SUPREME COURT

G.H. Eheliyagoda and two others
V.
Janatha Estates Development Board and others

S.C. Application Nos. 91 - 93/81

Fundamental Rights – Re-organization of Employment Scheme resulting in demotion – Article 126 of the Constitution.

The First and Second Petitioners were Assistant Branch Managers while the Third Petitioner was the Branch Manager under the Land Reform Commission Co-operative Society Ltd. All these appointments were made in 1972 consequent to the nationalization of Estates.

The Petitioners were classified as Executive Grade Officers enjoying the privileges and having functions and responsibilities equivalent to those of Superintendents of Estates.

In 1981 consequent to a Reorganization Programme the Petitioners were offered the Posts of Field Officers. The effect of this change was to demote them in some respects to a lower status. The Petitioners urged that the Respondents had used their discretion arbitrarily.

Held that this determination relating to the Petitioners were not based on just and reasonable criteria but that the discretion exercised was one that was unfettered unregulated and without guidelines and so were null and void.

APPLICATION for infringement of Fundamental Rights

Before: Wanasundera, J., Wimalaratne, J., and Ratwatte, J.

Counsel: Nimal Senanayake with Sanath Jayatilake, (Mrs) A.B. Dissanayake and Arunatilake de Silva for the Petitioner in each Application.

S.S. Rajaratnam with R. Suresh Chandra for the 1st & 2nd Respondent in each Application.

Argued on: 18th January 1982.
Decided on: 28th January 1982.

Reasons delivered on: 12th February 1982.

Cur. adv. vult.

WANASUNDERA, J.

These three applications - S.C. Applications Nos. 91/81 to 93/81 under Article 126 of the Constitution were consolidated and taken up together for hearing. In S.C. Application No. 91/81 the petitioner's claim is based on his appointment as Assistant Branch Manager of the Dehiowita Electorate Land Reform Co-operative Society Limited and upon his functioning in that capacity on Reucastle Estate. The petitioner in S.C. Application No. 93/81 is also an Assistant Branch Manager of the same Dehiowita Electorate Land Reform Co-operative Society Limited and functions in that capacity on Keenbena Estate. The petitioner in S.C. Application No. 92/81 claims to be the Branch Manager of the same Co-operative Society and functions in that capacity on Nahalmar Estate. All these appointments were made in 1972 consequent to the nationalization of estates and their vesting in the Land Reform Commission. The respondents are - (1) The Janatha Estate Development Board, (2) M.N. Sadanandan, the Director of the said Board, and (3) The Attorney General. The Attorney-General did not appear nor was he represented before us at the hearing. The 1st and 2nd respondents had taken over the management of the Dehiowita Electorate Land Reform Co-operative Society Limited in 1977 after the change of Government.

These petitioners claim that until the present dispute they had been classified in the official records as falling within the Executive Grade of officers and their functions and responsibilites in most respects have been equivalent to those of Superintendents and Assistant Superintendents of Company-owned estates. They have accordingly enjoyed the salary scales, emoluments, perquisites and privileges appertaining to officers of such Executive Grade. The position taken by the respondents however is that –

> "The appointment of Project Managers, Branch Managers and Assistant Branch Managers was a novel manipulation of the previous administration, unheard of in the history of the plantation industry in Sri Lanka. These employees did not have any special duties to perform. So it became a problem for the 1st Respondent Board to keep them in employment and hence a scheme of reorganisation was adopted to harmonise the situation."

In terms of the reorganisation, the petitioners have been offered alternative employment.

On the material placed before us, it is however clear that the functions and responsibilities of these petitioners were substantially the same as those of Superintendents and Assistant Superintendents of estates and no serious attempt was made to controvert this position. In fact document 1R1 relied on by the respondents itself shows that not only were these several offices lumped together into one category for the purpose of the interview but the appointments made consequent on the interview show that in some cases these various officers have been regarded as being fit for the same kind of appointment, whether as Trainee Superintendent or Field Officer.

The petitioners have referred to two interviews they have had with the management - one in November 1977 and the second on 3rd July 1981. The first meeting apparently came immediately on the heels of the respondents taking over the management of these estates. The second interview was in 1981 and this was the one which decided the future of the petitioners. Thereafter the three petitioners received letters on 3rd or 4th November 1981, but dated a few days earlier, from the 2nd respondent offering them the post of Assistant Field Officer and stating that such employment would be subject to the

terms of a collective agreement. These letters also required the petitioners to intimate their acceptance of this offer and gave them barely two days from the date of receipt to do so. It is at this stage that the petitioners sought relief from this Court.

In the affidavit filed on behalf of the respondents, an attempt has been made to play down the implications and effects of this alleged reorganisation by stating that this involved only a regularisation of the designations of the petitioners and nothing more. The material before us does not bear that out and counsel who appeared for the respondents was frank enough to concede that the effect of this change on the petitioners was to 'demote' them in some respects to a position and status lower than what they have hitherto enjoyed. Incidentally, it is unnecessary for this Court to make any pronouncement about the entire reorganisation scheme or to categorise the operation as one of appointment or promotion or demotion or abolition of post except to relate it to the limited facts of the three petitions before us.

The entire material the respondents have chosen to place before this Court to justify their action consists of a bare statement in the affidavit of the Deputy General Manager of the 1st respondent referring to an alleged interview and document 1R[1]. 1R[1] is a document prepared by some officer, unnamed, giving the results of an interview held by a panel again unnamed. This document is entitled "Redesignation of former Land Reform Co-operative and Janawasa Commission Employees absorbed into the J.E.D.B." I think, when the material placed before this Court is sufficient to establish a prima facie case as regards an allegation that the acts of the respondents are arbitrary and discriminatory, this Court will naturally insist on a frank and adequate disclosure of all material which would justify the impugned acts, so that we can satisfy ourselves of the legality of those acts. Such material however has not been forthcoming.

Turning to the law, we find that there are numerous decisions of the Indian Courts from which we can derive assistance. First, let me refer to the case of *State of Mysore v. Krishna Murthy*, 1973 A.I.R.(S.C.) 1147. In this case the question before the Court related to the validity of a rule relating to a division into two classes of members of the same service belonging to the same cadre for purpose of their promotion. The facts were as follows: The two petitioners

had joined the Accounts service in the Comptroller's office of the former Mysore State as first and second Division Clerks. Consequent upon the abolition of the Comptroller's office, the petitioners began working as accounts Clerks under the Chief Engineer, P.W.D. In 1955, a Divisional Accounts' Cadre was created by the Mysore Government under the administrative control of the Chief Engineer. Both the petitioners passed the prescribed examinations and were absorbed in the Divisional Accounts' Cadre. It appears that in 1959 the P.W.D. Reorganisation Committee had recommended the transfer of the P.W.D. Accounts' Branch in toto to the newly set up Controller of State Accounts. In accordance with the recommendation, the petitioners came under the administrative control of the Controller and the designation of their office was changed to that of 'Accounts Superintendent'. In May 1959, the two formerly separate units of the Accounts service, namely the P.W.D. Accounts unit, under the Chief Engineer of P.W.D., and the State Accounts' Department came under the common administrative control of the Controller of State Accounts Services' Cadre and accordingly Recruitment Rules were issued and combined cadre strengths were fixed.

Counsel for the State sought to justify this difference in promotional chances by a reference to differences in the historical background and to the practice of making the distinction in promotional chances. The Court however observed that "neither a fortuitous artificial division in the past nor the unconstitutional practice of making an unjustifiable discrimination in promotional chances of Government servants belonging to what was really a single category without any reference either to merit or seniority or educational qualifications" could justify the differences in promotional chances.

In striking down the impugned rules as being violative of the equality clause, the Indian Supreme Court said that –

> ".....inequality of opportunity of promotion, though not unconstitutional *per se* must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of Government Servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and background entitling them to be considered as members of one class."

In the *State of Mysore v. S.Rajayaram*, A.I.R. 1968 (S.C.) 346; the Indian Supreme Court had again to decide the validity of a regulation which reserved the right to the Government of appointing to any particular cadre, any candidate whom it considers to be more suitable for such cadre. In this case applications were called for recruitment to certain offices under the State Civil Service. This was to be done upon an open competitive examination. The posts though in one cadre were divided into two categories – (a) Assistant Commissioners in the Administrative Service, and (b) Assistant Controllers in the State Accounts Service. The former post which had better prospects was more attractive and was sought after by the candidates. There appear to have been 20 vacancies in the post of Assistant Commissioners and seven in the cadre of Assistant Controllers. At the examination the petitioner was placed fourth in order of merit and had indicated a preference for the former post. The Government however assigned him to a post as Assistant Controller. The Government relied on rule 9(2) of the Recruitment Rules for its action which *prima facie* smacked of arbitrariness. The rule was worded as follows:-

"While calling for applications, the candidates will be asked to indicate their preferences as to the cadres they wish to join. The Government however reserves the right of appointing to any particular cadre, any candidate whom it considers to be more suitable for such cadre."

The Supreme Court said –

"The Rules are silent on the question as to how the Government is to find out the suitability of a candidate for a particular cadre. A single competitive examination is held to test the suitability of candidates for several cadres. Those who succeed in the examination are found suitable for all the cadres and their list in order of merit is published under Rule 8. No separate examination is held to test the suitability of the candidate for any particular cadre. The list of successful candidates published under Rule 8 does not indicate that any candidate is more suitable for cadre 'A' rather than for cadre 'B'. The Rules do not give the Public Service Commission the power to test the suitability of a candidate for a particular cadre or to recommend that he is more suitable for it. Nor is there any provision in the Rules under which the Government can test the suitability of a candidate for any cadre after the result of the examination is

published. The result is that the recommendation of the Public Service Commission is not a relevant material nor is there any other material on the basis of which the Government can find that a candidate is more suitable for a particular cadre. It follows that under the last part of Rule 9(2) it is open to the Government to say at its sweet will that a candidate is more suitable for a particular cadre and to deprive him of his opportunity to join the cadre for which he indicated his preference."

"The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidate. Rules 1 to 8, 9(1) and the first part of Rule 9(2) seek to achieve this aim. The last part of Rule 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though R. 9(1) requires the appointment of successful candidates to Class I posts in the order of merit and thereafter to Class II posts in the order of merit, Rule 9(1) is subject to Rule 9(2), and under the cover of Rule 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious candidate. We hold that the last part of Rule 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down."

Again in *Jaisinghani v. Union of India*, AIR 1967 (S.C.) 1427, the Indian Supreme Court stressed the need for laying down clear principles in matters of recruitment. The Court observed:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey - "Law

of the Constituion" - Tenth Edn., Introduction), 'Law has reached its finest moments,' stated Douglas, J., in *United States v. Wunderlich*, (1951) 342 US 98, 'when it has freed man from the unlimited discretion of some ruler.....Where discretion is absolute, man has always suffered.' It is in this sense that the rule of law may be said to be the sworn enemy of caprice. 'Discretion', as Lord Mansfield stated in classic terms in the case of *John Wilkes*, (1770) 4 Burr 2528 at p. 2539 'means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful'."

Upon a careful consideration of the material before us and after making due allowance for the submissions of counsel for the respondents who referred to a genuine need for a restructuring of the present administrative structure, which is the only objection taken before us, we are not satisfied that the determinations relating to these petitioners are based on just and reasonable criteria. The discretion that has been exercised in these cases is one that is unfettered, unregulated, and without guidelines. There is also nothing in the material to show that the cases of the petitioners were considered on their merits and how their cases compared with those of the others who obtained appointment and *vice versa*.

Further, counsel for the petitioners submitted specifically that the 'demotion' of the petitioners was in fact an exercise of disciplinary powers and it was improper and illegal to exercise that power in the manner it was done in these cases, that is by an *ad hoc* tribunal forming an impression after a single interview with the petitioners. There is much to be said for this submission. "When a public officer or employee has a right to an office or post, the termination of his employment or a reduction of his position to a lower one is by itself and *prima facie* a punishment." Disciplinary proceedings however must follow certain well defined procedures. The complaint before us is of a violation of a fundamental right and this submission comes in only indirectly to support counsel's main argument.

After the arguments were concluded in this case, in deference to requests made by counsel we withheld a ruling in this matter so as to enable them to adjust this matter if that was possible, and a calling date was given for that purpose. Since no such adjustment has taken place we pronounced our decision in open court allowing

the three petitions with costs. We indicated that the reasons and directions, if any, would be given later.

In regard to the three petitions before us, we declare that the determinations of the respondents to place the three petitioners in the category of Field Officers or Assistant Field Officers, as the case may be, are null an void. The status, salary and perquisites which they were entitled to or which they have hitherto enjoyed shall not be reduced or diminished or they should be granted such status, salary and perquisites equivalent or no less favourable thereto. These are referred to specifically in paragraphs 9 and 14 of the petitions. This direction would of course be superseded if the petitioners are absorbed in the new scheme in the posts of Assistant Superintendents, which they indicated they would be prepared to accept. We also order the 1st respondent to pay the costs of each of the petitioners.

WIMALARATNE, J. — I agree.
RATWATTE, J. — I agree.

Application allowed and relief granted.