

DAYASENA

v.

**BINDUSARA, DIRECTOR, NATIONAL BLOOD TRANSFUSION
SERVICE AND OTHERS**

SUPREME COURT
FERNANDO, J.
GUNASEKERA, J. AND
YAPA, J.
SC (FR) 583/2001
29th NOVEMBER 2002

Fundamental Rights – Transfer order – Failure to produce the order – Failure to notify the transferee the reasons for the order or to provide an opportunity of meeting allegations made – Article 12(1) of the Constitution.

The 1st respondent was the Director, Central Blood Bank, Colombo; the 2nd respondent was the Director-General Department of Health Services, and the 3rd respondent was the Secretary, Ministry of Health.

The petitioner was a book-keeper in the public service attached to the Central Blood Bank, Colombo. His duties included processing of loan applications and submission to the 2nd respondent for approval of the 3rd respondent.

In February, 2001 the petitioner evaluated a loan application of the 1st respondent and forwarded it with a recommendation that the 1st respondent was not entitled to the sum applied for in view of an outstanding balance on a previous vehicle loan. However, in July 2001 the 1st respondent acting independently of the petitioner was able to obtain approval for a lesser amount as a loan and collected it on a voucher authorized by herself, even though that loan was also not in accordance with the relevant conditions.

The petitioner next received the 1st respondent's letter dated 4.10.2001 informing him that by order dated 4.10.2001 the 2nd respondent has transferred the petitioner to the Mental Hospital, Angoda. Neither the original nor a copy of the transfer order was produced. It was not suggested that the petitioner was served with a copy.

On appeal, the 3rd respondent replied that due to "administrative reasons" the transfer could not be varied. The 2nd respondent did not file affidavit.

The 1st respondent in her affidavit did not state whether the transfer order gave reasons. However, the 1st respondent alleged misappropriation of funds and dereliction of duty against the petitioner.

Held:

1. There was no proof that the 2nd respondent did actually make a transfer order.
2. There was no transfer on the advice of the relevant Transfer Board as required by Chapter III, Section 3 of the Establishment Code (which permitted an *ad hoc* transfer - *inter alia* on disciplinary grounds)
3. In any event the petitioner was not informed of the allegations against him and given an opportunity to explain matters.
4. As such the transfer was wrongful and arbitrary and violative of the petitioner's rights under Article 12(1) of the Constitution.

Per Fernando, J.

"The contention of the counsel for the petitioner that the real reason for the transfer was the 1st respondent's displeasure about her vehicle loan is much more probable".

APPLICATION for relief for violation fundamental rights.

Case referred to:

(1) *Manage v. Kotakadeniya* (1997) 1 Sri LR 204.

Elmore Perera for petitioner

M. Gopallawa, State Counsel for respondent.

Cur.adv.vult

January 29, 2003

FERNANDO, J.

The petitioner is a book-keeper in the public service. He was transferred to the Central Blood Bank on 30.5.2000. By letter dated 4.10.2001 the 1st Respondent, the Director of the National Blood Transfusion Service, informed him that he had been transferred to the Mental Hospital, Angoda, with immediate effect. He complains

that the transfer was in violation of his fundamental right under Article 12(1).

In February 2001 the Petitioner was given a revised list of duties which included the receipt and processing of loan applications, and their submission to the 2nd Respondent (the Director-General of Health Services) for the approval of the 3rd Respondent (the Secretary to the Ministry). A number of loan applications, which had been submitted previously but returned unapproved due to various shortcomings, were sent to him for attention. One of these was a vehicle loan application by the 1st Respondent. The petitioner pointed out to the 1st Respondent how the shortcomings should be corrected. According to her that was done. The Petitioner maintains that one prerequisite was that the outstanding balance on a previous vehicle loan application should have been settled, and that the 1st Respondent refused to do so. However, there is no doubt that the Petitioner did forward that application on 20.2.2001 together with his evaluation, which showed her maximum loan entitlement to be Rs. 783,360 and the balances due from her on two outstanding loans to be Rs. 53,695 on a vehicle loan, and Rs. 104,640 on a distress loan. Accordingly, after deducting the balances outstanding, the maximum loan then obtainable was Rs 625,025.

The Petitioner alleged that thereafter, in May 2001, the 1st Respondent – without the Petitioner's knowledge – obtained another distress loan of Rs 121,960, having approved it herself. Admittedly, it was only on 12.7.2001 that she repaid the balance of the vehicle loan. The Petitioner's position is that thereupon the 1st Respondent would have been entitled to a further loan of not more than Rs 560,000 (i.e. after deducting the total of the then outstanding loans), and that she did not disclose to the 2nd and 3rd Respondents the fact that she had obtained the second distress loan.

By letter dated 12.7.2001 the Additional Secretary to the Ministry approved a loan of Rs 633,720. On the same day the 1st Respondent obtained a special imprest from the Ministry of a sum sufficient to cover her loan. The Accountant by a memorandum dated 13.7.2001 informed her of ten earlier loan applications by other officers, for a total of Rs 3.8 million, which had all been approved by the Ministry before her application, and asked her to obtain an imprest to cover those loans too. That was not done.

When the file was forwarded to the Petitioner for payment, he submitted a memorandum to the Accountant stating, first, that after her loan application had been submitted to the Ministry the 1st Respondent had obtained a further distress loan on 15.5.2001, and second, that when the then outstanding loans were taken into account the loan instalments to be deducted from her monthly salary would exceed the limit of 40% prescribed by the Establishments Code. The Accountant submitted that memorandum to the 1st Respondent, pointing out that the 40% limit would be Rs. 8,704 p.m. while the loan instalments including interest would amount of Rs. 11,732 p.m. The 1st Respondent merely minuted "Noted and approved", without disputing the Petitioner's allegation as to her second distress loan. A sum of Rs. 633,720 was thereupon paid to her the same day, upon a voucher authorized by herself.

The Petitioner then received the 1st Respondent's letter dated 4.10.2001 which stated that by the 2nd Respondent's transfer order dated 4.10.2001 he had ordered the Petitioner's transfer to the Mental Hospital, Angoda, with immediate effect. The original of the 2nd Responder's transfer order would have been in the 1st Respondent's possession, but she produced neither the original nor a copy. It was not suggested that a copy had been sent to the Petitioner. Both the Petitioner and his Trade Union submitted appeals, but the 3rd Respondent's reply merely stated that for then prevailing administrative reasons the transfer could not be varied. Thus the Petitioner had to file this application without knowing why he had been transferred, and without even being certain that it was the 2nd Respondent who had actually ordered his transfer.

The 1st Respondent did not state in her affidavit what reason had been given in the 2nd Respondent's letter, nor did the 2nd Respondent file an affidavit. In her affidavit the 1st Respondent referred to certain complaints which she had received about the Petitioner and claimed that his transfer "was recommended and ordered in order to facilitate an inquiry into such complaints and in order to avoid further disruption being caused to the smooth functioning of the administrative affairs at the Central Blood Bank", and again that it had been ordered "on disciplinary grounds and for administrative reasons". However, she did not state *who* had made

that recommendation, and failed to produce the recommendation.

The resulting position is that the Respondents have failed to produce the alleged recommendation for the transfer and the transfer order, and there is no evidence that the 2nd Respondent did order the transfer, and as to the grounds of transfer – all of which should have been matters of record in the official files.

In her affidavit the 1st Respondent referred to the following allegations against the Petitioner:

1. The Commissioner-General of Samurdhi, by letter dated 1.6.2001 had informed her that the Petitioner had been involved in misappropriation of funds and frauds in the year 2000 and had failed to hand over certain documents, and had requested the 1st Respondent to hand over such documents to a named officer; and that although she instructed the Petitioner in writing to comply with that request, he refused to do so;
2. On 9.7.2001 the Petitioner refused to accept a revised duty list;
3. By letter dated 28.7.2001 the Accountant had complained that the Petitioner was reporting for duty late very frequently; that being the Secretary of his Trade Union, he was attending to Trade Union matters and entertaining outsiders at the office during duty hours; and that he was reluctant to carry out instructions from other officers; and
4. By letter dated 20.9.2001 a doctor had complained that the Petitioner had not paid a vehicle loan even three days after it had been approved by the Accountant.

Both Counsel agreed that it was the 2nd Respondent, as Head of the Department, who had the authority to transfer the Petitioner within the Department, from the Central Blood Bank to the Mental Hospital, that the impugned transfer had been effected without obtaining the advice of the relevant Transfer Board as required by the Establishments Code, and that under Chapter III section 3 of the Code a transfer without such advice was authorized only in four situations: a transfer not involving a change of station, a transfer on disciplinary grounds, a transfer necessitated by the exigencies of service, and a transfer in a Department having less than 25 transferable officers.

While the 2nd Respondent had authority to transfer the Petitioner on one or more of the grounds stated above, there is no proof that he did actually make a transfer order. Even assuming that he did make a transfer order, there is no evidence as to the basis on which he acted, and it cannot be assumed that it was on one of the four permitted grounds. But even if I were to assume that he did act on one of those grounds, yet that ground and the supporting reasons were not disclosed to the Petitioner when the transfer order was made, and even when his appeals were refused – and that was a fatal flaw. In *Manage v Kotakadeniya*,⁽¹⁾ an extension had been refused on the basis of findings that he had committed several offences. It was held that the refusal of the extension was flawed because *inter alia* no reasons had been given for the findings in respect of two of the offences alleged against him. In the present case, not only the reasons but even the ground had not been disclosed. I therefore hold that the Petitioner's transfer was wrongful and arbitrary.

I have now to consider the complaints referred to by the 1st Respondent. There is nothing to show that those matters were brought to the notice of the 2nd Respondent, and it cannot be assumed that he acted on those matters. Further, the Petitioner was not given an opportunity of submitting an explanation in regard to those matters. Quite apart from any explanation which the Petitioner might have given, certain comments are unavoidable. Allegations of fraud and misappropriation of Samurdhi funds were undoubtedly serious – but if they rendered him unfit to serve as book-keeper at the Central Blood Bank how could he have been allowed to serve elsewhere? As for the refusal to accept the revised duty list, the Petitioner averred in his counter-affidavit that the Accountant had accepted his position – and that may well be true because the Accountant's letter dated 28.7.2001 made no complaint on that score. If the Accountant's complaints about frequent lateness and attending to Trade Union matters during working hours were true, one would have expected supporting evidence in the form of previous warnings to the Petitioner and reports to the 1st Respondent. The contention of learned Counsel for the Petitioner that the real reason for the transfer was the 1st Respondent's displeasure about her vehicle loan is much more probable.

I hold that the Petitioner's fundamental right under Article 12(1) has been infringed by the 1st Respondent, quash the Petitioner's transfer to the Mental Hospital, Angoda and award him a sum of Rs 50,000 as compensation payable by the State, and a sum of Rs 10,000 as costs payable by the 1st Respondent personally, on or before 31.3.2003. The Auditor-General is directed to submit a report to this Court, on or before 30.4.2003, on the Petitioner's complaint to the Auditor-General dated 4.10.2001.

GUNASEKARA, J. - I agree.

YAPA, J. - I agree.

Relief granted.