# KARUNATHILAKA AND ANOTHER
# v
# THE PRINCIPAL
# G/DHARMASOKA MAHA VIDYALAYA AND OTHERS

SUPREME COURT.
SARATH SILVA, CJ.
DR. SHIRANI BANDARANAYAKE, J.
HECTOR YAPA, J.
S.C. (F.R.) APPLICATION NO. 334/2002.
22ND OCTOBER, 2002

*Fundamental Rights – Infringement of Article 12(1) of the Constitution – Basic principles governing the concept of equality - Mandatory duty to allocate an alternative school?*

The 2nd petitioner is an 11year old boy, represented by his next friend, the 1st petitioner, the mother of the 2nd petitioner. The 2nd respondent is the Director, National Schools of the Ministry of Education.

The 1st petitioner who was teaching at Jinarathana Maha Vidyalaya, situated in Galle was transferred to Dharmasoka Vidyalaya, Ambalangoda. Since then, she had been making applications to the 1st respondent, seeking admission for the 2nd petitioner to Dharmasoka Vidyalaya. The 2nd respondent had taken up the position that the 1st petitioner's transfer does not *per se* qualify the 2nd petitioner to be admitted to the said Dharmasoka Vidyalaya in terms of clause 13 of the School Admissions Circular No. 2001/15 as there were no vacancies in year 5 of the School concerned. The 2nd respondent's view in interpreting the aforesaid circular is that if there were more than 40 students, no more new students should be admitted to those classes.

**Held:**

(1) Clause 16 of the School Admission Circular No. 2001/15 stipulates a mandatory duty on the Educational Authorities to allocate an alternative school for a child who has been studying in a school which has classes only up to Grade 5.

(2) The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of

the concept of Equality, is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.

*Per* Dr. Shirani Bandaranayake, J.

".....The 2nd petitioner has been denied his cherished companion of education and compelled to languish at home whilst, the 1st petitioner, his mother teaches other children in the school located within 500 meters from his home. This was due to unreasonableness and arbitrariness in executive and administrative action in the failure to take necessary action in terms of Clauses 13 and 116 of Circular No. 2001/15, at the appropriate stage ...."

*Per* Dr. Shirani Bandaranayake, J.

".....Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home a friend, abroad an introduction. In solitude a solace, and in society an ornament. It chastens vice, it guides virtue, it gives at once, grace and government to genius. Without it what is man? A splendid slave, a reasoning savage..." (Joseph Addison, in "The Spectator")

**APPLICATION** in terms of Article 126 of the Constitution.

*Vasana Wickremasena* for petitioners.

*S. Barrie* S.C. for the respondents.

*Cur adv vult.*

November 25, 2002

**DR. SHIRANI BANDARANAYAKE, J.**

The 2nd petitioner in this application is an 11-year old boy, represented by his next friend, the 1st petitioner, who is the mother of the child. Presently the child is without a school and according to the submissions made, is at home striving hard to study in whichever the limited way it is conceivable. By the numerous letters which are filed of record, it appears that the 1st petitioner, a teacher by profession, has made every endeavour, for her son to obtain admission to G/Dharmasoka Vidyalaya, Ambalangoda, which is a mere 500 meters away from her permanent residence, to no avail.

The 1st petitioner joined the Government service as a teacher in September 1979, and was attached to Jinaratne Maha Vidyalaya, a school situated in Galle. During the period 1988-1989, she

underwent training at the Balapitiya Teachers' Training College and was transferred to Attavilluwa Medhananda Government School in Puttalam with effect from 01.01.1990. This transfer was effected on the basis of compulsory service for teachers in difficult or uncongenial areas in the country, which is generally limited to a period of 5 years. The 2nd petitioner was born in February 1991, while she was serving in Puttalam and became eligible to be admitted to the year 1 in January 1997. Since June 1995, the 1st petitioner had been requesting for a transfer to Ambalangoda, admittedly, that being her native place. The documents marked P2 dated 19.06.1995, P3 dated 07.08.1996, P4 dated 01.11.1998 and P5 dated 28.11.2000, bear ample testimony for her unremitting efforts to obtain a transfer to a place closer to her native place. Meanwhile the 2nd petitioner commenced his studies at St. Andrew's Primary School in Puttalam in January 1997; admittedly a school with classes upto Grade 5. Meanwhile the 1st petitioner was transferred to Dharmashoka Vidyalaya, Ambalangoda with effect from 15.06.2001 (P10). Since then, the 1st petitioner had been making applications to the 1st respondent, seeking admission for the 2nd petitioner to the said school.

The petitioners claim that the 1st to 4th respondents have acted contrary to Clause 15(a) and /or Clause 16 of the Circular No. 2001/15 (P22) and thereby infringed the 2nd petitioner's fundamental right to equality and equal protection of the law guaranteed to him by Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

It is not disputed that, the 2nd respondent is in charge of national schools as the Director of Education attached to the Ministry of Education. He, on the grievances of the 2nd petitioner, has taken the position that the 1st petitioner's transfer does not *per se* qualify the 2nd petitioner to be admitted to the same school, in terms of Clause 13 of the currently applicable School Admission Circular No. 2001/15. His explicit submission was that the maximum number of students per class in a Government school had to be maintained at 40 and if that number is exceeded, no further admissions should be made from the date of the publication of the said Circular. Due to

the above position, the 2nd respondent submitted that there were no vacancies in year 5 of Dharmashoka Vidyalaya and the application to admit the 2nd petitioner to Grade 5 in the year 2001 was therefore rejected.

Concerning the admission to Grade 6, he submitted that Clauses 14 and 15 of the Circular No. 2001/15, regulates such admissions. The students who pass the Grade 5 scholarship examination were entitled to apply for entrance to a different school wherein all such applications will be processed and selections made by the School Affairs Division of the Ministry of Education. For the Grade 5 scholarship holders to obtain entrance to a new school, a cut off mark would be worked out by the Ministry of Education based on the aggregate marks of all the applicants who have chosen the school, which results in the cut off mark differing from school to school. Consequently, the cut off mark for Dharmasoka Vidyalaya for admission to year 6 for the year 2002 was 148. The 2nd respondent took up the position that as the 2nd petitioner obtained only 139 marks (P7) he was not eligible for admission to the said school. Referring to the 6th, 8th and 10th respondents, who were admitted to Dharmashoka Vidyalaya, the 2nd respondent stated that, they were entitled to have a legitimate expectation of being admitted to the said school upon the marks they had obtained at the Grade 5 scholarship examination. He further took up the position that if the 2nd petitioner was admitted to Grade 6 of Dharmashoka Vidyalaya, that would cause grave prejudice to numerous other applicants, who have applied, but not selected as they have fallen short of the cut off mark by a few marks.

Admittedly the 2nd petitioner studied in a school at Puttalam, which had classes only upto Grade 5. Circular No. 2001/15 dated 29.05.2001 provided for such situations and Clause 16 specifically states that the Provincial Director of Education/Zonal Director of Education should provide alternative school for all students who have got through Grade 5 in such school. In such circumstances, it cannot be disputed that the educational authorities were responsible in allocating a school for the 2nd petitioner. Clause 16 referred to in Circular No. 2001/15, does not specify any obligation on the part of the parent to take any action for the purpose of such child gaining admission to a school.

No material was placed before this Court to establish that either the Provincial Director of Education for the North Western Province or the Zonal Director of Education for Puttalam, took any action to locate a suitable school for the 2nd petitioner. From a practical perspective it should have been the Provincial Director of Education for the Southern Province or the Zonal Director of Education for Ambalangoda, who should have allocated a school for the 2nd petitioner, as his mother was transferred to Dharmashoka Vidyalaya in June 2001. Admittedly, no steps were taken by any person in authority in compliance with Clause 16.

Learned State Counsel for the respondents took pains to submit that in terms of Clause 13.1 of Circular No. 2001/15, dated 29.05.2001, that the number of students in a class of a Government school cannot exceed 40. The said Clause states that, at the time the Circular was issued, if there were more than 40 students no more new students should be admitted to those classes. Indeed it is a laudable decision not to over crowd the classrooms, which would permit a better environment that would be conducive for the students in Government schools. However, it appears that the 1st respondent has paid no heed to the contents of this Clause. His letter dated 14.03.2002 to the 2nd respondent, which gives the breakdown of the number of students, as given below, demonstrates that all 10 classes of Grade 6 had more than 40 students, at a time well after the relevant Circular had come into effect.

| | |
|---|---|
| 6A - 44 | 6G - 44 |
| 6B - 45 | 6H - 45 |
| 6C - 44 | 6J - 44 |
| 6D - 45 | 6K - 45 |
| 6E - 45 | |
| 6F - 44 | |

In the circumstances it is revealing to note that the 8th respondent was admitted to Dharmashoka Vidyalaya on the basis of a letter, dated 08.05.2002, issued by a Director of Education (School Affairs) of the Ministry of Education. If I may reiterate, the 1st respondent, informed the 2nd respondent by letter dated 14.03.2002, that they are not having any vacancies, as all classes

are accommodating more than 40 students. However, the Ministry issued a letter in order to admit the 8th respondent ignoring the fact that all classes by that time had more than 40 students. It is also pertinent to note that the 8th respondent was moving from Sangamitta Girls School to Dharmashoka Vidyalaya. Admittedly, she had obtained 158 marks at the scholarship examination. However, Clause 13.1 does not refer to any special circumstances that should be taken into consideration in exceeding the maximum number of students in a class. It is thus clear that the 40 student limit in each class has been observed in the breach.

It is common ground that the 1st petitioner was endeavouring to admit the 2nd petitioner to Dharmashoka Vidyalaya since mid 2001. At that time the 2nd petitioner was studying in Grade 5 and the basis for such admission was the transfer of the mother, the 1st petitioner, from Puttalam to Ambalangoda. In this kind of a situation, the 1st respondent should have applied the guide-lines enumerated in Clause 13 of the Circular No. 2001/15.

Clause 13 of the said Circular dated 29.05.2001, provides for the following:

> "Vacancies in Grade 2 to 11 (excluding Grade six) should be filled from the students in the following categories:
>
> A) students, whose parents/lawful guardian, who are public servants and have come to reside in the area where the school is situated at;
>
> B) students whose parents/lawful guardian who has changed their/his permanent residence to the area where the school is situated at.

It is not disputed that the 2nd petitioner falls into both categories as the 1st petitioner was transferred and at the same time the 1st petitioner shifted her permanent residence from Puttalam to Ambalangoda. The 1st and the 2nd respondents could have, thus considered the admission of the 2nd petitioner on the basis of Clause 13 of Circular No. 2001/15 to Grade 5.

The 1st petitioner was compelled to work in Puttalam, considered an uncongenial area as an administrative requirement in the service. She has served more than double

the required period of 5 years. The 2nd petitioner, being the child, had to remain with the mother and receive his education in the same area, nearly 200 kilometers away from his native place. When the mother received the benefit of a transfer to her native place after more than a decade, it is only reasonable that the child should also receive the benefit of obtaining a school in the same area. Clause 13 vests the authorities with ample power to grant such benefits to the child. Instead of looking at the situation in a realistic and humane way, they have unreasonably refrained from acting in terms of Clause 13.

The significance of Clause 16 of the Circular, which is referred to earlier, could be seen with reference to section 37(2) of the Education Ordinance, No. 31 of 1939. This section refers to the powers conferred to the Minister to make Regulations for any matter referred under that section. The items under reference include the compulsive need for a child between the ages of 5 to 16 to attend school, and thus it reads as follows:

> "(s) requiring, subject to such exemptions and qualifications as may be contained in such regulations, the parent of any child not less than five and not more than sixteen years of age residing within such area, to cause such child to attend a school unless he has made adequate and suitable provision for the education of such child...."

Two broad aspects strike my mind on a consideration of the totality of the point at issue; firstly, a child at the tender age of 11 years falling prey to diffident decisions of the relevant authorities for no fault of his and secondly, having been made to approach the apex Court in the country to obtain redress for his grievance. These two matters, in my view speak volumes on the lackadaisical attitude of the authorities concerned in this extraordinarily important sphere of service.

The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality,

approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.

However, situations such as the instant case under review cannot be applauded, as the question in issue itself indicates clearly, that the refusal to admit the child to the school was not on a reasonable basis, but is a decision that rests on arbitrariness. At the time the 1st petitioner was transferred from Puttalam to Ambalangoda, the authorities should have acted in terms of Clauses 13 and 16 of the said Circular. To reiterate; Clause 13 enumerates a parents transfer and/or the change of residence as the basis for filling up vacancies in the Grades 2 to 11, excluding Grade 6, whereas Clause 16 stipulates a mandatory duty on the Educational authorities to allocate an alternative school for a child who has been studying in a school which has classes only up to Grade 5.

Considering the circumstances of this case, the following points are not in dispute; the 1st petitioner served in an uncongenial area for 11 years; she obtained a transfer to Dharmashoka Vidyalaya in June 2001, her present residence is a mere 500 meters away from the said school, her younger son was admitted to year 1 of Dharmasoka Vidyalaya in March 2002, the 2nd petitioner obtained 139 marks at the Grade 5 scholarship examination, he was attached to a school which has classes only up to Grade 5 and since January 2002, he is without a school.

It was Joseph Addison, in "The Spectator", who referred to the value of Education, in the following words:

> *"Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home a friend, abroad an introduction, in solitude a solace, and in society an ornament. It chastens vice, it guides virtue, it gives at once, grace and government to genius.*
>
> *Without it what is man? a splendid slave, a reasoning savage."*

The 2nd petitioner has been denied his cherished companion of education and compelled to languish at home whilst, the 1st petitioner, his mother teaches other children in the school located within 500 meters from his home. This was due to unreasonableness and arbitrariness in executive and administrative action in the failure to take necessary action in terms of Clauses 13 and 16 of Circular No. 2001/15, at the appropriate stage.

For the aforementioned reasons, I hold that the 2nd petitioner's fundamental right guaranteed under Article 12(1) has been infringed by the State. I have made the State responsible, as the liability of this infringement cannot be attributed to any single officer of the Ministry of Education. The 2nd respondent is directed to make necessary arrangements for the 2nd petitioner to be admitted to the Grade 6 of the G/Dharmashoka Maha Vidyalaya, Ambalangoda, forthwith. The State is directed to pay a sum of Rs. 25,000/- to the 2nd petitioner as compensation and costs, for being deprived of formal education at a vital stage in his life. This amount is to be deposited, within a month from today, in a "Hapan" Childrens' Savings Account at the National Savings Bank, Ambalangoda Branch in the name of the 2nd petitioner and the 1st petitioner as the guardian for such account.

**SARATH SILVA, C.J.** - I agree.

**YAPA, J.** - I agree.

*Application allowed.*