

MALLIKA AND OTHERS
v
RUHUNU DEVELOPMENT BANK

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 218/2004
SEPTEMBER 27, 2006

Writ of Certiorari -Promotion challenged – Regional Development Bank Act No. 6 of 1997 Section 42 – Acting contrary to Circular – Statutory underpinning? – Office of a public character – Provision in the Act conferring statutory powers?

The petitioners, employees of the 1st respondent – Ruhunu Development Bank sought a writ of certiorari to quash the decision of the respondents to appoint 9th – 19th respondents to the post of Assistant Manager. The petitioners contended that, their non-selection is illegal contrary to the procedure laid down in the Bank Circular.

The respondents contended that, the Circular is an employees Circular, and it can no manner be construed as having any statutory flavour of underpinning. The circular is one confined to the realm of the employer-employee relationship and is purely of contractual in nature.

Held:

- (1) The rule making power under Section 42 in relation to the promotion of the officers of the Bank is vested with the Board of Directors. The circular is not a rule made by the Board but is a communication between the administration of the Bank and its staff. There is no provision of the Act under which the circular has been promulgated or issued, the circular does not take the form of a rule for promotion.
- (2) There is no provision under the Act which confers any statutory status on the office of the petitioners or that of Asst. Managers, neither as to the office or position under consideration nor the scheme of promotion has any statutory flavour or underpinning.

APPLICATION for a Writ of Certiorari/Mandamus.**Cases referred to:-**

1. *K.S. de Silva v National Water Supply and Drainage Board and another* – 1989 – 2 Sri LR 3,
2. *Rodrigo v Municipal Council – Galle and another.*
3. *Wijesinghe v Mayor of Colombo and another* 50 NLR 87.
4. *Perera v Municipal Council Colombo* – 48 NLR 66
5. *Piyasiri v People's Bank* 1989 2 Sri LR 47 at 53.
6. *R.M. Jayasena and others v Uva Development Bank and others* CA 2042/2003 – CAM 16.12.2003.
7. *R.M. Jayasena and others v Uva Development Bank and another* SC Spl. LA 33/2004 SCM 29.4.2004.

Mohan Peiris PC with *Indunil Bandara* for petitioner.

Geof Alagaratnam with *Mohamed Adamaif* for 1-8 respondents.

March 20, 2007

SRISKANDARAJAH, J.

The petitioners are employees of the 1st respondent Bank. They have sought in this application a writ of certiorari to quash the decision of the 1st to 8th respondents to appoint the 9th respondent to the post of Assistant Manager Grade 3 – III of the 1st respondent Bank. The petitioners have also sought a *mandamus* directing the 1st to 8th respondents to make appointments according to law.

The petitioners submitted that the 1st respondent issued circular No 69/2003 marked P2 calling for applications and setting out the criteria and selection process for promotion to Assistant Manager Grade III of the Bank. The said Circular, setout, *inter alia*:

- (a) the Persons eligible to apply,
- (b) the number of vacancies as 15,
- (c) that the selection process is two tiered, being by a written examination and an interview.
- (d) That the Persons being placed 1st, 2nd and 3rd at the examination to be promoted irrespective of marks obtained at the interview if they satisfy the threshold criteria,
- (e) Marks to be allowed under the different criteria set out in the circular.

The petitioners further submitted that the 1st and 2nd petitioners were placed 2nd and 3rd at the examination stipulated by the said

circular. All the petitioners were called for an interview before the interview panel consisted of the 2nd 3rd and 8th respondents. The results of the interview were published on 24th December and the petitioners were not successful at the interview and the 9th to 19th respondents were promoted.

The petitioners contended that their non selection is illegal, contrary to the procedure set out in the circular, irrational, unfair and unreasonable for the reason that the 1st and 2nd petitioners should have been mandatorily promoted as they have been placed 2nd and 3rd at the written examination as per section 4.2.1 of the circular and by their non-selection of the 2nd to the 8th respondents have breached the mandatory provisions of the circular. Most of the respondent selected had got less marks at the examination and for other qualifications compared to the petitioners and therefore to promote the 9th to 19th respondents in preference to the petitioners evidences a patent error in the selection process.

The respondents contended that the circular 69/2003(P2) dated 26.03.2003 is an employees circular for the promotions to Assistant Manager Grade III. The system prevalent in the Banks to send out general and formal communications is in the form of circular and hence the term circular only indicates the formality. However it can in no manner be construed as having any statutory flavour or underpinning. The circular is one confined to the realm of the Employer-Employee relationship between the Bank and its employees and is purely contractual in nature.

The petitioner contended that the 1st respondent bank is a creature of the Regional Development Bank Act No.6 of 1997. The Powers of the bank established in terms of the provisions of the said Act is set out in Section 5. It provides:

5. The Bank may, subject to the provisions of this Act, and without prejudice to any powers conferred on it by or under any law, exercise all or any of the following powers:-

(a)

(b)

.....

(x) to appoint such officers and servants as may be necessary

for carrying out the activities of the Bank, to fix the wages, salaries or other remuneration of such officers and servants and determine the terms and conditions of service of such officers and servants;

(y) to provide welfare and recreational facilities, and accommodation facilities, to officers and servants employed by the Bank;

(z) to enter into and perform all such contracts, whether in or outside Sri Lanka, as may be necessary for the exercise of the powers and the performance of the duties of the Bank.

(aa) to make rules in relation to its officers and servants including their appointment, promotion, remuneration, disciplinary control and the grant of leave to them;

(bb) to make rules in respect of the administration of the affairs of the Bank; and

(cc) to do all such other things which in the opinion of the Board of Directors of the Bank may be necessary to facilitate the proper carrying on of the business of the Bank.

The petitioner contended that the 1st respondent bank is vested with powers which should be exercised for the public benefit and as such when the 1st respondent bank exercises the said powers it displays a public character.

The question that has to be determined is whether the 1st respondent has exercised its Rule making power under Section 42 of the said Act to make rules in relation to its officers and servants including their appointment, promotion, remuneration, disciplinary control and the grant of leave to them. Section 42 of the said Act provides:

"42. The Board may make rules in respect of all or any matters for which rules are required or authorized to be made under this Act or any other matter necessary to enable the Bank to effectively carry out and perform its powers and duties under this Act."

From the above provision the rule making power in relation to the promotion of the officers of the said Bank is vested with the Board of Directors. The circular marked P2 is not a rule made by

the Board of Directors, but it is a communication between the administration of the bank and its staff. There is no provision of the Act under which P2 has been promulgated or issued. P2 does not take the form of a rule for promotion.

In *K.S.De.Silva v National Water Supply and Drainage Board and another*⁽¹⁾ at 3 G.P.S.De.Silva, J. with H.A.G.De Silva, J. and Jameel, J. agreeing held:

"The case of *Rodrigo v The Municipal Council, Galle and another*,⁽²⁾ appears to me to have a direct bearing on the matters that have arisen for decision on this appeal. That was a case where the petitioner who was Revenue Inspector in the Moratuwa Urban Council applied for a writ of *Mandamus*. He was transferred to the Galle Municipal Council (1st respondent) by the Local Government Service Commission. When the petitioner reported for work at the Galle Municipal Council, he was refused work and he was not paid his salary. The petitioner sought a writ of *Mandamus* to order the respondents (the Municipal Council and the L.G.S.C.) "to give the petitioner work and to pay his salary." In refusing the application for the writ, Windham, J. stated that one of the matters upon which the court must be satisfied is that "the petitioner is being prevented from exercising a right to perform certain duties and functions legally conferred upon him by virtue of his holding an office carrying with it such a right In the present case the petitioner has no powers or duties statutorily vested in him. It may well be that he is a public servant and in the employ of a public body (i.e. the 1st respondent)...But that is not the test. The question is whether he has public duties and powers vested in him by statute, so that he can be said to be statutorily entitled to exercise them." In short, Windham, J. held that the petitioner was not the holder of an office "to which specified duties and powers had been statutorily attached."

Another decision which throws some light on this question is *Wijesinghe v Mayor of Colombo and another*⁽³⁾ The petitioner was appointed to the post of Charity Commissioner by the Local Government Service Commission. The Municipal Council, Colombo, declined to recognize his appointment. The petitioner moved for a writ of *Mandamus* to order the

respondents (the Mayor and the Secretary of the Colombo Municipal Council) "to permit him to perform his duties in the exercise of his lawful functions as Charity Commissioner.....". In allowing the application, Gratiaen, J. stated: "I do not agree that the petitioner's right to the office of Charity Commissioner was only of a private nature which could adequately be enforced in a civil suit. The petitioner is an executive officer of the Council by virtue of Section 176 of the Municipal Councils Ordinance of 1947 many, if not all, of the powers and functions contemplated are clearly powers and functions of a public nature" (at pages 90 and 91). See also the case of *Perera v Municipal Council of Colombo*⁽⁴⁾.

In support of his submission that the petitioner in the application before us is seeking admission to an office which is of a public character, Mr. Perera referred us to sections 68 and 69 of the National Water Supply and Drainage Board Law No.2 of 1974. But these two sections refer only to the powers and duties of the General Manager of the Board and the powers of the Board to appoint "to its staff such officers and servants as the Board may deem necessary and determine their terms of remuneration and other conditions of employment." We were not referred to any rules made under the said Law No.2 of 1974 which speak of the powers or duties attached to the post of Accountant. In my opinion, the office to which the petitioner is seeking admission is not a "public office" of the kind which attracts the remedy by way of *Mandamus*. It is an office essentially of a contractual or private character. Accordingly, as a matter of law, the writ of *Mandamus* does not lie and the application must fail.

In *Piyasiri v People's Bank*⁽⁵⁾ at 53 Wijeratne J held:

"Having regard to the constitution and functions of the respondent Bank, I hold that there is no public duty or statutory duty in this case to call the petitioner for this interview. As is well known this Writ will not be issued for private purposes.

Staff Circular 186/82 (which adopts the Nihal Wiratunga Report on the Minister's directions) is only a circular and not a regulation having statutory force. The said circular lays down

the policy and does not purport to provide for every step. The implementation of this circular is a private and internal matter of the respondent Bank. To call for recommendations from superior officers before a promotion is effected is a common practice based on prudence prevalent everywhere in the world and is nothing unusual. I am of the view that in the implementation of the circular the respondent Bank has a modicum of discretion as to whether recommendations should be sought from superior officers before effecting promotions."

The respondents also brought to the notice of this Court a similar application challenging the non-selection for the appointment to Grade 3-III of the Bankers' Service under a circular calling for applications for promotion to the said post was refused by the Court of Appeal in *R.M. Jayasena and 8 others v Uva Development and 48 others*⁽⁶⁾ based on *K.S.De Silva v National Water Supply and Drainage Board (supra)*. The Leave to Appeal against this Order was also refused by the Supreme Court⁽⁷⁾.

There is no provision under the Act which confers any statutory status on the office of the petitioners or that of the Assistant Managers Grade 3-III. Therefore neither as to the office or position under consideration nor the scheme of promotion marked P2 has any statutory flavour or underpinning. Therefore the petitioners are not entitled to the relief claimed and this application is dismissed without costs.

Application dismissed.