

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A 250/2013 &
C.A 251/2013

Nirmala Hemamali Dissanayake
61/A1, Dambahena Road,
Maharagama.

PETITIONER

Vs.

3. P.M. Salahudeen
Director of Education
Teacher Transfer Unit,
Ministry of Education,
"Isurupaya", Battaramulla.

14. Anura Dissanayake
Secretary (Acting)
Ministry of Education,
"Isurupaya", Battaramulla.

And 12 others

RESPONDENTS

Withanage Kalyani Dissanayake
"Vijayasiri",
Udagama,
Bope.

PETITIONER

C.A 250/2013 &
C.A 251/2013

Vs.

2. Ranjith Chandrasekera
Director, National School
Ministry of Education,
"Isurupaya", Battaramulla.
3. P.M. Salahudeen
Director of Education
Teacher Transfer Unit,
Ministry of Education,
"Isurupaya", Battaramulla.
14. Anura Dissanayake
Secretary (Acting)
Ministry of Education,
"Isurupaya", Battaramulla.

And 11 others

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Nalin Amarajeewa for the Petitioner
Sanjeeva Jayawardena P.C. for 4th Respondent
Rajaratnam D.S.G. for 1st – 3rd & 5th – 14th Respondents

ARGUED ON: 30.01.2014

DECIDED ON: 12.02.2014

GOONERATNE J.

The two Petitioners in these applications for a Writ of Certiorari, seeks to cancel letter marked P5a of 16.7.2013 pertaining to a transfer order from one national school to another national school. Order of this court, on the said applications deal with both applications since the identical issue is being canvassed by the two Petitioners who were Teachers at Royal College, Colombo 7. Petitioner in CA 250/2013 was by letter P5a transferred to Thurston College, Colombo 7 and the other Petitioner in CA 251/2013 was by letter P5a transferred to Isipathana College. Both applications were supported before this court on 31.1.2014 and the learned Deputy Solicitor General who appeared for 1st – 3rd and 5th – 14th Respondent raised a preliminary objection and contended that in view of Article 61A (17th Amendment) to the Constitution of our country, court has no jurisdiction to inquire into or call in question the impugned order made by the 1st Respondent. Secretary to the Minister of Education as per letter marked P5a.

All counsel who appeared for the Petitioners and the Respondents were heard by this court in support of each other case. Learned Counsel for the Petitioner contends that the above article 61A of the Constitution has no

application in the context and circumstances of these applications, Perusal of the body of the Petition of the petitioners, we find that several allegations are stated therein. The grounds on which the Petitioners rely to quash letter P5a are more particularly referred to in paragraphs 12 & 14 of application No. 250 7 251 respectively. Petitioners in their respective applications attempt to establish that the transfer effected in letter P5a was done at the instigation and or behest of the 4th Respondent and as such P5a is illegal, nullity, unreasonable, void etc.

However this court is of the view that provisions contained in Article 61A of the Constitution is a complete bar and a jurisdictional ouster and only the Apex Court would have jurisdiction to inquire as contained therein.

Article 61A reads thus:

Subject to the provisions of paragraphs (1), (2), (3), (4) & (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or impose on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

We had the benefit of perusing the following authorities cited by learned Deputy Solicitor General. The case of Ratnasiri & Others Vs. Ellawala & Others 2004 (2) SLR 180/181 considers a variety of issues as follows which are inter alia relevant to the cases in hand.

Held:

- (i) Article 61A – 17th Amendment – seeks to oust the jurisdiction of courts to review determination of the P.S.C except where there has been a violation or imminent violation of a fundamental right.

Per Saleem Marsoof, J. P/CA.

“The seventeenth Amendment has brought about several fundamental changes in relation to the public service, the most important of which was the abolition of the pleasure principle which was recognized by our law as a fundamental norm inherent in the prerogative of the British Crown and was expressly embodied in every Constitution of this country since 1946”.

- (ii) Provisions of the Establishment Code such as Cap. III:5:I being subordinate legislation cannot prevail over or inhibit the application of Article 61 in terms of which the decision of the P.S.C which has been made in pursuance of powers vested in the P.S.C by Article 65 is precluded from judicial review.
- (iii) However Article 55 (5) would be of no effect if the order is made by an officer who does not have legal authority to do so. In such cases it could be held that the decision of the relevant authority is null and void and the preclusive clause is no bar to review.
- (iv) As the impugned decision of the 1-3 respondents who purported to act the T.A.B. was clearly not made in pursuance of any power or duty conferred or imposed on them by any provision of law or delegated to them by the P.S.C. Article 61A has no application to the impugned decision.

Per Saleem Marsoof, J. P/CA.

“I am inclined to the view that the P.S.C. as well as a Committee of the Commission or a Public Officer exercising delegated authority may in appropriate circumstances ratify an order made or action taken by a public officer without authority; there is nothing in the

Constitution or any law to prevent the respondent Secretary, from making a decision in regard to a matter where some person or body of persons has previously made some decision without any authority to do so.

- (v) The decision or determination made by the 4th respondent Secretary, being the decision or determination of a public officer exercising authority delegated by the P.S.C. are precluded from judicial review by Article 61A
- (vi) It is futile to issue a writ, since what is sought to be quashed therein is the decision said to have been made by the T.A.B. however the 4th respondent to whom the power of transfer has been delegated by the P.S.C. has approved and adopted the decision of the TAB. No relief has been sought against that decision; therefore it would be futile to grant the relief prayed for since it would still leave intact the decision of the 4th respondent.

On the question of ouster of Jurisdiction the Case of Katugampola vs. Commissioner General of Excise and others 2003 (3) SLR 207 need to be considered.

The petitioner sought (1) to quash the decision taken by the Public Service Commission to cancel the examination (2) a writ of mandamus to release and declare the results of the examination already held.

Held:

- (i) Art 55 (5) restricted the application to orders or decrees concerning appointment, transfer dismissal or disciplinary control of a public officer. Whereas Article 61A (17th amendment) dealt with any type of decision so long as it is made pursuant to a power conferred.

- (ii) The only ground upon which the writ jurisdiction could be sought under circumstances where a challenge was being made regarding the promotion and/or appointment, transfer etc. was where the person who made the impugned decision, did not have any legal authority to make such a decision.

No claim has been made that the person who make the promotion had no legal authority to make such decision.

- (iii) 'Ouster clause' precluded the jurisdiction of the Court of Appeal and grants exclusive jurisdiction to the Supreme Court. A person aggrieved by the decision would have to invoke the jurisdiction of the Supreme Court under Article 126.

The applicability of Article 61A no doubt oust the jurisdictions of court but would not have any applicability if it could be shown that there had not been a proper delegation of power as required by the said article. A Writ of certiorari is sought in the application in hand more particularly for the reason stated in para 12 & 14 of the petition of the relevant applications that the transfer has been done by the 1st Respondent at the instigation and or behest of the 4th Respondent. There is no challenge to delegation of power. In fact para 2(1) of the petition reiterate some aspect of mala fides (but only a mere statement) and para 2(v) of the petition support the view there had been a delegation of power by the Public Service Commission.

This court having heard counsel on either side is of the view that these are not fit and proper applications to issue formal notice. As such we refuse to issue notice. Applications dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL