

WEERASINGHE
v.
DISSANAYAKE AND OTHERS

SUPREME COURT
DR. AMERASINGHE, J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S.C. APPLICATION NO. 143/95
FEBRUARY 7 AND MARCH 25, 1997.

Fundamental Rights – Article 12(1) of the Constitution – Transfer of educational personnel serving a Provincial Council – List 1 (Provincial Council List) Appendix III. 3 – Thirteenth Amendment to the Constitution.

The petitioner who was a Class II officer of the Sri Lanka Education Administrative Service complained that whilst he was in the service of the North Central Provincial Council on secondment, he was transferred to the Ministry of Education and Higher Education by the Education Service Board of the Public Service Commission in violation of his rights under Article 12(1) of the Constitution in that *inter alia*, officers who are so seconded cannot be transferred without the approval of the Head of the relevant Department of the Provincial Council.

Held:

(1) In terms of Appendix III.3. List 1 (Provincial Council List) of the Thirteenth Amendment to the Constitution there are two kinds of officers who are subject to the power of transfer and disciplinary control of a Provincial Council (1) those who

belong to a National Service but serving a Provincial Council on Secondment (2) those who belong to the Provincial Public Service.

(2) The petitioner did not belong to either class of officer referred to an Appendix III.3; he had not been seconded nor was he a member of the Provincial Public Service. He belonged to a third group – those who belong to a National service, but whose services had been made available to Provincial Councils to support and assist them but not upon the basis of secondment. Persons in the third group would remain subject to the powers of transfer and disciplinary control of the Public Service Commission.

APPLICATION for relief for infringement of fundamental rights.

L. C. Seneviratne, P.C. with Nigel Hatch for petitioner.

Kolitha Dharmawardene, D.S.G. for respondents.

Cur. adv. vult.

April 4, 1997.

DR. AMERASINGHE, J.

In 1960, the petitioner was appointed a Temporary Assistant Teacher at the Maha Bellankadawala Vidyalaya, Anuradhapura, by the Director of Education, North Central Province. In 1968, he was appointed a Graduate Assistant Teacher of the Wannitammannawa Maha Vidyalaya, Anuradhapura, by the Director of Education, North Central Province. While at that school, in 1982, he was appointed to Class V of the Sri Lanka Education Service by the Education Services Board of the Public Service Commission and, in 1985 he was appointed to Class III of the Sri Lanka Education Administrative Service and continued to serve at Wannitammannawa Maha Vidyalaya.

The petitioner was appointed to the Deepani Maha Vidyalaya, Anuradhapura and later in February 1990, transferred to the Anuradhapura Division Education Office by the Secretary of the North Central Provincial Council's Ministry of Education, Health, Transport, and Youth Affairs. On 26 August 1992, while he was serving in the Anuradhapura Division Education Office, the petitioner was appointed by the Education Service Board of the Public Service Commission as a Class II officer of the Sri Lanka Education

Administrative Service. On 26 August 1992, the petitioner was appointed Deputy Director of Education, Anuradhapura Division Education Office by the Secretary of the North Central Provincial Council's Ministry of Education, Health etc. On 01 January 1993, the petitioner was appointed Director of Education, Anuradhapura Education Zone, by the Secretary of the North Central Provincial Council's Ministry of Education, Health etc. but it seems he continued to function as Deputy Director. On 28 March 1995, the Secretary of the Education Service Board of the Public Service Commission (the third respondent) wrote to the petitioner stating that he had been transferred to the Ministry of Education and Higher Education. The fourth respondent was appointed by the Education Service Board of the Public Service Commission to fill the vacancy created by the transfer of the petitioner. On 10 April 1995 and 20 April 1995 the petitioner appealed in writing to the Secretary of the Education Service Board of the Public Service Commission. He also interviewed the Secretary on 12 April 1995. Consequently, the earlier order was varied and petitioner was, by letter dated 06 May 1995 issued by the Secretary of the Education Service Board, attached to the North Central Province Education Department, Anuradhapura.

The petitioner alleged that his fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by his transfer to the Ministry of Education and Higher Education. The petitioner's case is that although he did once belong to the Sri Lanka Education Administrative Service, yet when Provincial Councils were established, he was employed by the North Central Provincial Council which appointed him to various posts and paid his salary. He states that, in terms of Public Administration Circular No. 25/91 dated 03 July 1991, officials released to a Provincial Council would serve that Council for a period of four years; at the end of that period, the officer was entitled at his request to have his service with the Council extended. Until such a request was made he could not be transferred without the approval of the Head of the relevant Department of the Provincial Council. He had neither requested a transfer, nor had the transfer been made with the approval of the Head of his Department. On the other hand, the Additional Secretary (Education), on the

directions of the Minister of Education of the Provincial Council, had objected to the transfer of the petitioner. The petitioner maintains that the Secretary of the Education Service Board had no power to transfer the petitioner and frustrate his legitimate expectation of serving the North Central Provincial Council.

While it is not in dispute that the petitioner did serve the North Central Provincial Council and was appointed to various posts by that Council, there was no evidence placed before us to show that he had been released to serve the Provincial Council on secondment. All that the petitioner has been able to say is that "to the best of his knowledge and belief he signified his consent to be released to the North Central Provincial Council in terms of ... Circular 25/91." The petitioner referred to Public Administration Circular 10/89. That Circular prescribes the manner and form of release, and he could hardly be heard to say that he was ignorant of the procedures and requirements for release to serve on secondment.

If the petitioner had not been released on secondment in terms of the prescribed manner to serve in the Provincial Council of the North Central Province, then he would have been subject to the authority of the Education Service Board of the Public Service Commission and could legitimately have been transferred by that Board. If he had been released, as he believed, he might have come under the authority of the Provincial Council until 23 April 1993. After that date, however, he would, it seems, have been subject to the control of the Education Service Board even if he had been released on secondment, for Public Administration Circular No. 56/89 (1) issued on 23 April 1993 states that to be the case. On the date of the letter intimating his transfer, namely 28 March 1995, the petitioner was subject to the authority of the Education Service Board of the Public Service Commission in terms of Circular No. 56/89 (1).

However, learned counsel for the petitioner submitted that if Circular No. 56/89 (1) did permit the Education Service Board "to transfer any officer in the all-island services during their period of release to the Provincial Public Service unilaterally then ... this Circular is contrary to the Constitution which by the 13th Amendment

Provincial Council List has vested the transfer and disciplinary control of such officers in the Provincial Council. This circular, can only be made operative if such transfers are made on the recommendation or approval of the Provincial Public Service or the relevant Provincial Ministry. Further the question arises whether the consent of the officer should not be obtained if he is to be transferred out of the Province since his consent is obtained in respect of his transfer or appointment to the Provincial Public Service.”

The petitioner was neither transferred nor appointed to the provincial public service, and therefore the question of obtaining his consent before he was transferred does not arise. He did serve the North Central Provincial Council under some arrangement or on the basis of some tacit understanding, with regard to which the Court was not provided with any information. More importantly, there was no evidence placed before us to show that the petitioner was seconded in the manner prescribed by the relevant circulars to the Provincial Council, let alone being transferred or appointed to the provincial public service. The petitioner continued to be a member of the Sri Lanka Education Administrative Service and while he was serving the Provincial Council was promoted to Class II of that Service by the Education Service Board of the Public Service Commission.

Education and Educational Services are indeed placed on List 1 (the Provincial Council List) by the Thirteenth Amendment to the Constitution, but there is no unqualified devolution. List 1 states that the subject of education is devolved “to the extent set out in Appendix III”. Appendix III.3 states as follows: “The transfer and disciplinary control of all educational personnel, i.e. Teachers, Principals and Education Officers, Officers belonging to a National Service but serving the Provincial authority on secondment will have the right of appeal to the Public Service Commission. Officers belonging to the provincial public service will have a right to appeal to the Public Service Commission against dismissal.”

At first sight, the phrase “all educational personnel” would suggest that each and every person, without exception, engaged in providing

educational services, whether as a teacher, principal or as an education officer, would in terms of Appendix III.3 be subject to the powers of transfer and disciplinary control of the relevant Provincial Council.

However, the legal meaning of Appendix III.3 is that there are two kinds of officers who are subject to the power of transfer and disciplinary control of a Provincial Council: (1) those who belong to a National Service but serving a Provincial Council on secondment; and (2) those who belong to the provincial public service. A distinction is made between those who belong to a National Service and serve a Provincial Council on secondment on the one hand, and those who are members of a provincial public service. The former have a right of appeal to the Public Service Commission in respect of all matters connected with their employment, for, although for the time being they are subject to the powers of transfer and disciplinary control of the Provincial Council they serve, they are nevertheless members of a National Service coming therefore within the purview of the Public Service Commission. Those who belong to the provincial public service too have a right of appeal to the Public Service Commission, but only against an order of dismissal.

The petitioner does not belong to either class of officer referred to in Appendix III.3: he has not been seconded nor is he a member of a provincial public service. He belongs, in my view, to a third group – those who belong to a National Service, but whose services have been made available to Provincial Councils to support and assist them but not upon the basis of secondment. Persons in the third group would remain subject to the powers of transfer and disciplinary control of the Public Service Commission.

In the circumstances, I am of the view that the transfer of the petitioner was valid and in no way frustrates his legitimate expectations. The Secretary of the Education Service Board of the Public Service Commission has adduced evidence to establish that other officers having the status of the petitioner have also been transferred and that there has been no invidious discrimination.

For the reasons set out above, I declare that the petitioner's fundamental rights under Article 12(1) of the Constitution have not been violated and make order dismissing the petition; but, having regard to the important and debatable questions he has raised for consideration, without costs.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Application dismissed.
