

**JAYARATHNE**

v

**WICKREMARATNE AND OTHERS**

COURT OF APPEAL  
TILAKAWARDENA, J., (P/CA) AND  
WIJEYARATNE, J.  
C:A. 1349/01  
SEPTEMBER 13, 2002 AND  
JANUARY 23, 2003

*Writ of certiorari to quash decision to pay pension – Writ of mandamus to pay pension with effect from an earlier date – Petitioners' entitlement to pension – Is it an absolute right? – Minute of Pensions – Does it confer any legal right?*

*Interpretation Ordinance, section 2 – What is written law? – Errors of law – Laches – Do laches stand against grant of relief? – Constitution, Article 55*

**Held:**

- i) Public servants have no absolute right to any pension or allowance under the regulations of the Minutes of Pension.
- ii) Minutes of Pension merely regulates the administration of pensions by those in whose hands that duty is placed.
- iii) Under section 2 (kk) of the Interpretation Ordinance, the Minutes of Pension is included to be "written law". Therefore, the decision of the Education Service Committee on the payment of pension is one regulated by 'written law of the country.'
- iv) In terms of the Minutes of Pension there is no regulation empowering or authorising the authorities determining the grant of pension to differ the date of payment of pension from the date of retirement.

*Per Wijayarathne, J.,*

"The Education Services Committee has made its decision (18.5.1984) to retire the petitioner and grant his pension after 11 years of his vacation of post (15.7.1983). There is no rational basis or reason to relate the effective date of payment of pension to the date of decision made after 11 years; the decision is both irrational, arbitrary and unreasonable.

Per Wijayarathne J.,

"Even when the petitioner is entitled to the relief on grounds of error of law, the petitioner is guilty of laches which stands against the grant of relief by way of writ of certiorari.

**APPLICATION** for writs in the nature of certiorari and mandamus.

**Cases referred to:**

1. *Gunawardena v Attorney-General* – 49 NLR 359
2. *Attorney General v Abeysinghe* – 78 NLR 361
3. *R v Criminal Injuries Compensation Board, Ex parte Lain* – (1967) 2 All ER 770
4. *Dissanayake v Fernando* – 71 NLR 356
5. *Sarath Hulangamuwa v Siriwardena* – (1986) 1 Sri LR 275
6. *Jayaweera v Assistant Commissioner of Agrarian Services* (1996) 2 Sri LR 70

*Nuwanthi Dias* for petitioner.

*Janak de Silva*, State Counsel for respondents.

*Cur adv vult*

May 8, 2003

**WIJAYARATNE, J.**

This application is made by the petitioner seeking a mandate in the nature of a writ of certiorari quashing the decision to pay him his pension with effect from 18.5.1994 in terms of documents marked P1 and P2. He also seeks a mandate in the nature of a writ of mandamus directing the respondents to pay him his pension with effect from 15th July 1983 being the date of his retirement. The application is made against first to third respondents as the chairman and members of the Educational Services Committee of the Public Service Commission, 4th respondent as its Secretary and three other officers of the relevant state agencies.

The facts relevant are that the petitioner who joined the state service as a Instructor in Electrical Engineering in the Technical College of Warakapola in the year 1968 was functioning as the

Senior Instructor at the time of vacation of his post on 15.7.1983. He left the country seeking foreign employment without leave of absence from his post. Having returned to the country in the year 1987 he made an appeal to 4th respondent for reinstatement/retirement in lieu of reinstatement. The Education Service Committee of the Public Service Commission by its decision dated 03.06.1994 (P1) decided to:

- a) Retire the petitioner as an alternative to vacation of post from the date of such vacation
- b) Pay the petitioner his pension with effect from 18.05.1994
- c) Deduct 1% from the petitioner's pension.

The decisions so made were conveyed to him by letter dated 15.05.1997 (p2) and the 7th respondent has awarded petitioner pension with effect from 18.05.1994 (p3). The petitioner appealed to the 4th respondent by letter dated 20.03.2000(p4) and the refusal to entertain such appeal was communicated to him by letter dated 12.02.2001(p5).

The petitioner complains that the decision to award a pension after 11 years of the retirement is illegal, arbitrary, unfair, unreasonable and irrational and seeks the intervention of this court by way of review of such decision and issue of mandates of writs as aforesaid. Given notice of the application, the respondent represented by the Attorney General resisted the application through affidavits filed by the 4th and 5th respondents, who produced documents marked 5R1 to 5R12. The decision to retire the petitioner with effect from the date of his vacation of post and the award of pension effective from the date of the decision ie, 18.5.1994 and the background facts were admitted. It is urged that in terms of regulation 1 of Minutes of Pension the petitioner has 'no absolute right' to a pension and in terms of Article 55 (5) of the Constitution this court has no jurisdiction or power to inquire into, pronounce upon or in any manner call in question the decision of the Education Service Committee of the Public Service Commission and in any event the petitioner is guilty of undue delay which stands against the grant of relief by way of writs given as discretionary relief. The 5th respondent further adverted to the past record of service of the petitioner and disciplinary steps taken against him.

In his counter affidavit the petitioner denied all and singular the matters urged by the respondent and attributed malice and ill-will to the 5th respondent who referred to event of history of petitioner's service which is not relevant to the matter in issue. In support of his contentions he also produced documents marked P6 and P7.

At the hearing the petitioner argued that there is no provisions in the Minutes of Pension authorizing the respondent to differ the date of payment of pension from the date of retirement and hence the decision is contrary to law and irrational and arbitrary. The respondents argued that the petitioner has no absolute or legal right to a pension and thus the petitioner has no legal right to claim a pension for the period since vacation of post to date of the decision. It is further urged that the petitioner who was copied the letter of 4th respondent dated 03.06.1994 (P1) was aware of this decision but took no steps to challenge the same by way of writ. The communication of such decision by the 5th respondent was on 15.05.1997 (P2) and the petitioner has preferred this application in the year 2001, after a period of seven years from the date of the impugned decision. Even if his second appeal is to be considered a step he has taken in having this decision reviewed, it was only on 20.03.2000, again after a period of three years. The petitioner therefore is not entitled to the relief of writ of certiorari on grounds of undue delay.

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The respondent further submitted that Article 55(5) of the Constitution which was operative as at the date of invoking the jurisdiction of this court, has ousted the jurisdiction of this court to inquire into or pronounce upon any matter of the nature of a decision of the Education Services Committee of the Public Service Commission. The learned counsel for the respondent referred this court to several decisions of this court and the Supreme Court holding that undue delay stands against the grant of relief by way of writs.

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It is pertinent in my view to first examine the position with regard to the petitioner's entitlement to the pension as claimed. I had the benefit of several decisions of the Supreme Court on the question of the right of a retired government servant to the pension. That the petitioner has no right to the pension is based on regulation 1 of the Minutes of Pension which states:

“Public servants have no absolute right to any pension or allowance under these rules, and the crown retains the power to dismiss a public servant without compensation.” 90

This position is commented upon and decided in the case of *Gunawardane v Attorney General*<sup>(1)</sup> wherein Gratiaen, J commented that :

“... minutes of pension does not confer upon a retired government servant any legal right in respect of pension.

However it was held in the same decision that:

“minutes of pension merely regulates the administration of pensions by those in whose hands that duty is placed.”

In terms of the provisions of section 2 subsection KK of the **Interpretation Ordinance** “the minutes of pension” is included in and meant to be ‘written law’ of the land. Accordingly the decision of the Education Services Committee on the payment of pension is one regulated by ‘written law’ of the country. In terms of minutes of pension there is no regulation empowering or authorizing the authorities determining the grant of pension to differ the date of payment of pension from the date of retirement. The learned counsel for the respondents who argued that the petitioner has no legal right to the pension does not refer this court to any provisions authorizing such a decision either. The respondents take up the position that it is the practice of the Education Services Committee to grant the pension effective from the date of the decision to retire a public servant. There is not adduced any basis for such a course of action, hence it can only be classified as arbitrary and ‘irrational’, because in the event of the Education Committee for whatever the reason delays its decision till the death of a public servant, even if the committee granting the pension would effectively deny him the benefit of his pension. In the instant case the Education Service Committee has made its decision to retire the petitioner and grant his pension after 11 years of his vacation of post. There is no rational basis or reason to relate the effective date of payment of pension to the date of decision made after 11 years. Hence the decision of the Education Services Committee (P1) is both irrational, arbitrary and unreasonable. 110 120

In view of the dictum of Gratiaen. J, if minutes of pension is meant to regulate the administration of pensions by those in whose hands that duty is placed, the Education Services Committee granting the petitioner his pension from the date of its decision and not with effect from the date of his retirement, it has no authority of any regulations in the minutes of pension to do so; such a decision therefore is "an error of law". 130

In the case of *Attorney General v Abeysinghe* (2) too it was held that 'a retiring public servant has no absolute or legal right to pension'. However this decision can be differentiated because in it was considered only the question of the respondent's entitlement to get declaratory relief from the District Court on his entitlement to the pension., which according to the rule has to be based on a legal right. This same rule cannot apply in the present case which is an application for grant of relief by way of writ of *certiorari* and *mandamus* in the exercise of writ jurisdiction of this court. This decision of *A.G. v Abeysinghe (supra)* refers to the decision of *R v Criminal Injuries Compensation Board Ex parte Lain*, (3) Their Lordships held. 140

".....That if there was an error of law, *certiorari* would have been granted even though there was no legal right to compensation under the scheme."

Accordingly in this present application, even though the petitioner has no legal right to the pension, there is present an error of law in the decision granting the pension with effect from a date other than the date of retirement, and the same has no authority of any regulation under the minutes of pension. This fact would make the relief of *certiorari* available to a party placed in such a situation. 150

Even when the petitioner is entitled to the relief on grounds of error of law, the question remains whether he invoked the jurisdiction of this court without 'undue delay' entitling him to the grant of such relief. The undisputed fact of the matter of this application is that the same is made after seven years of the impugned decision. His second appeal to the 4th respondent in the year 2000 cannot in my view take him out of this undue delay because the 5th respondent's communication was three years prior in time. Besides, the petitioner did not honestly disclose the fact that his recourse to writ jurisdiction of this court was only as a second thought after failing to 160

collect his pension without delay. This position is well demonstrated by his own document P7 according to which the petitioner's grievance at the time was only the delay in payment of his pension and not the basis of the payment of pension according to the impugned decision. This letter is dated 18.8.1998 and the present application is still three years later. The petitioner is thus guilty of laches which stand against the grant of relief by way of *writ of certiorari*.

Several decisions of

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- i) *Dissanayake v Fernando* (4)
- ii) *Sarath Hulangamuwa v Siriwardane* (5)
- iii) *Jayaweera v Asst. Commissioner of Agrarian Services*

Ruled that undue delay stand against the grant of relief in a writ application.

Accordingly I hold that the petitioner is not entitled to the grant of relief claimed on grounds of undue delay on his part in the presentation of this application to the court. This compels this court to refuse his application. In view of same the question of jurisdiction does not call for any determination.

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Accordingly the application is dismissed with costs.

**TILAKAWARDANE, J. (P/CA)** - I agree.

*Application dismissed.*

The petitioner sought a *writ of mandamus* directing the 1st respondent to pay to her all the monies due on account of the Universities Provident Fund contributed by her husband. The petitioner's husband had not submitted any nomination form to the University.

**Held:**

- (i) The petitioner could recover the Provident Fund contributions of her late husband only if she has been nominated in terms of section 93(2A)(a).
- (ii) The document relied upon by the petitioner is a private and an internal communication between the petitioner's husband and the University. It is not a nomination made in terms of section 93 (2A)(a).
- (iii) The existence of legal rights and statutory duties are essential conditions for the issue of Mandamus. The 1st respondent is unable to perform the statutory duty cast upon it in the absence of a valid nomination which is a condition precedent to the exercise of the jurisdiction.

**APPLICATION** for a *writ of mandamus*

**Cases referred to:**

1. *R v National Joint Council for Dental Technicians ex parte Neate* (1953) 1QB 704 at 707.

*Dr. Jayampathy Wickremaratne P.C with Pubudini Wickremaratne* for petitioner.

*M.N.B. Fernando*, Senior State Counsel for 1st respondent.

*R.E. Thambiratnam with Dr. T. Thirunaukarasu* for 2nd, 3rd, 5th and 6th respondents.

*Cur.adv.vult*

July 29, 2003

**SRIPAVAN, J.**

The petitioner seek a *writ of mandamus* directing the 1st respondent to pay to the petitioner all the monies due on account of the Universities Provident Fund contributed by her husband, namely, Professor S. Mageswaran including interest. The basis upon which the petitioner seeks the aforesaid remedy is that the petitioner's husband by the document marked P2 informed the University of Jaffna that the petitioner would be the beneficiary to his Provident Fund.



It was not in dispute that the petitioner's husband who died on 2nd February, 1998 did not leave any last will. Upon the death of the petitioner's husband the Financial Controller of the 1st respondent on 22.09.1998 (1R6) requested the Bursar of the University of Jaffna to submit the Provident Fund refund papers and the original Nomination Form to enable the 1st respondent to refund the Provident Fund contributions. The Bursar of the University of Jaffna by letter dated 25.09.1998 (1R7) informed the Financial Controller of the 1st respondent that the petitioner's husband did not submit any Nomination Form to the University of Jaffna. In view of the claims made by the brothers and sisters of Professor Mageswaran who are 2nd to the 7th respondents to this application, the 1st respondent requested the petitioner to obtain letters of administration from a court of Competent Jurisdiction and to produce same to the 1st respondent for the payment of the Provident Fund contributions lying to the credit of late Professor Mageswaran. (P4)

It is common ground that the Universities (Amendment) Act, No. 1 of 1995 was brought into operation on 03.01.1995. Section 93 of the said Act read as follows:-

- "2A. (a) A contributor may nominate a person (hereinafter in this section referred to as "*a nominee*") to whom the monies lying to the the credit of the contributor's account in the provident fund shall be paid upon the death of such contributor.
- (b) A nomination made under paragraph (a) shall have effect notwithstanding anything to the contrary in the last will of the nominator.
- (c) .....
- (d) .....
- (e) .....
- 3. ....
- 4. Where a contributor dies while in the service of the Commission or a Higher Educational Institution, the Secretary of the Commission shall, subject to the

provision of section 94, pay the full amount lying to the credit of his account in the Provident Fund, together with the accumulated interest thereon, to the nominee or nominees nominated under sub section 2(A) or in the absence of a valid nomination, to the person or persons lawfully entitled to such amount.”

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Thus, it could be seen that the petitioner can receive Provident Fund contributions of her late husband only if she has been nominated in terms of section 93 (2A) (a) of the said Act.

Learned President's Counsel submits that the document marked P2 dated 31.01.1995 was a valid nomination made to the University of Jaffna and amounts to a substantial compliance of section 93 (2A)(a) of the said Act. A perusal of P2 shows that it is a declaration to be made by all employees of the University of Jaffna in the 1st month of each financial year. By this document the declarant undertakes to inform the Vice Chancellor, University of Jaffna any change in the declarant's status or living condition. This document, in my view cannot be considered as a **nomination** made in terms of section 93 (2A)(a) of Universities (Amendment) Act, No. 1 of 1995. The document P2 is a private and an internal communication between the petitioner's husband and the University of Jaffna.

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A *writ of mandamus* only commands the person or body to whom it is directed to perform a public duty imposed by law. In other words, a *writ of mandamus* would lie where a statute requires certain action in defined circumstances and despite the existence of such circumstances, the required action has not been performed. Lord Goddard C.J. said in *R. v National Joint Council for Dental Technician ex-parte Neate* <sup>(1)</sup> “the bodies to which in modern times, the remedies of these prerogative writs have been applied, have been all statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised may lead to the detriment of subjects who may have to submit to their jurisdiction.” Thus, existence of legal right and statutory duty are essential conditions for the issue of mandamus. The 1st respondent is unable to perform the statutory duty cast upon it in the absence of a valid nomination as provided by law which is a condition precedent to the exercise of the jurisdiction. Where an act or thing required by the statute is a condi-

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tion precedent to the jurisdiction, compliance cannot be dispensed with and, if it be impossible, the jurisdiction fails. It would not be competent to a Court to dispense with what the legislature has made the indispensable foundation of the first respondent's jurisdiction. The petitioner has failed to show that a legal duty is owed to herself by the first respondent.

In the circumstances, I do not see any basis upon which a *writ of mandamus* can be issued on the 1st respondent. Accordingly, the application is dismissed, however in all the circumstances without costs. 90

*Application dismissed*