the Establishments Code, and that the decision taken by the 2nd to 4th Respondents was not their own independent decision but was upon a direction by the 1st Respondent, who, she says, had no power in law to transfer her. She

claims that the transfer was effected because of her political opinion, in order to restrain her from fully participating in her duties as a member of the Pradeshiya Sabha.

The 1st Respondent admitted that he made a "request" for the Petitioner's transfer, but claimed that he did not "direct" it. He said that he did so:

"consequent to several complaints that I received pertaining to [her] behaviour that in the discharge of her official duties and functions she blatantly favoured her political supporters and persons who shared her political ideologies whilst discriminating against those who belonged to other political parties

My primary concern was the allegation that the partisan conduct of the Petitioner was adversely affecting the rights of the general public in their day to day dealings with the Petitioner." [emphasis added]

He went on to say that he was compelled to request her transfer. "Since [her conduct] adversely affected the neutralization of administration of the Divisional Secretary's Office". He added, however, that he was unaware "whether the transfer was effected based solely on [his] request".

The 2nd Respondent stated that he directed the transfer upon receiving the 1st Respondent's letter dated 30.10.95, which said :

"I have been informed that one Mrs. Olga Athukorale who has been a clerk attached to Divisional Secretariat, Hanwella for over a period of 8 years, is also a Pradeshiya Sabha Member of the Seethawaka Pradeshiya Sabha, which comes within the jurisdiction of the above Divisional Secretary's office.

In view of the fact that this would adversely affect the neutralization of administration of the Divisional Secretary's office, I request you to kindly transfer her to an adjoining Divisional Secretary's office which falls outside the Pradeshiya Sabha she represents."

He sought to explain his conduct as follows :

"The Petitioner's transfer in this instance is not a normal transfer, nor is it a punishment transfer. The Petitioner had to be transferred because the Petitioner's official conduct was detrimental to the smooth working and upkeep of discipline at the workplace.....

In the course of the Petitioner's work such as matters connected with Janasaviya grants, poor relief etc., the Petitioner is found to have favoured her own political supporters while harassing and discriminating against others. In addition to several oral complaints I have received in this connection the following are written complaints received regarding the Petitioner's official conduct:

- A. Communication dated 17 May 1995 addressed by the Hon. Minister of Co-operatives Local Government and Provincial Councils and Home Affairs wherein the Hon. Minister points out that Mr. Anura Ratnayake Member of the Provincial Council has brought to his notice that the Petitioner exercises undue influence by political patronage of her party people in the discharge of her duties connected with Janasaviya, relief for the poor and other welfare benefits.
- B. Communication dated 30 October 1995 of the Secretary of Public Administration wherein the 1st Respondent evidently on having received complaints from people in responsible public office has discovered that the Petitioner's dual role as a member of the Seethawaka Pradeshiya Sabha which comes within the Hanwella Divisional Secretariat limits would adversely affect the neutral administration in the Divisional Secretariat.

It is respectfully submitted that in order to avoid a breakdown in neutral administration and maintenance of discipline in the Hanwella Divisional Secretariat I decided to transfer the petitioner to Horagama Divisional Secretariat which is the next closest Secretariat in Western Province to the Petitioner's residence and which had no dealings with the constituents of the Seethawaka Pradeshiya Sabha of which the Petitioner is a member." [emphasis added]

Citing the relevant provisions of the Establishments Code (in Chapter XXXII dealing with "Exercise of Political Rights") -

"3.7 If an officer who is entitled to exercise his political rights is elected a member of a Local Government body he should be allowed the concession of serving in a station close to the office of the Local Authority to which he is elected, subject to the exigencies of service and disciplinary requirements. He will not be subject to the normal transfer rules as long as he continues to be a member of that Local Government Body"-

the 2nd Respondent asserted that an elected member of a local government body is entitled to serve at a work place closest to that body as a concession, and that "the grant of the said concession is at [his] discretion".

Answering the averments in the Petitioner's affidavit, he added :

"In view of the Petitioner's aforesaid conduct it became necessary for the 1st Respondent to request me to transfer the Petitioner and I complied because I have a duty to do so in order to ensure non-partisan impartial administration of the institution. I state that the said transfer was effected by me taking into consideration the several complaints I had received regarding the Petitioner's official conduct.

. . . . the Petitioner's favouritism of her political supporters and bias against others led to this situation. I state that the 1st Respondent and I as responsible officers could not continue to ignore repeated representations that the Petitioner was misusing her position and using the Secretariat facilities to favour her constituents while denying others their rights." [emphasis added]

It is unfortunate that the 1st Respondent, holding the high public office of Secretary to the Ministry of Public Administration, made a very serious charge of blatant political favouritism against another officer, also engaged in the service of the public, albeit in a much humbler capacity, without disclosing to her who had made the "several complaints" which he claimed to have received, or any particu-

lars whatever as to the allegations of political partiality. Although he refers to these "several complaints" in his affidavit in this Court (but without producing them), in his letter dated 30.10.95 to the 2nd Respondent, he made no mention whatever of such complaints; instead in that letter he put forward a very different reason, namely the undisputed fact that the Petitioner was a member of the Seethawaka Pradeshiya Sabha, and that "this would adversely affect the neutralization of administration of the Divisional Secretary's office". Thus his only official communication to the 2nd Respondent did not even suggest that any misconduct had taken place, or might have taken place, in the past, but seemed to be based entirely on the possibility of some future conflict of interest. Curiously, however, the 2nd Respondent would have this Court believe that on receipt of that letter he inferred that the 1st Respondent had evidently received complaints "from people in responsible public office". I cannot for a moment accept that the 2nd Respondent was so skilled at reading between the lines as to be able to discern from the 1st Respondent's letter of 30.10.95 that the latter had received complaints which he did not mention therein. The obvious inference is that there had been some communication other than that disclosed in the pleadings; and that the 1st Respondent had supplemented his letter of 30.10.95, by conveying secret allegations of political bias. That points to the probability that although he purported to make what appeared to be a mere "request" in his letter, the 1st Respondent was much more closely and directly involved in the decision to transfer - a transfer which was virtually an automatic response by the 2nd Respondent to that letter. As for the oral complaints which the 2nd Respondent says he received, he gave no particulars whatsoever, and did not explain why. It is quite unsafe to act on such vague allegations.

I find the affidavits of the 1st and 2nd Respondents in this respect to be totally unacceptable, and hold that the 1st and 2nd Respondents' assertions that they had received complaints about the Petitioner to be unproved, with the exception of the letter to which I will refer at once.

The 1st Respondent does not assert that one of the complaints he received was that set out in the letter dated 17.5.95 from the Minister of Co-operatives, Local Government, Provincial Councils and

Home Affairs. It is the 2nd Respondent who seeks to rely on that letter. However, it is significant that Mr. Morris Rajapakse, the Chief Minister, of the Western Provincial Council to whom it was addressed, appears to have taken no action on it - certainly, the Respondents do not claim he did. That letter may be treated as evidence of the fact that a Member of the Provincial Council had made that complaint to the Minister, but it is not evidence as to the truth of that complaint, in the absence of an affidavit from the Member concerned - and it may well be that the Member did not claim to have been personally aware of the alleged misconduct, but was only passing on a complaint made by another. Had the Chief Minister decided promptly to investigate the matter, and to transfer the Petitioner pending such an investigation, different considerations might have arisen. But here, nothing having been done for five months, it is unsatisfactory that the 2nd Respondent should have suddenly decided to act on that complaint without any attempt to obtain particulars of the misconduct and without any evidence of it; without any kind of inquiry; and summarily, without disclosing the reasons to the Petitioner. By acting in that way, he deprived the Petitioner of the protection which the relevant rules and regulations provide. It must be noted that in his affidavit the 2nd Respondent did not confine himself to "allegations" based on the Minister's letter, but implied that the Petitioner was guilty of the misconduct alleged against her: that she was "**found**" to have favoured her political supporters, while "**harassing and discriminating against others**", and that her official conduct "**was detrimental**" to efficiency and discipline. If there is any truth at all in those assertions in his affidavit, it is he who has been seriously wanting in the discharge of his duties in failing to initiate disciplinary proceedings against her. The transfer cannot be justified by reference to that letter.

Learned Counsel for the 2nd to 4th Respondents submitted that the transfer was justifiable on a different basis: that it was to ensure non-partisan, impartial, neutral and efficient administration in the Divisional Secretariat, and that the Petitioner was transferred to the next closest at Secretariat having regard to "the exigencies of service". In so far as that submission depends on any misconduct by the Petitioner, it fails because there is no evidence of misconduct. I must, however, consider whether that submission can be sustained apart from any such misconduct. Reference was made to section 3.7 of the

Establishments Code, quoted above, and also to a *dictum* in *Madurapperuma v. A.G.*,⁽¹⁾ that the Cabinet of Ministers has the competence to regulate or control the exercise of the fundamental rights of public service and that the State has the power to insure that public officers in the interests of the public officers who lack the qualities of efficiency, honesty, impartiality and discipline are not retained in service. That *dictum* has no relevance here because there is no evidence that the Petitioner lacks any of those qualities.

Section 3.7 does not authorise or require the transfer of an officer from a station within the area of authority of the Local Government Body of which he is an elected member to a station outside - not even to one close to the office of that Body. It deals, rather, with the converse case: where such an officer is serving outside the area of authority, or in a station not close to the office, of that Body, he should be allowed the concession of being brought to a station close to that office. Chapter XXXII of the Establishments Code seeks to give practical effect to the political rights of public officers elected to representative office; it recognizes the difficulties which public officers may face in fulfilling their dual responsibilities, to their employer and to the Body to which they have been elected. Section 3.7 gives them the right to work at a place as close as possible to the office of that Body, thus facilitating the discharge of their duties. What the 2nd Respondent did was the converse of what section 3.7 intended. I therefore hold that section 3.7 did not authorise the transfer of the Petitioner from the Hanwella Divisional Secretariat to a place of work outside the area of authority of the Pradeshiya Sabha of which she was a member.

It is clear from their affidavits that the 1st and 2nd Respondents caused the Petitioner's transfer because of their views as to the Petitioner's political opinion and activities.

In this connection I must mention that when judgment was reserved Counsel desired to have an opportunity of exploring the possibility of a settlement. Counsel were unable to effect a settlement, but Counsel for the 2nd to 4th Respondents then brought to our notice Public Administration Circular No 24/96 dated 12.8.96, which introduced a new section 3.7:

"If an officer who is entitled to exercise his/her political rights has been elected as a member of a Local Government Body and if he/she is serving in an office within the area of such Local Authority, he/she should immediately be transferred to a not too distant station outside that area of Local Authority of which he/she is elected as a member. Under normal circumstances he/she should not be subjected to the normal transfer rules as long as he/she continues to be a member of such a Local Government Body."

Such a provision would *prima facie* have sanctioned the transfer of the Petitioner, but I express no view as to its validity or effect prospectively. However, this amendment does not purport to have retrospective effect, and as far as the Petitioner's claim is concerned, it has no relevance.

The Petitioner is entitled to a declaration that her fundamental right under Article 12(2) has been infringed by the 1st and 2nd Respondents because of political opinion. Her transfer is cancelled, and the Respondents are directed to reinstate her at Hanwella forthwith. There is no reason why the State or the Provincial Council (which has not been made a party) should be directed to compensate the Petitioner. The 1st and 2nd Respondents have acted arbitrarily, in flagrant disregard of the Petitioner's rights, and it is they who are primarily responsible for this litigation. The infringement is the more serious because it affects the system of representative local government. I therefore consider it equitable to direct each of them to pay the Petitioner a sum of Rs 25,000/- as compensation and costs.

WADUGODAPITIYA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Relief Granted.