

DE WAAS GUNAWARDENA
v.
NATIONAL SAVINGS BANK AND ANOTHER

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
GUNASEKERA, J.
SC APPLICATION NO. 408/97
OCTOBER 20, 1998

Fundamental rights – Refusal to grant an extension of service – Unreasonable and arbitrary decision – Article 12 (1) of the Constitution.

The petitioner joined the public service in 1972. In 1992 she was Deputy Director, Ministry of Agricultural Development and Research. Later that year, the petitioner was temporarily released to the 1st respondent Bank and appointed as Consultant of its Janasaviya Implementation Division. Thereafter she was absorbed into the permanent cadre of the 1st respondent and appointed Deputy General Manager (DGM) in view of her experience including in projects for rural uplift and in anticipation of the proposed reorganization of the Bank to assist certain development programmes. On 04.01.1996 the petitioner had applied for her first extension of service up to 06.06.1997 and on 03.01.1997 for her second extension. On 31.12.1996 the 1st respondent's involvement in the implementation of the Janasaviya scheme came to an end. On 08.04.1997 the new Chairman submitted a Board paper representing that the petitioner had been appointed DGM (Janasaviya), that as the 1st respondent had no connection with the Janasaviya scheme after 31.12.1996 there was no longer any work for the petitioner. Hence she should not be granted any extension after 31.12.1996 but that on sympathetic grounds her services should be extended up to 06.06.1997. Consequently the Board refused the petitioner's second extension.

Held:

The petitioner had been appointed in 1993 as DGM; that there was no basis whatever for treating her functions as being limited to "Janasaviya" activities; that the decision of the 1st respondent to refuse her second extension was unreasonable, arbitrary and perverse and hence violative of her rights under Article 12 (1) of the Constitution.

Case referred to:

Madurapperuma v. Junaid SC No. 437/96 SC minutes 26th March, 1997.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonasekera with *G. Alagaratnam* for the petitioner.

K. Sripavan, DSG for the respondents.

Cur. adv. vult.

December 2, 1998.

FERNANDO, J.

The petitioner complains that her fundamental right under Article 12 (1) has been infringed by the 1st respondent, the National Savings Bank, by the arbitrary, unreasonable and/or malicious refusal of her second extension of service, from 7.6.97 to 6.6.98.

The petitioner joined the public service in 1972. In 1992 she was holding the post of Deputy Director, Ministry of Agricultural Development and Research. The responsibility of making monthly interest payments to Janasaviya families was entrusted to the 1st respondent.

The Establishments Code provides in chapter V for the release of public officers to other posts in the public service (section 1) as well as for service outside the public service (section 2):

2. Release for service outside the Public Service:

2:1 An officer may be released for service outside the Public Service (as for instance in a Public Corporation) only with the sanction of the Appointing Authority and any other authority whose concurrence is required by the law under which the Corporation or Board is constituted.

2:2 Every such release requires the concurrence of the Director of Establishments as well, to ensure the preservation of pension rights of a public officer during a period of temporary release to a Public Corporation and, in the case of permanent release, the conferment of benefits under the Minutes on Pensions in respect of services under the Government.

2:3 An application for release (Temporary or Permanent) should be made on a form as in specimen given at Appendix 6 by the Appointing Authority of the officer's substantive post through the Secretary to his Ministry and the Secretary to the Ministry under which (*sic*) the Public Corporation to which it is proposed to release the officer . . .

2:5 If the officer is released temporarily, the terms of his release will be as follows:

2:5:1 The period of release should not exceed 2 years. Before the expiry of the period of temporary release he should opt either to revert to his former post or (if the Public Corporation desires to retain his services permanently) to be permanently released to that Public Corporation . . .

2:6 If an officer is permanently released for service in a Public Corporation, the terms and conditions of his release will be governed by the law under which that Public Corporation is constituted and by the relevant provisions of the Minutes on Pensions.

The then Chairman of the 1st respondent made an application to the Secretary, Ministry of Agricultural Development and Research, through the Secretary, Ministry of Finance, for the petitioner's temporary release "to be attached to Janasaviya Implementation Division". The 1st respondent selected the petitioner "in view of her experience in the implementation of the Income Support Scheme, which had (similar) features". By letter dated 5.8.92 the Secretary of the Ministry of Agricultural Development and Research informed the Deputy Secretary to the Treasury that she was released to the 1st respondent "to implement the Janasaviya programme". The 1st respondent appointed her as Consultant of its Janasaviya Division.

Thereafter the petitioner was absorbed into the permanent cadre of the 1st respondent, with effect from 1.8.93, to a post outside the normal cadre of the Bank. As I held in *Madurapperuma v. Junaid*, SC No. 437/96, SCM 26.3.97, a permanent release requires the concurrence of "the Appointing Authority of the officer's substantive

post". The 1st respondent has not produced the application for permanent release (cf. section 2.3), but I assume that the necessary sanction or concurrence had been obtained because the validity or the regularity of the petitioner's temporary and permanent releases was not disputed.

The only point of dispute is whether she was appointed as "Deputy General Manager" (DGM) or as "DGM (Janasaviya)", and I now turn to the documents relating to that appointment.

The then Chairman submitted a Board paper dated 19.7.93, stating that:

"[The petitioner's] discipline is mainly that of a planner, but she also possesses wide experience in management and administration. She has been responsible during most part of her career in the Public Service with the planning of programmes and projects meant for the rural uplift, their implementation and review. *Her experience would be of particular use to the NSB in the near future when NSB funds are to be made available for development programmes with direct economic relevance, following the restructuring and reorganisation of the Bank . . .*

During the period [the petitioner] has been employed in the Bank, she has amply proved her capabilities in organising, implementing and managing the responsibilities entrusted to her. *Besides, she has contributed to other work as well.*" [emphasis added throughout.]

He recommended to the Board that the petitioner be permanently appointed to a post outside the normal cadre of the Bank, and that "she be designated DGM". At a meeting held on 21.7.93 the Board granted approval for that appointment. The following letter of appointment dated 22.7.93 was issued to her:

"It has been decided to absorb you to the permanent cadre of the National Savings Bank with effect from 1st August, 1993. The terms and conditions applicable to your absorption as stated above are given hereunder.

- (i) Your appointment to the permanent cadre of the NSB will take effect from 01.08.93.
- (ii) You will be designated DGM on the salary scale of . . .
- (iii) You will be placed on the salary point of . . .
- (iv) Your post will be outside the normal cadre of the Bank.
- (v) You will be subject to the usual conditions of service applicable to the employees of the Bank.

If you are willing to accept the appointment subject to these conditions, please sign and return to me the copy of the letter sent herewith . . ."

She accepted:

"I hereby give my consent to be absorbed to the permanent cadre of the National Savings Bank and to be appointed to the post of DGM, subject to the terms and conditions stated herein."

Shortly thereafter, in a circular dated 8.9.93 the staff were notified that the Rural Credit Section, Matara, had been placed under the supervision of "Mrs. J. B. de Waas Gunawardena, DGM".

The employment agreement between the 1st respondent and the petitioner was thus reduced to writing, in the form of that letter of appointment. That was prepared by the 1st respondent, and must therefore be interpreted *contra proferentem* in the event of ambiguity. However, there is not even a hint in the letter of appointment – or in the Board paper and the Board decision which preceded it – that her appointment as "DGM" was in any way limited or restricted to "Janasaviya" functions.

I am of the view, therefore, that the petitioner was appointed as "DGM", without any limitation as to the functions of that post. That is supported by an affidavit tendered by the former Chairman. Although

the present Chairman now asserts the contrary, he had no personal knowledge of the facts and circumstances as he was appointed only about a year later; and indeed, it was only much later, in April, 1997, that he alleged such a limitation.

Two officers of the 1st respondent, filed CA Application No. 931/93, praying for *Certiorari* to quash the petitioner's appointment as "DGM", and for *Mandamus* to direct the 1st respondent to make a proper appointment. The then Chairman and Board decided to resist that application, and agreed to reimburse the petitioner the expense of retaining her own counsel. However, thereafter the Board was reconstituted, and on 7.11.94, the present Chairman and Board decided not to contest that application, and to discontinue reimbursement of the petitioner's legal expenses. The Court of Appeal made order on 17.1.96 quashing her appointment on the ground that the failure to advertise it was a procedural irregularity. By letter dated 23.1.96 the General Manager of the 1st respondent told the petitioner that that was her last working day.

That attitude resulted in a very inequitable position. The petitioner had given up her employment in the public service by virtue of her permanent release in August, 1993; and she ceased to function as Consultant upon her appointment – which was in effect a promotion – as DGM. The quashing or annulment of that appointment by the Court of Appeal ought to have resulted in the reversion to the *status quo*. However, the 1st respondent took up the position that upon the quashing of her appointment as DGM, her employment under the 1st respondent came to an end – and that, too, despite the fact that the 1st respondent continued to have functions in relation to the Janasaviya scheme.

The petitioner applied for and obtained special leave to appeal against that order on 3.7.96. This court made an interim order that the petitioner would be "entitled to continue to function *in the capacity which she held* immediately prior to her appointment as Deputy General Manager, and to draw the relevant emoluments with effect from the date of the Court of Appeal Order". The 1st respondent did not comply with that order. Instead, the present Chairman made a

totally irrelevant request to the Ministry of Agricultural Development and Research to restore her to the position which she had held in that Ministry before her permanent appointment as DGM. He claimed that before that appointment the petitioner held no *permanent* post in the 1st respondent Bank, and that the Attorney-General's Department had advised that in compliance with the order of this Court she should be restored to the position she held *in the Ministry*. That was a blatant distortion of the order of this court, because that order made no reference to any previous *permanent* post, and required that she should function "in the *capacity* which she [previously] held", which *capacity*, unmistakably, was that of Consultant, Janasaviya. Clearly, the Chairman's request was just an unworthy pretext to delay, if not to circumvent, the implementation of the interim order. It was only after a further order made by this court on 3.10.96 – three months later – that she was allowed to resume duties in her former capacity of Consultant.

On 31.3.97 this court set aside the order of the Court of Appeal and upheld the petitioner's appointment as DGM (SC Appeal No. 88/96, SCM 31.3.97).

It would appear from the judgments of the Court of Appeal and of this court that all parties in the writ application proceeded on the basis that in August, 1993, the petitioner had been appointed as "DGM". No one seems to have suggested that she had been appointed as "DGM (Janasaviya)".

In the meantime, on 4.1.96 the petitioner had applied for her first extension of service, up to 6.6.97, and on 3.1.97 for her second extension. She received no response. On 31.12.96 the 1st respondent's involvement in the implementation of the Janasaviya scheme came to an end.

Thus in April, 1997, the 1st respondent had to decide what action it would take to comply with the order of this court upholding her appointment as DGM, and in respect of the petitioner's applications for extensions of service.

With otherwise commendable promptitude, the Chairman of the 1st respondent submitted a Board paper dated 8.4.97, with the manifest intention of inducing the Board to believe that in August, 1993, the petitioner had been appointed as "DGM (Janasaviya)", and not as

"DGM"; that her 1993 appointment had been made solely because of her experience with the "Income Support Scheme"; that since her functions were thereby confined to the Janasaviya scheme, with which the 1st respondent had no connection after 31.12.96, there was no longer any work for her; and that therefore she should not be granted any extension after 31.12.96 – but that on sympathetic grounds her services should be extended up to 6.6.97. That Board paper concealed the facts and circumstances and completely distorted the truth as to the petitioner's appointment, in two important respects.

First, as to the appointment itself, the Chairman alleged:

"The post to which she was appointed, *ie DGM (Janasaviya)* was categorized as a post outside the normal cadre of the Bank. This was also stated in the letter of appointment issued to [the petitioner] dated 22nd July, 1993". [emphasis added]

That was a manifest misrepresentation of the 1993 Board paper and Board decision, and the letter of appointment, all of which neither described the petitioner's appointment as "DGM (*Janasaviya*)", nor limited her post or her functions to "Janasaviya" matters.

Second, as to the reasons for that appointment, the Chairman represented that:

". . . the Board of Directors approved the absorption of [the petitioner] on a permanent basis as a DGM with effect from 1.8.93. In the recommendation made to the Board by the then Chairman *the reason for the appointment was stated as follows:*

[The petitioner] was engaged as Consultant, Janasaviya Division with effect from August 10, 1992, in view of her experience in implementing many rural based development programmes and particularly the Income Support Scheme for Unemployed Youth . . ."

". . . She was absorbed to the permanent cadre of the Bank on 1.8.93 *in view of the experience she is alleged to have had in the Income Support Scheme* which was familiar to the Janasaviya Interest Payment Scheme."

That was a flagrant distortion of the facts. The petitioner's "Income Support Scheme" experience was the reason for her 1992 temporary appointment as Consultant. Quite plainly, that that was not the reason for her 1993 permanent appointment. The Chairman, inexcusably, withheld the very specific reasons which the former Chairman had given the former Board when recommending her permanent appointment:

". . . Her experience would be of particular use to the NSB in the near future when NSB funds are to be made available for development programmes with direct economic relevance, following the restructuring and reorganisation of the Bank . . .

During the period [the petitioner] has been employed in the Bank, she has amply proved her capabilities in organising, implementing and managing the responsibilities entrusted to her. Besides, she has contributed to other work as well".

The very next day, on 9.4.97, the Board considered that Board paper, and *for the reasons stated in that paper* (nothing else is mentioned) refused the petitioner's second extension. The Board minute does not indicate that the 1993 Board paper and Board decision, or the letter of appointment, had been made available to, or considered by, the other Board members. That decision was thus one procured by concealment and misrepresentation of facts. Had the facts been fully and accurately disclosed, and fairly considered, no reasonable Board could possibly have come to the conclusion that the petitioner had been appointed as DGM (Janasaviya), and that consequently there was no longer any work for her, compelling the refusal of any further extension of service – despite the practice of giving senior officers of comparable rank extensions upto the age of sixty.

It was submitted on behalf of the 1st respondent that the petitioner had been appointed to a post "outside the normal cadre of the Bank". This court has already held that appointment to be valid. From the fact that it was outside the normal cadre it does not follow that its functions were limited to Janasaviya activities: on the contrary, the documents relating to the appointment confirm that it was intended

that the functions of that post should be more extensive. Reliance was also placed on the description of her post as "DGM (Janasaviya)" in various subsequent documents. Those documents cannot be used to contradict or vary the terms of the August, 1993, Board paper, Board decision, and letter of appointment. Finally, it was argued that because the petitioner's temporary release was to implement the Janasaviya program and/or because she was attached to the 1st respondent's Janasaviya implementation division, necessarily her permanent release could only have been for that same purpose; and that upon that purpose ceasing to exist, her employment must come to an end. Chapter V, section 2, of the Establishments Code contains no such provision, express or implied, although section 2.6 refers to other terms and conditions. Even assuming that the relevant authorities might lawfully have refused the permanent release of the petitioner for a purpose other than Janasaviya activities, yet there is no evidence that they granted sanction for release only upon that condition – since the documents relating to the release have not been produced it must be presumed that they do not contain such a condition. In the absence of express provision, I must decline to introduce into the Establishments Code, by means of interpretation, a condition which would cause such manifest hardship and injustice. Further, had the petitioner been told in August, 1993, that the seemingly permanent employment offered to her was – contrary to the Board paper – dependent on the 1st respondent continuing its Janasaviya activities, she may well have opted instead to revert to the public service. I am therefore not prepared to impose upon her permanent release terms and conditions which neither the Establishments Code nor the 1st respondent stipulated.

I hold that the petitioner had been appointed in 1993 as "DGM"; that there was no basis whatever for treating her functions as being limited to the 1st respondent's "Janasaviya" activities; that the decision of the Board of the 1st respondent to refuse her second extension of service was unreasonable, arbitrary and perverse, and procured by concealment and distortion of the truth. I grant her a declaration that her fundamental right under Article 12 (1) has been violated by the 1st respondent, and that she was entitled to her second extension of service with all the attendant rights and privileges.

The petitioner must therefore be put back, as far as possible, in the position in which she would have been but for that violation. Normally, that means reinstatement with full back wages. However, her second extension was due to expire on 6.6.98, and she did not make a timely application for any further extension while these proceedings were pending; and so she cannot now be reinstated. Nevertheless, this court has to make a just and equitable order, and that requires that she be granted all the benefits which she would have received upon a notional reinstatement from 7.6.97 to 6.6.98. I have therefore to assess the benefits she would have received if she had been allowed to carry out the duties of her post from 7.6.97 to 6.6.98. First, she would have received her salary and other employment benefits (including bonus, concessionary loan facilities, and medical, EPF and ETF benefits) during that period. According to the Chairman's affidavit, her gross salary inclusive of all allowances as at 1.1.94 was Rs. 27,669; increments and increases thereafter would have resulted in a higher figure by 7.6.97. Having regard to the shabby treatment meted out to the petitioner, to leave the computation of salary and employment benefits to the 1st respondent is to invite further delay and evasion. I assess their value at Rs. 550,000. Second, she would have had the right to apply for her third and subsequent extensions of service; and the value to be placed on the expectation of such extensions must take account of the practice of the 1st respondent of granting extensions, even upto the age of sixty. I would equitably assess that at Rs. 550,000. She will be treated for all purposes as having been in employment until 6.6.98.

For the above reasons, I direct the 1st respondent to pay the petitioner, on or before 31st December, 1998, the aforesaid sum of Rs. 1,100,000, as well as a sum of Rs. 30,000 as costs; and to submit proof of payment to the Registrar of this court on or before 7.1.99, failing which the Registrar will list this case or an order regarding enforcement.

WADUGODAPITIYA, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.