

**FAROOK
VS
DHARMARATNE, CHAIRMAN, PROVINCIAL PUBLIC SERVICE COMMISSION,
UVA AND OTHERS**

SUPREME COURT,
BANDARANAYAKE, J.
DISSANAYAKE, AND
FERNANDO, J.
SC (FR) APPLICATION NO. 508/2002
29TH SEPTEMBER, 2004..

Fundamental Rights - Transfer of petitioner as Principal, Razick Fareed Maha Vidyalaya procured by influence or deceit - Petitioner not eligible for Principal's post of that school - Subsequent appointment of eligible candidate challenged - Article 12(1) of the Constitution.

The petitioner who was in Grade I-I of the Sri Lanka Principals' Service was not eligible to apply for the post of Principal of Sir Razick Fareed Maha Vidyalaya. However, with the support of the Provincial Chief Minister of the Uva Province, he first became Principal of Liyanagahawela Tamil Vidyalaya for which he was not eligible and thereafter by deceit and with the support of the Provincial Ministry of Education he obtained an appointment as Principal of Razick Fareed Maha Vidyalaya. When the 05th respondent the Provincial Director of Education,

Uva realized the mistake the petitioner was duly transferred as the Principal of Pitarathmale No. 01 Tamil Vidyalaya and the 06th respondent who was eligible for higher status was appointed as Principal, Razick Fareed Maha Vidyalaya. The petitioner challenged that appointment of the 06th respondent as violative of Article 12(1) of the Constitution.

Held :

1. The petitioner was not eligible for appointment as Principal, Razick Fareed Maha Vidyalaya and obtained that appointment by deceit or influence.
2. There is no right under Article 12(1) to have to obtain an illegal appointment made, the right of the petitioner being the equal provision of the law (not equal violation)

Cases referred to :

1. *Ajaya Hasia v Kalid Mujib* (1981) AIR SC 487
2. *C. W. Mackie and Company Ltd v Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986) 1 Sri LR 300 at page 309.

APPLICATION for relief for infringement of fundamental rights.

Dr. Jayampathi Wickramaratne, PC, with Pubudini Wickramaratne for petitioner.

S. Herath, State Counsel for the 01st to 05th and 07th respondents.

Cur.adv.vult.

25th October, 2004,

SHIRANI BANDARANAYAKE, J.

The petitioner served as the Principal of Liyanagahawela Tamil Vidyalaya since 01.06.1993 (P3) until 06.02.2000. As submitted by the petitioner on a request made by the then Chief Minister of Uva Province Mr. Samaraweera Weerawanni, he was appointed to the post of Advisor on Muslim Culture to the Ministry of Education, Health Services, Cultural, Youth Affairs, Sports and Co-operatives of the Uva Province. He had assumed duties in the said

post on 07.02.2000 (P4). After the resignation of Mr. Weerawanni from the People's Alliance, the petitioner had received credible information that the new Chief Minister was contemplating to remove the petitioner from his post as the Advisor of the aforementioned Ministry. He had therefore made a request to the Secretary of the said Ministry by his letter dated 26.12.2001 to release him from the said post and to appoint him as the Principal of Sir Razick Fareed Maha Vidyalaya at Bandarawela. At that time, according to the petitioner, the said post had been vacant.

By letter dated 16.01.2002, the petitioner was sent as the Principal of Sir Razick Fareed Maha Vidyalaya (P6) and the petitioner had assumed duties in the said post on 17.01.2002. However, on 17.01.2002, the 05th respondent had cancelled the petitioner's transfer to Sir Razick Fareed Maha Vidyalaya and transferred him to Liyanagahawela Tamil Vidyalaya as its Deputy Principal (P7). Thereafter the petitioner had made representations against his transfer to Her Excellency the President, the Governor of the Uva Province, the Minister of Education of the Central Government, the Chief Minister of the Uva Province and the Secretary to the Provincial Ministry of Education (P8). The petitioner claimed that he was in Grade II of the Sri Lanka Principals' Service with effect from 01.06.1996.

By letter dated 30.01.2002, the Secretary of the Provincial Ministry of Education informed the petitioner that his transfer to Liyanagahawela Tamil Vidyalaya was cancelled and that he had been appointed as the Principal of Sir Razick Fareed Maha Vidyalaya, Bandarawela (P10). By Circular dated 18.02.2002, the Provincial Director of Education called for applications for the posts of Principals in various schools in the Uva Province (P11) and the Circular had stated that the post of Principal of Sir Razick Fareed Maha Vidyalaya is vacant from 29.10.2001. Thereafter on 14.08.2002, to the surprise of the petitioner he has received a letter dated 14.08.2002 from the 05th respondent transferring him to Pitarathmale No. 01, Tamil Vidyalaya with immediate effect (P13.). The 06th respondent who was serving as the Principal of Pitarathmale No. 01 Tamil Vidyalaya was transferred as Principal Sir Razick Fareed Maha Vidyalaya by letter of even date (P14).

The petitioner submitted that to the best of his knowledge, Pitarathmale No. 01 Tamil Vidyalaya is a Grade II School with classes upto Grade 11 and it is an Estate School 15 kilometers away from Bandarawela. The school consists 100% Tamil Students and the general practice of the Ministry of Education is to have a Tamil Principal in such schools. He further submitted that, the 06th respondent is not a graduate whereas the petitioner is one of the four Muslim Graduate teachers in the Bandarawela Education Zone.

The petitioner contended that he has credible information that his sudden transfer to Pitarathmale No. 1 Tamil Vidyalaya was effected on the instructions of one A. M. Buddhadasa, Chief Minister of Uva Province and M. H. M. Mubarak, Member of the Uva Provincial Council. He further contended that he is being victimized due to his close relationship with Mr. Samaraweera Weerawanni, who appointed the petitioner to the post of Advisor on Muslim Culture. The petitioner claimed that his sudden transfer is contrary to the principles laid down in Circular P11 as the transfer was made without any reference to a Transfer Board and to a school where the post of principal is not vacant. Also there was no reason to effect such a sudden transfer. The petitioner therefore claimed that in the aforesaid circumstances his transfer as Principal to Pitarathmale No. 1 Tamil Vidyalaya, is arbitrary, capricious and unreasonable and thereby is in violation of his fundamental rights guaranteed to him under Article 12(1) of the Constitution. Further he claimed that as the transfer was effected due to his close relationship with Samaraweera Weerawanni, it is in violation of Article 12(2) of the Constitution.

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

The 5th respondent, who is the Provincial Director of Education of the Uva Province, in his affidavit had averred that, at a time when the petitioner was officiating in the capacity of Principal of Liyanagahawela Tamil Vidyalaya at Bandarawela, he was appointed to the Sri Lanka Principals' Service on supernumerary basis with effect from 01.06.1993. These appointments were made consequent to a decision of the Cabinet of Ministers to grant supernumerary appointments in the Sri Lanka Principals'

Service to persons serving as Acting Principals at the relevant time. According to the 5th respondent, such supernumerary appointees did not sit for the usual examination conducted for appointments for the Sri Lanka Principals' Service and it was expected that they would continue to provide their services in the same schools or in schools of similar standing. The 5th respondent has further averred that the petitioner was granted the supernumerary appointment to the Sri Lanka Principals' Service purely for the reason that he was acting as Principal at Liyanagahawela Tamil Vidyalaya. Referring to the position taken by the petitioner regarding his transfer to Razick Fareed Maha Vidyalaya and to Liyanagahawela Tamil Vidyalaya, the 5th respondent has averred in his affidavit in the following terms :

"..... I also received the letter dated 10.01.2002 from the Secretary to the Ministry of Education, Health, Sports, Transport, Tourism Estate Infrastructure and Hindu Cultural Affairs of the Uva Provincial Council whereby he forwarded the petitioner's request to him for an appointment as the Principal of Razick Fareed Maha Vidyalaya for necessary action (5R4).

As the petitioner was released from the Liyanagahawela Tamil Vidyalaya, upon reversion his appointment should have been to the same school, but in order to accommodate his request I authorized his transfer to Razick Fareed Maha Vidyalaya, Bandarawela, but to the post of Deputy Principal as there was already a person acting in the capacity of Principal in the said school.

However, the then Deputy Director of Education was of the opinion that it would not be appropriate to appoint the petitioner who was a SLEAS Officer to the post of Deputy Principal as the Acting Principal was not a SLEAS Officer and therefore made the minute dated 16.01.2002.

Before I could consider the said minute of the Deputy Director of Education and make a decision thereon, the petitioner had falsely informed the Deputy Director of Education that I had authorized his appointment as Principal to Razick Fareed Maha Vidyalaya until a permanent appointment is made consequent to an interview and having believed the petitioner the then Deputy Director of Education had issued to him the transfer letter dated 16.01.2002 transferring him from Liyanagahawela Tamil Vidyalaya to Razick

Fareed Maha Vidyalaya as Principal until interviews are held and a permanent Principal is appointed (an affidavit sworn by the then Deputy Director of Education and the Subject Clerk is annexed hereto marked as 5R5)."

The 5th respondent had further averred that,

"The issue of the said transfer letter (P6) was never authorized by me and when I realized that the petitioner had procured the said transfer letter by deceit I immediately cancelled the said transfer and directed the petitioner to revert to Liyanagahawela Tamil Vidyalaya by letter dated 17.01.2003 (P7) (emphasis added)."

The dates of the aforementioned letters of transfers are indicative as to how the petitioner has procured his transfer. The initial letter of transfer from Liyanagahawela Tamil Maha Vidyalaya to Razick Fareed Maha Vidyalaya is dated 16.01.2002 and was signed by the Deputy Director of Education. The petitioner was to assume duties with immediate effect. The letter of cancellation of such transfer and directing the petitioner to assume duties at Liyanagahawela Tamil Maha Vidyalaya is dated 17.01.2002 and is signed by the Provincial Director of Education. By letter dated 21.01.2002 the petitioner informed the Chief Minister of the Uva Province that he had assumed duties at Razick Fareed Maha Vidyalaya on 17.01.2002 and to permit him to continue serving in that school. The Secretary of the Provincial Ministry of Education refers to the letter sent by the petitioner to the Provincial Director of Education for suitable action and on 30.01.2002 the Assistant Secretary of the Provincial Ministry of Education informed the petitioner that the transfer to Liyanagahawela Tamil School has been cancelled and that now he is appointed as the Principal of Razick Fareed Maha Vidyalaya.

The sequence of letters referred to above substantiates the contention of the 5th respondent that the petitioner has procured the said transfer to Razick Fareed Maha Vidyalaya not by the normal routine procedure of obtaining a transfer, but by adopting deceitful practice.

It is to be borne in mind that Razick Fareed Maha Vidyalaya is a Grade IC school. In terms of the Circular No. 23 of 1998, only a person who is in

Grade I, II or III of the Sri Lanka Educational Administrative Service or a person in Grade I of the Sri Lanka Principals' Service would be entitled to apply for the vacancies of a Principal's post. Admittedly the petitioner is in Grade II - I of the Sri Lanka Principals' Service and therefore is not qualified to apply for the Principal's post at Razick Fareed Maha Vidyalaya.

Furthermore, it is to be noted that in terms of the Circular, No. 23 of 1998, when steps are being taken to fill up the vacancies in the post of Principal in a Grade IA, B or C school, the Provincial Administrators have to inform the Ministry of Education at least 3 months prior to such decision being taken.

The petitioner has complained that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution have been violated by the respondents. Article 12(1) of the Constitution which speaks of equal treatment, reads thus,

"All persons are equal before the law and are entitled to the equal protection of the law."

Article 12(1) of the Constitution embodies the basic principle that equal laws apply alike to all in any similar situation. Thus it is envisaged that there would be no discrimination by those entrusted with the powers of administration when discharging their administrative functions. In *Ajay Hasia v Khalid Mujib*⁽¹⁾ reference was made to the concept of equality and it was stated that,

Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law....."

The petitioner's allegation is that the respondents have infringed his fundamental rights by transferring him to Pitarathmale No. 1 Tamil Vidyalaya

and that they should have allowed him to remain as the Principal of Razick Fareed Maha Vidyalaya. It is common ground that the petitioner was appointed to the Razick Fareed Maha Vidyalaya as the Principal on 30.01.2002 on the orders of the Assistant Secretary of the Provincial Ministry of Education. However, as clearly pointed out earlier the said school which is categorised as a Grade IC school requires, according to Circular No. 23 of 1998, a person who is in Grade I of the Sri Lanka Principals' Service. Admittedly the petitioner is in Grade II - I of the Sri Lanka Principals' Service and therefore is not qualified to be appointed to Razick Fareed Maha Vidyalaya. The petitioner claimed that he would be facing several hardships if he is not given Razick Fareed Maha Vidyalaya as his wife was also transferred to the said school in year 2000. His position is that after he moved to the Principal's quarters of the said school their earlier residence, which belonged to his wife, was given on lease in February, 2002.

The petitioner's relief sought from this Court is to declare that his transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the forgoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his fundamental rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act. In *C. W. Mackie and Company Ltd. v Hugh Molagoda, Commissioner General of Inland Revenue and others*⁽²⁾ it was stated that,

“But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law.”

For the aforesaid reasons I hold that the petitioner has failed to establish the alleged violation of Article 12(1) of the Constitution. This application is accordingly dismissed, but in all the circumstances of the case without costs.

DISSANAYAKE J – I agree.

FERNANDO, J. - I agree.

Application dismissed.
