

## MADURAPPERUMA AND OTHERS

v.

## M. N. JUNAID AND OTHERS

SUPREME COURT.

FERNANDO, J.,

WADUGODAPITIYA, J. AND

DR. GUNAWARDANA, J.

S.C. APPLICATION NO. 437/96

FEBRUARY 06, 1997.

*Fundamental Rights – Article 12(1) of the Constitution – Development Lottery Trust – Transfer of officers of the Ministry of Finance to the staff of the Development Lottery Trust – Establishments Code – Release for service – Exercise of option – Status of the Trust – Was the Trust a legal entity?*

In 1982 the Development Lottery was established and run as a unit of the Ministry of Finance. The net proceeds of the Lottery were paid to the President's Fund established by Act No. 7 of 1978. On 25.5.93 the Government of Sri Lanka acting by R. Paskaralingam, as Secretary to the Treasury as "settlor" purported to establish the Development Lottery Trust which was to be Trust to run the Development Lottery for the purpose of raising funds for the President's Fund. H. A. Abhayagunawardhana as Deputy Secretary to the Treasury was described as the Trustee in the Deed. Both settlor and trustee were defined to include successors in the said office for the time being. The Trustee had power to appoint staff. The Deed also provided for a six member Board of Management and the 1st respondent was the Chairman and 2 to 5 respondents were four of the members of the said Board. The trustee was empowered to delegate any of his functions, powers and duties to the said Board.

**Held:**

The Trust was not a legal entity. The petitioners who were already public officers continued to be public officers even when they purported to be temporarily released to the Trust. They were not therefore exempt from transfer to the Ministry of Finance.

Further since they failed to change their status by a proper exercise of their option under the Establishment Code Section 2.5.1. Their *status quo* continued and they remained as public officers. The Establishment Code did not permit any release temporary or permanent to the Trust. The Trust cannot be treated as being a public corporation or board or analogous thereto.

**APPLICATION** for relief for alleged violation of fundamental rights.

*Elmore Perera* for petitioner.

*D. P. Kumarasinghe, A.S.G.* for respondents.

*R. K. W. Goonasekera* with *J. C. Weliamuna* for intervenient-respondents.

*Cur. adv. vult.*

March 26, 1997.

**FERNANDO, J.**

The 25 petitioners allege actual and imminent infringements of their fundamental rights under Article 12(1) by reason of their transfers – some actual, some anticipated – contrary to the Establishments Code.

In 1982 the Development Lottery was established and run as a unit of the Ministry of Finance. The petitioners had been working in that unit, as public officers, some from the inception itself. The net proceeds of that Lottery have throughout been paid to the President's Fund established by Act No. 7 of 1978.

The problem that arises in this case resulted from a "Deed of Trust" entered into, on 25.5.93, between the Government of Sri Lanka, acting by R. Paskaralingam, "as Secretary to the Treasury", as "settlor", and H. A. Abhayagunawardhana, "as Deputy Secretary to the Treasury", as "trustee". Both "settlor" and "trustee" were defined to include "successors in the said office for the time being". The 6th and 7th respondents are the present Secretary and Deputy Secretary to the Treasury.

That Deed purported to establish the "Development Lottery Trust" ("the Trust"), the object of which was to take over and continue the administration, control and functions of the said Development Lottery for the purpose of raising funds for the President's Fund. The trustee had, *inter alia*, the power "to appoint such officers and servants as are considered necessary for the conducting of lotteries and the achievement of the objectives of the Trust".

That Deed also provided for a six-member "Board of Management" of the Trust ("the Board"), and the 1st to 5th

respondents are the Chairman and four of the members of that Board. The trustee was empowered "to delegate any functions, powers and duties of the office of trustee to the said Board of Management", and it is not disputed that the 7th respondent as trustee did delegate his powers of appointment to the Board. The services of all the petitioners were utilised to run the Development Lottery under the Trust, and the question which we have now to decide is whether they are entitled to continue with the Trust, as permanent employees, or are liable to be transferred or reverted back to the Ministry of Finance.

It is the Establishments Code which 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 [comes ?] 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.

It is not disputed that until 1993 the petitioners were public officers serving in the public service. Their case is that they were temporarily released (under section 2.1) from 25.5.93 for service in the Trust for two years; that the 1st respondent called the petitioners to exercise, on or before 1.9.93, this option to join the Trust on a permanent basis on the expiration of the period of temporary release, and that they did so; that on 28.7.94 the Board decided "to issue letters to all members of the staff who requested that they be absorbed into the permanent cadre and to inform the Director/Combined Services accordingly"; that by letters date 8.8.94, addressed to the Director/Combined Services through the 1st respondent, they expressed their desire to join the staff of the Trust permanently and asked for permanent release; that the whole matter was reviewed by the new Board appointed after the General Elections, and it was found that some of the petitioners would not complete 10 years service even by 24.5.95; that the petitioners appealed to the 1st respondent for a further two-year extension; that the 1st respondent recommended a one-year extension; and that by letter dated 16.11.95 he informed the petitioners that Cabinet approval had been obtained for such extension. That decision was not produced. In the meantime, on 11.10.95, the Board had decided to absorb staff members who wished to join the permanent cadre of the Trust, and on 12.10.95 issued fresh option forms, which the petitioners duly completed. By letter dated 16.10.95, addressed to the Director/Combined Services (the 9th respondent) through the 7th respondent, the 1st respondent requested the release of 25 employees (including 24 petitioners) for permanent employment in the Trust; the 7th respondent replied on

9.11.95 requesting some particulars as to their period of service, and the reasons for recommending their absorption; and this information was furnished by the 1st respondent on 16.11.95.

In or about December 1995 the Cabinet decided to establish a Development Lottery Board to replace the Trust. By letters dated 27.12.95 and 28.12.95 the 7th respondent informed the 1st respondent and ten of the petitioners that those ten petitioners were transferred to the Ministry of Finance with effect from 1.1.96, and that ten other officers were transferred to the Trust; however, the petitioners were permitted to remain with the Trust. (Those ten officers were permitted to intervene as intervenient-respondents.) Thereafter, ten of the petitioners received letters dated 9.5.96 purporting to transfer them to the Ministry on 25/5/96 on the expiration of their period of release.

The petitioners' case is that upon being called upon by the Trust (through the Board) to exercise their option under section 2.5.1, not only did they opt to remain with the Trust, but the Trust also decided to retain them in service permanently. Consequently they ceased to be public officers, and became permanent employees of the Trust.

Mr. Kumarasinghe, PC, ASG, on behalf of the 1st to 10th respondents contended that the purported exercise by the petitioners of their option, under section 2.5.1, not to revert to the public service was not effective to make them permanent employees of the Trust for two reasons. First, the exercise of that option by a temporarily released public officer (even if his present employer concurs) becomes effective only if and when the appointing authority of his substantive post consents. He submitted that if this Court held otherwise, that would result in the State losing the services of useful public officers without its consent. Second, the petitioners had not complied with the requirements for a permanent release, in that they had not used the form prescribed by section 2.3. In that connection, it must be noted that in his affidavit the 7th respondent has pointed out that under the Establishments Code the period of temporary release should not exceed two years, and that there is no provision to extend that period in order to enable employees to earn pension rights.

Section 2.5.1 permits a temporary release for a period not exceeding two years. An authority which makes a rule is bound by it unless and until duly amended, because *legem patere quem ipse fecisti*. While the enactment of a rule inconsistent with an existing rule would operate as an implied amendment, a decision contrary to the existing rule, even though it is by the authority which made it in the first place, is not a valid amendment of that rule, and would inevitably result in unequal treatment. Accordingly, the petitioners should have exercised their option within that period of two years. Sections 2.2 and 2.3 specify the manner in which that option should be exercised. If section 2.2 is not observed, benefits under the Minutes on Pension may be affected. Section 2.5.1 grants a public officer an option – either to revert to the public service or to become a permanent employee of his new employer – and for the first alternative, no pre-condition is stipulated; and at first sight it seems that the only pre-condition for the second is the concurrence of his new employer. *Expressio unius, exclusio alteris*, and so this suggests that the concurrence of his substantive employer, the State, is unnecessary. However, the context prevents such an interpretation: the requirement in section 2.3, that the application for permanent release should be made “by the appointing authority of the officer’s substantive post” through the Secretaries to the two Ministries concerned, indicates that the option which section 2.5.1 gives an officer is not entirely unfettered. Here no such application was made, and while the failure to use the prescribed form may not have been fatal by itself, yet here there has been substantial non-compliance with section 2.2. and 2.3.

Thus at the end of the maximum permissible period of temporary release, the petitioners had not duly exercised their option under section 2.5.1. Did they continue as public officers, or did they become employees of the Trust? Quite apart from the submission which I have to consider in the succeeding part of this judgment, I hold that since they failed to change their status by a proper exercise of their option, the *status quo* continued, and they remained as public officers.

However, a more fundamental question was raised by Mr. Goonasekera, on behalf of the intervenient-respondents, who

submitted that in any event the Establishments Code did not permit any release, temporary or permanent, to the Trust.

Although section 2 is captioned "Release for service outside the Public Service", an examination of its provisions shows that it is applicable only to service in public corporations and boards established by or under statute. It is true that section 2.1 says "as for instance in a public corporation", and thereby suggests that a variety of other employments is permissible. However that section goes on to refer to concurrence "required by the law under which the corporation or board is established", and thus shows an intention to permit release to such bodies only (see also sections 2.2, 2.3, 2.5.1 and 2.6, and Appendix 6). None of those provisions would be applicable, for instance, to release for service in the private sector. The context therefore requires me to consider whether the Trust could be treated as being a public corporation or board, or analogous thereto.

Learned Counsel for the Petitioners submitted that the Trust was a "public institution" which came within the Constitutional definition of a "public corporation":

"Any corporation, board or other body which was or is established by or under any written law other than the Companies Ordinance, with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise."

This includes not only any "other body" but even a body established *under* any written law, while sections 2.1 and 2.6 refer only to corporations and boards *constituted "by" law*, and accordingly I am of the view that chapter V contemplates release only to corporations and boards constituted by statute. One characteristic of such corporations and boards is that they have a legal personality, distinct from the State.

I will assume that the Trust deed created a valid trust, for a public purpose. The definition of a trust in our Trusts Ordinance is that it is an obligation annexed to the ownership of property, and arising out of

a confidence reposed in the trustee and in this instance, not in the trustee in his personal capacity, but *nomine officii*. Thus the Trust deed did not create a legal entity, and the trustee was not incorporated under section 114 of the Trusts Ordinance, and hence neither the Trust nor the trustee has legal personality. Further, the Trust was set up by the Government acting through the Secretary to the Treasury (and his successors in office), and the Trustee was the Deputy Secretary to the Treasury (and his successors in office), and thus cannot be regarded as distinct from the Government.

If the Trustee had recruited persons from outside, they would have become his employees, in his capacity as trustee; whether such persons became "public officers", we do not have to decide. I hold, however, that the petitioners who were already public officers, when they purported to be temporarily released to the Trust, continued to be public officers. They were not thereby exempted from transfer to the Ministry of Finance.

For these reasons the petitioners' application is dismissed. It is the conduct of the officials of the Trust which induced the petitioners to believe that they had a right to permanent release, and compelled the Intervient respondents to intervene. In these circumstances we direct the Trust to pay two sets of costs, of Rs. 5,000 each, one to the petitioners (although unsuccessful) and other to the Intervient respondents.

**WADUGODAPITIYA, J.** – I agree.

**DR. GUNAWARDANA, J.** – I agree.

*Application dismissed.*