RANGE BANDARA
v.
GEN. ANURUDDHA RATWATTE AND ANOTHER

SUPREME COURT.
FERNANDO, ACJ.,
WIJETUNGA, J. AND
GUNAWARDENA, J.
S.C.. APPLICATION (F.R.) NO. 128/96
AUGUST 21, 1997.

Fundamental Rights – Transfer of a Police Officer – Misuse of power – Arbitrary decision – Article 12(1) of the Constitution.

The petitioner, a sub-inspector of Police who was attached to the Weerambugedera Police Post in the Kurunegala District as Officer-in-Charge was transferred by the 2nd respondent, Inspector-General of Police (IGP) to Moratuwa. This was in consequence of a request by the 3rd respondent the S.L.F.P. Chief Organiser for Polgahawela to appoint another officer as O.I.C. Weerambugedera Police Post. However, the 3rd respondent issued a letter to the 1st respondent Deputy Minister of Defence stating that the petitioner was an efficient and an honest officer and requesting him to transfer the petitioner to a station close to Kurunegala. That request was forward by the 1st respondent to the I.G.P. At the hearing of the application the I.G.P.'s position was that the impugned transfer was a normal transfer. He also stated that the transfer was effected additionally on disciplinary grounds.

Held:

The summary transfer of the petitioner to a distant place was a misuse of discretion. The decision to transfer was arbitrary, capricious, and unreasonable and violative of the petitioner's rights under Article 12(1).

***Per* Fernando, A C J.**

> "The evidence in this case shows that what happened was not the result of a mistake or error of judgment, but of a misuse of . . . powers, of a kind which demoralises and demotivates the victim, and indirectly the entire service".

Cases referred to:

1. *Leelaratne v. Herath*, S.C. 145/86 S.C. Minutes 9 March 1987.
2. *Tennakoon v. de Silva*, 1997 – 1 SLR 16.

APPLICATION for relief for infringement of fundamental rights.

Chula Bandara for the petitioner.

S. Rajaratnam, P.C., for the 1st, 2nd and 4th respondents.

R. K. W. Goonasekera, for 3rd respondent.

Cur. adv. vult.

September 26, 1997.

FERNANDO, ACJ.

Having joined the Police service in 1983 as a constable, the petitioner was appointed a sub-inspector in 1990. After completing his training he was posted to Ampara and thereafter to Gokarella; and in August 1992 he was appointed Officer-in-Charge, Weerambugedera Police Post, which was upgraded in 1994 as a Police station. For administrative purposes, in the Police service the Kurunegala district is sub-divided into three divisions – Kurunegala, Kuliyapitiya, and Nikaweratiya – and Weerambugedera is in the Kurunegala division. By a Police message received on 5.1.96, the petitioner was informed that the 2nd respondent, the Inspector-General of Police, had ordered his transfer to Moratuwa, as a sub-inspector (supernumerary) with effect from 5.1.96. He filed this application under Article 126 on 30.1.96 challenging that transfer. This Court granted leave to proceed under Article 12(1) on 5.2.96, and made an interim order staying the transfer on 16.2.96, whereupon he was sent to Kurunegala on 13.3.96.

All Counsel agreed that the power to transfer officers of the category to which the petitioner belongs had been delegated to the Inspector-General of Police by the Public Service Commission (PSC).

It is the petitioner's case that the transfer was not in terms of the Establishments Code and the Departmental regulations, but had been made at the request of the 3rd respondent, an Attorney-at-Law and the S.L.F.P. Chief Organiser for Polgahawela. He says that on 6.1.96 he met the 3rd respondent, who admits that he then gave the petitioner a letter dated 6.1.96 (produced as P7), addressed to the 1st respondent, the Deputy Minister of Defence, under whom the Police service comes. In that letter the 3rd respondent stated that **at**

his request one sub-inspector Ratnatilleke had been transferred from Puttalam to Weerambugedera (in the Polgahawela electorate) with effect from 6.1.96; that in consequence the petitioner had been transferred to Moratuwa; that the petitioner was an efficient, good and honest Police officer; that he had a host of personal difficulties; and he therefore requested that the transfer to Moratuwa be cancelled, and that the petitioner be transferred to a place like Kegalle, Kandy or Anuradhapura. The petitioner says that, along with a covering letter (produced as P7A) addressed to the 1st respondent, he posted that letter to the 1st respondent on 13.1.96. That covering letter expressly stated that a letter from Mr. Ihalagama, Attorney-at-Law, the "Government Party" Chief Organiser for Polgahawela, was enclosed.

The 3rd respondent did not expressly say in P7 that his request for the transfer of SI Ratnatilleke had been made to the 1st respondent. However, the problem which had arisen was a consequence of that request, and it therefore seems natural for the 3rd respondent to have asked the same person to whom he had made that request (rather than a third person) to deal with the consequential problem. On the other hand, if that request had been made to someone other than the 1st respondent, the 3rd respondent would have had to mention that fact in P7, in order to make the 1st respondent aware of the background. I therefore understand the "request" mentioned in P7 to be a request made to the 1st respondent to transfer SI Ratnatilleke.

In his affidavit dated 8.3.96 the 1st respondent said:

"5. ... While I am unaware as to whether the petitioner has in his discussion with the 3rd respondent, as set out in his affidavit, [sic] I state that I cannot recall having received any request from the petitioner to [sic] the 3rd respondent requesting transfer of the petitioner or Mr. Ratnatilleke, the Sub-Inspector of Police. I state further that I have given no instructions or directions to the 2nd respondent for the transfer of the petitioner or any other officer of the police station."

"6. ... **I am unaware as to whether the 3rd respondent issued a letter to the petitioner** as stated therein. I state further that while I

have no personal recollection as to whether the said letter ... [P7] ... was received by me. I verily believe that in terms of sections 5:4 and 6:2 of Chapter XXVIII of the Establishments Code, the petitioner has no right or authority to communicate directly with me and that I am [neither ?] required nor authorised to reply any such communication sent contrary to the said provisions."

"7. ... I deny that I directed or instructed the 2nd respondent to transfer the petitioner. I state that **upon receipt of copy of the petition and affidavit** filed by the petitioner I made inquiries from the 2nd respondent and was informed that the petitioner was transferred as **part of the year end transfers** and the choice of district and place of transfer was based on **exigency of service** and **reports made by the Senior Officers."**

"9. ... I am personally unaware as to whether the 3rd respondent is the Chief Organiser for the time being of the Polgahawela Electorate Division of the Sri Lanka Freedom Party." [emphasis added]

There can be no doubt that – before he gave instructions for the preparation of his affidavit – the 1st respondent did have the petition and annexes, and that he had made inquiries about the subject-matter from the 2nd respondent. If it was a rare occurrence to receive requests for the transfer of Police officers, it would have been natural for the 1st respondent to have stated more positively, one way or the other, that he **had,** or had **not,** received such a request from the 3rd respondent. Although it might have been contended, therefore, that it was because he was receiving many such requests that he had no personal recollection, I will nevertheless assume in his favour that it was the heavy burden of his undoubtedly onerous responsibilities which made it difficult to have a personal recollection of relatively less important matters concerning the transfers of sub-inspectors. But in that event it would have been an elementary precaution – of which his legal advisers could not have failed to remind him – to have his files checked to see whether there had been any such correspondence, and what steps had been taken, instead of relying on his memory alone. Further, the 1st respondent made no mention of P7A – although annexed to the petition – and in the absence of any

such reference paragraph 6 of his affidavit amounts to a denial of the receipt of any letter whatever from the petitioner; a denial which he sought to support by an assertion that the petitioner had no right to communicate directly with him. He was therefore disclaiming any knowledge of P7 and P7A.

As for the 2nd respondent, in his affidavit dated 12.3.96 he said that he was unaware of P7 and P7A. That necessarily meant that even if P7 and P7A had reached the 1st respondent, the 2nd respondent had not received them (or copies) from the 1st respondent. Although he expressly denied that the petitioner had been transferred at the 3rd respondent's request, he did not deal with or deny the 3rd respondent's assertion (in P7) that SI Ratnatilleke had been transferred at the 3rd respondent's request. The 2nd respondent explained the impugned transfer thus:

"7. ... I specifically deny that the transfer was made outside the normal annual transfers of the Department of Police. I state that the transfer of the petitioner was one of 69 transfers ordered by me on 03.01.1996 as **a continuation of the end of the year transfers** for 1995. I annex hereto a copy of the said transfer orders marked 2R2. The reasons for the decision to transfer the petitioner **to a distant Police Station** are set out by me in the following paragraph of this affidavit."

"8. ... While specifically denying that the 1st respondent directed me to transfer the petitioner or that the transfer is contrary to the transfer procedure of the Police Department, I state as follows:

(a) the decision to transfer the petitioner was taken **after considering the reports** submitted by the Deputy Inspector General of Police (North Western Range – Kurunegala (report dated 28.10.1994) and the Senior Superintendent of Police (report dated 09.10.1994). **The material brought to my notice in these two reports** clearly indicated that there were several complaints against the petitioner from the members of the Public of the area and that the petitioner was unsuitable to perform the functions of an Officer-in-Charge of a station. I annex hereto copies of the said two reports marked 2R3 & 2R4.

(b) I also gave my conscious attention to the fact that many of the complaints had to be dropped due to lack of evidence whilst some other complaints had been withdrawn or settled on a later date before steps could be taken to conduct a fuller inquiry or to prosecute the petitioner. I was also made aware that some other complaints against the petitioner were pending at the time I took the decision to transfer the petitioner. I state that it is for these reasons that **I considered it necessary to transfer the petitioner out of the North Western Province Range so that proper inquiries could be conducted** and appropriate action could be taken at the conclusion of such inquiries. All material regarding the complaints will be made available to Your Lordship's Court for perusal since I am of the view that the petitioner should not have access to this material at this stage as all the accusations are against him." [emphasis added]

The petitioner filed a counter-affidavit dated 19.4.96, producing as P8 a letter which he had received: this was dated 6.2.96 (bearing reference number PS/P/2/79/96) and was signed by Major S. M. Wijeratne, as private secretary to the 1st respondent. The subject-matter was stated to be the variation of the transfer of the petitioner. That was an acknowledgement of the receipt of a letter (date unspecified) addressed to the 1st respondent. P8 stated that on the instructions of the 1st respondent that letter had been referred, for suitable action, to the Inspector-General of Police, to whom all future queries should be addressed, and P8 also indicated that, on the directions of the 1st respondent, a copy of P8 was being sent to the Inspector-General of Police for suitable action and reply, together with the letter in question (presumably, the original).

The respondents made no effort to contradict that affidavit, either by a counter-affidavit or by producing documents.

Learned Counsel for the petitioner submitted that P8 was proof that – long before the date of the 1st respondent's affidavit – the 1st respondent had received P7, and that his denial could not be accepted; and that P7 and P7A had been referred to the 2nd respondent, so that these documents had been in the 2nd

respondent's possession at the time he signed his affidavit, in which event it could not be correct that he was "unaware" of them. Learned State Counsel submitted, however, that P8 was only proof of the receipt of a letter **from the petitioner,** and not of P7 which was a letter **from the 3rd respondent;** but he could not tell us what that letter was, if it was not P7A.

In view of the 3rd respondent's statement in P7 that he had requested the transfer of SI Ratnatilleke to Weerambugedera, it becomes important to decide three questions: Did the 1st respondent receive P7A, enclosing P7? And, if so, did his private secretary (by P8) – acting on his instructions – refer P7 and P7A to the 2nd respondent for suitable action and reply? And did the 2nd respondent receive P7 and P7A?

The petitioner's version is intrinsically probable. He received a sudden transfer order; he went to meet the 3rd respondent, who explained that SI Ratnatilleke had been transferred at the 3rd respondent's request; the 3rd respondent confirmed that the petitioner was a good and efficient officer, and therefore gave him P7, addressed to the 1st respondent, to help him get a closer station than Moratuwa. What else was the petitioner to do with P7 except to send it to the 1st respondent, with a covering letter? P8 affords conclusive proof that the 1st respondent did receive **some** letter from the petitioner. If the 1st respondent's position is that he received P7A, but not P7, then – because P7A stated that P7 was enclosed – P8 would have pointed out that nothing was enclosed. On the other hand, if his position was that he received neither P7 nor P7A, nevertheless P8 amounted to an admission that he had received **some** letter from the petitioner, and the only acceptable way to prove that what he had received was not P7 or P7A was to produce the document which he had actually received. In the absence of any such document, the petitioner asks the Court to infer that the 1st respondent did receive P7 and P7A. Further P8 shows that the 1st respondent referred P7 and P7A to the 2nd respondent, which means that either the originals or copies of P7 and P7A were received by the 2nd respondent. Those two respondents had a common legal adviser, and if P8 had been brought to his notice, in the normal course these matters should

have been probed and the relevant documents should have been produced; and if the copy of P8 (and enclosures) intended for the 2nd respondent had not reached him, that also would have been stated. In the absence of that clarification the petitioner asks the Court to hold that the 1st respondent did receive P7 and P7A; and that the 2nd respondent received P7 and P7A (or copies) from the 1st respondent.

At the hearing on 21.8.97 learned State Counsel, faced with these difficulties, asked for permission to produce the letter or letters which P8 acknowledged. That was shortly afternoon that day, and we gave him permission to do so. However, we felt that if additional material was being produced at that late stage to clarify one matter, then in the interests of justice other matters, including the question whether the 3rd respondent had communicated with the 1st respondent in regard to SI Ratnatilleke's transfer, should also be probed. For that reason, we allowed production, provided the entire file was produced, and produced immediately – to leave no room for insinuations of tampering – by 2 o'clock that afternoon, after the lunch adjournment. When we resumed in the afternoon State Counsel informed us that the file had not been traced. This might have been due to the short notice.

In those circumstances, the failure to produce the document which P8 acknowledged attracts the presumption under section 114(f) of the Evidence Ordinance. On the available evidence, I hold that the petitioner has established, on a balance of probability, that the 1st respondent did receive P7A with P7 annexed; that he did refer those letters, by means of a copy of P8, to the 2nd respondent, for action and reply; and that the 2nd respondent did receive P8 with its enclosures. Neither the 1st nor the 2nd respondent has suggested any reason why the 3rd respondent should have falsely said that he had made a request for the transfer of SI Ratnatilleke, and I hold that that was probably true. The petitioner's transfer was thus the consequence of the 3rd respondent's request.

I will nevertheless examine the reasons given by the 1st and 2nd respondents for the petitioner's transfer, independently of P7 and P8.

The 2nd respondent stated that it was "a continuation of the end of the year transfers from 1995", and that 68 others were transferred at the same time. Although he did not make any reference to the "exigencies of service", the 1st respondent claimed that the 2nd respondent had told him it was on account of the exigencies of service. At the hearing, learned State Counsel stated that officers are not normally transferred from a station until they have served four to five years, and that a "supernumerary" appointment to a station meant that the cadre at that station was already full. If that were so, it was very relevant that the petitioner had served only three years and five months at Weerambugedera, and had been transferred as a "supernumerary" indicating that in all probability he was not really needed at Moratuwa.

The 2nd respondent also said that his decision was to transfer the petitioner "to a **distant** Police Station" for the reasons set out in paragraph 8 of the 2nd respondent's affidavit. Why "distant"? Paragraph 8 of the 2nd respondent's affidavit refers to complaints against the petitioner, and thus suggests that there was a punitive or disciplinary element to the transfer.

Prima facie, therefore, the transfer was neither a normal annual transfer nor on account of the exigencies of service.

Was there any material justifying such a transfer to a distant place? And in any event, if that was the real reason, was it proper to withhold that reason from the petitioner?

Let me recall the 1st respondent's version that on inquiring from the 2nd respondent he learned that the transfer was based "on exigency of service and **reports** made by Senior Officers". The 2nd respondent referred to, and relied on, only two reports both made in October 1994 ("the material brought to my notice **in these two reports**"). Although in paragraph 8(b) he referred to complaints made even after October 1994, he did not produce or mention any **reports** about such subsequent complaints; instead, he simply said that "[he] was also made aware . . ." The only reasonable inference is that there had been **no** reports after October 1994.

Did the 2nd respondent really act on those two reports? The reports contained specific recommendations that the petitioner be interdicted and transferred, and disciplinary proceedings taken. That was not done. If indeed it had been considered necessary to transfer him on the basis of those reports, the 2nd respondent should have explained why that was not done at once or as part of the end of the year transfers for 1994 (effective January 1995).

As for alleged complaints after October 1994, since the 2nd respondent did not refer to any reports relating to such complaints, it is quite unsafe to act on the 2nd respondent's bare assertion that he was "made aware" of complaints, particularly because these were not disclosed to the petitioner so that he could have been heard in his defence. It is true that the 2nd respondent said that the relevant material would be placed before the Court at the hearing, but neither natural justice nor the rules of procedure applicable to fundamental rights application permit any party the unilateral privilege of deciding that he will furnish evidence in support of his case for the perusal of the Judges alone. This Court has recognised that considerations of national security may permit an exception (see *Leelaratne v. Herath,*[1] but even then the material relied on must be furnished to the Court before the hearing. Here national security is not involved, and the material was not tendered before the hearing. We therefore refused to allow the production of any new material.

But there is a more serious objection to allowing that material to be tendered. Not having given the petitioner even an inkling that his transfer was on account of such complaints, and having pretended that the transfer was a normal annual transfer – with 68 other transfers – can the 2nd respondent now be allowed to say that it was on disciplinary grounds, "so that proper inquiries could be conducted", in respect of the complaints against him? All the complaints referred to in the October 1994 reports were not proceeded with, either because they were withdrawn or because there was insufficient evidence. Even if there were subsequent complaints (i.e. between October 1994 and December 1995), why was no action taken in 1995? If it was difficult to take action while the petitioner was at Weerambugedera, why was no charge sheet at

least served during the 18 months that elapsed between then and the hearing of this application? Surely fairness demanded that the petitioner be informed early of the allegations made against him? One must remember also that there are complaints and complaints. There are genuine complaints from responsible members of the public against dishonest Police officers who misuse their powers, but on the other hand there are false complaints by wrong-doers when they are adversely affected by the conscientious discharge of their duties by honest Police officers. Likewise, complaints are withdrawn, settled, or not pursued, for good reasons as well as for bad. Vague assertions of "complaints" against a Police officer can hardly justify a transfer.

In this connection, I must refer to *Tennakoon v. de Silva*.[2] There the petitioner, an Assistant Superintendent of Police, had inquired into four complaints against a sub-inspector – involving rape, bribery, assault of a Grama Seva Niladhari, and assault of a RPC – and had recommended his transfer. But it was the petitioner who was transferred! And what is more, the then Inspector-General of Police sought to justify that transfer on the ground, *inter alia*, that "if any officer is unable to work in harmony with the elected members of Parliament it would not be desirable for such officer to be retained in that Division".

The 2nd respondent's version is also contradicted by the two reports which the Senior Superintendent of Police, Kurunegala, submitted after inspecting the Weerambugedera Police station in 1995. In his report dated 20.5.95 he concluded:

> "Standard of parade in satisfactory. Buildings, premises and vehicles are maintained well. Standard of books and registers were in fair order except few mistakes pointed out by me. OIC Crimes should concentrate more on investigation into property cases and must have a better grip and control over them. OIC Range Bandara is in charge of this station . . . He has a good control over the station and the area as well. He is spoken well among the public in the area and Citizen Rights Watch Committee system is very well organized here".

And in his second report dated 18.12.95 – just three weeks before the impugned transfer – he said:

> "Vehicles, buildings, and premises are being maintained well. Registers pertaining to crime matters are in order, except for the few mistakes pointed out by me. I am glad to note that OIC has motivated the men to organize Civil Defence Force System and Neighbourhood Watch Committee system in the area. These two systems are successfully activated in this area and the public are very happy about the commitments of the Police in organizing the Service Funerals in the area. OIC is working well. The other SI, and the men are assisting the OIC to control the station as well as the area effectively."

The 2nd respondent neither explains why these reports make no mention of any complaints against the petitioner nor whether they were taken into account in deciding to transfer the petitioner.

The 2nd respondent also annexed to his affidavit dated 12.3.96 a computer printout of the petitioner's "Personnel Details", showing all the stations at which he had worked. It is quite clear that this was not out of date, because the last three entries were for 1996 – indeed, even extending to one day after the date of his affidavit:

WEERAMBUGEDERA	94.07.29	96.01.04	SI	OIC
MORATUWA	96.01.05	96.03.12	SI	SN
KURUNEGALA	96.03.13		SI	SN

At the hearing, we observed that, tucked away among a host of others, were the following entries:

Transfer on dis. grud. [sic]?:	**N**	Reference:
Any inquiries pend. ?:	**N**	Reference:
Any Adverse Remarks. ?:	**N**	Reference:

Learned State Counsel stated that "dis. grud." meant "disciplinary grounds", and that "**N**" meant Nil or None. It would follow that there would be an entry under "Reference" only if there was no negative

answer. These entries cannot easily be reconciled with the 2nd respondent's assertion that there were complaints or pending inquiries against the petitioner.

In my view, the summary transfer of the petitioner to a distant place was unreasonable, on the material available to the 2nd respondent, and it was also a misuse of discretion to withhold from him the true reason for the transfer, because it deprived him of the opportunity to rebut it.

I hold that the 2nd respondent's decision to transfer the petitioner was arbitrary, capricious, and unreasonable, and in violation of the petitioner's fundamental rights under Article 12(1). I quash that transfer. Nothing in this order will preclude disciplinary proceedings against the petitioner for any past misconduct, or his transfer, in accordance with the applicable rules and regulations.

The impugned transfer was effective from 6.1.96, and the petitioner was re-assigned to Kurunegala only on 13.3.96. I award him a sum of Rs. 25,000 as compensation and Rs. 15,000 as costs. In making the impugned transfer order, the 2nd respondent was acting as a public officer exercising powers delegated to him by PSC. Those powers are held in trust by him, and should have been exercised, with due care, for the purpose for which they were entrusted to him by the PSC; and with the same independence which the public have the right to expect, which Article 60 of the Constitution protects on pain of punishment:

> "Any person who, otherwise than in the course of his duty, directly or indirectly, by himself or by any other person, in any manner whatsoever, influences or attempts to influence any decision of the Public Service Commission, or of any Committee thereof, or of any member of such Commission, or of **any public officer exercising any powers delegated by such Commission** or Committee, shall be guilty of an offence . . . provided that nothing in this Article shall prohibit any person from giving a certificate or testimonial to any applicant or candidate for any public office."

The evidence in this case shows that what happened was not the result of a mistake or an error of judgment, but of a misuse of those powers, of a kind which demoralises and demotivates the victim, and indirectly the entire service. The 2nd respondent does not claim that he acted on material furnished by his subordinates; his affidavit suggests that he gave his "conscious attention" to the relevant facts. I therefore direct that the compensation be paid by the State and that costs be paid by the 2nd respondent personally.

WIJETUNGA, J. – I agree.

GUNAWARDENA, J. – I agree.

Relief granted.