RANASINGHE PERERA

v.

ATTORNEY-GENERAL

COURT OF APPEAL
SOZA, J., AND ATUKORALE, J.
C.A. 29/71.
D. C. COLOMBO 1467/Z.
FEBRUARY 8, 12, 14, 1980
SEPTEMBER 11, 12, 1980
OCTOBER 16, 1980
JULY 22, 1981
OCTOBER 18, 1981

Pension – pensionable status - appointment on 10.5.1944 as Iron Works Instructor on probation - continued service despite failure to confirm or extend probation – Fresh letter of appointment as Demonstrator on permanent and pensionable basis with effect from 24.7.1957 – refusal to accept appointment claiming that appointment on pensionable basis was from 10.5.1944 claim for declaration of pensionable status – status - s. 217(G) Civil Procedure Code.

The plaintiff was appointed an Iron Works Instructor with effect from 10.5.1944 on one year's probation. At the expiration of the year the plaintiff was neither confirmed in service nor was his probationary period extended. He however continued in service and received increments. In 1949 an attempt was made to say that plaintiff's appointment was really temporary. There was dissatisfaction over his work and conduct and an allegation of shortages was also made against him. His increments were suspended at one stage and the value of the shortages was deducted in instalments from his salary. He was not given school vacations although his was a teaching post. Action was even initiated to retire him for inefficiency. On 10.12.1959 however the plaintiff was informed that he was being appointed a Demonstrator on a permanent and pensionable basis with effect from 24.7.1957. The plaintiff refused to accept the appointment contending that he was already in pensionable service from 10.5.1944.

He then filed this suit to have his status as a pensionable officer declared and also to recover the amounts lost by him on account of suspension of increments and the amounts deducted from him on account of shortages. He also asked for a declaration that he was entitled to the school vacations. The main claim of the plaintiff was that the post he held was pensionable because he was in the permanent service and the Government in its estimates stated that teachers appointed after 15th June 1934 would be entitled to a pension under the School Teachers Pension Ordinance No. 6 of 1927.

Held:

(1) The post which the plaintiff held was permanent and pensionable despite naive attempts by his superiors to establish that the post was temporary.

(2) Status is the condition of membership of a class to which the law assigns particular capacities or incapacities or both in the matter of exercising rights or claims and powers, enjoying privileges or liberties and immunities and being subject to duties, no-rights, liabilities and disabilities.

Eligibility to a pension or pensionable status is a legal right which the Court will recognise although the holder of such a right will have no legally enforceable right to receive a pension. The holder of a pensionable post belongs to a class and membership of this class invests him with a legal condition carrying generally certain capacities and incapacities, as for instance, in the matter of the very eligibility to a pension and other matters like housing, concessionary travel, immunity, subject to conditions, from money recovery suits and so on. Hence the plaintiff's claim for pensionable status falls within s.217(G) of the Civil Procedure Code.

(3) The plaintiff's money claims are prescribed. School vacations in plaintiff's case were a perk of office. Vacations were not an entitlement of plaintiff's service.

Cases referred to:

(1) *Shanks v. Shanks (1942) 65 C.L.R. 334, 335.*
(2) *Daniel v. Daniel (1906) 4 C.L.R. 563, 566.*
(3) *Ford v. Ford (1947) 73 C.L.R. 524, 529.*
(4) *Niboyet v. Niboyet (1878) 4 P.D. 1, 11.*
(5) *Salvesen or Von Lorang v. Administrator of Austrian Property [1927] A.C. 641.*
(6) *Thiagarajah v. Karthigesu (1966) 69 N.L.R. 73.*
(7) *Nixon v. Attorney-General [1931] A.C. 184.*
(8) *Gunawardene v. The Attorney-General (1948) 49 N.L.R. 359.*
(9) *The Attorney-General v. Sabaratnam (1955) 57 N.L.R. 481, 485.*
(10) *The Attorney-General v. Abeysinghe (1975) 78 N.L.R. 361.*
(11) *Joint Anti-Fascist Refugee Committee v. McGrath (1961) 341 U.S. 123, 185.*

Appeal from judgment of the District Court of Colombo.

C. Ranganathan with S. Mahenthiran for plaintiff-appellant.

S. W. Wadugodapitiya A.S.G., with D. C. Jayasuriya S.S.C. for Attorney-General.

Cur. adv. vult.

October 23, 1981

SOZA, J.

In this case the plaintiff who at the times material to this action was an Iron Works Instructor in the Department of Commerce and Industries sues the Attorney-General for a declaration that he is in respect of the post he held entitled to pensionable status from 10th May 1944, to school holidays and also for the recovery of a sum of Rs. 153/80 alleged to be illegally deducted from him and a sum of Rs. 3414/- along with a sum of Rs. 1776/- per annum being increments and allowances wrongfully withheld from him. The Attorney-General joined issue with the plaintiff in respect of these claims. After trial the learned District Judge dismissed the plaintiff's action. The plaintiff appeals.

It will be useful to have before us a resume' of the facts which have given rise to the filing of the appeal before us. The plaintiff was appointed as Iron Works Instructor with effect from 10.5.44 by letter of appointment P1 dated 2/3 May 1944. The letter P1 merely says that the plaintiff is appointed as Instructor to Sarikkamulla Iron Works School, Sarikkamulla, Moratuwa and directs him to report for duty on the 10th May 1944. This was followed by a letter dated 22nd July 1944(P6) which states that the plaintiff is appointed as Iron Works Instructor on one year's probation with effect from 10th May 1944. The salary payable is mentioned as Rs. 360/- per annum rising by annual increments of Rs. 52/- to a maximum of Rs. 672/-. In P6 there is also a statement that no rent allowance would be paid and the conditions of service would be those applicable to Government Teachers who are new entrants. The plaintiff entered upon his service in terms of his letter of appointment but he was not informed whether he was confirmed in his appointment or not, nor was any extension of the probationary period expressly made. When the plaintiff had served in Sarikkamulla Iron Works School as Instructor from 10.5.1944 till 31.1.53 he was transferred to the Industrial Research Institute, Velona. At the time of the transfer no reasons were given but later it was alleged that the transfer was because of unsatisfactory work and failure to maintain harmonious relations with the villagers. A further transfer followed but the plaintiff's increments due after 1954 were not paid.

In 1945 by letter P7 the Director of Commerce and Industries informed the plaintiff that he was entitled to school holidays which every instructor in a school is entitled to. On 16.3.1951 the Acting Director of Industries sent circular P9 to the plaintiff informing him of the Easter Vacation. P9 is for the information of Demonstrators of Govt. Industrial Schools and addressed to the Demonstrator of the Govt. Iron Works School, Sarikkamulla. On 9.12.1952 circular No. 12 (P10) was issued by the Commissioner of Cottage Industries stating that there is no grade of instructor in the establishment of Cottage Industries. There were supervisors and demonstrators attached to Industrial Schools but they were not entitled to school vacations. This was followed by circular P8 of 10.12.1952 to Demonstrators of Government Industrial Schools and addressed to the O.I.C. Iron Works School, Sarikkamulla informing him of the period of the Christmas vacation for 1952. The upshot of all this however was that the plaintiff was deprived of the vacations he had up to 1952 enjoyed. This is one matter regarding which the plaintiff seeks relief.

In 1953 the plaintiff was charged with responsibility for shortages in the equipment of the Sarikkamulla School at the time he

handed over on leaving the station on transfer. After some correspondence (P11, P11(a), P12) the Commissioner of Cottage Industries by his letter P13 of 2.9.1954 directed the recovery of Rs. 153/80 in monthly instalments of Rs. 7/- being the value of the shortages, from the plaintiff. It is worthy of note that in P13 the plaintiff is designated as Iron Works Instructor. The plaintiff in the present suit seeks the recovery of this sum of Rs. 153/80 which he alleges was illegally deducted from him.

In 1955 by letter P14 of the 9th of November the plaintiff was informed that his increment falling due on 16.5.1955 was being suspended for six months owing to unsatisfactory work. On 12.12.1955 by letter P15 the plaintiff was informed that the suspension of the increment was being extended for a further six months from 16.11.1955 as there was no improvement in his work and conduct. In P14 and P15 the plaintiff was described as Instructor. No increments were paid from 1955 (see D1) and on 22.6.1961 the Director of Rural Development and Cottage Industries took action to have the plaintiff retired for inefficiency – see P22, P23 and P24. On 10.12.1959 by P17 the Director of Rural Development and Cottage Industries informed the plaintiff that he was being appointed a Demonstrator on a permanent and pensionable basis with effect from 24.7.1957. The plaintiff refused to accept this appointment contending that he was already in the pensionable service from 10.5.1944. Thereupon the plaintiff was informed by letter P18 of 9.5.1954 that he was being placed on a non-pensionable basis. In the circumstances the plaintiff claims a sum of Rs. 3414/- and a sum of Rs. 1776/- per year on account of increments due together with allowances and adjusted travelling claims.

The main claim of the plaintiff however is that the post of Iron Works Instructor which he held from 10.5.1944 is a pensionable post. He concedes he has no legal right to a pension and accordingly that he cannot seek the enforcement of any legal right to a pension in any proceedings at law. But what he claims in this suit is only a declaration that he held a pensionable post. Although the declaration he seeks would be bereft of enforceable legal consequences yet, he submits, the Executive will respect it. After all there is overwhelming public interest in fair administration by government authorities and this may, and indeed often will, bear fruit. Even if no tangible benefits will accrue the declaration per se will not be without value. Section 217(G) of the Civil Procedure Code provides that a decree or order of court may, without affording any substantive relief or remedy, declare a right or status. The appellant takes up the position that what he is claming is a status.

As Zamir says in his book on The Declaratory Judgment (1962), 120 declaratory proceedings are often the most convenient and sometimes the only possible mode of determining status.

But firstly can it be said that a person who joins the pensionable service of State acquires a particular legal status ? To answer the question it is necessary to have before us an explanation of the word 'status.' The meaning of the word has been considered by textbook writers and judges.

Paton in his work on Jurisprudence (3rd Edn. 1964) defines 'status' as the fact or condition of membership of a group of which the powers are determined extrinsically by law. A person's status affects not merely one particular relationship but being a condition affects generally, though in varying degree, a member's capacities and incapacities. The test is that status is a condition which affects generally, although in varying degrees, a person's capacity or incapacity or both. There is a distinction between status which is a condition or capacity constituting power to acquire and exercise rights and the rights themselves which are acquired by the exercise of that capacity— see C. K. Allen: **Legal Duties p. 47.**

The word status is of wide import and should be given a liberal meaning – see the case of *Shanks v. Shanks.*[1] Griffith C. J. in the case of *Daniel v. Daniel*[2] explained the word "status" as follows:

> "Without pretending to give an exhaustive definition, I apprehend that the term 'status' means something of this sort: a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction."

Again in the case of *Ford v. Ford*[3] Latham C. J. said:

> "A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights, or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons."

One of the few English judicial attempts at definition of the

1. (1942) 65 C.L.R. 334, 335.
2. (1906) 4 C.L.R. 563, 566.
3. (1947) 73 C.L.R. 524, 529.

term was by Brett L. J. in his dissenting judgment in *Niboyet v. Niboyet*[4] where he said:

> "The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community."

The inference from Brett L. J.'s definition is that while a married woman has a status in law, a bachelor has not. The decision in *Niboyet's* case was overruled by the House of Lords in the case of *Salvesen or Von Lorang v. Administrator of Austrian Property.*[5] Even the definition given by Brett L. J. was disapproved – see the speech of Lord Dunedin (p. 662). Celibacy was regarded just as much a status as marriage. In fact in the local case of *Thiagarajah v. Karthigesu*[6] it was accepted that a plaintiff could bring an action for a declaration of his status of bachelor.

Regarding the emphasis on the absence of agreement in the creation of status it must be mentioned that this is not always so. Rank and caste, race and colour, illegitimacy and nationality for example are forms of status where capacities and incapacities attach independently of agreement. The individual has no choice in the matter. But coverture, celibacy, official position and profession for instance are matters of choice. Yet the legal condition which results here from the voluntary act is something very different from the legal condition which results from the voluntary act of becoming, say a mortgagor. The mortgagor defines for himself his own rights vis-a-vis the mortgagee and the mortgaged property. But when a woman, for example, chooses to enter into a married state, there is something which the law imposes on her legal condition independently of her free election. The principle was well explained by Viscount Haldane in his speech from the Woolsack in *Salvesen's* case (supra) (p. 653). His Lordship said that status in connection with marriage means something more than a contractual relationship between the parties to the contract of marriage. It results from the contractual relationship but only when the contract has passed into something which the law recognises has been superadded to it by the authority of the State where the ceremony has taken place. This juridical result is more than the mere outcome of the agreement inter se to marry of the parties. It is due to a result which concerns the public generally and which the State where the ceremony takes place superadds. This is something which may or may not be capable of being got rid of subsequently by proceedings before a competent public autho-

4. (1978) 4 P.D. 1, 11.
5. [1927] A.C. 641.
6. (1966) 69 N.L.R. 73.

rity but in the meantime it carries with it rights and obligations as regards the general community. Status is a term of art and not the title of a legal formula. We must bear this in mind when defining the term. Using the well-known Hohfeldian terminology only of jural relations I would define status as the condition of membership of a class to which the law assigns particular capacities or incapacities or both in the matter of exercising rights or claims and powers, enjoying privileges or liberties and immunities and being subject to duties, no-rights, liabilities and disabilities. But what constitutes a group or class of persons in contemplation of laws? With a little ingenuity and imagination society can be divided into an almost infinite number of classes. The whole community for instance, could be divided into a blue-eyed class, a brown-eyed and a black-eyed class. But the division would have no legal significance. In relation to status, the class must be of such a kind that legal consequences result to the members from the mere fact of belonging to it.

And when we say that legal consequences must result from mere membership of the class we must bear in mind that there can be an infinite diversity of legal consequences attaching to different groups of persons. Let me illustrate this. Today a very large number of persons own television sets. Each one of them is under a duty to obtain a licence to operate it. Each one of them is entitled to receive the pictures broadcast on the television network. Yet we cannot speak of the status of T.V. owners. These owners possess in common certain specific rights and duties in regard to a particular thing but their capacity is not affected in a general way. Contrast this for instance with the legal concept of infancy. The incidents of infancy bear on the general juridical capacity to contract. The legal notion of status involves, in varying degrees albeit, a general condition of capacity or incapacity in law. A further matter may also be noted. The capacities and incapacities appertaining to status are not without economic value in that they afford an opportunity for the acquisition of proprietary rights. Yet status pertains not to a man's estate, not to his wealth but rather to his welfare or well-being.

If the effect of the decree or order is to place a person in or to remove a person from such a class as we have been discussing, then the decree or order can be said to declare his status as contemplated by Section 217(G) of the Civil Procedure Code.

Even if pensionability is a status there is no legal right to a pension. It was held by the House of Lords in the case of *Nixon v. Attorney-General*[7] that there is no legal right to a pension and

7. [1931] A.C. 184.

no claim for it can be enforced by any legal proceedings. Further as a necessary consequence of the application of this principle there can be no right to a declaration of what the amount of the pension should be where it is granted. In Sri Lanka too the principle that there is no enforceable right to a pension has been repeatedly upheld in a line of cases – see *Gunawardene v. The Attorney-General*[8] and *The Attorney-General v. Sabaratnam.*[9] In the case of *Attorney-General v. Abeysinghe*[10] the same principle was affirmed by a majority decision.

In considering the question for decision in the case before us however, we should bear in mind that eligibility to a pension is one thing and the grant of a pension is quite another and a different thing. The pension is just a delectable crumb thrown by the sovereign to his good and faithful servants. But such largess is not distributed to all servants of the sovereign but only to such of them as hold a pensionable post and fulfil certain stipulated conditions. The distinction between eligibility for the bounty and selection to receive it must be borne in mind. Justice Jackson had an analogous distinction in mind when he said in *Joint Anti-Fascist Refugee Committee v. McGrath.*[11]

> "The fact that one may not have a legal right to get or keep a government post does not mean that he can be judged ineligible illegally."

To be declared eligible for a pension is a legal right which the court will recognise although the holder of such a right will have no legally enforceable right to receive a pension. The holder of a pensionable post belongs to a class and membership of this class invests him with a legal condition carrying generally certain capacities and incapacities, as for instance, in the matter of the very eligibility to a pension and other matters like housing, concessionary travel, immunity, subject to conditions, from money recovery suits and so on. Hence what the plaintiff claims in this case must be regarded as a status within the meaning of the term as it appears in Section 217(G) of the Civil Procedure Code.

Although employers in the private sector are obliged to grant their employees a pension the Government which should be a model employer is immune from such an obligation. This immunity remains an anachronism in modern times. Yet it is a matter for the Legislature. There is no legal right to a pension. Section

8. (1948) 49 N.L.R. 359.
9. (1955) 57 N.L.R. 481, 485.
10. (1975) 78 N.L.R. 361.
11. (1961) 341 U.S. 123, 185.

5(1) of the School Teachers' Pension Ordinance No. 6 of 1927 and its legislative successor section 8(1) of the School Teachers' Pension Act (Cap. 432) stipulate that no person shall have an absolute right to any pension. A similar provision is found in the first section of the Minutes on Pensions. But as I said before this does not mean that a person cannot claim to belong to a class of persons who are qualified to receive a pension. It is true in *Nixon's* case (supra) the Court held that it will not entertain a suit to determine the quantum of a pension because that is a second question which hinges on the first question whether there is a right at all to a pension. But the status of pensionability is a question apart from these questions. There can surely be no objection to the Court giving a declaration that a person holds a pensionable post, that is, holds a post which is eligible for pension. This is a status which a person can claim. I am therefore of the view that the plaintiff is entitled to maintain this action under Section 217(G) of the Civil Procedure Code.

The next point is whether the plaintiff in fact holds a pensionable post. The advertisement (P2) in the Government Gazette in response to which the plaintiff applied said there were vacancies for Instructors and that the appointment would be on one year's probation and "subject to the rules laid down in the Code of Regulations by the Education Department." The salary scale is stated to be Rs. 360/- rising by annual increments of Rs. 52/- to Rs. 672/- per annum. The estimates (P3) for the years 1942/1943 and 1943/1944 provide for 27 Industrial teachers on the same salary scale as is mentioned in the advertisement P2 and in a footnote it is stated that teachers appointed after 15th June 1934 are entitled to a pension. The plaintiff was appointed for training as an Instructor in an Industrial School by letter P1 and later on 22.7.1944 by letter P6 appointed as an Instructor with effect from 10.5.1944. In the letter of appointment the salary payable is stated to be Rs. 360/- per annum rising by annual increments of Rs. 52/- to a maximum of Rs. 672/-. No rent allowance was payable. The conditions of service would be those applicable to Government Teachers who were new entrants. The appointment was on one year's probation but at the end of the year the plaintiff was not informed either that he was confirmed in permanent service or that his probationary period was being extended but he continued in service and he even received increments as they fell due though only up to 1954. The plaintiff contends that in the circumstances he should be regarded as holding a permanent post. He invites the Court to infer that he holds a pensionable post firstly because his post is permanent and secondly because the Government itself in its estimates P3 has stated that teachers appointed after 15th June 1934 are entitled to a pension under the School Teachers'

Pension Ordinance No. 6 of 1927. This Ordinance made provision for the granting of pensions from public revenue to teachers in assisted schools – see Section 3. The expression 'teacher' was defined as a teacher in a school maintained wholly or partially from the public funds of the island – see Section 2 as amended by Ordinance No. 29 of 1931.

The Director of Industries wrote D2 to the plaintiff on 10.12.1949 stating that the post he held was temporary and that he had been appointed on a probationary basis by inadvertence. The advertisement P1 calling for applications for the post of Instructor said the appointment would be on a year's probation. Much later the letter of appointment P6 once again was to the effect that the plaintiff was to be on one year's probation. In these circumstances it would be indeed naive to say after more than five years that the appointment was really meant to be temporary and that "the word 'probation' " had been "inadvertently included" in the letter of appointment. The fact that neither the advertisement nor the letter of appointment described the post as permanent cannot be taken to mean that the post was temporary. The converse is the truth. The fact that the appointment was described as 'on probation' and not described as temporary supports the inference it was permanent.

Was the post also pensionable ? The plaintiff was during the first few years of his appointment consistently described as Instructor. The duties which were assigned to the plaintiff had a teaching bias. He was trained to conduct "classes at a school according to the syllabus" approved by the Department – see P5 of 2.5.1944. No doubt in the estimates no post designated as Instructor was included. In the estimates P3 where provision was made in regard to Industrial Schools there were 27 posts designated as Industrial teachers on the salary scale on which the plaintiff was appointed. This was clearly the budgetary financial provision under which the plaintiff was paid. The answer to the question whether the plaintiff though described as an Instructor was really an industrial teacher in an Industrial School is provided by the letter D2 produced by the defence. Here the Acting Director of Industries writes as follows:–

> "It is now found out that you belong to the category of Industrial Teachers (now known as Industrial Demonstrators) who have been appointed after 15th June, 1934, and are on this account classified as new entrants for purposes of registration under the rules framed under the School Teachers' Pension Ordinance No. 6 of 1927, (as amended by Ordinance No. 29 of 1931 and No. 13 of 1933)."

The letter goes on to say that the plaintiff was not qualified for registration as he did not have the Industrial Teachers Certificate. This letter proves one thing. Despite the fact that the plaintiff had not the requisite certificate, he was in the category of Industrial teachers later designated as Demonstrators though the department called them Instructors. According to P3 industrial teachers appointed after June 15, 1934, are entitled to a pension under the School Teachers' Pension Ordinance. The plaintiff was therefore fully qualified to receive a pension under this Ordinance and later under the School Teachers Pension Act (Cap 432) passed in 1953. The Learned District Judge's conclusion on the point was unduly influenced by the statement in P10 of 9.12.1452 that there is no grade of Instructor. It is the Department that used this designation. Even after the circular P10 was issued there were occasions on which the plaintiff was referred to as Instructor. In P14 and P15 written in 1955 in connection with the suspension of plaintiff's increment, he was described as Instructor. It would be unjust to make the plaintiff suffer for the ineptitude of the Department.

Of course it was always open to the Department to change the designation of the plaintiff to that of Demonstrator but this could be done only without in any way affecting the pensionable status he enjoyed from 10.5.1944. The removal of the plaintiff from pensionable status by letter P18 when he refused to accept pensionable status with effect only from 24.7.1957 offered to him on the basis of a new appointment to the post of Demonstrator by letter P17, was certainly not warranted. In these circumstances therefore the plaintiff was entitled to the declaration he sought, that he held a pensionable post from 10.5.1944 and the learned District Judge's conclusion on the point is not sustainable.

In regard to the money claims the learned District Judge has rightly held that these claims are prescribed in any event and therefore unenforceable. This finding is in my view right and I see no ground to interfere with it.

On the question of entitlement to school vacations it must be remembered that vacations are perks of office that are granted and could be withheld by those who grant them. Vacations are not an entitlement of the service, unlike the other holidays which attach to the ordinary public service. Therefore, the plaintiff was not entitled to the declaration he sought in regard to school vacations.

In the result, setting aside the findings of the learned District Judge on the point, I hold that the plaintiff is entitled to pensionable status from 10.5.1944 and therefore his removal from pensio-

nable status was illegal. The appeal on this point is allowed. The other findings of the learned District Judge are affirmed and the appeal as regards them is dismissed. The main dispute in this case has been on the question of pensionable status and the plaintiff has succeeded on this point. Therefore we direct the defendant to pay the costs of the proceedings before us and in the Court below to the plaintiff.

ATUKORALE, J.

I agree.

Appeal partly allowed.