

AMARASEKERA
vs.
**KARUNASENA KODITHUWAKKU, MINISTER OF
HUMAN RESOURCE DEVELOPMENT,
EDUCATION AND CULTURAL AFFAIRS AND OTHERS**

COURT OF APPEAL
SALEEM MARSOOF P.C., J.(P/CA),
SRISKANDARAJAH, J.,
CA APPLI.362/2004
SEPTEMBER, 30, 2004 WRIT
OCTOBER 18, 2004
NOVEMBER 15TH, 25TH, 2004

Writ of Mandamus - Pension - Intentionally delayed - Minutes on Pensions - Section 12 (1) - Applicability - Constitution - 17th Amendment - Article 61A - Ouster of jurisdiction - Interpretation Ordinance 2 of 1947 - Section 2.

The Petitioner sought a Writ of Mandamus directing the Respondents to forward the necessary documents to the 14th Respondent - Director of Pensions, to enable him to take steps for the award of the pension. The complaint of the Petitioner was that, the Respondents were intentionally delaying the forwarding

of the relevant documents to the Director of Pensions, with a view of applying the provisions of Section 12 (1) of the Minutes on Pensions (MOP) to the Petitioner with retrospective effect and that Section 12 (2) of the MOP cannot be applied to withhold the pension of an officer who has already retired; and that in order to make an Order under Section 12 (1) of the MOP disciplinary action against a Public Officer should have been pending or contemplated at the time of retirement.

The Respondent contended that after a Preliminary Investigation the Petitioner was found responsible for certain irregularities and disciplinary action was recommended.

The Respondent further contended that the Public Service Commission (PSC) was intimated that the Petitioner is due to retire on 15.02.2003, and to consider the possibility of retiring the Petitioner in terms of Section 12 (1) of the MOP in view of the findings against him. On 23.06.2003, the PSC has intimated that the payment of the Petitioner's pension should be withheld in terms of Section 12 (1) and further directed that disciplinary action be commenced against the Petitioner.

HELD -

- (i) It is quite fortuitous that the retirement of the Petitioner had intervened into the disciplinary and other proceedings which were contemplated not only against the Petitioner but also against other officials - this is a case in relation to which Section 12 (1) of the MOP may be legitimately applied, so long as disciplinary proceedings were contemplated against the retiring public officer at the time of his retirement the relevant disciplinary authority may permit his retirement, subject to Section 12 of the MOP.
- (ii) The fact that the PSC may have made its determination (23.06.2003) after his actual retirement (15.02.2003) will not affect the validity of the said Order.
- (iii) The Petitioner cannot maintain this application if he is not challenging the determination of the PSC.

APPLICATION for a writ of Mandamus.

Cases referred to :

1. *Wilbert Godawela vs S. D. Chandradasa and Others* - 1995 2 Sri LR 338 (Distinguished)

2. *Peiris vs Wijesooriya, Director, Irrigation and others* - 1999 1 Sri LR 295.

D. S. Wijesinghe P. C., with Ms Faisza Musthapha - Marikkar and Ms Tushani Machado for Petitioner.

Ms Uresha de Silva, State Counsel for the Respondent

December-16, 2004

SALEEM MARSOOF, P. C. P(C/A)

The Petitioner has sought a mandate in the nature of a writ of *mandamus* directing the 2nd Respondent and/or the 3rd to the 13th Respondents to forward the necessary documents to the 14th Respondent Director of Pensions to enable him to take steps for the award of pension to the Petitioner. The Petitioner complains that the 2nd Respondent and/or the 3rd to the 13th Respondents are intentionally delaying the forwarding of the relevant documents to the 14th Respondent with a view of applying the provisions of Section 12 (1) of the Minutes on Pensions to the Petitioner with retrospective effect. It is submitted on behalf of the Petitioner that this course of action is contrary to law and to established procedure. It is further submitted that the non-payment of the Petitioner's pension, despite the lapse of over one year after retirement, is illegal, null and void and a gross violation of the Petitioner's rights to receive the same in terms of the Minutes on Pensions which is a part of the written law of this country in terms of Section 2 of Interpretation (Amendment) Ordinance No. 2 of 1947.

According to the petition filed in this case, the Petitioner counts an unblemished record of 35 years of service in the public service. Having being released from the public service by the Ministry of Rehabilitation, the Petitioner was appointed as Project Accountant of the Emergency School Rehabilitation Project funded by the Asian Development Bank under the Ministry of Education from 23rd November 1992. With effect from 24th January 1994, the petitioner was appointed as Project Accountant of the Secondary Education Project also funded by the Asian Development Bank under the Ministry of Education on a contract basis initially for a period of 3 years. As the period of release granted to the petitioner was due to expire on 2nd January 1997 in terms of Public Administration Circular No. 52/91 dated 10th January 1991, the then Minister of Education had sought and obtained Cabinet approval to retain the services of the Petitioner until the completion of the said project and accordingly the Petitioner continued to serve until the completion of the Project in 2000.

The Petitioner states that he was then appointed as Project Accountant of a new project, namely the Asian Development Bank funded Secondary Education Modernization Project with effect from 1st January, 2001 upon Cabinet approval obtained for the purpose. Subsequently, in addition to the duties of his substantive post as Project Accountant, the petitioner was appointed to act as the Project Director following the removal of the then Director. The Petitioner states that he had to decline the said appointment as it was improper for him as a single individual to perform two of the four financial functions, namely, authorization, approval, certification and payment, as each such function has to be performed by different officers to ensure internal check as envisaged by the Government Financial Regulations. Accordingly, the post of Project Director was filled and the Petitioner continued in his position as Project Accountant. The Petitioner claims that thereafter he was called upon by the 2nd Respondent by his letter dated 20th December, 2002 (P10) to explain certain accounts maintained in respect of the Project for the period 21st to 29th October 2002. The Petitioner claims that he duly tendered his explanation which he considers as having been accepted as he did not received any intimation to the contrary.

The Petitioner held the substantive post of Accountant Class II Grade I of the Sri Lanka Accountants' Service at the time he reached the age of compulsory retirement (60 years) on 15th February, 2003. In response to a request made by the Petitioner from the 2nd Respondent by his letter dated 6th September 2002 (P-12) that steps be taken to retire him from service with effect from 15th February, 2003 on which date he was due to complete his age of compulsory retirement, he received a letter dated 14th February, 2003 (P-13) from the 2nd Respondent that his services as the Project Accountant would be terminated from 15th February, 2003. However, as there was no confirmation that the Petitioner was retired from public service with effect from 15th February, 2003, the Petitioner wrote the letters dated 25th February, 2003 (P14), 8th April, 2003 (P15) and 6th May 2003 (P16) to the 2nd Respondent and the Petitioner received the letter dated 7th May, 2003 (P-17) from the Additional Secretary of the 2nd Respondent informing him that his pension papers had been forwarded to the Secretary of the Accountants' Services Board.

The Petitioner claims that as he did not receive any pension, he sought the assistance of the Human Rights Commission by his letter dated 19th

May, 2003 (P 18a) addressed to the Secretary of that Commission. The Petitioner states that to his utmost surprise, he received a letter dated 15th October, 2003 (P-21) from B. A. W. Abeywardena - Preliminary Investigation Officer, captioned "Special Investigation into the Activities of the Secondary Education Modernization Project", calling upon the Petitioner to call over at the Ministry of Education on 7th November 2003. As the Petitioner was no more a public officer, and as his services as Project Accountant was purportedly terminated upon his reaching the age of compulsory retirement (60 years) on 15th February 2003, he replied the said letter with his letter dated 31st October 2003 (P-22) stating that he was at a loss to comprehend as to why he was being called up to clarify any irregularities after the lapse of nine months from his retirement. The Petitioner states that he received the letter dated 3rd December, 2003 (P-23) from the Human Rights Commission forwarding for his response a copy of a letter dated 29th October 2003 sent to the said Commission by the office of the 2nd Respondent from which it transpired that -

- (a) a preliminary investigation was in progress relating to certain financial irregularities in the said Project involving, *inter alia* the Petitioner ;
- (b) the Public Service Commission had directed that the Petitioner be retired under Section 12 (1) of the Minutes on Pensions ; and
- (c) a decision with regard to the payment of pension to the Petitioner would be taken only on receipt of the report of the said preliminary investigation.

The Petitioner states that he replied the said letter with his letter dated 23rd December 2003 (P-24) addressed to the Legal Officer of the Human Rights Commission stating *inter alia* that the Petitioner could not be retired under Section 12 (1) unless there was disciplinary action pending or contemplated against him at the time of his retirement. The Petitioner has also invited the attention of Court to the letter dated 12th January, 2004 (P-25) addressed by the Secretary to the Public Service Commission to the 3rd Respondent as a reminder to an earlier letter dated 17th December, 2003 requesting the latter to forward his observations and recommendations together with draft charges against the Petitioner. It is submitted on behalf of the Petitioner that he has not been informed in terms of Section 26 ; 8

of the Establishments Code, of any decision either by the Public Service Commission or by any other duly appointed authority that he had been retired under Section 12 (1) of the Minutes on Pensions, and as there was no disciplinary action contemplated against the Petitioner at the time he retired upon reaching the age of compulsory retirement on 15th February, 2003, the Petitioner is entitled to a writ of *mandamus* directing the 2nd Respondent and/ or the 3rd to the 13th Respondents to forward the necessary documents to the 14th Respondent Director of Pensions to enable him to take steps for the award of the pension to the Petitioner. It is contended on behalf of the Petitioner that the non-payment of his pension despite the lapse of nearly one year after he became entitled to retire, is illegal, null and void and a gross violation of the petitioner's right to receive same in terms of the Minutes on Pensions which is a part of the written law in terms of Section 2 of the Interpretation (Amendment) Ordinance No. 2 of 1947. It is further submitted that the Petitioner had a legitimate expectation of receiving his pension on retirement in terms of Rule 1 of the Rules framed under Section 2 of the Public and Judicial Officers' Retirement Ordinance No. 11 of 1910 as subsequently amended, and the denial of the Petitioner's pension offends the principle of reasonableness, proportionality and fairness.

The case of the Respondents as set out in the Statement of Objections of the Respondents is that by his letter dated 20th December 2002 (P10) the 2nd Respondent called upon the Petitioner to explain certain irregularities relating to certain financial transactions involving the Secondary Education Modernization Project that took place during the period 21st to 29th October 2002, and the Petitioner tendered his explanations by his letter dated 31st December 2002 (P11). Thereafter, a preliminary investigation was held and the Interim Report dated 29th January 2003 (15R3) revealed that the Petitioner was, along with certain other officers, responsible for certain financial irregularities. The Investigation Officer has recommended that disciplinary proceedings be commenced against the officers responsible for the said financial irregularities, and that the responsible officers be interdicted, sent on compulsory leave or retired under Section 12 of the Minutes on Pensions, as may be appropriate, pending the disciplinary proceedings. He has also recommended that the matter be also referred to the Commission to Investigate Bribery and Corruption. The Public Service Commission was informed of the findings of the aforementioned preliminary investigation by the letter dated 13th

February 2003 (15R1). A copy of the Interim Report marked 15R3 was also submitted to the Public Service Commission. The Public Service Commission was further intimated that the Petitioner is due to retire on 15th February 2003 upon reaching the age of retirement and to consider the possibility of retiring the Petitioner in terms of Section 12 (1) of the Minutes on Pensions in view of the aforesaid findings against him. By its letter dated 23rd June 2003 (15R4) the Public Service Commission has intimated its decision that the payment of the Petitioner's pension should be withheld in terms of section 12 (1) of the Minutes on Pensions and further directed that disciplinary action be commenced against the Petitioner. The principal question that arises for determination in this case is whether Section 12 (1) of the Minutes on Pensions can be applied to withhold the pension of an officer who has already retired.

Section 12 (1) of the Minutes on Pensions reads as follows :

"12 (1) Where the explanation tendered by a public servant against whom, at the time of his retirement from public service, disciplinary proceedings were pending or contemplated in respect of his negligence, irregularity or misconduct, is considered to be unsatisfactory by the competent authority, the Permanent Secretary Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable to such public servant under these Minutes."

Learned Counsel for the Petitioner submits that it is trite law that in order to make an order under Section 12 (1) of the Minutes on Pensions, a disciplinary action against a public officer should have been pending or contemplated at the time of the retirement of the officer in question. He relies on the decision of the Supreme Court in *Wilbert Godawela v. S. D. Chandradasa and Others*⁽¹⁾ in which Amarasinghe J has observed at 343 as follows :-

"It will be seen that a pension could, in terms of Section 12 (1) be withheld or reduced only where (1) at the time of his retirement from the public service, disciplinary proceedings were pending or contemplated and (2) where the explanation tendered by the public servant concerned is considered to be unsatisfactory. In the matter before us, there was no disciplinary proceedings pending at the time of the retirement. Nor were such proceedings contemplated."

As emphasized by learned State Counsel appearing for the Respondents, the factual circumstances relating to the decision in that case are clearly distinguishable from the instant case as the Petitioner had been called upon by the letter dated 20th December 2002 (P10) to explain certain irregularities relating to certain financial transactions involving the Secondary Education Modernization Project that took place during the period 21st to 29th October 2002, and after the Petitioner tendered his explanations by his letter dated 31st December 2002 (P11), a preliminary investigation had been held and the Interim Report relating to which dated 29th January 2003 (15R3) revealed that the Petitioner was, along with certain other officers, responsible for some of the said financial irregularities. The Public Service Commission has been informed of these findings by the letter dated 13th February 2003 (15R1) albeit two days prior to the retirement of the Petitioner, and the said Commission has determined that the payment of pension to the Petitioner, should be withheld pending the ensuing disciplinary proceedings as evidenced by the letter dated 23rd June 2003 (15R4).

This case materially differs from *Wilbert Godawela v. S. D. Chandradasa (supra) and Others* where the allegations against the officer concerned were apparently not taken seriously by the authorities concerned. In fact, the factual circumstances of the instant case are comparable with the facts of *Peiris vs. Wijesooriya, Director, Irrigation and Others*¹² in which the Supreme Court sanctioned the application of Section 12 (1) of the Minutes on Pensions. Indeed in the case before us it is quite fortuitous that the retirement of the petitioner had intervened into the disciplinary and other proceedings which were contemplated not only against the petitioner but also against the officials. I am therefore of the opinion that this is a case in relation to which section 12 (1) of the minutes on pensions may be legitimately applied. In my view, so long as disciplinary proceedings were contemplated against the retiring public officer at the time of his retirement, the relevant disciplinary authority may permit his retirement subject to section 12 of the Minutes on Pensions. In my opinion the mere fact that the Public Service Commission may have made its determination after his actual retirement will not affect the validity of that order.

Learned State Counsel appearing for the Respondent's has also placed reliance on Article 61A of the Constitution which was introduced by the 17th Amendment to the Constitution. The said article provides that -

"Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into or pronounce upon or in 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 imposed on such commission or delegated to a committee or public officer under this chapter or any other law".

Learned President's Counsel for the Petitioner has responded to this by submitting that the petitioner is not challenging any order made by the Public Service Commission but is merely seeking a writ of *mandamus* directing the 2nd and/or 3rd - 13th Respondents to forward the necessary papers to the 14th Respondent, Director of Pensions to enable him to take steps for the award of pension to the Petitioner. I am of the opinion that the Petitioner cannot maintain this application for a writ in the nature of *mandamus* if he is not challenging the determination of the Public Service Commission contained in the letter dated 23rd June 2003 (15R4) as it cuts across his case.

In the circumstances the application of the petitioner is refused. There will no order for costs in all the circumstances of this case.

SRISKANDARAJAH, J., - I agree.

Application dismissed
